

How Can International Institutions Be Improved to
Ensure Accountability and Justice for Violations That
Occur in Humanitarian and Counter-Terrorism
Operations?

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Abstract

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How Can International Institutions Be Improved to Ensure Accountability and Justice for Violations That Occur in Humanitarian and Counter-Terrorism Operations?

Keywords: Afghanistan, Iraq, Palestine, Syria, Libya, International Humanitarian Law, Counter-Terrorism Operations, International Criminal Court, United Nations, 9/11.

The thesis purports to assess the United Nations Security Council (UNSC) in maintaining international peace and security and the International Criminal Court (ICC) in prosecuting individuals who have committed severe violations of international humanitarian law (IHL) and international law, during humanitarian and counter-terrorism operations. The thesis endeavours to highlight the failures of both institutions, firstly, the UNSC being unable to fulfil its institutional mandate, which is mainly attributed to the abuse of veto privileges granted to the five permanent members (P5). This has effectively allowed individuals from the militaries of the P5 and their allies elude criminal liability, promoting a culture of impunity. The UNSC's failure to prevent P5 members use of unauthorised military force in pursuing counter-terrorism operations and interpose expeditiously in humanitarian crises, have also contributed to the erosion of the institutions' legitimacy, which is further perpetuated by the USA's continued 'War on Terror' doctrine after the 9/11 terrorist attacks. Secondly, the ICC's inability to prosecute individuals for crimes under the Rome Statute will also be highlighted as the principle of complementarity and the court's inability to enforce arrest warrants are significant factors contributing to the institutions inability to administer international criminal justice. The thesis draws upon practical examples to substantiate the failures of both institutions by referring to the conflicts in: Afghanistan, Iraq, Palestine, Syria and Libya. Before concluding the UNSC and the ICC have become futile, the thesis will then make recommendations

for reform and propose a novel solution to restore legitimacy back to both institutions.

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Table of Contents

Abstract	i
Acknowledgements and Dedications	viii
Table of Contents	ix
List of Abbreviations	xix
Chapter 1 – Introduction	1
1.1 Chapter Overview	4
1.2 Originality of Research	11
1.3 The Research Question.....	15
1.4 Research Objectives and Applicable Sub-Questions.....	18
1.4.1 ‘Procedural’ Sub-Questions.....	18
1.4.2 ‘Issue’ Sub-Questions.....	19
1.5 Research Methodology.....	21
1.5.1 Application of the Qualitative Case Study Methodology in the Thesis	23
1.6 Methods of Research.....	27
Chapter 2 – Legal Framework	31
2.1 The Importance of International Humanitarian Law	32
2.1.1 Key International Law Concepts Which Will Be Used Throughout the Thesis: State Sovereignty, Territorial Integrity and the Doctrine of R2P 38	
2.2 The United Nations Security Council	42
2.2.1 The UNSC and the Organisations Historic Peace Efforts.....	42
2.2.2 The UNSC and the Organisations Historic Shortcomings in Preventing Genocide & Mass Killings.....	49
2.2.3 The UNSC, the Veto and the Organisations Historic and Continued Failures in Preventing and Intervening in Humanitarian Disasters.	69
2.2.4 The Veto Privilege and its Legality in Accordance with the Peremptory Norm of <i>Jus Cogens</i>	89
2.3 The International Criminal Court.....	91
2.3.1 The ICC, Enforcement, Complementarity and Its Controversial Relationship with Africa	92
2.3.2 The ICC, Western Imperialism and the African Union’s Response	102

2.3.3 The Relationship Between the ICC and the UNSC and the Problem of Imperialism	107
2.4 Islam: The New Global Threat	110
2.4.1. The 9/11 New York Terrorist Attacks, Islamophobia, and the Rise of Islamist Terrorism.....	112
Chapter 3 – The Islamic Republic of Afghanistan & The Republic of Iraq	129
3.1 Al-Qaeda and the USA’s ‘War on Terror’ Post-9/11.....	130
3.1.1 The UNSC’s Response to the Al-Qaeda Terrorist Attack Post 9/11 and the Illegality of Operation Enduring Freedom	132
3.1.2 Counter-Terrorism, Drone Strikes, State Sovereignty, Violations of IHL and the USA’s Continued Illegal Occupation in Afghanistan and the Emergence of ISIS-KP	137
3.2 The USA and UK’s Illegal Invasion of Iraq.....	144
3.2.1 The USA, the UNSC, WMD’s and the Events Prior to the 2003 Invasion of Iraq.....	145
3.2.2 Operation Iraqi Freedom and the Illegal Invasion of Iraq.....	148
3.2.3 The UK’s Role in the Illegal Invasion of Iraq and the Chilcot Report	155
3.3 The IHL Breaches Following the Military Occupation in Iraq	159
3.4 Presidential Directives, Black Sites and Judicial Decisions: The USA, UK and European State’s Human Rights Abuses in the War on Terror.....	167
Chapter 4 – The State of Palestine	189
4.1 Background to the Historic Conflict.....	190
4.2 Israel and the emergence of the new terrorist threat: Hamas and Hezbollah.....	195
4.3 Operation Cast Lead: The 22-Day War Between 2008-2009.	201
4.3.1 The IHL Violations Committed by the IDF	202
4.4 Operation Pillar of Defense: The 8-Day War In 2012.....	207
4.5 The Events of Operation Brother’s Keeper and the Lead Up to Operation Protective Edge	210
4.6 Operation Protective Edge: The 50-Day Israeli-Palestinian War.	211
4.6.1 The Legality of Israeli Forces Conduct Throughout Operation Protective Edge	216
4.7 The Failure of the UNSC to Respond to Israel’s Counter-Terrorism Operations.....	219

4.7.1 Operation Cast Lead	219
4.7.2 Operation Protective Edge	222
4.8 Israeli Authorities Reluctance to Prosecute Military Personnel Responsible for Serious and Gross International Crimes	224
4.9 Justice, Palestine and the Shortcomings of both the UNSC and the ICC	228
4.9.1 Palestinian Statehood, The ICC’s Involvement Following Operation Protective Edge and New Developments and Obstacles Towards Unlikely Palestinian Justice.....	231
Chapter 5 – The Syrian Arab Republic	237
5.1 Background to the Conflict.....	238
5.2 The Syrian Civil War	242
5.2.1 Alliances and Oppositions, State and Non-State Actors: Prevailing the Confusion of the Power Struggle in the Syrian Civil War.....	247
5.2.2 The Violations Committed by Russian and Syrian Forces in the Syrian Civil War	250
5.2.3 The Use of Prohibited Weapons and Chemical Attacks in the Syrian Civil War	258
5.3 The USA’s ‘Global War on Terror’: The UNSC and the ICC’s Inability to respond Exeditiously in the Syrian Crisis.....	265
5.3.1 R2P, Aggression and the Syrian Crisis.....	267
5.3.2 The Veto Privilege and the Continuing Political Challenges in the UNSC	270
Chapter 6 – The Libyan Arab Jamahiriya.....	278
6.1 Background to the Conflict.....	280
6.1.1 The Islamic Kingdom of Libya and the Rise of Muammar Gaddafi	282
6.1.2 Gaddafi’s Military Adventurism, International Terrorism and Longstanding Conflict with Western States	285
6.2 The Arab Spring Protests, Violations by the Gaddafi Regime and the UNSC’s Response to the Libyan Civil War	290
6.2.1. The IHL violations Committed by the Gaddafi Regime in the Libyan Civil War	292
6.2.2 The UNHRC’s and the UNSC’s Response to The Libyan Civil War	294
6.3 Operation Unified Protector and NATO’s Illegal Military Conduct in The Libyan Civil War.....	296

6.3.1 The IHL Violations Committed by NATO Coalition Forces Throughout Operation Unified Protector.....	298
6.4 R2P, The Failure of the UNSC and The Illegitimacy of The ICC following the 2011 Libyan conflict.....	302
6.4.1 Resolution 1973 and R2P: Criticisms Pertaining to the UNSC's Authorisation of NATO in Libya	306
6.5 The USA's Illegal Use of Force in Counter-Terrorism Operations in Post-Gaddafi Libya	310
6.5.1 The Bewildering Stance of The UNSC On the Use of Force in Response to Terrorism.....	314
6.6 The Role of the ICC After the 2011 Libyan Conflict	317
6.6.1 The Principle of Complementarity and ICC's Inability to Prosecute Saif Al-Gaddafi	319
Chapter 7 – Thesis Proposals & Recommendations	327
7.1 Previous Proposal's and Recommendations by Academics for Reforming the UNSC and the ICC.....	327
7.1.1 Proposals and Recommendations by the UNGA and Member States for Reforming the UNSC.....	331
7.1.2 Previous Proposals and Recommendations for Reforming the ICC	336
7.2 The Authors Novel Proposal for Reforming the UNSC and the ICC Entitled: 'The Justice, Equality, Peace and Security (JEPS) Model' or Alternatively 'The Sarwar Model'.	340
7.2.1 Abolishing the Veto Privileges Granted to the P5.....	341
7.2.2 Equal Representation	345
7.2.3 Restructuring the United Nations.....	346
7.2.4 Updating International Crimes	352
7.2.5 Hypothetical Scenario of the JEPS Models Application in Practice Using the Syria Case Study.....	356
7.3 Obstacles to Reform	359
7.4 Alternative Solutions to improve the UNSC and the ICC	363
Chapter 8 - Thesis Conclusion	368
Table of Case Law.....	379
1. African Commission on Human Rights and Peoples'	379
2. Annual Digest of International Public Law Cases (ADPIL).....	379
3. Canadian Case Law	379

4. Court of Justice of the European Union (CJEU)	379
5. European Commission on Human Rights (ECoHR)	379
6. European Court of Human Rights (ECtHR).	380
7. Extraordinary Chambers in the Court's of Cambodia (ECCC)	382
8. Inter-American Court of Human Rights (IACHR)	383
9. International Court of Justice (ICJ)	383
10. International Criminal Court (ICC).....	385
11. International Criminal Tribunal for Bangladesh (ICTB)	391
12. International Criminal Tribunal for Rwanda (ICTR)	392
13. International Criminal Tribunal for the former Yugoslavia (ICTY).....	392
14. International Law Reports Cases (ILR).....	393
15. Israel High Court of Justice Case Law (IHCJ)	393
16. Permanent Court of International Justice (PCIJ)	394
17. Reports of International Arbitration Awards (RIAA).....	394
18. South African Court Cases	394
19. Special Court of Sierra Leone.....	395
20. Special Tribunal for Lebanon	395
21. The Netherlands Case Law	395
22. United Kingdom of Great Britain Case Law	395
23. United Nations Human Rights Committee Decisions.....	398
24. United States of America Case Law	398
Table of International Treaties and Conventions	400
1. Historic Treaties.....	400
2. African Treaties.....	400
3. American Treaties.....	400
4. Australian Treaty Series	400
5. European Treaties	400
6. League of Nations Treaty Series	401
7. United Nations Treaty Series.....	401
8. United States Department of State Bulletin Treaty Series	406
9. United States Statutes At Large Treaty Series	406
Table of Regional and State Legislations	407
1. Assembly of the African Union.....	407

2. Council of Europe Documents	407
3. European Council Legislation	408
4. European Commission Papers	408
5. Libyan Arab Jamahiriya Legislation	408
6. Peoples Republic of Bangladesh Legislation	409
7. Peoples Republic of China Legislation	409
8. Republic of India Legislation	409
9. United Kingdom of Great Britain Parliamentary Bills.....	409
10. United Kingdom of Great Britain Legislation	409
11. United Kingdom of Great Britain Parliamentary Reports.....	411
12. United States of America Legislation	411
13. United States Congress Resolutions	412
14. United States of America Presidential Orders	412
Table of United Nations Documents and Other Key Documents.....	413
1. Diplomatic Conferences.....	413
2. International Law Commission Reports (ILC)	414
3. Organisation for the Prohibition of Chemical Weapons Reports (OPCW)	414
4. United Nations General Assembly Documents and Resolutions (UNGA)	416
5. United Nations General Assembly Emergency Session Resolutions (UNGA).....	419
5. United Nations General Assembly Draft Resolutions (UNGA).....	420
6. United Nations Human Rights Council Documents and Resolutions (UNHRC)	420
7. United Nations Security Council Draft Resolutions (UNSC)	425
8. United Nations Security Council Resolutions (UNSC)	428
Thesis Bibliography.....	435
1. Books.....	435
A.....	435
B.....	435
C.....	436
D.....	436
G	437

H.....	437
I.....	437
J.....	438
K.....	438
M.....	438
N.....	439
P.....	439
S.....	439
T.....	440
V.....	440
W.....	440
Z.....	440
2. Conference Papers.....	441
3. Electronic Journal Articles	441
A.....	441
B.....	441
C.....	441
D.....	442
F.....	442
G.....	442
H.....	443
K.....	443
M.....	444
O.....	444
P.....	444
S.....	444
W.....	445
4. International Yearbooks.....	445
B.....	445
F.....	445
G.....	445
L.....	446
N.....	446

S.....	446
T.....	446
W.....	446
Y.....	447
5. Internet Sources	447
O.....	447
A.....	447
B.....	448
C.....	449
D.....	449
E.....	450
F.....	450
G.....	451
H.....	451
I.....	452
L.....	454
M.....	454
N.....	455
O.....	455
P.....	456
Q.....	457
R.....	457
S.....	458
T.....	461
U.....	463
V.....	464
W.....	464
6. Journal Articles	465
A.....	465
B.....	473
C.....	483
D.....	491
E.....	496

F.....	499
G.....	502
H.....	509
I.....	516
J.....	517
K.....	520
L.....	526
M.....	530
N.....	539
O.....	542
P.....	544
Q.....	548
R.....	548
S.....	553
T.....	565
U.....	568
V.....	569
W.....	571
Y.....	576
Z.....	577
7. Newspaper Articles.....	578
A.....	580
B.....	581
C.....	584
D.....	585
E.....	585
G.....	585
H.....	586
J.....	587
K.....	588
L.....	588
M.....	588
N.....	589

P.....	590
R.....	590
S.....	591
T.....	592
U.....	593
V.....	593
W.....	593
8. Websites.....	594
A.....	594
B.....	595
C.....	595
D.....	596
E.....	597
F.....	597
G.....	598
H.....	598
I.....	599
J.....	599
K.....	599
L.....	600
M.....	600
N.....	601
P.....	602
R.....	602
S.....	602
T.....	604
U.....	604
W.....	605
Y.....	605
9. Working Papers.....	605

List of Abbreviations

9/11 – Reference to the Al-Qaeda Terrorist Attack on September 11th, 2001 attack on the World Trade Centre In New York.

AAU – Assembly of the African Union.

ACHPR – African Court of Human and Peoples Rights.

ACJ – African Court of Justice.

ACJHPR – African Court of Justice and Human and Peoples Rights.

ACT - Accountability, Coherence and Transparency Group (referring to 25 states including Austria, Chile, Costa Rica, Denmark, Estonia, Finland, Gabon, Ghana, Hungary, Ireland, Jordan, Liechtenstein, Luxembourg, Maldives, New Zealand, Norway, Papua New Guinea, Peru, Portugal, Rwanda, Saudi Arabia, Slovenia, Sweden, Switzerland and Uruguay).

ANC - African National Congress.

AP I – 1977 Additional Protocol I to the Geneva Conventions of 1949.

AP II – 1977 Additional Protocol II to the Geneva Conventions of 1949.

APIC - Agreement on the Privileges and Immunities of the International Criminal Court.

ASP - Assembly of State Parties.

BBC – British Broadcasting Corporation.

BM – Binyam Mohamed.

CCW - Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1992.

PCCW - Protocol III of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons.

CIA – Central Intelligence Agency (United States of America Intelligence Agency).

CIL – Customary International Law.

COVID-19 – Coronavirus Disease 2019.

CPS – Crown Prosecution Service.

CURE - Centre of United Nations Reform Education.

DoD - United States Department of Defense.

ECCC - Extraordinary Chambers in the Court's of Cambodia.

ECHR – European Convention of Human Rights.

CJEU – Court of Justice of the European Union.

ECohR – European Commission on Human Rights.

ECtHR – European Court of Human Rights.

ECOMOG - Economic Community of West African States Monitoring Group.

ECOWAS - Economic Community of West African States.

EU – European Union.

FRELIMO - Front for the Revolution of Mozambique.

FSA – Free Syrian Army.

G4 - Group of Four (referring four states Brazil, Germany, India and Japan).

GCHQ – Government Communications Headquarters.

GWOT - Global War on Terror.

HRW – Humans Rights Watch.

HTS - Hayat Tahrir Al-Sham.

IAC – International Armed Conflict.

ICC - International Criminal Court.

ICCPR – International Covenant of Civil and Political Rights.

ICISS – International Commission on Intervention and State Sovereignty.

ICJ – International Court of Justice.

ICL – International Criminal Law.

ICPPED - International Convention for the Protection of All Persons from Enforced Disappearance.

ICRC – International Committee of the Red Cross.

ICTB – International Criminal Tribunal for Bangladesh.

ICTR – International Criminal Tribunal for Rwanda.

ICTY – International Criminal Tribunal for The Former Yugoslavia.

IDF – Israeli Defense Force.

IHL- International Humanitarian Law.

IHRL – International Human Rights Law.

IL – International Law.

ICL – International Criminal Law.

ILC – International Law Commission.

ILCS – International Law Commission Statute.

IMT – International Military Tribunal (commonly referred to as the Nuremberg Trials).

IMTFE – International Military Tribunal for the Far East (commonly referred to as the Tokyo Trials).

ISF - Iraqi Security Forces.

ISIL – Islamic State of Iraq and Levant.

ISIS – Islamic State of Iraq and Syria.

ISIS-KP – Islamic State of Iraq and Syria – Khorasan Province.

JEPS Model – Justice, Equality, Peace and Security Model or The Sarwar Model (referring to authors novel contribution proposing four-point plan to restructure and improve the effectiveness of the UNSC and the ICC).

LOAC – Law of Armed Conflict (referring to International Humanitarian Law or IHL).

LON – League of Nations.

MAG - Office of the Israeli Military Advocate-General.

MCA – Military Commissions Act 2006.

MI5 – Military Intelligence 5 (British Intelligence Agency).

MI6 – Military Intelligence 6 (British Intelligence Agency).

NATO – North Atlantic Treaty Organisation.

NDF - National Defense Force.

NGO – Non-Governmental Organisation.

NIAC – Non-International Armed Conflict.

NTC - National Transitional Council.

OCC – Operation Cast Lead.

OEF – Operation Enduring Freedom.

OEWG - Open Ended Working Group.

OIF – Operation Iraqi Freedom.

OPC – Operation Protective Edge.

OPCW - Organisation for the Prohibition of Chemical Weapons.

OPD – Operation Pillar of Defense.

OPT – Occupied Palestinian Territory.

OUP – Operation Unified Protector.

P3 – Referring to three of the five members of the United Nations Security Council, specifically: UK, USA and France in Libya.

P5 – Referring to the five permanent members of the United Nations Security Council, specifically: UK, USA, France, Russia and China.

PKK - Kurdistan Workers Party.

PLO – Palestinian Liberation Organisation.

PNA – Palestinian National Authority.

QCSM – Qualitative Case Study Methodology.

R2P – Responsibility to Protect.

RCC - Revolutionary Command Council.

RDI – Rendition, Detention and Interrogation Program.

RENAMO - Mozambican National Resistance.

Rome Statute – Rome Statute of the International Criminal Court.

SAA - Syrian Arab Army.

SMB - Syrian Muslim Brotherhood.

SOHR - Syrian Observatory for Human Rights.

TPIM - Terrorism Prevention and Investigation Measure Notice.

U4P - United for Peace (referring To United Nations General Assembly Resolution 377 (V) A).

UDHR – Universal Declaration of Human Rights.

UFC - Uniting for Consensus Group (referring to Argentina, Canada, Colombia, Costa Rica, Italy, Malta, Mexico, Pakistan, Republic of Korea, San Marino, Spain and Turkey).

UK – United Kingdom of Great Britain and Northern Ireland.

UN – United Nations.

UN Charter - Charter of the United Nations.

UNAMSIL – United Nations Mission in Sierra Leone.

UNCIL - United Nations Commission of Inquiry in Libya.

UNGA – United Nations General Assembly.

UNHRC – United Nations Human Rights Committee.

UNHRC - United Nations Human Rights Council.

UNIS – United Nations Commission of Inquiry on Syria.

UNJIM – United Nations Joint Investigative Mechanism.

UNMHA – United Nations Mission to Support the Hudaydah Agreement.

UNMISS – United Nations Mission in South Sudan.

UNMOGIP – United Nations Military Observer Group in India and Pakistan.

UNMOVIC - United Nations Monitoring, Verification and Inspection Commission.

UNOCHA – United Nations Office for the Co-Ordination of Humanitarian Affairs.

UNOMIG – United Nations Observer Mission in Georgia.

UNOMSIL - UN Observer Mission in Sierra Leone.

UNRWA - United Nations Relief and Works Agency for Palestine.

UNSC – United Nations Security Council.

UNSCOM – United Nations Special Commission.

UNSMIL - United Nations Support Mission in Libya.

US – United States (referring to the United States of America).

USA – United States of America.

USSF – United States Special Forces.

USSR – Union of Soviet Socialist Republics (Russia).

VCLT – Vienna Convention on the Law of Treaties 1969.

WMD – Weapons of Mass Destruction.

WSOD - The World Summit Outcome Document.

WWI – World War I.

WWII – World War II.

YPG - Kurdish Peoples Protection Unit.

Chapter 1 – Introduction

The United Nations (UN) was created to maintain international peace and security, and to that end, take effective collective measures for the prevention and removal of threats to peace, suppress acts of aggression or other breaches of the peace by peaceful means in conformity with the principles of justice and international law (IL), in addition to making adjustments and settlements where situations of international disputes may lead to breaches of the peace.¹

The Charter of the United Nations² (UN Charter) authorises enforcement measures through the United Nations Security Council³ (UNSC). This gives the council pre-eminent authority over member states to maintain international peace and security.⁴

This places an obligation upon member states⁵ to carry out the decisions made by the UNSC⁶ including making their armed forces and military support readily available for the purposes of fulfilling this organisational mandate.⁷

The UNSC also possesses legal authority over 193 member states⁸ to authorise the 'use of force'⁹ and carry out peacekeeping operations in times of humanitarian crises to protect civilians under imminent threat of physical

¹ Charter of the United Nations [1945] art 1 (1).

² Charter of the United Nations [1945].

³ Charter of the United Nations [1945] art 2 (7).

⁴ Jeremy Farall et al, 'Elected Member Influence in the United Nations Security Council' (2020) 33 (1) LJIL 101, 101.

⁵ Charter of the United Nations [1945] art 49.

⁶ Charter of the United Nations [1945] art 48 (1).

⁷ Charter of the United Nations [1945] art 43.

⁸ Sondre Torp Helmersen, 'The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations' (2014) 61 (2) NILR 167, 168.

⁹ Charter of the United Nations [1945] art 42.

violence¹⁰ and to protect populations¹¹ from acts of: aggression, genocide, war crimes and crimes against humanity.¹²

The UNSC has a special relationship with the International Criminal Court (ICC)¹³ as it was created to administer international criminal justice upon offenders who have committed terrible international crimes.¹⁴

The Rome Statute of the International Criminal Court (Rome Statute)¹⁵ established a permanent court possessing the power to exercise its jurisdiction over persons for the most serious crimes of international concern, whilst being complementary to national criminal jurisdictions.¹⁶

The ICC can exercise jurisdiction if a state is party to the Rome Statute¹⁷, a referral by a state party has been made to the ICC where a crime has been committed¹⁸ or a referral has been made by the UNSC¹⁹ to investigate and prosecute individuals for the crimes of; genocide, war crimes, crimes against humanity and aggression.²⁰

The purpose of this thesis will be to critique the provisions contained under the UN Charter which have prevented the UNSC from holding individuals from states accountable after using illegal military force in counter-terrorism and humanitarian operations.

¹⁰ Ingvild Bode and John Karlsrud, 'Implementation in Practice: The Use of Force to Protect Civilians in United Nations Peacekeeping' (2019) 25 (2) European Journal of International Relations 458, 459.

¹¹ Hitoshi Nasu, 'The UN Security Council's Responsibility and the Responsibility to Protect' (2011) 15 (1) Max Planck Yearbook of United Nations Law 377, 379.

¹² S. Krishnan, 'UN Peacekeeping, Responsibility to Protect and Humanitarian Intervention' (2020) 76 (1) India Quarterly 120, 121.

¹³ Rome Statute of the International Criminal Court [1998] art 2

¹⁴ Alec Samuels, 'The International Criminal Court' (2006) 70 (4) J.C.L. 317, 317

¹⁵ Rome Statute of the International Criminal Court [1998].

¹⁶ Rome Statute of the International Criminal Court [1998] art 1

¹⁷ Rome Statute of the International Criminal Court [1998] art 4 (2)

¹⁸ Rome Statute of the International Criminal Court [1998] art 13 (a)

¹⁹ Rome Statute of the International Criminal Court [1998] art 13 (b)

²⁰ Rome Statute of the International Criminal Court [1998] art 5.

The thesis will demonstrate military force is often used outside the authority of the council. It will also adduce, where use of force has been authorised, states have often breached IL and International Humanitarian Law (IHL).

The thesis will critique the UNSC, specifically the veto privileges the UN Charter bestows upon the five permanent members (P5) of the council namely: China, France, Russia, the United Kingdom (UK) and the United States of America (USA).

In practice, the veto has cumbered the council's ability to act quickly in humanitarian crises and in circumstances where referral to the ICC has been sought to give the ICC jurisdictional authority over non-state parties to investigate suspected perpetrators who have committed serious international crimes.

The thesis will substantiate the role of the ICC and the handicaps which exist within the Rome Statute, serving as an encumbrance preventing it from achieving its organisational mandate due to its limited jurisdictional authority and its inability to indict individuals of a specific state where serious international crimes have been committed.

The court's inability to enforce arrest warrants will also be highlighted as this has often resulted in states administering imposturous justice, which is mainly due to the ICC's lack of primacy over cases which is attributed to the principle of complementarity.²¹

The thesis will exhibit the shortcomings of the UNSC and the ICC's failure to interpose in; Non-International Armed Conflicts (NIAC) and International Armed Conflicts (IAC) by observing five Muslim majority states as case studies. This will include: Afghanistan, Iraq, Palestine, Syria and Libya which have continued to be most adversely affected by armed conflicts.

²¹ Mohamed M. El Zeidy, 'From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 *Bis* of the Ad Hoc Tribunals' (2008) 57 (2) ICLQ 403, 404.

In analysing these states, the thesis will demonstrate that the P5 with allied states have breached IL, IHL, Customary International Law (CIL) and the international peremptory norm of *Jus Cogens*.

The thesis will also examine the P5 and their involvement directly and indirectly in counter-terrorism operations in Afghanistan, Iraq, Palestine, Syria and Libya, which have been found to be in breach of various bodies of IL.

However, despite their iniquitous and illegal conduct, the P5 continue to use their permanent membership in the UNSC to allow their citizens to elude criminal responsibility further demonstrating the shortcomings of both organisations.

1.1 Chapter Overview

The second chapter will comprise of a legal framework²² which will discuss the importance of IL, IHL and CIL. The chapter will then analyse the academic literature pertaining to the UN and the ICC, in order to critique both organisations and assess their capabilities and effectiveness in fulfilling their respective mandates.

In critiquing these institutions, the conduct of the P5 and their allied states who have deliberately violated IHL will also be adduced. The chapter will demonstrate historic and prominent examples where the veto privilege has actually been used (or the mere threat of it) by the P5 to avoid any accountability.

The chapter will also highlight the veto is often used to elude accountability when complaints by other states have been lodged against the P5 and their allies in military operations which have found to be in violation of the principle of '*Jus Cogens*' a peremptory norm of IL where no derogation is ever permitted.²³

²² Ian Dobinson and Francis Johns, 'Research Methods for Law' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd Edn, Edinburgh University Press 2017) 25.

²³ Anees Ahmed and Merryn Quayle, 'Can Genocide, Crimes Against Humanity and War Crimes Be Pardoned or Amnetised?' (2008) 79 *Journal of the Society for Advanced Legal Studies* 15, 15.

By disregarding the principle of *Jus Cogens*, the P5 in using their permanent membership and right to veto is a significant impediment in the UNSC'S referral process to give the ICC jurisdiction to conduct preliminary investigations where serious international crimes have been committed.

For the purposes of clarification, the peremptory norm '*Jus Cogens*' is considered to be a fundamental norm of IL where no derogation is allowed.²⁴ Thus, *Jus Cogens* is considered to be *Lex Superior* meaning the norm possesses an authority which exceeds that of ordinary IL.²⁵

Although, IL is created through the consent of sovereign states, every state is bound to a set of international legal norms²⁶ which qualify as *Jus Cogens* which include: prohibitions against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination.²⁷

Moreover, *Jus Cogens* also applies to the principles of the UN Charter prohibiting the use of force²⁸ including the prohibition of non-consensual uses of force in armed conflicts that have neither been validly authorised under the UN Charter, nor lawful exercises of self-defence.²⁹

The importance and superior nature of *Jus Cogens* as a peremptory norm can render any treaty provision³⁰ or emergence of a new peremptory norm of IL void and terminated if it is found to be in contravention.³¹

²⁴ Charlotte Ene, 'Jus Cogens (Peremptory Norms) – A Key Concept of the International Law' (2019) 8 (2) Perspectives of Law and Public Administration 302, 303.

²⁵ Ulf Landerfalk, 'The Legal Consequences of Jus Cogens and the Individualisation of Norms' (2020) 33 (4) LJIL 893, 893.

²⁶ Noémie Gagnon-Bergeron, 'Breaking the Cycle of Deferment: *Jus Cogens* in Practice of International Law' (2019) 15 (1) Utrecht Law Review 50, 51.

²⁷ Justice Winston Anderson, 'The Rule of Law and the Caribbean Court of Justice: Taking Jus Cogens for a Spin' (2021) 21 (1) Oxford University of Commonwealth Law Journal 1, 14.

²⁸ *ibid.*

²⁹ Katie A. Johnston, 'Identifying the Jus Cogens Norm in the Jus Ad Bellum' (2021) 70 (1) ICLQ 29, 29.

³⁰ Vienna Convention on the Law of Treaties [1969] art 53.

³¹ Vienna Convention on the Law of Treaties [1969] art 64.

In addition, the term 'international crimes' are those committed by individuals which trigger individual responsibility.³² International crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality in pursuit of a common criminal design.³³

The physical perpetration or action vital to the commission of a criminal act would then make an individual culpable under international criminal law³⁴ and liable for punishment under the Rome Statute.³⁵

Thus, 'individual responsibility' may invoke 'state responsibility' or 'international responsibility'. Hypothetically, if an obligation arose to prosecute an individual suspected of an international crime, if the person were acting as a state organ³⁶ this would not absolve the obligations and responsibilities of the state.³⁷

In such circumstances, state responsibility places a civil responsibility upon a state under IL³⁸ to pay compensation for the damage caused by the act.³⁹ Whereas, 'international liability' requires a state to pay compensation or make reparations for injuries that non-nationals suffer outside its national boundaries as a result of activities within its territory or under its control.⁴⁰

To complement the objective of the thesis, the chapters will only focus on individual responsibility arising from violations of IL, IHL and CIL as the ICC

³² Jessica Howard, 'Invoking State Responsibility for Aiding the Commission of International Crimes: Australia, the United States and the Question of East Timor' (2001) 2 (1) Melbourne Journal of International Law <https://law.unimelb.edu.au/__data/assets/pdf_file/0015/1680000/Howard.pdf> accessed 12 September 2020.

³³ Pamela J. Stephens, 'Collective Criminality and Individual Responsibility: The Constraints of Interpretation' (2014) Fordham Int'l L.J. 501, 503-504.

³⁴ *ibid.*

³⁵ Rome Statute of the International Criminal Court [1998] art 25 (3) – (3 *bis*).

³⁶ Andre Nollkaemper, 'Concurrence Between Individual Responsibility and State Responsibility in International Law' (2003) 52 (3) ICLQ 615, 615 – 616.

³⁷ *Selmouni v France* (1999) 29 EHRR 403 para 87.

³⁸ ILC, 'Report of the International Law Commission on the Work of its Fifty-Third Session' (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10, art 1, 2 and 3.

³⁹ Sompong Sucharitkul, 'State Responsibility and International Liability Under International law' (1996) 18 Loyola of Los Angeles International and Comparative Law Journal 821, 821.

⁴⁰ *ibid* 822.

possesses jurisdiction over natural persons⁴¹ not over states or organisations.⁴²

The ICC will be critiqued with a specific focus on the court's ability to prosecute individuals from P5 states and their allies who have committed international crimes under the court's founding statute, proving impuissant to administer international criminal justice.

This will be evinced by referring to certain provisions in the court's founding statute which have rendered it incapable of prosecuting individuals, heads of states, politicians and senior military figures responsible for committing international crimes in armed conflicts.

The chapter will then proceed to highlighting the wider implications of the 11th September 2001(9/11) Al-Qaeda terrorist attack on the world trade centre in New York, USA, which has resulted in Islam and Muslims being closely associated with terrorism by western states.

This will be demonstrated by highlighting after the 9/11 attacks, this contributed to the emerging narrative of revenge and national trauma which fuelled a process of othering of foreign, particularly Muslim ethnicities.⁴³

This has rendered Muslim communities residing within western states to be considered suspicious threats⁴⁴, giving rise to Islamophobic attitudes and human rights restrictions being imposed which has been reflected in various executive and judicial decisions.

The chapter will further examine creation of the 'global war on terror' (GWOT) doctrine after 9/11, which has propagated Islamophobia in western states and

⁴¹ Rome Statute of the International Criminal Court [1998] art 25 (1).

⁴² Gerhard Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 (4) JICJ 953, 956.

⁴³ Tobias Steiner, 'What Would Jack Bauer Do? Negotiating Trauma, Vengeance and Justice in the Cultural Forum of Post 9-11 TV Drama, From 24 to Battlestar Galactica and Person of Interest' (2018) 13 (4) European Journal of American Studies 1, 1.

⁴⁴ Toby Archer, 'Welcome to the Umma: The British State and Muslims Citizens Since 9/11' (2009) 44 (3) Cooperation and Conflict 329, 329-330.

frequently used by the P5 and their allied states to justify their violations of IL, IHL and CIL to eliminate global terrorism.

The third chapter will demonstrate after the events of 9/11, this initially led to the illegal military invasion of Afghanistan and Iraq violating IL by unjustly infringing their territorial integrity and state sovereignty, whilst commissioning significant IHL violations in pursuit of eliminating the terrorist threat Al-Qaeda and the Taliban regime by deliberately targeting and killing civilians.

The chapter will argue the GWOT doctrine has dictated the foreign policies of the P5 and their allied states to combat terrorism by continuing to use force outside the authority of the UNSC, through the use of invalid pre-emptive self-defence.

The role of the UNSC will also be examined following the passing of resolution 1373⁴⁵ which utilised language that could be argued to constitute, an almost unlimited mandate to use force⁴⁶ contravening IHL and its own institutional mandate.

Using various examples, the chapter will demonstrate the UNSC being unable to hold the P5 accountable but instead legitimising their illegal invasion and military conduct in Afghanistan and Iraq. The limitations of the ICC in conducting preliminary investigations and indictments against individuals for these arrant violations will also be demonstrated.

The fourth chapter of the thesis will examine the historic conflict between Israel and Palestine. The chapter will observe three military operations which have been authorised by the Israeli government and conducted by the Israeli Defense Force (IDF) since 2009, specifically these are: Operation Cast Lead (2009), Operation Pillar of Defense (2012) and Operation Protective Edge (2014).

The three operations were triggered in response to the terrorist threats presented by the military division of the political group Hamas in the Gaza Strip

⁴⁵ UNSC Res (28 September 2001) UN Doc S/RES/1373.

⁴⁶ M Byers, 'Terrorism, The Use of Force and International Law After 11 September' (2002) 51 (2) ICLQ 401, 402.

with the support of Hezbollah, a Lebanese militant terrorist group. The main focus here will demonstrate the UNSC has been unable to hold Israel accountable because of the USA's continued political support.

The chapter will highlight the limitations of the ICC as it has not been able to automatically impose its jurisdiction over Israel as it has not ratified the Rome Statute and not been able to respond to Palestine's request to investigate war crimes and other mass atrocity crimes by the IDF, prior to 2014 due to it not being legally recognised as a state under IL.

The fifth chapter will introduce the continuing civil war between the current Syrian government of Bashar Al-Assad with the military and political support of Russia against the terrorist group referred to as the so called 'Islamic State of Iraq and Levant' (ISIL) which has also demonstrated substantial IHL violations being committed in the decade long conflict.

The main inferences which will be drawn from the third and fourth chapter to the continuing conflict in Syria are Russia's permanent membership of the UNSC has proven vital in bilking any accountability or prompting any ICC intervention by invoking its veto privilege blocking numerous draft resolutions, which have sought to immediately cease hostilities and the deplorable humanitarian situation in Syria.

The devastation following the illegal use of chemical weapons, explosives and the USA's unauthorised 'use of force' has contravened IL, which has still not prompted any intervention from the UNSC holding the state accountable for its actions.

The sixth chapter will examine the Libyan civil war following the Arab Spring uprisings, which led to the demise of Colonel Muammar Gaddafi and the Libyan government in 2011, which then led to the presence of ISIL, armed groups and rebel factions within the state further contributing to its economic deterioration.

Following the passing of UNSC resolution 1973⁴⁷ which authorised the military forces of the P5 through the North Atlantic Treaty Organisation (NATO) to conduct humanitarian intervention in Libya dubbed 'Operation Unified Protector' resulted in disproportionate and deliberate attacks being carried out against civilians, yet NATO forces have continued to enjoy impunity for the violations of IHL throughout the duration of hostilities.

In addition, the chapter will highlight the USA's continued GWOT following the demise of Muammar Gaddafi, which has since led P5 member's committing the crime of 'aggression' pursuing senior commanders of terrorist organisations.

The thesis will argue without consent from the Libyan authorities, this renders the USA's counter-terrorism operations to be in breach of state sovereignty placing them in violation of IL which has remained unchallenged.

The chapter will also highlight the shortcomings of the ICC and its unwillingness to prosecute the NATO forces, in addition to the court's inability to enforce arrest warrants issued against senior members of the Gaddafi regime, which were instrumental in killing scores of civilians in the Arab Spring uprising in 2011 further demonstrating the shortcomings of the ICC.

With reference to the preceding chapters of the thesis, this chapter will substantiate individuals in P5 state militaries that are responsible for the most severe violations of IHL and mass atrocity crimes have continued to successfully elude prosecution by utilising their permanent membership to effectively promote impunity and selective justice.

The seventh chapter of the thesis will make recommendations by proposing a novel solution to address the encumbrances which currently exist preventing both organisations from achieving their founding mandates, before proceeding to the eighth and final chapter which will comprise of a conclusion summarising the findings of thesis.

⁴⁷ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

1.2 Originality of Research

The thesis' contribution in the chosen field of IL endeavours to propose a new structural configuration of the UNSC and the ICC by analysing both of these institutions' historic and continued shortcomings which inhibit and forestall their ability to maintain international peace and security and administer international criminal justice respectively.

In order to achieve this, the thesis uses five states (Afghanistan, Iraq, Palestine, Syria and Libya) as case studies to analyse the effectiveness of both of these international organisations after the events of 9/11 in holding states accountable where violations of IL, IHL and CIL have occurred as a result of illegal military intervention outside the authority of the UNSC, where the threat of terrorism is present or when a state has failed its responsibility to protect its citizens (R2P).⁴⁸

This will provide a comprehensive review of P5 states illicit military conduct in such operations by highlighting the violations of IL which have been committed as a result of their excessive 'use of force'.

The drawbacks of the UNSC and the ICC to interpose in severe violations of IL, will demonstrate the limitations and futility of both institutions in addressing the challenges presented in humanitarian situations, protracted armed conflicts and the formidable and looming threat of terrorism.

The thesis will achieve this by substantiating the UNSC's inability to hold the P5 and their allied states accountable because of the veto privilege which infracts the peremptory IL norm of *Jus Cogens*. This is illegal but also renders certain privileges granted to the P5 including using force without prior authorisation outside the framework⁴⁹ under the UN Charter⁵⁰ void.⁵¹

⁴⁸ Christof Royner, 'Framing and Reframing R2P – A Responsibility to Protect Humanity and Evil' (2020) 23 (6) *Critical Review of International Social and Political Philosophy* 659, 660.

⁴⁹ Charter of the United Nations [1945] art 106.

⁵⁰ Charter of the United Nations [1945] art 27 (3).

⁵¹ Vienna Convention on the Law of Treaties [1969] art 53.

The thesis will also demonstrate circumstances where the P5 have been granted authorisation to use force, but they have still committed serious violations of IHL. However, the UNSC and the ICC have not been able to hold individuals of the P5 and their allied states accountable despite the veto privilege not being invoked.

This is mainly due to the perplexing language used in the UNSC's resolutions relating to humanitarian intervention and counter-terrorism measures. The discourse and phraseological constructions of UNSC resolutions have been interpreted by the P5 in a manner which mandates illimitable use of force, directly resulting in many violations of IL directly contravening the UN Charter.

By encouraging states to use force in this manner, this has directly resulted in states engaging in counter-terrorism operations and/or using excessive force in direct contravention of IL, IHL, CIL and *Jus Cogens*.

The thesis argues that this has become consistent practice by the UNSC post-9/11, in response to terrorist threats supporting the USA's continued GWOT and pre-emptive self-defence justification, which led to the subsequent invasion of Afghanistan and Iraq which has continued in Palestine, Syria and Libya.

The originality of the research will be further demonstrated by considering the wider implications of the GWOT doctrine, which has significantly influenced Islamophobia, entrancing new counter-terror legislation in addition to Muslims in general being perceived by western states as threats to western ideals and supporters of terrorism.⁵²

The thesis will also argue that this has had far reaching effects by dictating western states foreign policy supporting the GWOT which has often been pursued illegally but has also led to human rights restrictions being imposed upon Muslims in various European states and the USA.

⁵² Scott Poynting and Victoria Mason, 'Tolerance, Freedom, Justice and Peace?: Britain, Australia and Anti-Muslim Racism Since 11 September 2001' (2006) 27 (4) *Journal of Intercultural Studies* 365, 371-376.

The impediments relating to the ICC and its inability to prosecute individuals is demonstrated through its lack of jurisdiction over states to enforce arrest warrants issued against suspected perpetrators of international crimes as the principle of complementarity allows states to retain 'monopoly on justice'.⁵³

The thesis will demonstrate Palestine, Syria and Libya being subjected to western imperialism from the beginning of the twentieth century and the consequences of this hegemonic legacy have continued to allow intrusion in the domestic affairs of these states till present.

The thesis will demonstrate the UNSC has become an imperialist institution, propagating imperialism through humanitarian and counter-terrorism operations, which in turn, has adversely affected the credibility of the ICC by administering unfair justice when the UNSC refers matters to the court.

In addition, the originality of the research will be demonstrated further by proposing a novel solution to reform both organisations to overcome and address the issues presented throughout the thesis.

The recommendations will propose the entire restructuring of both organisations by creating a 'new model' which will endeavour to re-distribute power retained by the P5, democratise the UNSC, allowing it to operate expeditiously in humanitarian crises and respond to the ongoing threat of terrorism, whilst making the process to refer matters to the ICC swift and seamless.

This will be achieved by detailing the 'current structural' composition for the UNSC and the ICC and replacing it with the authors newly proposed model entitled: the 'Justice, Equality, Peace and Security' (JEPS) model as an optimal solution to improve the function of both institutions.

The seventh chapter will highlight the advantages of the 'JEPS model' and will endeavour to address and overcome the present shortcomings highlighted

⁵³ Luke Moffett, 'Complementarity's Monopoly on Justice in Uganda: The International Criminal Court' (2016) 16 (3) *International Criminal Law Review* 503, 524.

throughout the thesis, which have prevented these international organisations till present from effectively and efficiently fulfilling their institutional mandates.

At present, the 'current model' places the UNSC and the ICC as separate entities. Although referrals can be made by the UNSC granting the court jurisdiction (over non-state parties of the Rome Statute) and authority to conduct preliminary examinations and investigations.

However, in practice the veto privilege (or threat of veto) has prevented the UNSC from making such referrals, in addition to preventing the council from acting expeditiously in humanitarian crises and failing to hold states, particularly the P5 and their allies accountable for serious violations of IL, IHL, CIL and *Jus Cogens* which have been committed in humanitarian and counter-terrorism operations.

This is also apparent in circumstances where a referral by the UNSC is made to the ICC, as the complementarity principle and the court's lack of primacy often allow suspected citizens of a state to elude arrest, indictment, trial and prosecution often due to the authorities of a certain state presenting an unwillingness to co-operate with the court, effectively promoting impunity.

However, the 'JEPS model' will merge the ICC to become a judicial organ of UN alongside the ICJ, UNSC and the UNGA, dealing exclusively with international crimes currently under the Rome Statute, whilst also introducing two new international crimes of ecocide and terrorism to be incorporated under the statute.

The chapter will then argue by removing the veto privilege and adopting a democratic majority voting system, this will allow the UNSC to respond to threats of peace in humanitarian crises and hold states accountable for violations, whilst also posing as a deterrent for states to violate and commit certain international crimes where the risk of being accountable remains highly probable.

The chapter will also argue the 'JEPS model' will make the referral process of individuals easier under the new democratic system, as state parties to the UN Charter will automatically fall within the jurisdiction of the ICC.

Should a state be a non-signatory to the UN Charter, then a referral by the UNSC would allow the ICC to obtain jurisdiction to conduct preliminary examinations, investigations, trials and prosecutions where applicable.

However, should states fail to comply, then the UNSC can impose sanctions and/or penalties, which will encourage states to comply, whilst also relinquishing current claims of the court being used as 'tool of western imperialism'⁵⁴ imposing a 'regime of selective justice'.⁵⁵

By eliminating this issue of a state's unwillingness to enforce arrest warrants and prosecute individuals (which is mainly attributed to the complementarity principle) it will also help overcome the ICC's current limitations in exercising jurisdiction over non-state parties.

In addition, after the thesis' novel proposal and arguments supporting the new 'JEPS model', the thesis will assess and discuss any factors which may prevent such a proposal for reform being implemented and explore whether an alternative and effective remedy is available to overcome the historic, present and continuing encumbrances which have subverted both organisations in maintaining international peace, security and justice.

1.3 The Research Question

One of the critical steps in doctoral research is the formulation of a research question which identifies the area of concern to be studied and explored, which points to a need of deliberate investigation guiding the research methodology, supporting a focused arguable thesis and construction of a logical argument.⁵⁶

Thus, formulating a research question is the first vital and essential step before commencing a research project, as it spells out precisely the focus of

⁵⁴ Seum Bamideule, 'Strengthening States and the International Community's Responsibility to Protect Civilians: Revisiting the Prosecution of War Crimes Committed in Africa by the International Criminal Court' (2018) 11 (1) African Journal of Legal Studies 82, 101.

⁵⁵ Celestine Nchekwube Ezennia, 'The Modus Operandi of the International Criminal Court System: An Impartial or a Selective Justice Regime' (2016) 16 (3) International Criminal Law Review 448, 450.

⁵⁶ Simmi K. Ratan, Tanu Anand and John Ratan, 'Formulation of Research Question – Stepwise Approach' (2019) 24 (1) Journal of Indian Association of Pediatric Surgeons 15, 15-20.

investigation which determines the focus of the work and provides guidance for the entire process and entrancing the quality of the final product.⁵⁷

The primary research question of the thesis is: 'How Can International Institutions Be Improved to Ensure Accountability and Justice for Violations That Occur in Humanitarian and Counter-Terrorism Operations?'

This question seeks to critique the effectiveness of both the UNSC and the ICC's ability to maintain international peace and security and administer international criminal justice respectively.

In order to adequately critique both organisations, specific analysis will be made to the conduct of the P5 members of the UNSC and the conduct of their allies in humanitarian and counter-terrorism operations within Muslim majority states namely: Afghanistan, Iraq, Palestine, Syria and Libya.

The primary research question seeks to explore the impact of the P5's military presence within these Muslim majority states, whilst assessing the legality of military intervention, where use of force has often been used outside the authority of the UNSC directly contravening the UN Charter, in addition to certain aspects of IL such as state sovereignty, territorial integrity and the peremptory norm of *Jus Cogens*.

The thesis in addressing the research question will also highlight the significance of the 9/11 terrorist attacks in New York, which swiftly led to the USA adopting the GWOT doctrine to justify use of force in pursuit of counter-terrorism objectives.

The thesis will advance certain members of the P5 through the NATO have often relied upon this doctrine to justify use of force in foreign states without any prior authorisation from the UNSC undermining the council's authority whilst violating IL.

The thesis will also analyse the constraints and restrictions of the UNSC, by making reference to the provisions of the UN Charter, which prohibit the

⁵⁷ Francise Neri De Souza et al, 'Asking Questions in the Qualitative Research Context' (2016) 21 (13) *The Qualitative Report* 6, 6-7.

council from being able to maintain international peace and security, particularly the veto privilege granted to P5 members which presents a significant impediment in council's ability to act expeditiously in humanitarian crises.

The thesis will also substantiate the veto privilege granted to P5 members can be assimilated to a barrier eluding accountability and ICC intervention subsequent to their illegal military conduct within the aforementioned states.

In addition to critiquing the UNSC, the thesis will also assess the effectiveness of the ICC especially in the court's ability to prosecute individuals from more economically powerful states such as the P5 and their allied states where violations of IHL have been committed in humanitarian and counter-terrorism operations within Muslim majority states.

The thesis will endeavour to highlight the shortcomings of the ICC by analysing the provisions contained in the Rome Statute of the International Criminal Court which have continued to restrict the court's ability to prosecute individuals responsible for international crimes, promoting a culture of impunity and highlight the institutions limitations and shortcomings.

The thesis in assessing the ICC will also highlight the prosecutor's restrictions to initiate preliminary investigations, due to the court's limited jurisdiction to investigate P5 members without referral by the UNSC.

In addition, the thesis will highlight even in circumstances where UNSC referral has been granted, the ICC's lack of primacy over domestic state courts in prosecuting suspected perpetrators of international crimes has also led to individuals evading criminal responsibility, due to the principle of complementarity.

By critiquing both the UNSC and the ICC, the thesis will highlight the weaknesses which exist in both institutions following the P5's continued illegal military intervention and conduct within the specified Muslim majority states.

The thesis will then progress to entrancing its recommendations to remedy the deficiencies and shortcomings which currently exist within both international

organisations by proposing a novel solution to overcome the issues presented throughout the thesis.

1.4 Research Objectives and Applicable Sub-Questions

The sub-questions relating to certain issues, areas and topics presented throughout the thesis are particularly important as it will provide a comprehensive review and in-depth insight into the wider issues relating to this thesis' primary research question.

Academics such as Agee support this view, arguing: 'An initial generative question can set the stage for developing related sub-questions. Sub-questions can take many forms, depending on the focus of the overarching question'.⁵⁸

Agee categorises and describes sub-questions as being either: 'issue and procedural sub-questions, although some questions may cut across these categories. Both types of sub-questions emerge from an overarching question and ask about the specifics of a topic/issue or a phenomenon'.⁵⁹

The sub-questions presented throughout this segment of the chapter will also be categorised into 'procedural' and 'issue' sub-questions.

The 'procedural' sub-questions will focus on both the UNSC and the ICC and their ability to fulfil their institutional mandates. Whereas the 'issue' sub-questions will focus on the issues presented within the chosen case studies for the purposes of thesis' analysis and investigation, specifically these are: Afghanistan, Iraq, Palestine, Syria and Libya.

1.4.1 'Procedural' Sub-Questions

- 1) Is the UNSC still an effective institution in maintaining international peace and security?

⁵⁸ Jane Agee, 'Developing Qualitative Research Questions: A Reflective Process' (2009) 22 (4) *International Journal of Qualitative Studies in Education* 431. 435-436

⁵⁹ *ibid.*

This sub-question purports to analyse the role of UNSC which will initially be discussed in the legal framework chapter by critiquing the role of both institutions by drawing upon historical examples of the institutions successes and shortcomings to interpose in humanitarian crises, regulate states use of force in humanitarian and counter-terrorism operations and hold states accountable for the violations of IL, IHL and CIL to determine whether in fact the UNSC is effective in maintaining international peace and security.

- 2) Is the ICC an effective institution in prosecuting individuals from powerful states for international crimes?

This sub-question purports to analyse the role of the ICC and the court's ability to prosecute individuals in light of its limitations such as; jurisdiction over states, complementarity, states unwillingness to co-operate with the ICC and its inability to enforce arrest warrants to prosecute individuals to determine whether the court can effectively administer international criminal justice.

1.4.2 'Issue' Sub-Questions

- 1) Are both the UNSC and the ICC imperialist institutions?

This sub-question will be explored throughout the thesis as the subsequent chapters will highlight the controversial relationship between the UNSC and ICC as the P5 have either exceeded the authority to use force in humanitarian and counter-terrorism operations or used force without any prior authorisation of the UNSC in pursuit of political and military advantages and objectives.

In turn, the illegal actions of the P5 and their allied states have been allowed to continue promoting a culture of impunity by eluding accountability, which has since led the ICC being manipulated to pursue senior political and military officials and heads of state of less economically prominent states through UNSC referrals.

- 2) Is Islam perceived to be synonymous with terrorism as a threat to western democracy and society subsequent to the events of 9/11?

This sub-question purports to analyse the wider implications of GWOT subsequent to 9/11, which has adversely led Islam to become synonymous with terrorism as advanced by western leaders, politicians and the media.

In turn this has influenced a generally negative perception of Islam and Muslim minority communities posing a threat to western society and often reflected in political/judicial decisions and western states foreign policy objectives which has remained a strong feature in the GWOT.

- 3) Are detained terrorists deprived of fundamental and basic human rights after 9/11?

This sub-question refers to the P5, their allies and other nation states practice of detaining suspected terrorists subsequent to 9/11 through secret renditions, depriving such individuals of due process, right to a fair trial and subjecting them to inhuman, degrading and torturous treatment contravening regional and international treaties and the fundamental norm of *Jus Cogens* which will be highlighted throughout the thesis.

- 4) Can P5 members and other states use self-defence to justify invasion and long-term occupation of another state in pursuit of counter-terrorism objectives?

The sub-question will analyse states which possess the right to use force in self-defence to justify long term military occupation and invasion in a foreign state without UNSC approval. Any military occupation is considered a violation of the UN Charter, IL and IHL which certain members of the P5 have been responsible for, yet such action has remained unchallenged by the UNSC and the ICC.

- 5) Will heads of states and individuals from P5 state militaries and their allies ever be held accountable for the international crimes they have committed in humanitarian and counter-terrorism operations?

The sub-question will highlight the ICC's inability to prosecute military personnel, senior political figures and heads of states of the P5 and their allied states due to the court's lack of jurisdiction which restricts the ability to bring

suspected perpetrators into ICC custody, which is mainly attributed to the invocation of the veto privilege or mere threat of invocation.

1.5 Research Methodology

Despite there being no set or agreed definition of research⁶⁰, it has been described as the process of collecting, analysing, and interpreting data in order to understand a phenomenon. The research process is systematic in defining the objective, managing the data, and communicating the findings within established frameworks and in accordance with existing guidelines.⁶¹

The frameworks and guidelines provide researchers with an indication of what to include in the research, how to perform the research, and what types of inferences are probable based on the data collected.⁶²

Research methodology is an articulated, theoretically informed approach to the production of data. It refers to the study and critical analysis of data production techniques. It is the strategy, plan of action, process or design that informs one's choice of research methods. It is concerned with the discussion of how a particular piece of research should be undertaken.⁶³

Essentially, it guides the researcher in deciding what type of data is required for a study and which data collection tools will be most appropriate for the purpose of the study.⁶⁴

The methodological approach is imperative to answer the proposed research question. This requires the research paradigm, research philosophy and research strategy to be considered, in order for the thesis to sufficiently investigate and analyse the deficiencies of both the UNSC and the ICC and

⁶⁰ Ruth Neumann, 'Research and Scholarship: Perceptions of Senior Academic Administrators' (1993) 25 (2) Higher Education 97, 97.

⁶¹ Carrie Williams, 'Research Methods' (2007) 5 (3) Journal of Business & Economic Research 65, 65.

⁶² *ibid.*

⁶³ Adil Abdul Rehman and Khalid Alharthi, 'An Introduction to Research Paradigms' (2016) 3 (8) International Journal of Educational Investigations 51, 52.

⁶⁴ *ibid.*

their inability to perform optimally in accordance with their institutional mandates.

Research Paradigm has been defined as: 'the technical word used to describe the ways we think about and research the world'.⁶⁵ This perception of the world⁶⁶ provides an overall framework for the researcher⁶⁷ and the research topic⁶⁸ which in turn informs the researcher's choice of methodology and methods of research.⁶⁹

The thesis will use the 'Qualitative Case Study Methodology' (QCSM) to underpin the thesis, which has been defined as: 'an approach to research that facilitates exploration of a phenomenon within its context using a variety of data sources. This ensures that the issue is not explored through one lens, but rather a variety of lenses which allows for multiple facets of the phenomenon to be revealed and understood'.⁷⁰

The advantages of using this methodology allows the researcher to investigate and analyse a single or collective case, which is intended to capture the complexity of the object of study. As a study design, case study is defined by interest in individual cases rather than the methods of inquiry used.⁷¹

The selection of methods is informed by researcher and case intuition and makes use of naturally occurring sources of knowledge, such as people or observations of interactions that occur in the physical space his qualitative

⁶⁵ Ellen Boeren, 'The Methodological Underdog: A Review of Quantitative Research In The Journal Key Adult Education Journals' (2018) 68 (1) *Adult Education Quarterly* 63, 65.

⁶⁶ Godswill Makombe, 'An Expose of the Relationship Between Paradigm, Method and Design in Research' (2017) 22 (12) *The Qualitative Report* 3363, 3364.

⁶⁷ Aliyu Ahmad Aliyu et al, 'Positivist and Non-Positivist Paradigm in Social Science Research: Conflicting Paradigms or Perfect Partners?' (2014) 4 (3) *Journal of Management and Sustainability* 79, 79.

⁶⁸ Siti Soraya Lin Binti Abdullah Kamal, 'Research Paradigm and the Philosophical Foundations of a Qualitative Study' (2019) 4 (3) *International Journal of Social Sciences* 1386, 1388.

⁶⁹ Marwa Elshafie, 'Research Paradigms: The Novice Researchers Nightmare' (2013) 4 (2) *Arab World English Journal* 4, 5.

⁷⁰ Pamela Baxter and Susan Jack, 'Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers' (2008) 13 (4) *The Qualitative Report* 544, 544.

⁷¹ Nerida Hyett, Amanda Kenny and Virginia Dickson-Swift, 'Methodology or Method?: A Critical Review of Qualitative Case Study Reports' (2014) 9 (1) *International Journal of Qualitative Studies on Health and Well-being* 1,2.

approach explores a real-life, contemporary bounded system (a case) or multiple bounded systems (cases) over time, through detailed, in-depth data collection involving multiple sources of information. Case study research has been defined by the unit of analysis, the process of study, and the outcome or end product.⁷²

1.5.1 Application of the Qualitative Case Study Methodology in the Thesis

QCSM in relation to the thesis, considers the two international organisations (the UNSC and ICC) to be the phenomena being analysed and critiqued with a particular focus on their respective abilities to fulfil their organisational mandates in practice to hold individuals from P5 states accountable for the violations of IL, IHL, IHRL, CIL and *Jus Cogens* in humanitarian and counter-terrorism operations.

This will be achieved by observing the multiple bounded systems or simply the five Muslim majority states as collective case studies, specifically: Afghanistan, Iraq, Palestine, Syria and Libya over the course of two decades.

These five Muslim majority states have been specifically selected as they have been adversely subjected to dire humanitarian conditions as a result of armed conflicts, which have ensued as a result of humanitarian and counter-terrorism military operations in the ongoing GWOT.

The first case study in chapter three will initially analyse both international organisation's role in the state of Afghanistan after the 9/11 terror attacks. This led to the illegal military occupation of the state in 2001 without the prior approval of the UNSC, which in turn has led the USA, UK, France and other coalition allies to conduct counter-terrorism military operations within the state in pursuit of Al-Qaeda with the overall objective to eliminate the threat. The UNSC legitimised the illegal occupation and use of force of these P5 members with no accountability for the IL, IHL, CIL violations which have occurred as a result.

⁷² *ibid.*

The second case study also in chapter three will analyse and critique the 2003 invasion of Iraq, which will portray similar tendencies and justifications to use force unjustifiably outside the authority of the UNSC to counter-terrorist threats by associating Al-Qaeda with the former regime of Saddam Hussein, which was then authorised by the council. This subsequently led to a decade long military occupation of the state by USA, UK, France and coalition allies which has resulted in disproportionate, discriminate excessive civilian deaths in direct contravention of IHL.

In both the Afghanistan and Iraq case studies similarities will be demonstrated within both states as the GWOT doctrine has often served as justification for breaching the sovereignty of both states, in addition to individuals of these P5 states unlawfully depriving the fundamental human rights of detained fighters, terrorists and suspected terrorists through arbitrary arrests, denial of judicial appeal and subjecting these individuals to torturous practices, which is contrary to IHL, IHRL, CIL and *Jus Cogens*.

This has still not led to any intervention by the ICC or states co-operating with the ICC to help prosecute and convict individuals for international crimes which have been alleged to have been perpetrated by individuals belonging to the militaries of the P5.

The third case study in chapter four, will examine the state of Palestine due to its historical and ongoing tensions and struggle for independence free from Israeli occupation and annexation. The thesis will adduce individuals in the Israeli Defense Force (IDF) with the support of the Israeli government have committed significant IL, IHL, IHRL and CIL violations in fighting against the terrorist threat specifically the military wing of the Palestinian political group 'Hamas'.

The three military operations carried out by the IDF between 2009-2014 will be demonstrated to have wrought disproportionate use of force in pursuit of eradicating Hamas leading to deaths of civilians, damage to civilian infrastructure through the use of illegal and internationally banned military artillery, which has been remained unchallenged.

Violations of the *Jus Cogens* norm will be demonstrated in this case study as Israel's political ally the USA has often invoked its veto privilege barring the UNSC from intervening in the humanitarian crises which has ensued as a result of the armed conflict between the states and preventing Palestine ascension to statehood, whilst also preventing the ICC from obtaining jurisdiction to investigate international crimes which have been committed by individuals of both states.

The fourth case study in chapter five will be used to critique both international organisations will be the state of Syria. The thesis will commence by demonstrating the armed conflict emanated from the 2011 Arab Spring uprisings between rebel groups against the current presiding regime of Bashar Al-Assad.

The case study has been chosen specifically due to the continued presence of terrorist groups since 2014 most notably the Islamic State of Iraq and Syria (ISIS) and its territorial expansion of Syria. Since then, Syrian governmental forces, allied militias and foreign/political allies predominantly Russia have been instrumental in eradicating the terrorist threat to reclaim Syrian territory whilst committing a myriad of IHL, IHRL and CIL violations including the use of internationally banned chemical weapons and other artillery.

In addition, the USA's use of force in its continued GWOT with the aid of the UK and France against ISIS has breached the sovereignty of Syria with no legal consequences befalling them nor any individuals from these states being held criminally accountable for the destruction and significant loss of life in the decade long conflict.

This case study is of particular importance as the actions displayed in this state are comparable to the previous states which will have been analysed demonstrating consistency in the shortcomings of both international organisations.

Specifically, this chapter will demonstrate the violation of Syria's sovereignty which has remained unchallenged by the UNSC and the ICC similar to the Afghanistan and Iraq. In addition, the invocation of the veto privilege

throughout the conflict has further exacerbated the dire humanitarian situation which has prevented any accountability and referral of alleged international crimes committed by individuals of these four P5 states and their allies similar to the Palestine case study.

The fifth and final case study chosen for the purposes of critiquing both international organisations is Libya in chapter six. Similar to Syria the case study will commence from the 2011 Arab Spring uprisings, which initiated the internal violence within the state between rebel forces seeking to overthrow the former regime of Colonel Muammar Gaddafi.

The case study will substantiate the UNSC authorising and sanctioning use of force for the purposes of humanitarian peacekeeping within state. However, the thesis analysing this state will adduce the USA, UK, France with the aid of coalition allies through the North Atlantic Treaty Organisation (NATO) exceeded the UNSC mandate to use force to overthrow the former regime, whilst also killing innocent civilians directly contravening IHL and CIL with no individuals from NATO forces being held criminally liable and accountable by the ICC.

This state as a case study will further demonstrate similarities with the Afghanistan and Iraq case studies, particularly illegal and/or excessive use of force to effectuate authoritarian regimes being overthrown as will be presented in Afghanistan and Iraq.

Further similarities will be presented, specifically after the mandate to use force in Libya was rescinded by the UNSC, the USA continued to illegally breach the sovereignty of Libya and commit the international crime of aggression in pursuit of senior individuals of terrorist groups in the ongoing GWOT, displaying similar tendencies and actions reminiscent in Afghanistan and Iraq.

Thus, failures of the UNSC to hold individuals accountable for civilian deaths caused by the NATO airstrikes and the ICC's inability to enforce outstanding arrest warrants against individuals of the former regime will further demonstrate the limitations and shortcomings of both international

organisations and their ability to hold individuals accountable for violations of IHL and CIL, which will have been consistently demonstrated throughout all the preceding chapters of the thesis.

Using QCSM to analyse and critique both international organisations in the chosen Muslim Majority states as case studies enables the author assuming the role of a researcher to replicate findings across all cases, comparisons to be drawn between cases as aforementioned to ultimately present similarities across cases⁷³ exacerbating the shortcomings, limitations and failures of both the UNSC and the ICC.

Thus, in order to effectively answer the proposed research question and entrance the authors novel solution, the QCSM methodology provides the ideal platform in the construction of new knowledge in relation to the thesis' assessment of whether the current international organisations can be improved to better deal with situations of armed conflict especially where humanitarian issues and threats of terrorism become prevalent.

1.6 Methods of Research

Research methodology refers to philosophy and theory and the method of research relates to the technical procedures applied to conduct research. Thus, the research paradigm encompasses two dimensions: (a) philosophical, basic beliefs and assumptions about the world (as mentioned above); and (b) technical, methods and techniques adopted when conducting research (which will be discussed below).⁷⁴

To complement QCSM, the thesis' analysis, critique and findings will use the qualitative research method, which concerns the way in which people interpret and make sense of their experiences to understand the social reality of

⁷³ Baxter and Jack (n 70) 548.

⁷⁴ S.L.T. McGregor and J A. Murnane, 'Paradigm, Methodology and Method: Intellectual Integrity in Consumer Scholarship' (2010) 34 (4) International Journal of Consumer Studies 419, 419-420.

individuals. It makes use of textual and visual materials to obtain, analyse, and interpret the data content for the purposes of analysis and critique.⁷⁵

It is exploratory and seeks to explain *how* and *why* a particular social phenomenon, or program, operates as it does in a particular context. It tries to help us to understand the social world in which we live, and why things are the way they are.⁷⁶

In addition, the thesis will also use the 'Doctrinal research' method⁷⁷ which enables the author to use an entirely desk-based approach to acquire, obtain and incorporate existing published literary material and from both legal and non-legal sources which will be used throughout the thesis.

This type of research comprises of a review by collating legal concepts and principles of all types of cases, statutes, and rules including a synthesis of various rules, principles, norms, interpretive guidelines and values. It explains, makes coherent or justifies a segment of the law as part of a larger system of law.⁷⁸

The, thesis will consult a variety of legal materials predominantly primary sources which will include: the national legislation of a state, international conventions, UN resolutions, case law of national/international courts and official publications issued by the UN.

The thesis whilst consulting the above sources will also refer to secondary such as: academic publications, conferences, working papers, books, governmental reports and non-governmental organisation reports.

⁷⁵ Haradhan Kumar Mohajan, 'Qualitative Research Methodology in Social Sciences and Related Subjects' (2018) 7 (1) Journal of Economic Development, Environment and People 23, 24.

⁷⁶ *ibid.*

⁷⁷ McConville and Chui (n 22).

⁷⁸ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 (1) Deakin LR 83, 84.

The thesis will refer to online sources and databases to obtain both academic commentary and published statistical data to substantiate, bolster and adduce arguments and findings presented throughout the thesis.

The use of doctrinal research method is imperative as it will allow the thesis to consult the aforementioned sources in order to sufficiently critique the UNSC and the ICC and their ability to ensure accountability for the violations of IL in the chosen five Muslim majority states which will be used as case studies, specifically: Afghanistan, Iraq, Syria, Palestine and Libya. Thus, further consideration must be given to the research strategy which comprises of 'Inductive' and 'Deductive' reasoning.

Inductive reasoning is described as drawing inferences from specific observable phenomena to general rules, or 'knowledge expanding'. Here evidence is collected about observable events and a premise is constructed based on the collected data. The degree to which the conclusion is probably true is based on the quality of the evidence used to support it.⁷⁹

Whereas, Deductive reasoning is often described as going from 'the general to the specific' or 'truth-preserving'. In essence, a valid deductive argument is one in which the premises if true must lead to a true conclusion. Induction, on the other hand, is.⁸⁰

This reasoning suggests inductive reasoning is more appropriate and suited to the aims and objectives of the thesis in assessing the effectiveness of the UNSC to hold the P5 and their allied states accountable and its ability to interpose in humanitarian crises and prevent mass atrocity crimes.

The use of inductive reasoning will accentuate the limitations of ICC including jurisdictional constraints over states and the court's difficulties in investigating, indicting and prosecuting individuals even in circumstances where referrals have been made by the UNSC, which will be evidenced by making reference

⁷⁹ William Tomas Worster, 'The Indictive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches' (2014) 45 (2) Georgetown Journal of International Law 445, 447.

⁸⁰ *ibid.*

to observable events following the ongoing conflicts in Afghanistan, Iraq, Palestine, Libya and Syria.

In addition to using the doctrinal research method, inductive reasoning will also be used to address the research question, by incorporating the QCS methodological framework through the use of qualitative research method.⁸¹

The thesis in addressing the research question will adopt Qualitative research methods by consulting various legal sources and literature in order to effectively critique, examine and analyse the effectiveness of the UNSC and the ICC throughout the thesis, as references will be made to published numerical and statistical data to substantiate and bolster arguments pertaining to the research question.

⁸¹ Par J. Agerfalk, 'Embracing Diversity Through Mixed Methods Research' (2013) 22 (3) European Journal of Information Systems 251, 251.

Chapter 2 – Legal Framework

This chapter of the thesis will initially, analyse the importance of International Humanitarian Law (IHL) and its intrinsic relationship with International Human Rights Law (IHRL), Customary International Law (CIL) and the peremptory international norm of *Jus Cogens*.

It is necessary to identify and review the legal sources, academic commentary and the rationale surrounding these bodies of law as they endeavour to mitigate states conduct and methods of warfare in armed conflict to preserve and protect human life and dignity.

The chapter will explore the purpose of the United Nations Security Council (UNSC) and the rationale for its creation to reiterate, complement and endorse these important bodies of international law (IL) in its resolutions and its applicability in armed conflicts,

The institutional relationship of the UNSC and the International Criminal Court (ICC) will also be demonstrated exemplifying the significant impact the courts creation has had in the development of International Criminal Law (ICL).

In doing so, the chapter will highlight the shortcomings of the UNSC and the ICC since their respective inceptions, particularly where military depredations by individuals belonging to the five permanent members of the UNSC (P5) and their allied states have violated IL, IHL, CIL and *Jus Cogens* during humanitarian peace-keeping and counter-terrorism operations.

This has mainly been attributed to the ‘global war on terror’ (GWOT) doctrine established by the United States of America (USA) subsequent to the Al-Qaeda terrorist attacks which occurred on the 11th September 2001 (9/11) on the World Trade Centre (WTC) in New York City.⁸²

The chapter will highlight that by allowing such serious violations to remain unchallenged this has created a culture of impunity, which in turn has

⁸² Renate Mayntz, ‘Control of a Terrorist Network: Lessons From 9/11 Commission Report’ (2006) 9 (3) International Public Management Journal 295, 295.

adversely affected both organisations reputation, credibility and ability to accomplish their respective mandates.

Whilst highlighting these shortcomings, this chapter will also explore the wider implications of 9/11 and the adverse effect the 'global war on terror' (GWOT) doctrine has had, particularly in the way Islam and Muslims are perceived in western states

The arguments presented in this chapter will also be substantiated in the subsequent chapters of the thesis in addressing the central argument of the thesis concerning both the UNSC and the ICC and how both institutions can be improved in holding individuals accountable for the international crimes which have been committed in humanitarian peace-keeping and counter-terrorism operations.

2.1 The Importance of International Humanitarian Law

The 'law of nations' originally advanced by Dutch scholar and lawyer Hugo Grotius⁸³ was later referred to as 'international law' by English philosopher Jeremy Bentham⁸⁴

IL has been described by English jurist William Blackstone as 'intercourse which must frequently occur between two or more independent states, and individuals belonging to each'.⁸⁵ Thus, the primary function of IL is to regulate the relations of states⁸⁶ in addition to international organisations deriving both rights and obligations from it.⁸⁷

The purpose of IHL is of paramount importance as it seeks to regulate states conduct in war. This branch of law is relevant to the research question as it

⁸³ Hugo Grotius, *On the Law of War and Peace* (first published 1625, Jazzybee Verlag Jürgen Beck 2018) 7.

⁸⁴ Jeremy Bentham, *Principles of Morals and Legislation* (first published 1789, Oxford Clarendon Press 1823) 326.

⁸⁵ William Blackstone, *Commentaries on the Laws of England* (Book IV, 1st edn, Oxford Clarendon Press 1765-1769) 66.

⁸⁶ Clive Parry, 'The Function of Law in the International Community' in M. Sørensen (ed), *Manual of Public International Law* (Melbourne Macmillan, 1968) 1.

⁸⁷ Niels Blokker, 'International Organizations and Customary International Law' (2017) 14 (1) *International Organizations Law Review* 1, 1.

highlights the intrinsic relationship with IHL and CIL, which states often violate when engaging in humanitarian peacekeeping and counter-terrorism operations.

IHL is strictly regulated⁸⁸ and 'based on the concepts of *jus ad bellum*, which is defined to be the law of war. This means that the laws involved are meant to be active in a situation of an armed conflict or during war'.⁸⁹

The International Committee of the Red Cross (ICRC) is an independent organisation which has been responsible for codifying CIL and has been crucial in the development of modern IHL governing states conduct in armed conflict. The ICRC has gained positive recognition for its achievements and regarded as the guardian and promoter of IHL⁹⁰.

The ICRC instigated a series of important treaties known as the Geneva Conventions⁹¹ being enacted which are still considered relevant legal authorities and applicable to the present-day in regulating states who endeavour to engage in armed conflict and war.⁹²

It is important to note, treaty law and CIL are sources of IL. Treaties bind only those states which have expressed their consent to be bound by them, usually through ratification, whereas, CIL, on the other hand, is derived from a general practice accepted by law⁹³ which is legally binding upon all states.⁹⁴ The

⁸⁸ Noelle Higgins and Kieran O'Reilly, 'The Use of Force Wars of National Liberation and the Right to Self-Determination in the South Ossetian Conflict' (2009) 9 (3) *International Criminal Law Review* 567, 567.

⁸⁹ Gertrude C. Chelimo, 'Defining Armed Conflict in International Humanitarian Law' (2011) 3 (4) *Inquiries Journal* <<http://www.inquiriesjournal.com/articles/1697/defining-armed-conflict-in-international-humanitari0061n-law>> accessed 01 September 2019.

⁹⁰ Knut Dormann and Louis Maresca, 'The International Committee of the Red Cross and Its Contribution to the Development of International Humanitarian Law in Specialized Instruments' (2005) 5 (1) *Chicago Journal of International Law* 217, 217.

⁹¹ Amanda Alexander, 'A Short History of international Law Humanitarian Law' (2015) 26 (1) *EJIL* 109, 109.

⁹² Page Wilson, 'The Myth of international Humanitarian Law' (2017) 93 (3) *International Affairs* 563, 563.

⁹³ Jean-Marie Henckaerts and Louise Doswald Beck, *Customary International Humanitarian Law, Volume I: Rules* (first published 2005, Cambridge University Press 2009) xxxvi – xlix.

⁹⁴ Zhang Yue, 'Customary International Law and the Rule Against Taking Cultural Property as Spoils of War' (2018) 17 (4) *Chinese JIL* 943, 971.

Statute of the International Court of Justice also confirms this⁹⁵ and is reflected in the court's previous rulings.⁹⁶

Moreover, Additional Protocol I to the Geneva Conventions (AP I)⁹⁷ and Additional Protocol II to the Geneva Convention (AP II)⁹⁸ are distinctive in governing armed conflicts, with Additional Protocol I applying to international armed conflict's (IAC) and Additional Protocol II applying to non-international armed conflict's (NIAC).⁹⁹

Both IHL and AP I are considered to be the new regime of internal armed conflicts distinguishing between combatants and non-combatants, introducing the principles of proportionality, discrimination and precaution which are fundamental principles of *Jus Cogens* aimed at prohibiting reprisals against civilians.¹⁰⁰

AP II supplements article 3 of the Geneva conventions 1949, which concerns the protection of victims of non-international conflict. Protocol II asserts 'insurgent forces or armed groups must be under responsible command and must control part of the territory in such a way as to be able to carry out sustained and concerted military operations and to implement the protocol'.¹⁰¹

The four Geneva Conventions¹⁰², AP I and AP II seek to regulate states conduct in armed conflict, which shares a special relationship with IHRL as the

⁹⁵ Statute of the International Court of Justice [1945] art 38 (1).

⁹⁶ *The Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266, para 14, *The Fisheries Jurisdiction Case (United Kingdom v Iceland)* (Joint Separate Opinion of Judges Forster, Bengzon, Jimenex De Arechaga, Nagendra Singh and Ruda) [1973] ICJ Rep 3, para 16, *The Anglo-Norwegian Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116, para 116.

⁹⁷ 1977 Additional Protocol I to the Geneva Conventions [1949].

⁹⁸ 1977 Additional Protocol II to the Geneva Conventions [1949].

⁹⁹ Deidre Wilmott, 'Removing the Distinction Between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court (2004) 5 (1) Melbourne Journal of International Law <<http://classic.austlii.edu.au/au/journals/MelbJIL/2004/8.html>> accessed 20 April 2020.

¹⁰⁰ Amanda Alexander, 'International Humanitarian Law, Post Colonialism and the 1977 Geneva Protocol I' (2016) 17 (1) Melbourne Journal of International Law 15, 16.

¹⁰¹ Sylvie Junod, 'Additional Protocol II: History and Scope' (1983) 33 (1) Am.U.L.Rev. 29, 29.

¹⁰² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [1949], Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces Sea [1949], Geneva Convention

convergence with IHL has been noted to share a 'common word 'human' which denotes their commonality to protect human dignity and life'.¹⁰³

The relationship between the two areas of law and their deep relationship have been identified in what forms the basis of IHL, which is codified in the four Geneva Conventions of 1949¹⁰⁴ and their Additional Protocols (AP I and II) and CIL which have been archived by the ICRC.¹⁰⁵

Common article 2 endeavours to mitigate and eliminate unnecessary violence which is considered injurious and harmful to persons involved in armed conflict. Whereas, common article 3 incorporates IHRL to regulate states, conduct in armed conflict and eliminate 'barbarity'.¹⁰⁶

Many of the provisions contained in common article 3 complement the Universal Declaration on Human Rights¹⁰⁷ (UDHR) as it resembles IHRL and its norms, which should be observed by states to comply with basic measures of respect and humane treatment towards their citizens¹⁰⁸

IHL comprises of four main legal concepts which states are bound by when engaging in armed conflict namely: 'the principle of distinction, the principle of military necessity, the principle of proportionality and unnecessary suffering. These principles are based on the desire to mitigate unnecessary human suffering and property destruction'.¹⁰⁹

Relative to the Treatment of Prisoners of War [1949], Geneva Convention Relative to the Protection of Civilian Persons in Time of War [1949].

¹⁰³ Waseem Ahmad Qureshi, 'Untangling the Complicated Relationship Between International Humanitarian Law and Human Rights law In Armed Conflict' (2018) 6 (1) Penn State Journal of Law and International Affairs 203, 204.

¹⁰⁴ n 102.

¹⁰⁵ Michael N Schmitt and Sean Watts, 'State Opinio Juris and International Humanitarian Law Pluralism' (2015) 91 International Law Studies 171, 180.

¹⁰⁶ John C. Dehn, 'The Hamdan Case and the Application of a Municipal Offence: The Common Law Origins of Murder in Violation of the Law of War' (2009) 7 (1) JICJ 63, 74.

¹⁰⁷ Universal Declaration of Human Rights [1948].

¹⁰⁸ Giovanni Mantilla, 'Conforming Instrumentalists: Why the USA and the United Kingdom Joined the 1949 Conventions (2017) 28 (2) EJIL 483, 495 – 496.

¹⁰⁹ Qureshi (n 103), 204.

Whereas IHRL is based on ‘the principles of non-discrimination, such as the right to be treated equally, and on respect for human dignity, such as the right not to be tortured and the right not to be enslaved’.¹¹⁰

Thus, IHL endeavours to strike a balance between the need for military necessity¹¹¹ and concerns for humanity. These laws may be described as securing the survival of the human species through regulating the modes of lawful killings in armed conflicts by strictly attacking necessary military targets and pursuing legitimate military objectives.¹¹²

In support of the above, the principle of proportionality seeks to mitigate states actions by regulating states: ‘Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.’¹¹³

Finally, the principle of unnecessary suffering prohibits states conduct in military and peacekeeping operations¹¹⁴ by regulating the use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering which is prohibited.¹¹⁵

In addition, the relationship between IHL and IHRL has been reaffirmed within the International Covenant on Civil and Political Rights (ICCPR)¹¹⁶ as article 6 (1) provides: ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life’.¹¹⁷

The importance to protect the lives and preserve human rights in armed conflict has been elaborated by the International Court of Justice (ICJ) in the

¹¹⁰ Qureshi (n 103), 205.

¹¹¹ 1977 Additional Protocol I to the Geneva Conventions [1949] art 52 (2)

¹¹² Matilda Arvidsson, ‘Targeting, Gender, and International Post humanitarian Law Practice: Framing the Question of the Human in International Humanitarian Law (2018) 44 (1) Australian Feminist Law Journal 9, 14.

¹¹³ Henckaerts and Beck (n 93) 46.

¹¹⁴ 1977 Additional Protocol I to the Geneva Conventions [1949] art 35 (2).

¹¹⁵ Henckaerts and Beck (n 93), 237.

¹¹⁶ International Covenant on Civil and Political Rights [1966].

¹¹⁷ *ibid* art 6 (1).

Nuclear Weapons case¹¹⁸ reiterating the fact that IHL should be observed in armed conflict, although reference can be made to ICCPR, where deprivation of life occurs through the use of a weapon used in warfare, IHL supersedes the requirement to deduce from the covenant itself.¹¹⁹

The ICJ has reiterated this approach and stressed the importance of observing IHL in armed conflict and further demonstrated this in the dissenting opinion of the *Palestinian Wall Case*.¹²⁰

Thus, in armed conflict IHL is given '*Lex Specialis Derogate Lege Generali*' status meaning the 'specific law will be more applicable to the intent of the parties and therefore will be more relevant and effective than a general law'.¹²¹

This suggests IHL is invariably regarded as '*Lex Specialis*' with regard to armed conflicts because it's set of norms were specifically formulated to mitigate and regulate state conduct placing an emphasis to prevent the loss of civilian life, civilian objects and non-belligerents in war.¹²²

The above has demonstrated the importance of IHL and the obligations it places upon states when engaging in armed conflict. The next segment of the chapter will critique the role of the UNSC and its ability to maintain international peace and security.

This is particularly important, as a major theme of this thesis endeavours to assess the effectiveness of the UNSC and the ICC and the criticisms of both institutions will be reflected in Afghanistan, Iraq, Palestine, Syria and Libya.

¹¹⁸ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

¹¹⁹ *ibid* para 25.

¹²⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) ICJ Rep 136, para 106.

¹²¹ Juliet Chevalier – Watts, 'Has Human Rights Law Become *Lex Specialis* for the European Court of Human Rights in Right to Life Cases Arising from Internal Armed Conflicts' (2010) 14 (4) *International Journal of Human Rights* 584, 586.

¹²² *ibid*.

2.1.1 Key International Law Concepts Which Will Be Used Throughout the Thesis: State Sovereignty, Territorial Integrity and the Doctrine of R2P

The state has long been accepted as IL's primary and central actor.¹²³ A state is recognised as a person of IL, if it possesses the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.¹²⁴

Thus, determination and demarcation of fixed territories and the subsequent allegiance between those territories and the individuals or groups of individuals that inhabit them are important elements in establishing the sovereignty of a state.¹²⁵ IL essentially constitutes cooperation of states.¹²⁶ Effectively, states on the one hand produce law and, on the other hand, is based upon law and is being regulated by law.¹²⁷

It has been said that 'the international political system has been structured around three central tenets: the notion of equal sovereignty of states, internal competence for domestic jurisdiction, and territorial preservation of existing boundaries'.¹²⁸

Indeed, the national sovereignty of a state is an important legal principle as it underlies IL's requirement of state consent to treaties and CIL, justifying respect of a state's territorial borders, whilst exercising a powerful influence on national behaviours.¹²⁹

¹²³ Derek Wong, 'Sovereignty Sunk? The Position of Sinking States at International Law' (2013) 14 (2) *Melbourne Journal of International Law* 346, 347.

¹²⁴ Montevideo Convention on the Rights and Duties of States [1933] art 1.

¹²⁵ Joshua Castellino, 'Territorial Integrity and the Right to Self Determination: An Examination of the Occupied Tools' (2008) 33 (2) *Brooklyn Journal of International Law* 503, 503.

¹²⁶ Anel Ferreira-Snyman, 'Sovereignty and the Changing Nature of Public International Law: Towards a World Law?' (2007) 40 (3) *The Comparative and International Law Journal of Southern Africa* 395, 395.

¹²⁷ Oleksandr Merezkho, 'The Mystery of the State and Sovereignty in International Law' (2020) 64 (1) *Saint Louis University Law Journal* 23, 24.

¹²⁸ Stuart Elden, 'Contingent Sovereignty, Territorial Integrity and the Security of Borders' (2006) XXVI (1) *SAIS Review of International Affairs* 11, 11.

¹²⁹ Jack Goldsmith, 'Sovereignty, International Relations Theory and International Law' (2000) 52 (4) *Stan.L.Rev.* 959, 959.

Once the sovereignty of a state is recognised it implies its independence¹³⁰, meaning the state possesses the ability to exercise jurisdiction over all persons and property within its territory.¹³¹ This includes any criminal offence which occurs within a state's territory¹³² as confirmed in previous judicial decisions reached in UK¹³³ and Canadian courts.¹³⁴

Another important principle in IL is a state is immune and may not be subjected to another state's jurisdiction, which has also been confirmed in various judicial decisions reached by courts in the UK¹³⁵, USA¹³⁶ and the ICJ.¹³⁷

Moreover, territories are considered to 'form an integral part of a sovereign state and are, in turn, protected by the principle of territorial integrity'.¹³⁸ Territorial integrity ensures the protection of a sovereign state from violations of its territory including forceful attacks and non-forceful interventions by another state.¹³⁹

The UN Charter confirms this by recognising the sovereign equality of all states¹⁴⁰ and also prohibits member states to use or threaten to use force which would violate the territorial integrity and sovereignty of a state¹⁴¹

Therefore, no state possesses the right to interfere in the domestic affairs of a state¹⁴², meaning a state is protected under IL, specifically, under the Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001

¹³⁰ Thomas Prehi Botchway, 'International Law, Sovereignty and the Responsibility to Protect: An Overview' (2018) 11 (4) Journal of Politics and Law 40, 40.

¹³¹ *Compania Vascongado v Steamship Christina* [1938] AC 485 [496]-[497] (MacMillan LJ).

¹³² *France v Turkey* [1927] PCIJ Rep Ser. A No 10, para 23.

¹³³ *R v Ellis* (1899) 1 QB 1 [230] (Hawkins, Wills and Bruce LJ).

¹³⁴ *R v Blythe* (1895) 1 CCC 263 BCSC.

¹³⁵ *Playa Larga v I Congreso del Partido* [1983] 1 AC 244 (HL) [262] (Wilberforce LJ), *De Haber v Queen of Portugal* (1851) 17 QB 196 [207] (Campbell LJ), *Holland v Lampen-Wolfe* [2000] 1 WLR 1573 (HL) [1577] (Hope LJ), *Jones v Interior Minister for Saudi Arabia* [2007] 1 AC 270 [289] (Bingham LJ).

¹³⁶ *Schooner Exchange v McFaddon* (1812) 7 Cranch 116 [137].

¹³⁷ *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (Judgment) 2012 para 57 <<https://www.icj-cij.org/public/files/case-related/143/143-20120203-JUD-01-00-EN.pdf>> accessed 5 July 2021.

¹³⁸ Jure Vidmar, 'Territorial Integrity and the Law of Statehood' (2012) 44 (4) George Washington International Law Review 697, 700.

¹³⁹ Christian Marxsen, 'Territorial Integrity in International Law - Its Concept and Implications for Crimea' (2015) 75 Heidelberg Journal of International Law 7, 12.

¹⁴⁰ Charter of the United Nations [1945] art 2 (1).

¹⁴¹ Charter of the United Nations [1945] art 2 (4).

¹⁴² Montevideo Convention on the Rights and Duties of States [1933] art 8.

against any direct¹⁴³ or indirect use of force or attack (through the use of non-state actors and/or armed groups within another state) as confirmed by the International Law Commission¹⁴⁴ and the UN Charter.¹⁴⁵

However, in certain circumstances use of force and military intervention is permissible if a state is acting in self-defence¹⁴⁶ or authorised by the UNSC under Chapter VII of the UN Charter¹⁴⁷ for the purposes of intervening in dire humanitarian situations which may ensue as a result of armed conflict¹⁴⁸ through the doctrine of responsibility to protect (R2P).

The International Commission on Intervention and State Sovereignty (ICISS) is an independent body which was established in 2000, after the failure of the international community to interpose in the genocides which occurred in Rwanda, Bosnia and also the humanitarian situation in Kosovo, which led to the creation of the Responsibility to Protect (R2P).¹⁴⁹ The ICISS has set out the core principles of R2P stating:

[A]. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.

B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.¹⁵⁰

The ICISS have stressed the importance of state sovereignty and confirmed that any military intervention by the international community through R2P

¹⁴³ ILC, 'Report to the General Assembly on the Work of Its Fifty-Third Session Volume II Part 2' (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10, art 2.

¹⁴⁴ ILC, 'International Law Commissions Draft Declaration on Rights and Duties of States' (1949) ILCYB 286, art 4.

¹⁴⁵ Charter of the United Nations [1945] art 2 (7).

¹⁴⁶ Charter of the United Nations [1945] art 51.

¹⁴⁷ Charter of the United Nations [1945] art 24.

¹⁴⁸ Vladyslav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution Conduct' (2017) 28 (2) EJIL 563, 567.

¹⁴⁹ Saira Mohamed, 'Syria, The United Nations and the Responsibility to Protect' (2012) 106 ASIL PROC. 223, 223.

¹⁵⁰ Gareth Evans et al, 'The Responsibility to Protect: Report of the international Commission on Intervention and State Sovereignty' (IC/ISS, 1 December 2001) XI <<https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf?sequence=6&isAllowed=y>> accessed 6 July 2021.

measures require the UNSC's prior authorisation¹⁵¹, which is contingent on a resolution being passed.¹⁵² The UNGA in the World Summit Outcome Document has confirmed and endorsed this position.¹⁵³

However, any state using force and violating the sovereignty and territorial integrity of a state without valid self-defence or prior authorisation of UNSC, even where a state fails to protect its citizens is considered to be an act of aggression.¹⁵⁴ The UNGA considers invasion or armed attack, bombardment, coastal blockades and attacks on the land, sea and air all to be acts of aggression.¹⁵⁵

The Rome Statute has listed acts of aggression as international crimes¹⁵⁶ meaning an individual is criminally liable before the ICC if they are found to have been in a position to have effectively planned, prepared, initiated or executed or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations¹⁵⁷ by using armed force against the sovereignty and territorial integrity of another state.¹⁵⁸

The above segment has demonstrated the importance of IL principles of State Sovereignty, Territorial Integrity and R2P. The subsequent chapters of the thesis will demonstrate the GWOT doctrine and the threat of terrorism has become justification of the P5 states and their allies in violating these principles which will be demonstrated subsequently in Afghanistan, Iraq, Syria and Libya case study chapters.

In addition, the UNSC's inability to authorise R2P intervention where states fail to protect their own citizens will also be made apparent due to the frequent invocation of veto privileges which will be discussed in the next segment of

¹⁵¹ *ibid*

¹⁵² Paul D Williams and Alex J Bellamy, 'Principles, Politics and Prudence: Libya, The Responsibility to Protect and The Use of Military Force' (2012) 18 (3) *Global Governance* 273, 273.

¹⁵³ UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 paras 138-139.

¹⁵⁴ UNGA Res 3314 (XXIX) (14 December 1974) art 1.

¹⁵⁵ *ibid* art 3.

¹⁵⁶ Rome Statute of the International Criminal Court [1998] art 5 (d).

¹⁵⁷ Rome Statute of the International Criminal Court [1998] art 8 *bis* (1).

¹⁵⁸ Rome Statute of the International Criminal Court [1998] art 8 *bis* (2).

this chapter. This has often prevented the council from interjecting, preventing and mitigating humanitarian crises and instead allowed conflicts to be unnecessarily prolonged, which will be elaborated in further detail in the Syria and Libya case study chapters.

2.2 The United Nations Security Council

This segment of the legal framework will critique the role of the UNSC by assessing the organisation's ability to fulfil its institutional purpose to maintain international peace and security.

This will be substantiated by observing the council's success in brokering peace between states involved in long term conflict, whilst also demonstrating the challenges the UNSC has faced, preventing it from intervening humanitarian disasters arising from armed conflicts and counter-terrorism operations.

By critiquing the role of the UNSC, this segment of the legal framework will establish the institutions ineffectiveness to fulfil its mandate due to the veto privileges granted to the P5 members. This will also be demonstrated where the veto or mere threat of veto by the P5 is enough to prevent a resolution from being approved, hindering the organisations administration of maintaining international peace and security.

This practice of invoking the veto to prohibit the UNSC from holding states accountable will also be observed in the subsequent chapters of the thesis. This will guide the thesis' objective to introduce a new structural configuration to improve the performance of the UNSC to hold states accountable for their violations which occur in armed conflicts and counter-terrorism operations.

2.2.1 The UNSC and the Organisations Historic Peace Efforts

The UNSC's primary mandate is to ensure and maintain international peace and security¹⁵⁹ and to that end take effective collective measures for the

¹⁵⁹ Charter of the United Nations [1945] art 24 (1)

prevention and removal of threats to the peace, suppression of acts of aggression and other breaches of the peace.¹⁶⁰

The UNSC comprises of fifteen member states with China, France, Russia, the United Kingdom (UK) and the United States of America (USA) holding permanent membership.

The United Nations General Assembly (UNGA) is responsible for electing ten other state members of the United Nations (UN) to be non-permanent members of the UNSC¹⁶¹ to serve two-year terms¹⁶² with each member having one representative.¹⁶³

The UN Charter¹⁶⁴ through the UNSC promotes the importance of the rule of law, albeit not directly¹⁶⁵ through its provisions¹⁶⁶ to comply with IL by encouraging: 'All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'.¹⁶⁷

The UN Charter prohibits states using force which would contravene IL stating: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations'.¹⁶⁸

Additional Protocol I (AP I) places an obligation for states to co-operate with the UN, where violations of IHL and the Geneva Conventions have occurred.¹⁶⁹ Thus, the UN Charter confers the authority to the UNSC to make

¹⁶⁰ Charter of the United Nations [1945] art 1 (1).

¹⁶¹ Charter of the United Nations [1945] art 23 (1)

¹⁶² Charter of the United Nations [1945] art 23 (2)

¹⁶³ Charter of the United Nations [1945] art 23 (3)

¹⁶⁴ Charter of the United Nations [1945].

¹⁶⁵ Bardo Fassbender, 'What's in A Name? The International Rule of Law and The United Nations Charter' (2018) 17 (3) Chinese JIL 761, 766-767.

¹⁶⁶ Charter of the United Nations [1945] art 36.

¹⁶⁷ Charter of the United Nations [1945] art 2 (3).

¹⁶⁸ Charter of the United Nations [1945] art 2 (4).

¹⁶⁹ 1977 Additional Protocol I to the Geneva Conventions [1949] art 89.

recommendations to address threats to peace, to decide the appropriate measures necessary to maintain or restore international peace and security.¹⁷⁰

The UNSC has been praised for its implementation effort upon states to comply and respect IHL in times of armed conflict and war. The UNSC has on many occasions expressed the view that compliance with its rules and principles are an important factor for restoring peace, in an attempt to avoid warring parties from spiralling into violence and be a first step in a conflict-settlement process.¹⁷¹

An example of the UNSC's conflict-settlement and peace efforts include the longstanding conflict between Pakistan and India for the control of the disputed region of Jammu and Kashmir, which has seen much military rivalry and violence.¹⁷²

After the demise of Ranjit Singh the Sikh ruler of Punjab in 1839, this swiftly led to the British conquest of Jammu and Kashmir, with the help of Gulab Singh the military commander of the Dogra cavalry contingent formerly under Ranjit Singh's rule.¹⁷³

After the British conquest in 1846, Britain recognised Gulab Singh as the *Maharaja* (ruler) of Jammu and Kashmir but also of Baltistan, Gilgit and Ladakh giving him full administrative control of the state, under the Treaty of Amritsar which was signed also in 1846.¹⁷⁴ This served as a buffer between the British Indian empire, China and Russia.¹⁷⁵

¹⁷⁰ Charter of the United Nations [1945] art 39.

¹⁷¹ Toni Pfanner, 'Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims' (2009) 91 (874) *International Review of the Red Cross* 279, 314.

¹⁷² Sumit Ganguly et al, 'India, Pakistan and the Kashmir Dispute: Unpacking the Dynamics of a South Asian Frozen Conflict' (2019) 17 (1) *Asia Europe Journal* 129, 129-130.

¹⁷³ Nasreen Akhtar, 'A Response the Kashmir Conflict' (2010) 27 (1) *International Journal of World Peace* 45, 45.

¹⁷⁴ K. Warikoo, 'Ladakh: India's Gateway to Central Asia' (2020) 44 (3) *Strategic Analysis* 177, 178.

¹⁷⁵ Akhtar (n 173).

After Britain relinquished its suzerainty over India¹⁷⁶, the 1947 partition of Pakistan from the Indian subcontinent has since resulted in many conflicts over the disputed region of Jammu and Kashmir which have continued to ensue.¹⁷⁷

The UNSC's role has been instrumental in encouraging peaceful relations between the two states. Since 1948, the UNSC has proactively urged cessation of hostilities in the disputed region¹⁷⁸ which led to the 1949 Karachi Agreement which Pakistan and India agreed, 'a ceasefire line in Kashmir which, until 1965 was to mark the limit of the two states'.¹⁷⁹

The UNSC shortly after the agreement demanded a demilitarisation programme of India and Pakistan¹⁸⁰ and the United Nations Military Observer Group in India and Pakistan (UNMOGIP) was established to maintain the ceasefire.¹⁸¹

Subsequently, the conflict which ensued violated the Karachi Agreement and after a series of failed ceasefire resolutions in 1965 passed by the UNSC notably: 209¹⁸², 210¹⁸³, 211¹⁸⁴, 214¹⁸⁵ and 215¹⁸⁶ In 1971, the UNSC passed a resolution demanding a durable ceasefire, cessation of hostilities and withdrawal of all armed forces.¹⁸⁷

Forty-eight years after the cessation of hostilities brokered by the UNSC, in February 2019 India carried out an unauthorised counter-terrorism operation

¹⁷⁶ Indian Independence Act 1947 s 6 and s 7.

¹⁷⁷ Wayne Wilcox, 'The Economic Consequences of Partition: India and Pakistan' (1964) 18 (2) *Journal of International Affairs* 188, 188.

¹⁷⁸ UNSC Res 47 (21 April 1948) UN Doc S/RES/47.

¹⁷⁹ Musarat Javed Cheema, 'Pakistan-India Conflict with Special Reference to Kashmir' (2015) 30 (1) *South Asian Studies* 45, 50.

¹⁸⁰ UNSC Res 80 (14 March 1950) UN Doc S/RES/80.

¹⁸¹ UNSC Res 91 (14 March 1951) UN Doc S/RES/91.

¹⁸² UNSC Res 209 (04 September 1965) UN Doc S/RES/209.

¹⁸³ UNSC Res 210 (06 September 1965) UN Doc S/RES/210.

¹⁸⁴ UNSC Res 211 (20 September 1965) UN Doc S/RES/211.

¹⁸⁵ UNSC Res 214 (27 September 1965) UN Doc S/RES/214.

¹⁸⁶ UNSC Res 215 (05 November 1965) UN Doc S/RES/215.

¹⁸⁷ UNSC Res 307 (21 December 1965) UN Doc S/RES/307.

which resulted in the destruction of a major base of operations for the terrorist militant group Jaish-e-Mohammed.¹⁸⁸

As this target was located in the Pakistani border region of Kashmir. India's violation of Pakistani airspace breaching the treaty line separating India and Pakistani airspace has since re-ignited the historic conflict.¹⁸⁹ In August 2019, a presidential order made by India's Prime Minister Narendra Modi¹⁹⁰ revoked the special status of partial autonomy¹⁹¹ granted to Jammu and Kashmir under the Constitution of India.¹⁹²

India's reluctance to comply with the UNSC's demands has been showcased after the introduction of Indian legislation in October 2019, which permits India taking total control over the disputed region splitting it into two federal territories: Jammu and Kashmir and Ladakh.¹⁹³

The UNSC has continued to conduct closed meetings between the states to de-escalate the tense and dangerous situation in Kashmir and urge peaceful settlement to be reached.¹⁹⁴

The UNSC's continued conflict-settlement efforts can be observed following the peace agreement reached in October 2018, ending the six-year civil war in South Sudan since 2013, which has since caused a major humanitarian disaster.¹⁹⁵

¹⁸⁸ 'The India-Pakistan Security Crisis' (2019) 25 (3) Strategic Comments IV, IV.

¹⁸⁹ *ibid.*

¹⁹⁰ Prabhaskar K Dutta, 'Kashmir: How Govt Used Article 370 to Kill Article 370' *India Today* (New Delhi, 2 August 2019) <<https://www.indiatoday.in/india/story/kashmir-article-370-ladakh-jammu-1577321-2019-08-05>> accessed 20 November 2019.

¹⁹¹ Constitution of India 1950 art 370.

¹⁹² Constitution of India 1950 art 370 (3).

¹⁹³ Jammu and Kashmir Re-Organisation Act 2019.

¹⁹⁴ 'UN Security Council Discusses Kashmir, China Urges India and Pakistan to Ease Tensions' (*UN News*, 16 August 2019) <<https://news.un.org/en/story/2019/08/1044401>> accessed 20 November 2019.

¹⁹⁵ Jason Burke and Benjamin Takpiny, 'South Sudan Celebrates New Peace Accord Amid Joy and Scepticism' *The Guardian* (London, 31 October 2019) <<https://www.theguardian.com/global-development/2018/oct/31/south-sudan-celebrates-new-peace-accord-amid-joy-and-scepticism>> accessed 20 November 2019.

The agreement between President Salva Kiir and opposition leader of the SPLM-10 rebel group Riek Machar¹⁹⁶ was reached following a sanctions regime being implemented including an arms embargo.¹⁹⁷

Since the initial peace agreement, a further agreement has been signed in 2019 to establish a transitional government by November 2019¹⁹⁸ which was postponed due to key outstanding issues which were not agreed extending the peace process by a further one hundred days.¹⁹⁹

The UNSC's commitment to maintain peace in South Sudan has been demonstrated following the extension of a United Nations Mission in South Sudan (UNMISS) to monitor the situation in South Sudan²⁰⁰ and extending the panel of experts mandate responsible for overseeing the sanctions regime.²⁰¹ These sanctions by the UNSC have since been renewed²⁰² and UNMISS's mandate has been extended until 15th March 2021.²⁰³

Another recent example of the UNSC conflict settlement can also be observed in the war between Yemen and Saudi Arabia supported by the USA and coalition allies against the Houthi rebels supported by Iran since 2015.²⁰⁴

In December 2018, the UNSC passed a resolution endorsing the agreements reached by the parties during the consultations held in Sweden, and authorised the UN Secretary-General to establish and deploy, for an initial period of 30 days an advance team to begin monitoring and facilitate

¹⁹⁶ *ibid.*

¹⁹⁷ UNSC Res 2428 (13 July 2018) UN Doc S/RES/2428.

¹⁹⁸ Denis Dumo, 'South Sudan Parties Agree to Form Interim Government by November 12' (*Reuters*, 11 September 2019) <<https://uk.reuters.com/article/uk-southsudan-politics-government/south-sudan-parties-agree-to-form-interim-government-by-november-12-idUKKCN1VW1HB>> accessed 20 November 2019.

¹⁹⁹ Nyagoah Tut Pur, 'South Sudan Has 100 More Days to Transition to New Government' (*Human Rights Watch*, 12 November 2019) <<https://www.hrw.org/news/2019/11/12/south-sudan-has-100-more-days-transition-new-government>> accessed 20 November 2019.

²⁰⁰ UNSC Res 2459 (15 March 2019) UN Doc S/RES/2459

²⁰¹ UNSC Res 2471 (30 May 2019) UN Doc S/RES/2471.

²⁰² UNSC Res 2521 (29 May 2020) UN Doc S/RES/2521.

²⁰³ UNSC Res 2514 (12 March 2020) UN Doc S/RES/2514.

²⁰⁴ Irem Askar Karakir, 'Ongoing Conflict in Yemen: A Proxy War?' (2018) 5 (2) Turkish Journal of TESAM Academy 121, 123.

implementation of the Stockholm Agreement which involved an immediate ceasefire, redeployment of troops and an increase UN presence in the port city of Hudeidah to address the dire humanitarian situation.²⁰⁵

The UNSC further supported the Stockholm Agreement by establishing the United Nations Mission to Support the Hodeidah Agreement (UNMHA) initially for a period of six months²⁰⁶ which has since been renewed until the 15th July 2021²⁰⁷ whilst appointing panel experts to oversee the financial and travel ban sanctions and arms embargo²⁰⁸ which has been further increased until July 2021.²⁰⁹

Another example is the ongoing historic conflict in the Nagorno-Karabakh region which broke out in the late 1980's following the collapse of the Union of Soviet Socialist Republics (USSR). Azerbaijan and Armenia emerged as two newly independent states which led to an outbreak of military clashes over control of the region.²¹⁰

Three decades of sporadic and bloody violence have become a frequent occurrence in South Caucasus, as hostilities have intensified following Armenia's military occupation in the Nagorno-Karabakh region which has been condemned.²¹¹

Ceasefire agreements have often paused the violence between the two states²¹², however long-term peace efforts and mediation have been

²⁰⁵ UNSC Res 2451 (21 December 2018) UN Doc S/RES/2451.

²⁰⁶ UNSC Res 2452 (16 January 2019) UN Doc S/RES/2452.

²⁰⁷ UNSC Res 2534 (14 July 2020) UN Doc S/RES/2534.

²⁰⁸ UNSC Res 2456 (26 February 2019) UN Doc S/RES/2456.

²⁰⁹ UNSC Res 2511 (25 February 2020) UN Doc S/RES/2511.

²¹⁰ Ali Mortazavian and Mohammad Ghiacy, 'Regional and International Cooperation to Reduce Nagorno-Karabakh Conflict' (2017) 10 (2) J.L. & Pol. 136, 138.

²¹¹ Caroline Morway, 'Armenia and Azerbaijan's Struggle with Occupation in Nagorno-Karabakh' (2018) 44 (1) Brooklyn Journal of International Law 448, 449.

²¹² Joseph M. Cox, 'Negotiating Justice: Ceasefires, Peace Agreements and Post Conflict Justice' (2020) 57 (3) Journal of Peace Research 466, 466.

attempted by Iran and Russia but have failed, despite dedicating themselves to finding a peaceful solution.²¹³

In 2020, Russia brokered a ceasefire and peace deal after six weeks of military conflict between the adversaries²¹⁴, which was overseen and supported by the UNSC and its permanent members the USA and France.²¹⁵

The aforementioned examples exemplify the UNSC's continued efforts to promote peacebuilding, security and respect for IL and IHL. However, the council has been criticised for being incompetent to achieve its institutional purpose²¹⁶ especially during armed conflicts which will be demonstrated in the next segment of the chapter.

2.2.2 The UNSC and the Organisations Historic Shortcomings in Preventing Genocide & Mass Killings

The UN Genocide Convention²¹⁷ defines genocide as: 'acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.²¹⁸ The crime of genocide is punishable despite an individual being a constitutionally responsible ruler, public official or private individual.²¹⁹

The twentieth century has been described as the 'century of genocide'.²²⁰ Prior to the establishment of the UN in 1945 and the UN Genocide Convention in

²¹³ Ceyhun Mahmudlu and Shamkhal Abilov, 'The Peace-Making Process in the Nagorno-Karabakh Conflict: Why Did Iran Fail in its Mediation Effort?' (2018) 26 (1) *Journal of Contemporary Central and Eastern Europe* 33, 33.

²¹⁴ 'Armenia, Azerbaijan and Russia Sign Nagorno-Karabakh Peace Deal' (*BBC News*, 10 November 2020) <<https://www.bbc.co.uk/news/world-europe-54882564>> accessed 30 January 2021.

²¹⁵ 'Russia Says Discussing U.N. Presence in Nagorno-Karabakh as its Troops Deploy' (*Reuters*, 13 November 2020) <<https://www.reuters.com/article/uk-armenia-azerbaijan-russia-un/russia-says-discussing-u-n-presence-in-nagorno-karabakh-as-its-troops-deploy-idUKKBN27T2C0>> accessed 30 January 2021.

²¹⁶ Marco Roscini, 'The United National Security Council and the Enforcement of International Humanitarian Law' (2010) 43 (2) *Israel Law Review* 330, 333.

²¹⁷ Convention on the Prevention and Punishment of the Crime of Genocide [1948] art 1.

²¹⁸ *ibid* art 2.

²¹⁹ n 217, art 4.

²²⁰ Pak K. Lee and Cecilia Ducci, 'No Humanitarian Intervention in Asian Genocides: How Possible and Legitimate?' (2020) 41 (9) *Third World Quarterly* 1575, 1577.

1948, there have been four major genocides which have occurred during the early twentieth century,

The 1904-1908 'Herero-Nama Genocide'²²¹ involved the slaughter of the Herero and Nama people during the German colonialisation of German South West Africa, now the Independent Republic of Namibia which is generally recognised as the first genocide in the twentieth century.²²²

One of the German concentration camps known as '*Orumbo rua Katjombondi*' is believed to be a place where thousands of indigenous Herero and Nama people were held, tortured, and killed as prisoners of war.²²³ An estimated total of 50,000-65,000 were intentionally eliminated as a result of the German-Herero-Nama colonial war.²²⁴

The second was the 1915-1916 'Armenian Genocide'. This involved the genocide of the ethnic Christian Armenian population at the hands of the Ottoman Turkish-Kurdish authorities during World War I, which resulted in an estimated 1.5 million Armenians being killed.²²⁵ At present, responsibility for the Ottoman genocide has been denied by the Republic of Turkey.²²⁶

The third major genocide is the 1932-1933 'Holodomor-Genocide' a man-made famine of Ukraine²²⁷ at the hands of the USSR following Joseph Stalin's oppressive state procurement policy on grain production tax.²²⁸

In the case of Ukraine, the famine was caused by three years of production tax and was implemented so harshly, Ukrainian villagers and peasants were

²²¹ Robyn Sassen, 'Dark Choreography of the Johannesburgtag Holocaust and Genocide Centre' (2020) 25 (2) Performance Research 87, 88.

²²² Allan D. Cooper, 'Reparations for the Herero Genocide: Defining Limits of International Litigation' (2007) 106 (422) African Affairs 113, 113.

²²³ Ellie Hamrick and Haley Duschinski, 'Enduring Injustice: Memory Politics and Namibia's Genocide Reparations Movement' (2018) 11 (4) Memory Studies 437, 437-438.

²²⁴ Katharina Von Hammerstein, 'The Herero: Witnessing Germany's Other Genocide' (2016) 20 (2) Contemporary French and Francophone Studies 267, 268.

²²⁵ Vladislav B. Sotirovic, 'The Armenian Genocide: The First Modern Islamic-Jihad Ethnic Cleansing' (2018) 3 (1) Journal of Security Studies in Global Politics 121, 121.

²²⁶ Vahagn Avedian, 'State Identity, Continuity and Responsibility: The Ottoman Empire, the Republic of Turkey and the Armenian Genocide' (2012) 23 (3) EJIL 797, 798.

²²⁷ Larysa Zasiiekina, 'Trauma, Re-Memory and Language in Holodomor Survivors' Narratives' (2020) 27 (1) Psycholinguistics 80, 91.

²²⁸ Omelian Rudnytskyi et al, 'The 1921 – 1923 Famine and the Holodomor of 1932-1933 in Ukraine: Common and Distinctive Features' (2020) 48 (3) Nationalities Papers 549, 560.

denied a single grain.²²⁹ The famine resulted in an estimated 3.2 million deaths.²³⁰

The fourth was 'The Holocaust' which occurred between 1939-1945, which involved the Nazi-German annihilation of European Jewry during World War II.²³¹ This campaign was led by Adolf Hitler²³² under the official Nazi designation the 'Third Reich'.²³³

In turn, the Jewish population were forcibly removed from Germany, Denmark, Poland and surrounding European states²³⁴ and transported to concentration camps²³⁵ to be systematically and ruthlessly murdered.²³⁶

Operation Reinhard between 1942-1943, is considered to be the largest murder campaign in German occupied Poland where 1.7 million Jews were murdered through the use of gas chambers and death camps in Belzec, Sobibor and Treblinka. The massive scale of the Nazi-persecution of Jewish people in Europe, resulted in the deaths of an estimated 6 million people.²³⁷

Moreover, the Auschwitz concentration and extermination camp situated in Poland is believed to have murdered 1.1 million Jews between 1943-1945, after being subjected to horrific criminal, scientific and medical experiments by Nazi doctors such as Josef Mengele.²³⁸

²²⁹ *ibid.*

²³⁰ Sergei Nefedov and Michael Ellman, 'The Soviet Famine of 1931-1934: Genocide, A Result of Poor Harvests or the Outcome of a Conflict Between the State and the Peasants' 71 (6) *Europe-Asia Studies* 1048, 1051.

²³¹ Lewi Stone, 'Quantifying the Holocaust: Hyperintense Kill Rates During the Nazi Genocide' (2019) 5 (1) *Science Advances* 1, 1.

²³² Peter Fritzsche, 'The Holocaust and the Knowledge of Murder' (2008) 80 (3) *Journal of Modern History* 594, 594.

²³³ James Page, 'Deconstructing the Enduring Appeal of the Third Reich' (2008) 29 (2) *Journal of Intercultural Studies* 189, 189.

²³⁴ Robert A. Goldberg, 'The Bystander During the Holocaust' (2017) 4 (2) *Utah.L.Rev.* 649,654.

²³⁵ Paul Weindling et al, 'The Victims of Unethical Human Experiments and Coerced Research Under National Socialism' (2016) 40 (1) *Endeavour* 1, 1.

²³⁶ Gustav Schonfeld, 'Holocaust Denial' (2010) 121 *Transactions of the American Clinical and Climatological Association* 104, 105.

²³⁷ Geraldien Von Frijtag Drabbe Kunzel and Valeria Galimi, 'Microcosms of the Holocaust: Exploring New Venues into Small-Scale Research of the Holocaust' (2019) 21 (3) *Journal of Genocide Research* 335, 335.

²³⁸ B. Halioua and D. Halioua, 'Josef Mengele's Research Program on Noma in Auschwitz' (2020) *Journal of Stomatology, Oral and Maxillofacial Surgery* 1, 1.

The allied powers (USA, UK, France and the USSR)²³⁹ victory over Germany against the Nazi regime led to the creation of the International Military Tribunal (IMT)²⁴⁰ also known as the 'Nuremberg Trials' by virtue of the 1945 London agreement which enacted the IMT statute.²⁴¹

The IMT was considered 'unique'²⁴² and 'revolutionary'²⁴³, for trying high-ranking Nazi politicians, military figures and doctors²⁴⁴ for war crimes, crimes against humanity and crimes against peace.²⁴⁵ The proceedings which lasted between 1945-1946²⁴⁶ led to 12 out of 24 defendants being sentenced to death.²⁴⁷

The success of the IMT also led to the establishment of the International Military Tribunal for the Far East (IMTFE) also known as the 'Tokyo Trials'²⁴⁸ which was the product of the Postdam Declaration and Japanese instrument of surrender.²⁴⁹

The purpose of the IMTFE was to try individuals of the Japanese military under the IMTFE Charter for war crimes, crimes against peace and crimes against

²³⁹ Mark A. Bland, 'An Analysis of the United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia: Parallels, Problems and Prospects' (1994) 2 (1) *Indiana Journal of Global Legal Studies* 233, 236.

²⁴⁰ Telford Taylor, 'The Nuremberg Trials Project at Harvard Law School: Making History Accessible to All' (2018) 5 (9) *Journal of Contemporary Archival Studies* 1, 1.

²⁴¹ F.B. Schick, 'The Nuremberg Trial and the International Law of the Future' (1947) 41 (4) *AJIL* 770, 770.

²⁴² Hans Ehard, 'The Nuremberg Trial Against the Major War Criminals and International Law' (1949) 43 (2) *AJIL* 223, 223.

²⁴³ Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 (4) *JICJ* 830, 831.

²⁴⁴ Christoph Burchard, 'The Nuremberg Trial and Its Impact on Germany' (2006) 4 (4) *JICJ* 801, 801.

²⁴⁵ Amanda Weiss, 'A Continuous Retrial: Trans/national Memory in Chinese and Japanese Tribunal Films' (2020) 9 (1) *Arts* 1, 2-3.

²⁴⁶ Elizabeth Borgwardt, 'A New Deal for the Nuremberg Trial: Limits of Law in Generating Human Rights Norms' (2008) 26 (3) *LHR* 679, 679.

²⁴⁷ Quincy Wright, 'The Law of Nuremberg Trial' (1947) 41 (1) *AJIL* 38, 38.

²⁴⁸ Zachary D. Kaufman, 'The Nuremberg Tribunal v. The Tokyo Tribunal: Designs, Staffs and Operations' (2010) 43 (3) *J.Marshall L.Rev.J.* 753, 753.

²⁴⁹ Xiao Mao, Yingxin He, Wanlu Zhang and Qinyang Luo, '70 Years Later: The International Military Tribunal for the Far East – AN Overview of the International Conference Held by the International Nuremberg Principles Academy 17-19 May 2018' (2019) 11 (1) *Amsterdam Law Forum* 66. 66

humanity²⁵⁰ it had committed during its occupation of northeast China known as the '15-year war' between 1931-1945.²⁵¹

This period also encapsulated Japan's aggression and invasion of the Chinese territory of Manchuria in 1931, full-scale war with China and its assault of Nanking in 1937²⁵², attack of Pearl Harbour (USA) in 1941²⁵³ (which led to the USA responding by dropping two atomic bombs in Hiroshima and Nagasaki killing 210,000 people)²⁵⁴ and war with the USA in the Pacific 1945.²⁵⁵

Despite criticisms of the IMTFE being controlled by the USA, defendants being subjected to judicial bias and its insignificant impact on ICL²⁵⁶, the proceedings lasted between 1946-1948²⁵⁷ sentencing 25 defendants to either death or imprisonment.²⁵⁸

The significance of the IMT and the IMTFE marked the first-time individuals of a defeated nation were tried in tribunals jointly established by victor nations to hear and sentence defendants for international crimes that did not appear in any national penal laws²⁵⁹ for transgressing IHL.²⁶⁰

²⁵⁰ Kirsten Sellars, 'Imperfect Justice at Nuremberg and Tokyo' (2010) 21 (4) EJIL 1085, 1092.

²⁵¹ Louise Young, 'When Fascism Met Empire in Japanese-Occupied Manchuria' (2017) 12 (2) Journal of Global History 274, 276.

²⁵² Timothy Brook, 'The Tokyo Judgment and the Rape of Nanking' (2001) 60 (3) Journal of Asian Studies 673, 673.

²⁵³ Sandra Wilson, 'Re-Thinking the 1930's and the 15-Year War' (2001) 21 (2) Journal of Japanese Studies. 155, 155.

²⁵⁴ Masao Tomonaga, 'The Atomic Bombings of Hiroshima and Nagasaki: A Summary of Human Consequences, 1945-2018, and Lessons for Homo Sapiens to End Nuclear Weapon Age' (2019) 2 (2) Journal for Peace and Nuclear Disarmament 491, 491-492.

²⁵⁵ Yukiko Koshiro, 'Japans World and World War II' (2001) 25 (3) Diplomatic History 425, 425.

²⁵⁶ Mikaela Ediger, 'Prosecuting the Crime of Aggression at the International Criminal Court: Lessons from the Tokyo Tribunal' (2018) 51 (1) N.Y.U.J.Int'l Law & Pol. 179, 181.

²⁵⁷ John O. Haley, 'Reviewed Works: The Tokyo International Military Tribunal: A Reappraisal by Neil Bolster and Robert Cryer; The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II by Yuma Totani' (2009) 35 (2) Journal of Japanese Studies 445, 445.

²⁵⁸ A.S. Comyns-Carr, 'The Tokyo War Crimes Trial' (1949) 18 (10) Far Eastern Survey 109, 109.

²⁵⁹ Henry Korn, 'International Military Tribunal's Genesis, WWII Experience and Future Relevance' (2017) 4 (5) Utah L.Rev.731, 731.

²⁶⁰ Donald Bloxham, 'From the International Military Tribunal to the Subsequent Nuremberg Proceedings: The American Confrontation with Nazi Criminality Revisited' (2013) 98 (4) History 567, 567.

Thus, the UN Charter's conception of 'universal jurisdiction'²⁶¹ and the UDHR both grew from WWII and the IMT.²⁶² The creation of the UN Genocide Convention, endeavoured to prevent great losses to humanity in the form of culture and contribution represented by human groups.²⁶³

However, since the inception of the Genocide Convention the UNSC has failed to halt and prevent genocide from occurring.²⁶⁴ A notable example of the UNSC's failure can be observed in the 1971 East Pakistan Genocide²⁶⁵ which subsequently became the independent nation state of Bangladesh in the same year.²⁶⁶

After the independence of Pakistan in 1947, academics have argued east and west Pakistan were created in haste without a basic territorial design, which in turn led to the cultural and economic exploitation of the east by west Pakistan.²⁶⁷

Bleacher argues the genocide was the result of elections which were held in Pakistan to a new constituent assembly to write a new national constitution.²⁶⁸

Bleacher further elaborates on the political situation at the time, stating:

The 1970 elections were the first in Pakistani history to be held on a one-person, one-vote basis and, therefore, a party that could sweep East Pakistan was in a position to dominate the national government. In these elections, the Bengali-based Awami League, led by Sheikh Mujibur Rahman, won a majority of the seats in the assembly. The ethnic divisions in Pakistani politics were starkly illustrated by the election results. The Awami League captured 167 of the 169 constituencies in East Pakistan. The League's 167 seats gave it an absolute majority in the new 313-seat assembly. The Awami League

²⁶¹ Charter of the United Nations [1945] art 55 and art 56.

²⁶² Gwynne Skinner, 'Nuremberg's Legacy Continues: The Nuremberg Trials Influence on Human Rights Litigation in U.S. Court's Under the Alien Tort Statute' (2008) 71 (1) Alb.L.Rev. 321, 329.

²⁶³ UNGA Res 96 (I) (II December 1946) UN Doc A/RES/96(I).

²⁶⁴ Kelly Maddox, 'Liberating Mankind from such an Odious Scourge': The Genocide Convention and the Continued Failure to Prevent or Halt Genocide in the Twenty-First Century' (2015) 9 (1) Genocide Studies and Prevention: An International Journal 48, 48.

²⁶⁵ John Salzberg, 'UN Prevention of Human Rights Violations: The Bangladesh Case' (1973) 27 (1) Int'l Org. 115, 115.

²⁶⁶ Ved P. Nanda, 'A Critique of the United Nations Inaction in the Bangladesh Crisis' (1972) 49 (1) Denver Law Review 53, 53.

²⁶⁷ Jagmohan Meher, 'Dynamics of Pakistan's Disintegration: The Case of East Pakistan 1647-1971' (2015) 74 (4) India Quarterly 300, 300-301.

²⁶⁸ Donald Bleacher, 'The Politics of Genocide Scholarship: The Case of Bangladesh' (2007) 41 (5) Patterns of Prejudice 467, 472.

advocated a six-point autonomy plan, first articulated in 1966, that would have granted the Bengalis a semi-independent status within Pakistan. With its electoral victory, the Awami League was in position to enact its programme and to name Mujib, as he was popularly known, as prime minister. Neither of these outcomes was acceptable to the military elites who dominated Pakistan. On 1 March 1971, after Zulfikar Ali Bhutto, head of the Pakistan People's Party that had won 80 constituencies in the elections, announced that his party would boycott the assembly, Pakistan's military dictator, Yahya Kahn, delayed the convening of the assembly.²⁶⁹

The postponement of the Assembly was met with mass outrage which subsequently led the Pakistani military leadership on the 25th March 1971 using brute force to quell the Bangladeshi uprising.²⁷⁰

The repression became a civil war²⁷¹ and the ensuing violence by the Pakistani military resulted in 10 million refugees fleeing to India²⁷² and a death toll estimate of approximately 3,000,000 ethnic Bengalis being killed. Reports of the genocide were kept away from the international community and were found to have been suppressed by Pakistan's ally and P5 member the USA.²⁷³

In the midst of the conflict three UNSC resolutions calling for ceasefire and withdrawal of military forces were vetoed by the USSR preventing the council from intervening and perhaps even mitigate the significant loss of civilian lives.²⁷⁴ The 1971 genocide by Pakistani military forces has been closely associated with the horrors of Nazi Germany and referred to as the 'Holocaust' and ranked as the worst genocide after WWII.²⁷⁵

However, Bangladesh's response to the 1971 Genocide led to the enactment of the International Criminal Tribunal of Bangladesh (ICTB) in 1973²⁷⁶ to try

²⁶⁹ *ibid.*

²⁷⁰ Bleacher (n 268).

²⁷¹ Sonia Cordera, 'India's Response to the 1971 East Pakistan Crisis: Hidden and Open Reasons for Intervention' (2015) 17 (1) *Journal of Genocide Research* 45, 45.

²⁷² Angela Debnath, 'British Perceptions of the East Pakistan Crisis 1971: Hideous Atrocities on Both Sides' (2011) 13 (4) *Journal of Genocide Research* 421, 421.

²⁷³ Husnain Iqbal, 'Denying the Denial: Reappraisal of Genocide in East Pakistan' (2017) 16 (4) *Artha-Journal of Social Sciences* 1, 2.

²⁷⁴ UNSC Draft Res S/10416 (4 December 1971) UN Doc S/10416, UNSC Draft Res S/10423 (5 December 1971) UN Doc S/10423, UNSC Draft Res S/10446 (13 December 1971) UN Doc S/10446.

²⁷⁵ Sarmila Rose, 'The Question of Genocide and the Quest for Justice in the 1971 War' (2011) 13 (4) *Journal of Genocide Research* 393, 419.

²⁷⁶ International Crimes (Tribunal) Act 1973

individuals domestically within the state for internationally recognised²⁷⁷ crimes.²⁷⁸

After four decades, the Awami league as part of electoral campaign promise in 2010 took sufficient measures²⁷⁹ to establish the ICTB²⁸⁰ to put an end to impunity and try individuals for war crimes, crimes against humanity and genocide.²⁸¹ The ICTB has been successful in trying and convicting perpetrators.²⁸²

However, the court has been criticised for awarding the death penalty to convicted perpetrators²⁸³ by conducting unfair trials as the ICTB has issued such sentences²⁸⁴ without hearing the entirety of the evidence in cases, in addition to due process concerns as the court has issued death penalty sentences against individuals²⁸⁵ in absentia.²⁸⁶

Another prominent example of the UNSC's failure can be referenced primarily to the 'East Timor Genocide', a state-sponsored genocide by Indonesia after its invasion of East Timor in 1975.²⁸⁷

²⁷⁷ International Crimes (Tribunal) Act 1973 s 3.

²⁷⁸ *Chief Prosecutor v Delowar Hossain Sayeedi* (ICT-1 Judgement) ICT-BD Case No 1 of 2011 (28 February 2013) para 16.

²⁷⁹ International Crimes (Tribunal) (Amendment) Act 2009 s 3 (1).

²⁸⁰ Muhammad Abdullah Faiz et al, 'Bangladesh's Approach Towards International Criminal Law: A Case Study of International Crimes Tribunal of Bangladesh' (2019) 12 (3) *Journal of Politics and Law* 80, 80.

²⁸¹ Abdus Samad, 'The International Crimes Tribunal in Bangladesh and International Law' (2016) 27 (3) *Crim.L.F.* 257, 258.

²⁸² *Chief Prosecutor v Abdul Quader Molla* (ICT-2 Judgement) ICT-BD Case No 2 of 2012 (5 February 2013), *Chief Prosecutor v Muhammad Kamaruzzaman* (ICT-2 Judgement) ICT-BD Case No 3 of 2012 (9 May 2013), *Chief Prosecutor v Salauddin Quader Chowdhury* (ICT-1 Judgement) ICT-BD Case No 2 of 2011 (1 October 2013), *Chief Prosecutor v Ali Ahsan Muhammad Mujahid* (ICT-2 Judgement) ICT-BD Case No 4 of 2012 (17 July 2013).

²⁸³ International Criminal (Tribunal) Act 1973 s 20 (1)-(3).

²⁸⁴ *Chief Prosecutor v Motiur Rahman Nizami* (ICT-1 Judgement) ICT-BD Case No 3 of 2011 (29 October 2014), *Chief Prosecutor v Professor Ghulam Azam* (ICT-1 Judgement) ICT-BD Case No 6 of 2011 (15 July 2013).

²⁸⁵ *Chief Prosecutor v Moulana Abdul Kalam Azad* (ICT-2 Judgement) ICT-BD Case No 5 of 2012 (21 January 2013).

²⁸⁶ Surabhi Chopra, 'The International Crimes Tribunal in Bangladesh: Silencing Fair Comment' (2015) 17 (2) *Journal of Genocide Research* 211, 213-214.

²⁸⁷ Julian Torelli, 'The Hidden Holocaust: The East Timor Alert Network (ETAN) and Human Rights Claims in Canada, 1985-1998' (2020) *Journal of Historical Sociology* 1, 3.

In 1974, the Portuguese Junta of National Salvation relinquished its colonial control of East Timor.²⁸⁸ A transitional government was established forming a coalition between two political parties. The Timorese Democratic Union (UDT) and the Revolutionary Front for an Independent East Timor (FRETILIN) merged to establish the independence of East Timor as a free state.²⁸⁹

In 1975, the coalition broke down after the UDT members staged a *coup d'état* against FRETILIN based on Indonesian intelligence, which descended into a civil war. Subsequently, UDT leaders signed the Balibo Declaration, which declared the territory's integration into Indonesia. Indonesia used this to justify a full-scale invasion.²⁹⁰

Indonesia's occupation of East Timor as the 27th province lasted for 24 years until 1999.²⁹¹ Although no reliable statistics existed at that time, in 1977 it was estimated between 50,000 – 80,000 East-Timorese people died as a result of Indonesia's military violence annexation, starvation and disease.²⁹²

The UN-Mandated Commission for Reception, Truth and Reconciliation in East Timor²⁹³ established in 2001 by the UN Transitional Administration in East Timor²⁹⁴ have placed a more accurate East-Timorese death toll figure of approximately 200,000 between 1975-1999.²⁹⁵

The UNGA in the midst of this atrocity, advanced that East Timor had a fundamental right²⁹⁶ to self-determination²⁹⁷ which was also confirmed by the

²⁸⁸ Robert Lawless, 'The Indonesian Takeover of East Timor' (1976) 16 (10) Asian Surv. 948, 948.

²⁸⁹ Roger S. Clark, 'The Decolonization of East Timor and the United Nations Norms on Self-Determination and Aggression' (1982) 7 (1) Yale J. World Pub. Ord. 2, 5-6.

²⁹⁰ Joanne E. Wallis, 'Cut and Paste Constitution-Making in Timor-Leste' (2019) 7 (2) Chinese Journal of Comparative Law 333, 336.

²⁹¹ Hilary Charlesworth, 'The Constitution of East Timor, May 20, 2002' (2003) 1 (2) ICON 325, 326.

²⁹² Torben Retboll, 'The East Timor Conflict and Western Response' (1987) 19 (1) Bulletin of Concerned Asian Scholars 24, 27.

²⁹³ Eva Ottendorfer, 'Intermediality in the Visualization of Peace: Contradicting Narratives About Peace and Violence in Timor-Leste' (2020) 45 (1) Peace and Change 78, 78-79.

²⁹⁴ UNSC Res 1272 (25 October 1999) UN Doc S/RES/1272.

²⁹⁵ Kai Thaler, 'Foreshadowing Future Slaughter: From the Indonesian Killings of 1965-1966 to the 1974-1999 Genocide in East Timor' (2012) 7 (2) Genocide Studies and Prevention: An International Journal 204, 214.

²⁹⁶ Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 Dec 1960) (adopted by 89 votes to none; 9 abstentions).

²⁹⁷ UNGA Resolution 3485 (XXX) (12 December 1975).

UNSC in 1975²⁹⁸ and 1976.²⁹⁹ However, both organs have been criticised for its inability to appreciate the seriousness of Indonesia's invasion, as Fernandes summarises:

[N]either the General Assembly nor the Security Council, however, used the words "invasion", "aggression" or "condemn" in connection with Indonesia's actions. Nor was Indonesia's use of force characterised as unlawful. There were no sanctions on Indonesia. Both organs used the hortatory phrase "calls upon" rather than the more robust "demands" or "decides" in asking "the Government of Indonesia to withdraw without delay" its armed forces from the territory.³⁰⁰

Between 1975-1982 eight resolutions were passed by the UNGA in relation to East Timor, yet the USA, UK and France did not support any of the resolutions, nor did it prompt UNSC intervention proving it to be utterly ineffective.³⁰¹

Perhaps even more troubling is the USA supported the Indonesian government in the invasion of East Timor, supplying it with military equipment including: aid, weapons³⁰², war planes and gunships.³⁰³ The USA by authorising and supporting this invasion is arguably guilty for aiding and abetting the international crime of aggression.³⁰⁴

Another example of genocide in the Asia-Pacific region includes the 'Cambodian Genocide' by the former Khmer Rouge regime, a radical Maoist political group with an objective to create a communist state by achieving self-sufficiency through agrarian communism.³⁰⁵

The regime seized power in 1975, headed by Saloth Sar (Pol Pot) established the Democratic Kampuchea (DK), which sought to implement a forceful

²⁹⁸ UNSC Res 384 (22 December 1975) UN Doc S/RES/384.

²⁹⁹ UNSC Res 389 (22 April 1976) UN Doc S/RES/389.

³⁰⁰ Clinton Fernandes, 'Accomplice to Mass Atrocities: The International Community and Indonesia's Invasion of East Timor' (2015) 3 (4) *Politics and Governance* 1, 4.

³⁰¹ *ibid.*

³⁰² Scott Sidell, 'The United States and Genocide in East Timor' (1981) 11 (1) *Journal of Contemporary Asia* 44, 44.

³⁰³ Brad Simpson, 'Illegally and Beautifully: The United States, the Indonesian Invasion of East Timor and the International Community, 1974-76' (2005) 5 (3) *Cold War History* 281, 294.

³⁰⁴ Joseph Nevins, 'The Making of Ground Zero in East Timor in 1999: An Analysis of International Complicity in Indonesia's Crimes' (2002) 42 (4) *Asian Survey* 623, 630.

³⁰⁵ Helen Horsington, 'The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal' (2004) 5 (2) *Melbourne Journal of International Law* <<http://www5.austlii.edu.au/au/journals/MelbJIL/2004/18.html>> accessed 9 September 2020.

communist state after the end of the civil war which was marked by overthrowing the regime of General Lon Nol who himself staged a *coup d'état* which overthrew the previous regime of Prince Norodom Sihanouk in 1970.³⁰⁶

The regime's increased extra-judicial and systemic murder practices conducted in 'killing fields', torture practices in the Tuol Sleng prison known as 'S-21' situated in Phnom Penh³⁰⁷, starvation through large scale population movement and forced labour of ethnic and religious groups³⁰⁸ were the result of the internal political conflict and violence.³⁰⁹

It has been estimated the four-year regime of the Khmer Rouge between 1975 – 1979, resulted in the death of 1.7 million Cambodians consisting mainly of Buddhist monks, Muslims, Christians, ethnic Cham Muslims, Chinese, Vietnamese, Thai, Lao, and Kola peoples as they were perceived to be threats to communist ideals.³¹⁰

Despite the failure of the UNSC in preventing the mass killings and genocide, in recent years there has been a turn towards bringing individuals from the Khmer Rouge to account within an international model of criminal justice and reconciliation.³¹¹

The UNGA in 2003 agreed to a co-operation agreement with the Royal Cambodian Government to establish the Extraordinary Chambers in the Courts of Cambodia (ECCC)³¹² in order to prosecute crimes against humanity committed during the DK period.³¹³

³⁰⁶ Jorg Menzel, 'Justice Delayed or Too Late for Justice? The Khmer Rouge Tribunal and the Cambodian Genocide 1975-1979' (2007) 9 (2) *Journal of Genocide Research* 215, 215.

³⁰⁷ Angeliki Andrea Kanavou and Kosal Path, 'The Lingering Effects of Thought Reform: The Khmer Rouge S-21 Prison Personnel' (2017) 76 (1) *Journal of Asian Studies* 87, 87 – 88.

³⁰⁸ Patrick Heuveline, 'The Boundaries of Genocide: Quantifying the Uncertainty of the Death Toll During the Pol Pot Regime (1975 – 1979)' (2015) 69 (2) *Population Studies* 201, 201 - 202.

³⁰⁹ Damien de Walque, 'Selective Morality During the Khmer Rouge Period in Cambodia' (2005) 31 (2) *Population and Development Review* 351, 351.

³¹⁰ Timothy Williams and Rhiannon Neilsen, 'They Will Rot the Society, Rot the Party and Rot the Army: Toxicification as an Ideology and Motivation for Perpetrating Violence in the Khmer Rouge Genocide?' (2019) 31 (3) *Terrorism and Political Science* 494, 500 – 503.

³¹¹ Caroline Bennett, 'Karma After Democratic Kampuchea: Justice Outside the Khmer Rouge Tribunal' (2018) 12 (3) *Genocide Studies and Prevention: An International Journal* 68, 68.

³¹² UNGA Res 57/228 (22 May 2003) UN Doc A/RES/57/228 B.

³¹³ Katherine Gruspier and Michael S. Pollanen, 'Forensic Legacy of the Khmer Rouge: The Cambodian Genocide' (2017) 7 (3) *Academy of Forensic Pathologists* 415, 416

The ECCC has been successful in securing three convictions of the last remaining living high-ranking members of the DK including the deputy chairman of the S-21 prison Kaing Guk Eav³¹⁴, Nuon Chea and Khieu Samphan (who was the successor of Pol Pot) were all sentenced and found guilty for genocide and crimes against humanity.³¹⁵

One of the most renowned examples of the UNSC's failure, can be observed during the 1994 'Rwanda Genocide' instigated by the Rwandan government³¹⁶ after the death of the former Rwandan President Juvenal Habyarimana's aircraft being shot down.³¹⁷

This led the military, administrators, the Interahamwe militia and ordinary people³¹⁸ to carry out a well-planned mass killing, which culminated the four-year civil war in Rwanda.³¹⁹

The deaths of approximately 500,000 to 1,000,000³²⁰ victims, comprised mainly of Tutsi and Hutu populations.³²¹ The Rwandan genocide has been compared to the major genocide which occurred in the Nazi death camps during the WWII Nazi Holocaust.³²²

The UNSC has been held responsible for failing to prevent and mitigate the Rwandan genocide.³²³ The United Nations Assistance Mission for Rwanda (UNAMIR) prior to the genocide had reported genocide of Belgian peacekeepers and Tutsi's was imminent and requested a stronger mandate to

³¹⁴ *Prosecutor v Kaing Guk Eav* (Judgement, Case 001) 001/18-07-2007/ECCC/TC (26 July 2010).

³¹⁵ *Prosecutor v Nuon Chea and Khieu Samphan* (Judgement, Case 002/02) 002//19-09-2007/ECCC/TC (16 November 2018).

³¹⁶ Catharine Newbury, 'Background to the Genocide: Rwanda' (1995) 23 (2) *Issue: A Journal of Opinion* 12, 12.

³¹⁷ Filip Reyntjens, 'Rwanda, Ten Years On: From Genocide to Dictatorship' (2004) 103 (411) *African Affairs* 177, 177.

³¹⁸ Marijke Verpoorten, 'The Death Toll of the Rwandan Genocide: A Detailed Analysis for Gikongoro Province' (2005) 60 (4) *Population* 331, 331.

³¹⁹ Peter Uvin, 'Prejudice, Crisis and Genocide in Rwanda' (1997) 40 (2) *African Studies Review* 91, 91.

³²⁰ Omar Shahabudin McDoom, 'Contested Counting: Toward a Rigorous Estimate of the Death Toll in the Rwandan Genocide' (2020) 22 (1) *Journal of Genocide Research* 83, 83.

³²¹ Scott Straus, 'The Limits of a Genocide Lens: Violence Against Rwandans in the 1990's' (2019) 21 (4) *Journal of Genocide Research* 504, 504.

³²² Helen M. Hintjens, 'Explaining the 1994 Genocide in Rwanda' (1999) 37 (2) *Journal of Modern African Studies* 241, 241.

³²³ Howard Adelman, 'Blaming the United Nations' (2008) 4 (1) *Journal of International Political Theory* 9, 9.

seize weapons and increase military force to act against extremists, yet the council did not act upon on this information.³²⁴

Instead, the UNSC decided to withdraw UNAMIR forces during the genocide instead³²⁵ until after the genocide ended³²⁶, where another peacekeeping mission was established.³²⁷

Another notable example of the UNSC's inability to obviate and interpose in humanitarian crises can be observed during the Srebrenica Massacre in 1995.³²⁸

The massacre led to the forcible removal of Bosnian Muslim women, children and elderly.³²⁹ During the hostilities claims of sexual violence, mass rape³³⁰ and genocide were apparent resulting in the deaths of an estimated 7,000-8,000 Muslim boys and men.³³¹

The deaths were found to be caused at hands of Bosnian-Serb forces in Srebrenica, which occurred in the designated UN safe areas.³³² The five designated areas³³³ were under the protection of the United Nations Protection Force for the former Yugoslavia (UNPROFOR).³³⁴

The Dutch battalion were UN peacekeepers tasked with the protection and safeguarding of these safe areas and deter any attacks, monitor ceasefires³³⁵ and prevent ethnic cleansing and bombardments of civilians.³³⁶

³²⁴ Fred Grunfeld, 'Failures to Prevent Genocide in Rwanda (1994), Srebrenica (1995) and Darfur (since 2003)' (2009) 4 (2) *Genocide Studies and Prevention: An International Journal* 221, 224.

³²⁵ UNSC Res 912 (21 April 1994) UN Doc S/RES/912.

³²⁶ Samantha Stevens, 'British Media and the Rwandan Genocide' (2018) 68 (5) *Journal of Communication* E59, E59.

³²⁷ UNSC Res 918 (17 May 1994) UN Doc S/RES/918.

³²⁸ Sonja Biserko, 'The Srebrenica Genocide: Serbia in Denial' (2012) 65 (3) *Pakistan Horizon* 1, 1.

³²⁹ Katherine G. Southwick, 'Srebrenica as Genocide? The Krstić Decision and Language of the Unspeakable' (2005) 8 (1) *Yale Human Rights and Development Law Journal* 188, 189.

³³⁰ Lynda E. Boose, 'Crossing the River Drina: Bosnian Rape Camps, Turkish Impalement and Serb Cultural Memory' (2002) 28 (1) *Signs* 71, 71.

³³¹ *Prosecutor v Radislav Krstić* (Trial Chamber Judgement) IT-98-33-T (2 August 2001) [84].

³³² UNSC Res 819 (16 April 1993) UN Doc S/RES/819.

³³³ UNSC Res 824 (6 May 1993) UN Doc S/RES/824.

³³⁴ UNSC Res 743 (21 February 1992) UN Doc S/RES/743.

³³⁵ UNSC Res 839 (4 June 1993) UN Doc S/RES/839.

³³⁶ Yasushi Akashi, 'The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Areas' Mandate' (1995) 19 (2) *Fordham Int'l L.J.* 312, 314.

The International Court of Justice confirmed the Srebrenica Massacre was perpetrated by Bosnian-Serb forces and considered to be genocide.³³⁷ The genocide is considered a failed peace-keeping mission³³⁸ and regarded as the worst massacre in Europe since WWII.³³⁹

The Netherlands has since accepted responsibility and liability for the failures of the Dutch battalion, which has been reflected in the judicial decisions reached by Dutch Courts in the cases of, *Mustafić*³⁴⁰ and *Nuhanović*³⁴¹ after their expulsion from the safe area led to the Bosnian Serb Army murdering Ibro Nuhanović, Muhamed Nuhanović and Rizo Mustafić.³⁴²

In 2017, a tortious action was brought by the 'Mothers of Srebrenica' which led to a decision by the Dutch Court of Appeal, holding the Netherlands thirty percent liable for exposing the Bosnian male refugees to inhumane and degrading treatment and their execution.³⁴³

However, the final decision reached by the Supreme Court of the Netherlands reduced the states liability in 2019 to just ten percent for the Dutch Battalions failure.³⁴⁴

Despite the failures of the UNSC in Rwanda³⁴⁵ and Srebrenica, as a result of both conflicts the council passed resolutions which led to the creation of two criminal tribunals: The International Criminal Tribunal for the former Yugoslavia (ICTY)³⁴⁶ and the International Criminal Tribunal for Rwanda

³³⁷ *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia v Serbia)* [2007] ICJ Rep 2, para 297.

³³⁸ Erna Rijsdijk, 'The Politics of Hard Knowledge: Uncertainty, Intelligence Failures and the Last-Minute Genocide of Srebrenica' (2011) (37 (5) *Review of International Legal Studies* 2221, 2221).

³³⁹ Helge Brunborg, Torkild Hovde Lyngstad and Henrik Urdal, 'Accounting for Genocide: How Many Were Killed in Srebrenica?' (2003) 19 (3) *European Journal of Population* 229, 229.

³⁴⁰ *The State of Netherlands v Mustafić* (First Chamber) 12/03329 (6 September 2013).

³⁴¹ *The State of Netherlands v Nuhanović* (First Chamber) 13/03324 (6 September 2013).

³⁴² Noelle Higgins, 'The Responsibility of the Netherlands for the Actions of Dutchbat: An Analysis of Nuhanović and Mustafić' (2014) 14 (3) *International Criminal Law Review* 641, 642.

³⁴³ Cedric Ryngaert, 'Peacekeepers Facilitating Human Rights Violations: The Liability of the Dutch State in the Mothers of Srebrenica Cases' (2017) 64 (3) *NILR* 453, 453.

³⁴⁴ *The States of Netherlands v Respondents and Stitching Mothers of Srebrenica* (Supreme Court) 17/04567 (17 July 2019).

³⁴⁵ Helen Hintjens, The Creation of the ICTR in Anne-Marie De Bouwer and Alette Smeulers (eds) *The Elgar Companion to the International Criminal Tribunal of Rwanda* (Edward Elgar Publishing 2016) 15.

³⁴⁶ UNSC Res 827 (25 May 1993) UN Doc S/RES/827.

(ICTR)³⁴⁷ to administer international criminal justice³⁴⁸ against individuals³⁴⁹ responsible for committing serious international crimes³⁵⁰ such as genocide.³⁵¹

The UNSC in 2010 has since introduced the International Residual Mechanism for Criminal Tribunals to conclude the mandate of the ICTY and the ICTR.³⁵²

The UNSC has been effective in post-conflict peacebuilding by establishing criminal tribunals to try individuals who have committed serious international crimes.³⁵³

An example of this is the Special Court of Sierra Leone³⁵⁴ after former president Alhaji Ahmad Tejan Kabbah of Sierra-Leone, sent a Letter requesting the UNSC authorise establishment of criminal tribunal.³⁵⁵

Although the work of the court is commendable for indicting politicians³⁵⁶ and prosecuting Liberia's former president Charles Taylor marking the first head of state to be convicted of aiding and abetting terrorism, war crimes and crimes against humanity³⁵⁷, it does not change the UNSC's position of being unable to respond expeditiously to humanitarian disasters.³⁵⁸

In the case of Sierra Leone, the civil war which lasted between 1991 – 2002 which was triggered by the Revolutionary Patriotic Front (RUF) led by Foday

³⁴⁷ UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

³⁴⁸ Frederic Megret, 'International Criminal Justice as a Peace Project' (2018) 29 (3) EJIL 835, 849.

³⁴⁹ *Prosecutor v Vujadin Popović et al* (Trial Chamber II Judgement) IT-05-88-T (10 June 2010).

³⁵⁰ *Prosecutor v Jean Kambanda* (Trial Chamber I Judgement) ICTR-97-23-S (4 September 1998).

³⁵¹ *Prosecutor v Zdravko Tolimir* (Trial Chamber II Judgement) IT-05-88/2-T (12 December 2012).

³⁵² UNSC Res 1966 (22 December 2010) UN Doc S/RES/1966.

³⁵³ *Prosecutor v Radovan Karadžić* (Trial Chamber Judgement) IT-95-5/18-T (24 March 2016).

³⁵⁴ UNSC Res 1315 (14 August 2000) UN Doc S/RES/1315.

³⁵⁵ UNSC Res 786 (10 August 2000) UN Doc S/2000/786.

³⁵⁶ *Prosecutor v Samuel Hinga Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction: Child Recruitment) SCSL-04-14-AR72E (31 May 2004).

³⁵⁷ *Prosecutor v Charles Ghankay Taylor* (Trial Chamber II Judgment) SCSL-03-01-T (18 May 2012).

³⁵⁸ Abu Bakarr Bah, 'The Contours of New Humanitarianism: War and Peacebuilding in Sierra Leone' (2013) 60 (1) Africa Today 3, 4.

Sankoh, who attempted to overthrow the former president Joseph Momoh³⁵⁹ with the support of Charles Taylor's National Patriotic Front.³⁶⁰

The RUF attempted to seize control of Sierra Leone's precious resources including diamond mines and blood diamonds.³⁶¹ The decade long conflict resulted in serious IHL violations being committed³⁶² producing an estimated 50,000 deaths³⁶³, 70,000 casualties and rendered 2.6 million internally displaced.³⁶⁴

The 1999 Lomé Peace Accord was eventually brokered³⁶⁵ which dissolved the RUF and reintegrated its members into society³⁶⁶ with the aid of the Military Observer Group (ECOMOG) and the Economic Community of West African States (ECOWAS) and Nigeria.³⁶⁷

Even though the UNSC interposed towards the end the conflict through the UN Observer Mission in Sierra Leone (UNOMSIL)³⁶⁸, which was superseded by the UN Mission in Sierra Leone (UNAMSIL) which provided military support against the RUF³⁶⁹, this example further demonstrates the UNSC's inability to act expediently in the face of genocide and humanitarian crises.

³⁵⁹ Alfred B. Zack Williams, 'Sierra Leone After the End of the Armed Conflict' (2002) 2 *Cadernos de Estudos Africanos* 1, 1-4.

³⁶⁰ George Klay Kieh Jr, 'Civilians and Civil Wars in Africa: The Cases of Liberia, Sierra Leone and Cote D'Ivoire' (2016) 48 (1-2) *Peace Research* 203, 215.

³⁶¹ Maarten Voors et al, 'Resources and Governance in Sierra Leone's Civil War' (2017) 53 (2) *Journal of Development Studies* 278, 278 – 280.

³⁶² Charles Chernor Jalloh, 'The Contributions of the Special Court for Sierra Leone to the Development of International Law' (2007) 15 (2) *African Journal of International and Comparative Law* 165, 165.

³⁶³ 'Sierra Leone, Getting Away with Murder, Mutilation and Rape: New Testimony' (1999) 11 (3) (A) *Human Rights Watch* <https://www.hrw.org/reports/1999/sierra/SIERLE99.htm#P2_0> accessed 10 September 2020, summary.

³⁶⁴ Mary Kaldor and James Vincent, 'Case Study: Sierra Leone' (*United Nations Development Programme*) <<http://web.undp.org/evaluation/documents/thematic/conflict/SierraLeone.pdf>> accessed 10 September 2020, 4.

³⁶⁵ David S. McDonough, 'From Guerillas to Government: Post-Conflict Stability in Liberia, Uganda and Rwanda' (2008) 29 (2) *Third World Quarterly* 357, 357.

³⁶⁶ Fodei Batty and Fredline M'Cormack-Hale, 'Do Not Disturb the Peace! Identities, Livelihoods and the Politics of Post-War Discontent in Sierra Leone' (2019) 54 (4) *Journal of Asian and African Studies* 533, 539.

³⁶⁷ Clotilde Asangna, 'An Examination of Sierra Leone War' (2017) 11 (5) *African Journal of Political Science and International Relations* 103, 104.

³⁶⁸ UNSC Res 1181 (13 July 1998) UN Doc S/RES/1181.

³⁶⁹ UNSC Res 1270 (22 October 1999) UN Doc S/RES/1270.

The most recent example of the UNSC's failure can also be observed in the 'Yemen Crisis'³⁷⁰ after the civil war engulfed the state³⁷¹ following the 2011 Arab Spring uprisings and protests.³⁷²

This led to the ousting of former President Ali Abdullah Saleh ending his 33-year dictatorship in Yemen and was succeeded by the Vice-President Abdrabbuh Mansour Hadi becoming the interim president for a two-year transitional period until presidential elections took place.³⁷³

The protests were a catalyst used by the non-state actors known as the Houthi rebellion a Zaidi Shia Islamic rebel group with an aim to assume political control of Yemen and remove the current presiding Salafi Islamic political influence over Yemen, which is supported by Saudi Arabia.³⁷⁴

The Houthi rebel militia originally from the northern region of Yemen with the continued support of Iran, has through its military conquest seized cities along the Yemeni west coast (Hudeidah) and even attempted to assume control over its internationally recognised³⁷⁵ territorial waters.³⁷⁶

The civil war became fertile ground for the presence of terrorist organisations³⁷⁷ such as the Islamic State (ISIS/ISIL) and Al-Qaeda in southern Yemen with ambitions to also assume political control, which led the

³⁷⁰ Wei Jiang, Guojin He, Tengfei Long and Huichan Liu, 'Ongoing Conflict Makes Yemen Dark: From the Perspective of Nighttime Light' (2017) 9 (8) *Remote Sensing* 1, 1.

³⁷¹ Stacey Philbrick Yadav, 'Fragmentation, Disintegration and Resurgence: Assessing the Islamist Field in Yemen' (2020) *Middle East Law and Governance* 14, 15.

³⁷² April Longley Alley, 'Assessing (In) Security After the Arab Spring: The Case of Yemen' (2013) 46 (4) *Political Science and Politics* 721, 721.

³⁷³ Moosa Elayah et al, 'National Dialogues as an Interruption of Civil War – The Case of Yemen' (2020) 8 (1) *Peacebuilding* 98, 100.

³⁷⁴ Waseem Ahmad Qureshi, 'The Crisis in Yemen: Armed Conflict and International Law' (2020) 45 (1) *North Carolina Journal of International Law* 227, 230 - 232.

³⁷⁵ UN Convention on the Law of the Sea [1982] art 2 and 3.

³⁷⁶ Khaldoon Ahmed, 'The Influence of Geography in Asymmetric Conflicts in Narrow Seas and the Houthi Insurgency in Yemen' (2018) 6 (1) *Malaysian Journal of International Relations* 84, 87.

³⁷⁷ Abu Amin, 'Crisis in Yemen and Countering Violence' (2015) 7 (7) *Counter Terrorist Trends and Analyses* 18, 18.

USA to respond militarily in its GWOT effort³⁷⁸ along with the support of France and the UK supporting Saudi Arabia and the Hadi regime.³⁷⁹

After the Houthi rebel's rapid expansion and territorial acquisition of Yemen's capital Sana'a, this led to the house arrest of President Hadi in 2015 forcing him to resign. After his escape from house arrest, he fled to Saudi Arabia and requested military support.³⁸⁰

The passing of resolution 2216³⁸¹ acknowledged a letter by the ousted President Hadi on the 24th March 2015, addressing the President of the UNSC to authorise military intervention to protect Yemen and its people from Houthi aggression and confirming the legitimacy of Hadi's presidency of Yemen.³⁸²

In response to the legitimate request of President Hadi in an aim to restore his rule³⁸³, on the 26th March 2015, a military intervention codenamed 'Operation Decisiveness Storm' was launched by a coalition of regional Arab countries led by Saudi Arabia.³⁸⁴

Since the inception of the military operation, the situation in Yemen has been described currently as the 'worst man-made humanitarian crisis of our time'³⁸⁵ as the ensuing conflict has resulted in 100,000 conflict related deaths largely at the hands of coalition forces.³⁸⁶

³⁷⁸ Tomi Pulkinnen, 'Yemen and the Houthi Rebellion in the Context of the Global War on Terror' (2017) 10 (4) 10 (5) *History in the Making* 27, 44.

³⁷⁹ Scharf M et al, 'Talking Foreign Policy – April 24, 2019 Broadcast: Untangling the Yemen Crisis' (2020) 52 (1-2) *Case.W.Res.J.Int'l L.* 513, 515.

³⁸⁰ Jeffrey S. Bachman, 'A 'Synchronised Attack' on Life: the Saudi-Led Coalition's 'Hidden and Holistic' Genocide in Yemen and the Shared Responsibility of the US and UK' (2019) 40 (2) *Third World Quarterly* 298, 299.

³⁸¹ UNSC Res 2216 (14 April 2015) UN Doc S/RES/2216.

³⁸² *ibid.*

³⁸³ May Darwitch, 'The Saudi Intervention in Yemen' (2018) 20 (2) *Insight Turkey* 125, 125.

³⁸⁴ Mohammed Taghi Ghasemzadeh and Mashallah Heidarpour, 'The Investigation of Yemen Crisis from the Perspective of International Law and the Actions of Iran and Saudi Arabia' (2019) 6 (2) *International Journal of Multicultural and Multireligious Understanding* 689, 689.

³⁸⁵ Megan Jenkins, 'Yemen: The Worst Humanitarian Crisis in the World, Ignored' (2020) 1 (1) *Global Connections* 1, 2.

³⁸⁶ Laura Graham, 'Prosecuting Starvation Crimes in Yemen's Civil War' (2020) 52 (1) *Case W.Res.J.Int'l L.* 267, 267-268.

The USA has also been accused for aiding and abetting war crimes by supplying Saudi Arabia with USA manufactured laser guided bombs used in coalition airstrikes in 2016 and 2018 deliberately violating IHL by targeting and killing innocent civilians including school children.³⁸⁷

Remnants of European manufactured guided bombs have also been used by the Saudi Royal Air Force, including other arms exports including fighter jets, bombs, naval mines and frigates.³⁸⁸

The manufacturer RWM Italia SPA a subsidiary of Rheinmetall AG based in Germany and multinational European company the Eurofighter Jagdflugzeug GmbH have been found to have supplied these weapons.³⁸⁹

The individuals within these companies for selling and supplying these weapons are criminally liable for aiding and abetting the commission of war crimes.³⁹⁰ These arms manufacturers for supplying such weapons have also breached the EU council provisions³⁹¹ and IL³⁹²

At present, more than 20 million people in Yemen are currently suffering from food insecurity and preventable diseases such as cholera, severe malnutrition.³⁹³ The humanitarian situation in the war-torn country³⁹⁴ has been complicated further with cholera³⁹⁵ and the outbreak of the corona virus disease 2019 (COVID-19).³⁹⁶

³⁸⁷ Fabiana Wells, 'Aiding and Abetting War Crimes in the Yemeni Civil War: U.S. Involvement' (2019) 10 *Journal of Global Rights and Organisations Annual Review* 104, 406.

³⁸⁸ Linde Bryk, 'Individual Criminal Liability for Arms Exports Under the ICC Statute' (2019) 17 (5) *JICJ* 1117, 1124.

³⁸⁹ *ibid* 1124-1125.

³⁹⁰ Rome Statute of the International Criminal Court [1998] art 25 (3) (c).

³⁹¹ EU Common Council Position 2008/944/CFSP of December 2008 defining common rules governing control of exports of military technology [2008] OJ L335/99, art 2 (2) (c).

³⁹² Arms Trade Treaty [2013] art 6 (3), art 7 (1) and art 7 (7).

³⁹³ *ibid*.

³⁹⁴ James S. Lee and Aurelie Godard, 'Critical Care for Covid-19 During Humanitarian Crisis – Lessons Learnt from Yemen' (2020) 24 (1) *Critical Care* 1, 1.

³⁹⁵ Qin Xiang Ng, Michelle Lee Zhi Qing De Deyn, Wayren Loke and Wee Song Yeo, 'Yemen's Cholera Epidemic is a One Health Issue' (2020) 53 (4) *Journal of Preventive Medicine and Public Health* 289, 289.

³⁹⁶ Sayed Meysam Mousavi and Mina Anjomshoa, 'Covid-19 in Yemen: A Crisis Within Crises' (2020) 19 (1) *International Journal for Equity and Health* 1, 1.

Since 2017, an estimated 13 million Yemeni's have been declared at risk of starvation with at least 85,000 children dying from starvation and starvation-related diseases.³⁹⁷ This is largely due to the USA's support in imposing the Saudi-led coalition 'maritime interdiction'³⁹⁸ or more widely considered to be a 'naval blockade'³⁹⁹ preventing vital humanitarian aid, food supplies⁴⁰⁰ and access for relief agencies, which has further been exacerbated due to the USA's counter-terrorism efforts.⁴⁰¹

The USA and coalition forces in support of Saudi Arabia have violated IHL rendering individuals criminally responsible⁴⁰² for intentionally causing the deaths of Yemeni civilians through starvation.⁴⁰³ Due to the collective nature of their conduct, academics have also considered the USA and the Saudi coalition forces to be complicit in committing the international crime of genocide.⁴⁰⁴

Despite IHL violations being evidenced since 2014 as detailed by UNHRC in its 2020 report⁴⁰⁵, the UNSC has condemned the actions of coalition forces imposition of a maritime interdiction.⁴⁰⁶

However, this has still not warranted UNSC intervention to prevent further mass atrocities nor has it prompted any referral to the ICC to investigate international crimes including genocide which have been committed by the USA, UK, France and Saudi coalition forces further undermining IHL, CIL and ICL.

³⁹⁷ Graham (n 386) 267-268.

³⁹⁸ Philip J. Drew, 'Blockade?: A Legal Assessment of the Maritime Interdiction of Yemen's Ports' (2019) 24 (1) *Journal of Conflict and Security Law* 35, 52.

³⁹⁹ Martin D. Fink, 'Naval Blockade and the Humanitarian Crisis in Yemen' (2017) 64 (2) *NILR* 291, 292.

⁴⁰⁰ John Hursh, 'International Humanitarian Law Violations, Legal Responsibility and US Military Support to the Saudi Coalition in Yemen: A Cautionary Tale' (2020) 7 (1) *Journal on the Use of Force and International Law* 122, 126.

⁴⁰¹ Hilal Elver, 'At the Brink of Famine in Conflict and Natural Disaster Zones: Human Rights Approach to Extreme Hunger and Malnutrition' (2018) 9 (3-4) *TLT* 191, 193.

⁴⁰² Rome Statute of the International Criminal Court [1998] art 8 (2) (b) (xxv).

⁴⁰³ 1977 Additional Protocol I of the Geneva Convention [1949] art 54.

⁴⁰⁴ Bachman (n 380) 308.

⁴⁰⁵ UNHRC Res 45/6 (28 September 2020) UN Doc A/HRC/45/6.

⁴⁰⁶ UNSC Res 2417 (24 May 2018) UN Doc S/RES/2417, paras 5 and 6.

2.2.3 The UNSC, the Veto and the Organisations Historic and Continued Failures in Preventing and Intervening in Humanitarian Disasters.

The veto privilege granted to the permanent five members (P5) is fundamentally responsible for hampering the UNSC's effectiveness.⁴⁰⁷ Shortly after the inception of the UNSC⁴⁰⁸ the P5's use of the veto has been argued to have established an 'unacceptable dictatorship' as opposed to a democratic institution demonstrating the inequalities of less powerful states.⁴⁰⁹

The voting procedure and veto privilege known as the 'Yalta formula' was established by the founders of the UN in San Francisco in 1944, initially aimed to restrict the veto of P5 members to issues of substance, although the pressure placed by the Union of Soviet Socialist Republic (USSR) regarding whether an issue should be deemed a matter of procedure or substance would not be regarded as a procedural decision. In practice, therefore, the right of veto could be invoked on every issue on the agenda.⁴¹⁰

The idea of granting P5 members veto privileges, evolved directly from the fact that the enforcement of many UNSC resolutions would require the military and financial support of the superpowers to enforce the council's decisions which has continued till present.⁴¹¹

The rationale of the veto and its advantages were discussed extensively during the 1944 San Francisco negotiations, which sought to protect the vital interests of the minority and less powerful states against the majority and prevent conflict between the P5.⁴¹²

⁴⁰⁷ Osita G. Afoaku and Okechukwu Ukaga, 'United Nations Security Council Reform: A Critical Analysis of Enlargement Options' (2001) 18 (2) *Journal of Third World Studies* 149, 149.

⁴⁰⁸ Andrew J. Carswell 'Unblocking the UN Security Council: The Uniting for Peace Resolution' (2013) 18 (3) *Journal of Conflict and Security Law* 453, 457.

⁴⁰⁹ Dwight E. Lee, 'The Genesis of the Veto' (1947) 1 (1) *Int'l Org.* 33, 33.

⁴¹⁰ Eyal Winter, 'Voting and Vetoing' (1996) 90 (4) *American Political Science Review* 813, 813.

⁴¹¹ Ilyana Kuziemko and Eric Werker, 'How Much Is A Seat on the Security Council Worth? Foreign Aid and Bribery at the United Nations' (2006) 114 (5) *Journal of Political Economy* 905, 905.

⁴¹² Aleksander W. Rudzinski, 'Majority Rule vs Great Power Agreement in the United Nations' (1955) 9 (3) *Int'l Org.* 366, 366.

However, the abuse of the veto privilege became apparent shortly after the signing of the UN Charter.⁴¹³ The confrontation between the USSR and the USA intensified following the events of the Cold War as Soviet leaders believed that communism would ultimately triumph in the world and that the USSR was the vanguard socialist/communist state. They also believed that the western imperialist powers were historically bound to pursue a hostile course of action against them.⁴¹⁴

In June 1950, North Korea's military attack on the Republic of Korea, resulted in the UNSC passing resolution 82⁴¹⁵ identifying North Korea's attack represented a breach of peace.⁴¹⁶ This led to the UNSC to pass resolution 83⁴¹⁷ which recommended members of the UNSC should provide military support against North Korea to restore international peace and security.⁴¹⁸

Subsequent to the passing of these resolutions, Russia boycotted the UNSC with its veto power.⁴¹⁹ Arguments pertaining to reform of the UNSC are not in themselves novel, as various proposals have been made since the end of the Cold War and subsequent collapse of the USSR in 1991⁴²⁰ which was succeeded by a multiparty democracy in which officials were chosen in regular elections.⁴²¹

This has been regarded as the turning point in history and marked the beginning of a new world order which was evidenced in the rapidly increasing rate of productivity and newfound spirit of co-operation by Russia in the

⁴¹³ Charter of the United Nations [1945].

⁴¹⁴ Raymond L. Garthoff, 'Why Did the Cold War Arise and Why Did It End?' 16 (2) *Diplomatic History* 287, 287.

⁴¹⁵ UNGA Res 82 (25 June 1950) UN Doc S/1501.

⁴¹⁶ *ibid.*

⁴¹⁷ UNGA Res 83 (27 June 1950) UN Doc S/1511.

⁴¹⁸ *ibid.*

⁴¹⁹ Carswell (n 408).

⁴²⁰ Richard Sakwa, 'The Soviet Collapse: Contradictions and Neo-Modernisation' (2013) 4 (1) *Journal of Eurasian Studies* 65, 65.

⁴²¹ Andrei Shleifer and Daniel Treisman, 'A Normal Country: Russia After Communism' (2005) 19 (1) *Journal of Economic Perspectives* 151, 151.

UNSC⁴²² and reforming the UNSC has been of utmost importance⁴²³ and has remained at the top of the international agenda since the early 1990's.⁴²⁴

Likewise, academics have also been keen to demonstrate the inadequate functioning of the UNSC reinforcing the argument that the world body needs reform.⁴²⁵

Proposals have included: abolishing the veto power altogether and placing limitations⁴²⁶, urging the P5 to self-limit the use of veto powers in exceptional situations⁴²⁷, keeping the UNSC in check by member states non-compliance with council decisions⁴²⁸, political control of the UNSC by the UNGA through the exercise of budgetary powers⁴²⁹ and even proposals being made to overrule the P5 veto through a supermajority.⁴³⁰

One of the fundamental elements of the UN Charter is that it deems all member states as equals.⁴³¹ However, in reality the potent veto privilege⁴³² has concentrated and confined power exclusively to the P5 members of the UNSC, often being used to serve self-interests and the interests of their allies, which the preceding chapters of thesis have demonstrated, specifically in the legal framework, Palestine and Syria chapters.

⁴²² Joelle Hageboutros, 'The Evolving Role of the Security Council in the Post-Cold War Period' (2016) 1 (1) *Swarthmore International Relations Journal* 10, 10.

⁴²³ Robert S. Snyder, 'Reforming the Security Council for the Post-Cold War World' (1997) 14 (1) *International Journal of World Peace* 3, 3.

⁴²⁴ Dimitris Bourantonis and Ritsa A. Panagiotou, 'Russia's Attitude Towards Reform of the United Nations Security Council, 1990-2000' (2004) 20 (4) *Journal of Communist Studies and Transition Politics* 79, 79-80.

⁴²⁵ Rajaram Panda, 'Japan, Germany and the UN Security Council' (1992) 48 (4) *India Quarterly* 51, 51.

⁴²⁶ Saleh Al-Shraideh, 'The Security Council's Veto in Balance' (2017) 58 *Journal of Law, Policy and Globalization* 135, 139.

⁴²⁷ Cesareo Gutierrez Espada, 'The Responsibility to Protect and the Right of Veto in the Security Council: Some Recent Examples' (2014) 3 *Journal of the Spanish Institute of Strategic Studies* 1, 12.

⁴²⁸ Dapo Akande, 'Are There Limits to the Powers of the Security Council' (2007) 5 (1) *Journal of International Law and Policy* 2, 3.

⁴²⁹ *ibid.*

⁴³⁰ Melanie Capuano, 'The P5: An Abuse of Power' (2015) 37 *Michigan Journal of International Law Online* < <http://www.mjonline.org/the-p5-an-abuse-of-power/> accessed 06/02/2020.

⁴³¹ Charter of the United Nations [1945] art 1 (2).

⁴³² Judy A. Gallant, 'Humanitarian Intervention and Security Council Resolution 688: A Reappraisal in Light of a Changing World Order' (1992) 7 (4) *Am.U.Int'l L.Rev.* 881, 898.

In turn, the UNSC is perceived to be an 'undemocratic body acting as a cloak for a new form of imperialism'.⁴³³ In response to this academics Cronin-Furman⁴³⁴ and Akande have previously assessed whether the UNSC's decisions are subject to judicial review by the International Court of Justice (ICJ), shifting the problem of one trying to get the council to work as it was intended, to one trying to control the work of the council.⁴³⁵

This question arose after the 1988 bombing of civilian aircraft 'Pan American Flight 103', which exploded and crashed in the hills of Lockerbie, Scotland, bound from New York to London, killing everyone on board.⁴³⁶

The subsequent investigations suggested that two Libyan nationals were to blame and needed to be tried.⁴³⁷ The UNSC imposed sanctions⁴³⁸ on the Libyan government for its failure to co-operate⁴³⁹ with the USA and UK extradition requests.⁴⁴⁰

Libya then asked the ICJ to declare that Libya was not obliged to extradite its nationals to the USA or the UK and further asked the court to enjoin the USA and the UK from the use of force or threats against Libya.⁴⁴¹

It was generally accepted for years by many experts that UNSC resolutions could not in fact be reviewed by the ICJ. However, the shift in popular opinion, was largely based on the decisions reached by the ICJ to the UK⁴⁴² and the

⁴³³ Jose E. Alvarez, 'Judging the Security Council' (1996) 90 (1) AJIL 1, 1.

⁴³⁴ Kathleen Renee Cronin-Furman, 'The International Court of Justice and the United Nations Security Council: Rethinking A Complicated Relationship' (2006) 106 (2) Colum.L.Rev. 435, 435.

⁴³⁵ Dapo Akande, 'The International Court of Justice and the Security Council: Is There Any Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46 (2) ICLQ 309, 309.

⁴³⁶ R.F. Kennedy, 'Libya v United States: The International Court of Justice and the Power of Judicial Review' (1992) 33 Va.J.Int'l L. 899, 899.

⁴³⁷ UNSC Res 1192 (27 August 1998) UN Doc S/RES/1192.

⁴³⁸ UNSC Res 748 (31 March 1992) UN Doc S/RES/748.

⁴³⁹ UNSC Res 731 (21 January 1992) UN Doc S/RES/731.

⁴⁴⁰ UNSC Res 883 (11 November 1993) UN Doc S/RES/883.

⁴⁴¹ Eric Zobel, 'The Lockerbie Controversy: Tension Between the International Court of Justice and the Security Council' (1999) 5 (1) Annual Survey of International and Comparative Law. 259, 259.

⁴⁴² *Questions of interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* (Preliminary Objections) [1998] ICJ Rep 9.

USA⁴⁴³, which led towards a view that the court may indeed possess a power of judicial review.⁴⁴⁴

The significance of the Lockerbie cases concerned the ICJ's assessment as to decide whether or not to exercise jurisdiction over cases brought by Libya against the USA and the UK concerning the application of the Montreal Convention⁴⁴⁵ to consequences of the Lockerbie bombing in 1989. While the Court upheld 'its implicit power to decide the dispute, including the question of whether the imposition of UNSC trade sanctions were lawful, it never had to rule on those issues because the case was settled out of court and struck from its docket'.⁴⁴⁶

Although, despite the ICJ being considered the main judicial organ of the UN⁴⁴⁷ it does not possess the power to judicially review the decisions of the UNSC.⁴⁴⁸ The ICJ in the *Namibia case*⁴⁴⁹ has reaffirmed this position, finding the court had no authority to judicially review the decisions of the UNSC and the decisions of any other UN organ.⁴⁵⁰

The ICJ's ability to judicially review UNSC decisions had been deliberately omitted as a result of negotiations reached in the 1945 San Francisco Conference.⁴⁵¹

⁴⁴³ *Questions of interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* (Preliminary Objections) [1998] ICJ Rep 115.

⁴⁴⁴ Ken Roberts, 'Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review' (1995) 7 (2) *Pace International Law Review*. 281, 284.

⁴⁴⁵ Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation [1971].

⁴⁴⁶ August Reinisch, 'Should Judges Second-Guess the UN Security Council?' 6 (1) *International Organizations Law Review* 257, 258.

⁴⁴⁷ Charter of the United Nations [1945] art 92.

⁴⁴⁸ Bernd Martenczuk, 'The Security Council, the International Court and Judicial Review' (1999) 10 (3) *EJIL* 517, 525.

⁴⁴⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* Notwithstanding the Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16.

⁴⁵⁰ *ibid* para 89.

⁴⁵¹ Geoffrey R. Watson, 'Constitutionalism, Judicial Review and the World Court' (1993) 34 (1) *Harv.Int'l L.J.* 1, 2.

The failures of the UNSC are also attributed to the veto privileges granted exclusively to the P5, concentrating the council's power to maintain international peace and security to these few states.⁴⁵²

This can be adduced by analysing previous decisions by the UNSC, which have varied according to the policies and interests of the P5, particularly: China, France, Russia, the United Kingdom (UK), and the USA, each with the right to veto any substantive decision by the UNSC.⁴⁵³

The UN Charter under article 27 sets the voting requirements for passing a resolution and confers the right to veto exclusively to the P5, stating:

[E]ach member of the Security Council shall have one vote.⁴⁵⁴

Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.⁴⁵⁵

Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.⁴⁵⁶

According to scholars the veto privilege granted to the P5 has proven to be a substantial obstacle⁴⁵⁷ in the UNSC being unable to fulfil its mandate to maintain international peace⁴⁵⁸ and interpose in humanitarian crises as resolutions and policies which are drafted are at risk of being vetoed, if only one of the P5 disapproves.⁴⁵⁹

⁴⁵² Fakiha Mahmood, 'Power Versus the Sovereign Equality of States: The Veto P5 and United Nations Security Council Reforms' (2013) 18 (4) *Perceptions* 117, 117.

⁴⁵³ Saira Mohamed, 'Shame in The Security Council' (2013) 90 (4) *Washington University Law Review* 1191, 1193-1194.

⁴⁵⁴ Charter of the United Nations [1945] art 27 (1).

⁴⁵⁵ Charter of the United Nations [1945] art 27 (2).

⁴⁵⁶ Charter of the United Nations [1945] art 27 (3).

⁴⁵⁷ Abdul Nafey, 'Permanent Membership in the UN Security Council: India's Diplomatic Initiatives and Strategies' (2005) 61 (4) *India Quarterly*. 1, 1.

⁴⁵⁸ Anna Spain Bradley, 'The UN Security Councils Duty to Decide' (2013) 4 *Harvard National Security Journal* 320, 321.

⁴⁵⁹ Bruce Bueno de Mesquita and Alastair Smith, 'The Pernicious Consequences of UN Security Council Membership' (2010) 54 (5) *Journal of Conflict Resolution* 667, 668.

The P5 have succumbed to censure and scrutiny, as they have often invoked the veto when voting against a draft resolution, quashing any prospect of it being adopted.⁴⁶⁰ This is also the case even if there is an overwhelming majority of states in support of a draft resolution, which has proven sufficient to brand the veto privilege as being an 'anachronistic, undemocratic and a tool of coercion unjustified in the twenty-first century'.⁴⁶¹

In support of this argument, the undemocratic nature of the veto privilege has been perceived as absolute power, which consequently serves the ambitions of the P5, which are often responsible for triggering, escalating and prolonging armed conflicts.⁴⁶²

In practice, P5 members' exploitation of the veto privilege has resulted in the UNSC historically being unable to respond expeditiously where a humanitarian crisis is prevalent⁴⁶³ demonstrating the organisations failure to maintain international peace and security.⁴⁶⁴

This in turn promotes impunity for nationals of the P5 that may have perpetrated international crimes⁴⁶⁵ by committing violations of IL, IHL and CIL in armed conflict and counter-terrorism operations.

Arguably the behaviours of the P5 have often demonstrated conformity to the principles laid down in Realpolitik, which essentially prioritises the vital self-interests of these states and the interests of their allies.⁴⁶⁶ Realpolitik is a

⁴⁶⁰ Richard Butler, 'Reform of the United Nations Security Council' (2012) 1 (1) Penn State Journal of Law and International Affairs 23, 28.

⁴⁶¹ Giorgia Papalia, 'A Critique of the Unqualified Veto Power' (2017) 2 Perth ILJ 55, 55.

⁴⁶² Blessing Nneka Iyase and Sheriff Folami Folarin, 'A Critique of Veto Power System in the United Nations Security Council' (2018) 11 (2) Acta Universitatis Danubius Relationes Internationales 104, 106.

⁴⁶³ Debidatta Aurobinda Mahapatra, 'The Mandate and the (In)Effectiveness of the United Nations Security Council and International Peace and Security: The Contexts of Syria and Mali' (2016) 21 (1) Geopolitics 43, 54.

⁴⁶⁴ Marie-Eve Loisele, 'The Penholder System and the Rule of Law in the Security Council Decision-making: Setback or Improvement?' (2020) 33 (1) LJIL 139, 147.

⁴⁶⁵ Thomas Christiano, 'The Arbitrary Circumscription of the Jurisdiction of the International Criminal Court' (2020) 23 (3) Critical Review of International Social and Political Philosophy 352, 352-353.

⁴⁶⁶ Brian Rathbun, 'The Rarity of Realpolitik: What Bismarck's Rationality Reveals About International Politics' (2018) 43 (1) International Security 7, 7.

political theory which promulgates political affairs are free of the problem of moral duty.⁴⁶⁷

This is most applicable to the P5 and their allies as the GWOT doctrine has often been the precursor, rationale and justification dictating the foreign policies of these states to serve their self-interests by using illegal military force and/or excessive force outside the authority of the UNSC to counteract the threat or perceived threat of terrorism.

An example of this can be observed in the 'Rohingya Genocide'⁴⁶⁸ in Myanmar which has been justified to eradicate terrorism within the state. Although, the systematic persecution of minority ethnic Rohingya Muslims in Myanmar has been ongoing since the 1970's.⁴⁶⁹

The situation in Myanmar has further escalated since 2017, after attacks were carried out by the Arakan Rohingya Salvation Army (ARSA) terrorist group against the Myanmar military.⁴⁷⁰

The UNSC has been unable to interpose in the mass atrocity crimes and IHL violations which have been committed by the interstate military during counter-operations to combat the ARSA terrorist group, which are referred to as 'clearance operations' authorised by the Myanmar government.⁴⁷¹

Ethnic cleansing claims have been leveraged⁴⁷² against the former leader of the National League of Democracy government by former Nobel Peace Prize winner Aung San Suu Kyi⁴⁷³ and military forces for the mass killings of ethnic

⁴⁶⁷ Henry C. Emery, 'What Is Realpolitik?' (1915) 25 (4) *International Journal of Ethics* 448, 449-451.

⁴⁶⁸ Melanie O'Brien and Gerhard Hoffstaedter, 'There We Are Nothing, Here We Are Nothing – The Enduring Effects of the Rohingya Genocide' (2020) 9 (11) *Social Sciences* 1, 12.

⁴⁶⁹ Md. Ali Siddiquee, 'The Portrayal of the Rohingya Genocide and Refugee Crisis in the Age of Post Truth Politics' (2020) 5 (2) *Asian Journal of Comparative Politics* 89, 89.

⁴⁷⁰ Arjun Gopinathan, 'Addressing the Human Rights Crisis Affecting the Rohingya People of Myanmar' (2019) 10 (1) *Journal of Defence and Security* 64, 64.

⁴⁷¹ Foreign Affairs Committee, *Violence in Rakhine State and the UK's Response* (HC 2017-19, 435-I) para 4.

⁴⁷² Arifa Sarmin, 'Ongoing Persecution of the Rohingya: A History of Periodic Ethnic Cleansings and Genocides' (2020) 28 (2) *Intellectual Discourse* 675, 690.

⁴⁷³ Faizah Binte Zakaria, 'Religion, Mass Violence, and Liberal Regimes: Recent Research on the Rohingya in Myanmar' (2019) 38 (1) *Journal of Current Southeast Affairs* 98, 99.

Rohingya Muslims.⁴⁷⁴ Severe human rights abuses have been publicised including systematic, and violent eviction, including the burning of their homes and farms, beatings executions and dumping of bodies in mass graves.⁴⁷⁵

The UNHRC has confirmed that the Myanmar military has committed genocide and the 'clearance operations' were not a direct response to the ARSA but a means to finish the longstanding ethnic Rohingya/Bengali problem.⁴⁷⁶

In 2018, the UNHRC has placed a conservative estimate that these 'clearance operations' which were carried out in the villages of Min Gyi (Tula Toli), Maung Nu, Chut Pyin and Gudar Pyin, and in villages in the Koe Tan Kauk village tract, which resulted in the mass deaths of 10,000 Rohingya, with women and girls being gang raped, killed and were then disposed of by being burned or buried in mass graves.⁴⁷⁷

The Myanmar government has proactively sought protection from its longstanding ally China and Russia to block any resolution made against it in the past⁴⁷⁸ to avoid UNSC scrutiny and/or prompt any ICC intervention by referral for preliminary investigations to be conducted.⁴⁷⁹

In response to the dire humanitarian situation in Myanmar, both France and the UK circulated a draft resolution in 2017, demanding an end to the violence in Myanmar. This was opposed by China and threatened to use its veto should any such resolution be voted on.⁴⁸⁰ This occurrence happened despite a

⁴⁷⁴ Afroza Anwary, 'Interethnic Conflict and Genocide in Myanmar' (2020) 24 (1) *Homicide Studies* 85, 85.

⁴⁷⁵ Rohini J. Haar et al, 'Documentation of Human Rights Abuses Among Rohingya Refugees from Myanmar' (2019) 13 (1) *Conflict and Health* 1, 2.

⁴⁷⁶ UNHRC, Thirty-Ninth Session 10-28 September 2018 'Report of the Independent International Fact-Finding Mission on Myanmar' (12 September 2018) UN Doc A/HRC/39/64, paras 84-87.

⁴⁷⁷ *ibid* para 36.

⁴⁷⁸ UNSC Draft Res 14 (12 January 2007) UN Doc S/2007/14.

⁴⁷⁹ Wa Lone and Simon Lewis, 'Myanmar Working with China, Russia, to Avoid UN Rebuke Over Persecution of Muslims' *Business Insider* (London, 06 September 2017) <<https://www.businessinsider.com/myanmar-working-with-china-russia-to-avoid-un-rebuke-over-persecution-of-muslims-2017-9?r=US&IR=T>> accessed 01 September 2019.

⁴⁸⁰ 'UN Increases Pressure on Myanmar To End Violence Against Rohingya' *The Guardian* (London, 07 November 2017) <<https://www.theguardian.com/world/2017/nov/07/un->

presidential statement being made to the UNSC, strongly condemning the violence by the Myanmar military.⁴⁸¹

This has since prompted the International Court of Justice to rule that Myanmar has breached its obligations under the UN Genocide Convention, reminding the Myanmar government to ensure it 'take all measures within its power to prevent the commission'⁴⁸² of all acts of genocide.

Due to large-scale persecution and mass atrocities, this has also led a mass exodus of Rohingya fleeing to Bangladesh.⁴⁸³ The unprecedented influx of refugees in Bangladesh have managed to settle in the Ukhiya and Teknaf Upazilas (subdistricts) of the Cox's Bazar, which is currently estimated to have settled close to one million Rohingya.⁴⁸⁴

Although a veto was not used, the significance here is the mere fact that a P5 member (China) simply being opposed to such a draft resolution is enough to block any prospect of UNSC involvement subverting the council's authority.⁴⁸⁵

However, since Bangladesh is party to the Rome Statute, the ICC prosecutor has been granted jurisdiction over Bangladesh to investigate the situation in Myanmar.⁴⁸⁶

This has since led to two individuals (Myanmar soldiers) being held in ICC custody after confessing to having committed mass atrocities including murder, rape and mass burials of Rohingya Muslims.⁴⁸⁷

increases-pressure-on-myanmar-to-end-violence-against-rohingya> accessed 02 September 2019.

⁴⁸¹ UNSC Presidential Statement 22 (2017) UN Doc S/PRST/2017/22.

⁴⁸² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Order) 2020 para 86 <<https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>> accessed 09 September 2020.

⁴⁸³ Nurul Islam, 'Rohingya: A People Under Endless Tyranny' (2021) 48 (1) *Asian Affairs: An American Review* 14, 15.

⁴⁸⁴ Mehereen Akhtar et al, 'Drinking Water Security Challenges in Rohingya Refugee Camps of Cox's Bazar, Bangladesh' (2020) 12 (18) *Sustainability* 1, 2.

⁴⁸⁵ Adam Simpson, 'The Rohingya Crisis and Questions of Accountability' (2020) 74 (5) *Australian Journal of International Affairs* 486, 489.

⁴⁸⁶ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic Union of Myanmar* (Pre-Trial Chamber III Decision) ICC-01/19 (14 November 2019).

⁴⁸⁷ Hannah Ellis-Petersen, 'Myanmar Soldiers Tell of Rohingya Killings, Rapes and Mass Burials' *The Guardian* (London, 8 September 2020) <

However, should the ICC issue arrest warrants against other individuals, Myanmar may refuse to co-operate with the court, and should the ICC seek UNSC intervention, this may also lead to China and Russia vetoing (or threatening to veto) any resolution preventing any UNSC action.

Moreover, China's 'war on terror'⁴⁸⁸ against the Turkic minority Uyghur Muslim population⁴⁸⁹ has also led the international community and academics to suggest that China has failed its responsibility to prevent⁴⁹⁰ and protect its population from mass atrocity crimes specifically: crimes against humanity and genocide.⁴⁹¹

Subsequent to the events of the 9/11, a number of terrorist organisations were recognised as an imminent threat by the UNSC⁴⁹², China⁴⁹³ and the USA⁴⁹⁴ as they were allegedly linked to Al-Qaeda⁴⁹⁵, specifically these were: the Islamic Movement of Uzbekistan⁴⁹⁶ and the East Turkestan Islamic Movement.⁴⁹⁷

[https://www.theguardian.com/world/2020/sep/08/myanmar-soldiers-tell-of-rohingya-killings-
rapes-and-mass-burials](https://www.theguardian.com/world/2020/sep/08/myanmar-soldiers-tell-of-rohingya-killings-rapes-and-mass-burials)> accessed 09/09/2020.

⁴⁸⁸ Joshua Tschantret, 'Repression, Opportunity and Innovation: The Evolution of Terrorism in Xinjiang, China' (2018) 30 (4) *Terrorism and Political Science* 569, 577.

⁴⁸⁹ 'Why Corporations Should Be Held Liable for China's Crimes Against Humanities in Xinjiang: Seeking Civil and Criminal Solutions' (2021) 106 (2) *Iowa L.Rev.* 1007, 1023.

⁴⁹⁰ Alexandra Bohm and Garrett Wallace Brown, 'R2P and Prevention: The International Community and its Role in the Determinants of Mass Atrocity' (2021) 13 (1) *Global Responsibility to Protect* 60, 63.

⁴⁹¹ Rosemary Foot, 'R2P Sidelined: The International Response to China's Repression of Muslim Minorities in Xinjiang' (2021) 13 (1) *Global Responsibility to Protect* 29, 29.

⁴⁹² UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267.

⁴⁹³ Sean R. Roberts, 'The Biopolitics of China's War on Terror and Exclusion of the Uyghurs' (2018) 50 (2) *Critical Asian Studies* 232, 232.

⁴⁹⁴ Executive Order No. 13224 – 'Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit or Support Terrorism' 66 FR 49079 (25 September 2001).

⁴⁹⁵ UNSC Res 1390 (28 January 2002) UN Doc S/RES/1390.

⁴⁹⁶ 'Terrorist Activities Perpetrated by 'Eastern Turkistan' Organizations and Their Links with Osama Bin Laden and the Taliban' (Permanent Mission of the People's Republic of China to the UN, 29 November 2001) <<https://www.fmprc.gov.cn/ce/ceun/eng/zt/fk/t28937.htm>> accessed 02/03/2021.

⁴⁹⁷ Pablo A. Rodriguez, 'Old Counter-Revolution, New Terrorism: Historicizing the Framing of Violence in Xinjiang by the Chinese State' (2019) 38 (1) *Central Asian Survey* 27, 30.

The Chinese government has portrayed that it has had to face a continued Uyghur terrorist threat in the Autonomous Region of Xinjiang⁴⁹⁸ or as the Uighur people prefer to call it 'East Turkestan'.⁴⁹⁹

Since then, multiple levels of state sanctioned violence and repression have become a norm in Xinjiang as tight restrictions on Ramadhan fasting, Mosque attendance and headscarves (*Hijab*) have been imposed threatening both cultural and religious practices.⁵⁰⁰

The importance of ethnic minorities and the protection of their rights⁵⁰¹ from discrimination⁵⁰², discrimination against women⁵⁰³, culture and cultural heritage is enshrined in various international declarations⁵⁰⁴, instruments⁵⁰⁵, treaties⁵⁰⁶ and judicial decisions.⁵⁰⁷ This also includes the protection of cultural property which has also been stressed in international criminal tribunals⁵⁰⁸ such as the ICTY.⁵⁰⁹

⁴⁹⁸ Michael Clarke, 'China's War on Terror in Xinjiang: Human Security and the Causes of Violent Uighur Separatism' (2008) 20 (2) *Terrorism and Political Violence* 271, 271.

⁴⁹⁹ Michael Clarke, 'China and the Uyghurs: The Palestinization of Xinjiang?' (2015) XXII (3) *Middle East Policy* 127, 127.

⁵⁰⁰ Sarah Tynen, 'Dispossession and Displacement of Migrant Workers: The Impact of State Terror and Economic Development in Urban Xinjiang' (2020) 39 (3) *Central Asian Survey* 303, 309.

⁵⁰¹ Noelle Higgins, 'Advancing the Rights of Minorities and Indigenous Peoples: Getting UN Attention Via the Universal Periodic Review' (2014) 32 (4) *Netherlands Quarterly Review of Human Rights* 379, 404.

⁵⁰² International Convention on the Elimination of All Forms of Racial Discrimination [1965] arts 1-2.

⁵⁰³ Convention on the Elimination of All Forms of Discrimination Against Women [1979] arts 1-3.

⁵⁰⁴ Convention for the Safeguarding of the Intangible Cultural Heritage [2003] art 1.

⁵⁰⁵ Convention Concerning the Protection of the World Cultural and Natural Heritage [1972] art 1.

⁵⁰⁶ International Covenant on Economic, Social and Cultural Rights [1966] art 15, International Covenant on Civil and Political Rights [1966] art 27, Universal Declaration of Human Rights [1948] art 27 (1).

⁵⁰⁷ *Lubicon Lake Bland v Canada* (1990) Comm No 167/1984, UN Doc CCPR/C/38/D/167/1984, para 32 (2).

⁵⁰⁸ Mohamed Elewa Badar and Noelle Higgins, 'Discussion Interrupted: The Destruction and Protection of Cultural Property Under International Law and Islamic Law – The Case of Prosecutor v Al-Mahdi' (2017) 17 (3) *International Criminal Law Review* 486, 487.

⁵⁰⁹ *Prosecutor v Kristić* (Trial Chamber Judgement) IT-98-33-T (2 August 2001), *Prosecutor v Kordić and Čerzek* (Appeals Chamber Judgement) IT-95-14/2-A (17 December 2004) para 207, *Prosecutor v Hadžihasanović and Kubura* (Trial Chamber) IT-01-47-T (15 March 2006) paras 57-64 and *Prosecutor v Jadranko Prlić and Others* (Trial Chamber Judgement) IT-04-74-T (29 May 2013) para 172.

However, examples of these abuses and restrictions have involved the Chinese police in the region carrying out extrajudicial killings against protesting Muslims, preventing Muslims from fasting in the holy Islamic month of *Ramadhan*, police forces breaking into Uyghur homes and forcing women to unveil and men to shave their beards.⁵¹⁰

Previously, China has enforced legislative prohibitions on religious ceremonies and divorces prior to the events of 9/11.⁵¹¹ However, China's GWOT strategy of launching a full-scale domestic counter-terrorism campaign⁵¹² has since expanded its repression by introducing legislative regulations in 2017⁵¹³ designed to severely restrict fundamental human rights of Uyghur Muslims.

This has included the prohibition of females wearing face coverings (*Niqab*) in public spaces⁵¹⁴ and men are prohibited from keeping beards.⁵¹⁵ Failure to comply with these regulations attracts criminal charges⁵¹⁶ which is enforced heavily by the Chinese police through its invasively stringent surveillance presence in the region.⁵¹⁷

This has since led to the forcible detention of over 1.5 million Uyghurs in 're-education camps'⁵¹⁸ which have also been state legislated⁵¹⁹ marking Xinjiang to be the 'site of the largest mass repression of an ethnic and/or religious minority today'.⁵²⁰

⁵¹⁰ Joanne Smith Finley, 'The Wang Lixiong Prophecy: Palestinization in Xinjiang and the Consequences of Chinese State Securitization of Religion' (2019) 38 (1) *Central Asian Survey* 81, 93-94.

⁵¹¹ Autonomous Region Additional Regulations on Implementing the Marriage Law 1980 art 9 (6).

⁵¹² Kilic Bugra Kanat, 'War on Terror as a Diversionary Strategy: Personifying Minorities as Terrorists in the People's Republic of China' (2012) 32 (4) *Journal of Muslim Minority Affairs* 507, 509-510.

⁵¹³ Xinjiang Uyghurs Autonomous Region Regulation on De-Radicalization 2017.

⁵¹⁴ Xinjiang Uyghurs Autonomous Region Regulation on De-Radicalization 2017 art 9 (7).

⁵¹⁵ Xinjiang Uyghurs Autonomous Region Regulation on De-Radicalization 2017 art 9 (8).

⁵¹⁶ Xinjiang Uyghurs Autonomous Region Regulation on De-Radicalization 2017 art 48.

⁵¹⁷ Anna Hayes, 'Interwoven Destinies: The Significance of Xinjiang to the China Dream, the Belt and Road Initiative, and the Xi Jinping Legacy' (2020) 29 (121) *Journal of Contemporary China* 31, 40.

⁵¹⁸ Adrian Zenz, 'Securitizing Xinjiang: Police Recruitment, Informal Policing and Ethnic Minority Co-Optation' (2020) 242 *The China Quarterly* 324, 345.

⁵¹⁹ Xinjiang Uyghurs Autonomous Region Regulation on De-Radicalization 2017 art 14.

⁵²⁰ Michael Clarke, 'Settler Colonialism and the Path Toward Cultural Genocide' (2021) 13 (1) *Global Responsibility to Protect* 9, 9.

The approval of mass DNA collection⁵²¹ and incarcerations by senior political figures of the Chinese Communist Party⁵²² including President Xi Jinping has continued to focus on detaining Uyghur intellectuals, academics and artists in an attempt to erase Uyghur ethnic identity by subjecting them to these camps, where individuals are made to endure daily indoctrination, forced labour, torture and rape.⁵²³

In addition, Uyghur Muslims are forcefully fed pork and alcohol⁵²⁴ and women have been systematically forced to take birth control in the form of abortions and sterilisations⁵²⁵ which is considered genocide.⁵²⁶

Children have been deprived their rights⁵²⁷ as Chinese state authorities have forcefully removed them from parents and placed them into 're-education camps', public boarding schools and children's shelters from pre-school to high school ages, promoting 'intergenerational separation', which has been confirmed to be a systematic campaign of cultural genocide⁵²⁸ and also considered to be actual genocide under the UN Genocide Convention.⁵²⁹

However, the office of the ICC prosecutor published a preliminary examination report in 2020, which confirmed that it had '[n]o basis to proceed'⁵³⁰ due to lack of evidence pertaining to Chinese officials commissioning such crimes and having no jurisdiction over China.⁵³¹

⁵²¹ Barbara Kelemen and Richard Q. Turcsanyi, 'It's the Politics, Stupid: China's Relations with Muslim Countries on the Background of Xinjiang Crackdown' (2020) 21 (2) *Asian Ethnicity* 223, 226.

⁵²² Timothy A. Grose, 'If You Don't Know How, Just Learn: Chinese Housing and the Transformation of Uyghur Domestic Space' (2020) *Ethnic and Racial Studies* 1, 7.

⁵²³ Ali Caksu, 'Islamophobia, Chinese Style: Total Internment of Uyghur Muslims by the People's Republic of China' (2020) 5 (2) *Islamophobia Studies* 175, 177-181.

⁵²⁴ Y.N. Tang, 'The Choice of Oppressor' (2019) 20 *Yale Human Rights and Development Journal* 27, 27.

⁵²⁵ Cecilia Jacob, Adran Gallagher and Charles T. Hunt, 'Pursuing Accountability for the Uighur and Muslim Minorities in China' (2021) 13 (1) *Global Responsibility to Protect* 5, 6.

⁵²⁶ Convention on the Prevention and Punishment of the Crime of Genocide [1948] art 2 (d).

⁵²⁷ Convention on the Rights of the Child [1989] arts 1-4.

⁵²⁸ Ciara Finnegan, 'The Uyghur Minority in China: A Case Study of Cultural Genocide, Minority Rights and the Insufficiency of the International Legal Framework in Preventing State-Imposed Extinction' (2020) 9 (1) *Laws* 1, 11-12.

⁵²⁹ Convention on the Prevention and Punishment of the Crime of Genocide [1948] art 2 (e).

⁵³⁰ 'Report on Preliminary Examination Activities 2020' (*International Criminal Court: The Office of the Prosecutor*, 14 December 2020) <<https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>> (10 March 2021) para 76.

⁵³¹ *ibid.*

Although, a recent report published in 2021, after an expert independent investigation was conducted in Xinjiang by the Newlines Institute for Strategy and Policy, obtained and presented evidence confirming Chinese authorities have in fact committed: ‘genocide against the Uyghurs in breach of each and every act prohibited in Article II (a) through (e)’⁵³² of the UN Genocide Convention.

Despite the findings of this report, any subsequent draft resolution calling China to be held accountable and refer the situation to the ICC, would most likely foreclose any UNSC intervention because of the veto privilege it possesses.⁵³³

This is despite the apparent acts of Chinese nationals including politicians sanctioning the IL prohibited acts of torture⁵³⁴, genocide⁵³⁵ and crimes against humanity⁵³⁶ which is also in violation of the underpinning IL norm of *Jus Cogens*.⁵³⁷

Furthermore, the threat of veto by China and Russia has become an effective strategy from preventing the UNSC from intervening in humanitarian crises. Notably, the 1998-1999 Kosovo war between Kosovar-Albanians (Kosovo Liberation Army) and Serbian forces, saw escalated levels of violence by Serbian forces sporadically attacking villages and Albanians.⁵³⁸

The UNSC in response sought to impose an arms embargo on Yugoslavia in respect of Kosovo, however, Russia and China had consistently made it clear

⁵³² Azeem Ibrahim, ‘The Uyghur Genocide: An Examination of China’s Breaches of the 1948 Genocide Convention’ (*Newlines Institute for Strategy and Policy*, 8 March 2021) <<https://3y4moi335jqc3hdi6ss66vpc-wpengine.netdna-ssl.com/wp-content/uploads/Chinas-Breaches-of-the-GC.pdf>> accessed 10 March 2021, 4-5.

⁵³³ Andrew Garwood-Gowers, ‘China and the Uyghurs: Options for Legal Accountability’ (2021) 13 (1) *Global Responsibility to Protect* 24, 25.

⁵³⁴ Convention Against Torture and Other Cruel Inhuman or Degrading Treatment and Punishment [1987] art 1 and art 2.

⁵³⁵ Rome Statute of the International Criminal Court [1998] art 6.

⁵³⁶ Rome Statute of the International Criminal Court [1998] art 7.

⁵³⁷ Sophie Ryan, ‘Atrocity Crimes in Xinjiang: Moving Beyond Legal Labels’ (2021) 13 (1) *Global Responsibility to Protect* 20, 21.

⁵³⁸ Sylvie Gangloff, ‘Turkish Policy Towards the Conflict in Kosovo: The Pre-eminence of National Political Interests’ (2004) 1 (1) *Balkanologie* 105, 105.

that they would veto any proposal for military action against Yugoslavia regarding its conduct in its own territory.⁵³⁹

This led the North Atlantic Treaty Organisation (NATO) including the UK, USA and other allied states in 1999 commencing Operation Allied Force⁵⁴⁰ which has been deemed to be illegal in the absence of a UNSC resolution authorising the use of force in Kosovo.⁵⁴¹

In addition, Russia has abused its permanent membership to commit the international crime of aggression⁵⁴² most notably in August 2008, when Georgian forces launched a military operation in South Ossetia (former territory of Georgia), which prompted Russian military forces to pour south across the Russian border into Georgian territory, which has come to be known as 'Russia's 9/11'.⁵⁴³

Russia was in clear breach of IL by infringing Georgia's territorial integrity and sovereignty which is prohibited against the UN Charter⁵⁴⁴ and interpose in the Georgian-Abkhaz conflict without explicit authorisation from the UNSC.

In response to Russia's invasion, France drafted a resolution which requested immediate withdrawal of Russian troops, which was never put to vote as it was likely it would provoke a Russian veto.⁵⁴⁵

In 2009, following a veto of a draft resolution⁵⁴⁶ which called for a two-week extension for the United Nations Observer Mission in Georgia (UNOMIG) tasked for maintaining the ceasefire of the Georgia-Abkhaz conflict over a

⁵³⁹ Adam Roberts, 'NATO's Humanitarian War Over Kosovo' (1999) 41 (3) *Survival* 102, 104.

⁵⁴⁰ Ralph R. Steinke, 'A Look Back at NATO'S 1999 Kosovo Campaign: A Questionably Legal but Justifiable Exception?' (2015) 14 (4) *Connections* 43, 43.

⁵⁴¹ Mary Ellen O'Connell, 'The UN, NATO and International Law After Kosovo' (2000) 22 (1) *Hum.Rts.Q.* 57, 57.

⁵⁴² Rome Statute of the International Criminal Court [1998].

⁵⁴³ Roy Allison, 'Russia Resurgent? Moscow's Campaign to Coerce Georgia To Peace' (2008) 84 (6) *International Affairs* 1145, 1145.

⁵⁴⁴ Charter of the United Nations [1945] art 2 (4).

⁵⁴⁵ Patrick Worsnip, 'Russia Blocks UN Security Council Draft on Georgia' (*Reuters*, 20 August 2008) <<https://www.reuters.com/article/us-georgia-ossetia-un/russia-blocks-u-n-security-council-draft-on-georgia-idUSN1933481820080820>> accessed 02 September 2019.

⁵⁴⁶ UNSC Draft Res 310 (14 June 2009) UN Doc S/2009/310.

course of 16 years to establish a new security regime in the region⁵⁴⁷ is another example of the UNSC's ability to maintain peace and security being undermined.

Similarly, in 2014 Russia's annexation of Crimea (Ukraine) demonstrated another act of aggression infringing Ukraine's territorial integrity and sovereignty, with no justification for using force which has led to significant death tolls, estimating over 9,000 people being killed, with an estimated 20,000 wounded in the conflict.⁵⁴⁸

The ensuing hostilities following Russian military intervention has led an estimated 600,000 Ukrainian refugees escaping to Russia for safe haven with approximately 1.4 million people being internally displaced within Ukraine.⁵⁴⁹ In response to Russia's illegal conduct, the UNGA adopted resolution 68/262 urging Russia to refrain from using force to disrupt Ukraine's borders.⁵⁵⁰

However, a UNSC draft resolution⁵⁵¹ which recalled member states (Russia) to refrain from use of force against Ukraine's territorial integrity and declared the international community not to recognise any alteration of Crimea was also vetoed by Russia.⁵⁵²

Russia's illegal and criminal conduct in Ukraine has since continued. This has since led to the horrific incident in 2014, where a civilian aircraft bound for Malaysia (Malaysian Aircraft MH17) was flying over Eastern Ukraine⁵⁵³ and

⁵⁴⁷ 'Security Council Fails to Adopt Resolution Extending Mandate of Georgia Mission for 2 Weeks, As Russian Federation Votes Against Text' (*United Nations*, 15 June 2009) <<https://www.un.org/press/en/2009/sc9681.doc.htm>> accessed 02 September 2019.

⁵⁴⁸ 'Ukraine: Events of 2015' (*Human Rights Watch*, 1 May 2016) <<https://www.hrw.org/world-report/2016/country-chapters/ukraine>> accessed 02 September 2019.

⁵⁴⁹ *ibid.*

⁵⁵⁰ UNGA Res 68/262 (27 March 2014) UN Doc A/Res/68/262.

⁵⁵¹ UNSC Draft Res 189 (15 March 2014) UN Doc S/2014/189.

⁵⁵² *ibid* para 5.

⁵⁵³ Michael Ramsden, 'Uniting for MH17' (2017) 7 (2) *Asian Journal of International Law* 337, 337.

was shot down by Russian and Pro-Russian forces which killed 298 civilians.⁵⁵⁴

In response, a resolution⁵⁵⁵ was drafted demanding technical and criminal investigations to take place⁵⁵⁶ and establish a criminal tribunal to prosecute individuals responsible for the downing of MH17⁵⁵⁷ which was also vetoed by Russia.

However, the UNSC's previous authorisation of a 'Joint Investigation Team' (JIT) to investigate the downing of MH17 in 2014⁵⁵⁸ has found sufficient evidence holding Russia responsible.⁵⁵⁹ The European Court of Human Rights (ECtHR) have communicated⁵⁶⁰ the human rights breaches which have been committed by Russia for failing to partake or co-operate in the investigation.⁵⁶¹

Although the suspects are not in Dutch custody, as of 2020, this has since led to the commencement of the MH17 murder trial in the Netherlands, initially to try one Ukrainian and three Russian suspects in absentia accused of downing the aircraft.⁵⁶² The Netherlands have also launched interstate proceedings with the ECtHR against Russia to present further evidence of human rights breaches.⁵⁶³

Similarly, in 2015, a draft resolution by the UK urging states to co-operate with the ICTY and other judicial mechanisms effort to investigate and prosecute all the individuals responsible in the genocide of the Srebrenica massacre and

⁵⁵⁴ Luke Harding, 'Three Russians and One Ukrainian To Face MH17 Murder Charges' *The Guardian* (London, 19 June 2019) <<https://www.theguardian.com/world/2019/jun/19/mh17-criminal-charges-ukraine-russia>> accessed 02 September 2019.

⁵⁵⁵ UNSC Draft Res 562 (29 July 2015) UN Doc S/2015/562.

⁵⁵⁶ *ibid* para 5.

⁵⁵⁷ n 555 para 6.

⁵⁵⁸ UNSC Res 2166 (21 July 2014) UN Doc S/RES/2014.

⁵⁵⁹ 'The Criminal Investigation by the Joint Investigation Team (JIT)' (*Netherlands Public Prosecution Service*, 03 February 2021) < <https://www.prosecutionservice.nl/topics/mh17-plane-crash/criminal-investigation-jit-mh17>> accessed 03 February 2021.

⁵⁶⁰ *Ayley and Others v Russia* App no 25714/16 and 56328/18 (ECHR, 03 April 2019).

⁵⁶¹ *ibid* paras 56 – 57.

⁵⁶² 'MH17 Summary of the Day in Court; 9 March 2020' (*De Rechtspraak*, 09 March 2020) <<https://www.courtmh17.com/en/news/2020/mh17-summary-of-the-day-in-court-9-march-2020.html>> accessed 03/02/2021.

⁵⁶³ *Ukraine and the Netherlands v Russia* App nos 8019/16, 43800/14, 28525/20 (ECHR, 27 November 2020).

breaching IHL during the Bosnia and Herzegovina conflict, was also vetoed by Russia.⁵⁶⁴

In 2019, the political crisis and the ongoing power struggle in Venezuela between President Nicolas Maduro successor of the late Hugo Chavez and opposition leader Juan Guaido declaring himself as the interim president of Venezuela⁵⁶⁵ has caused much tension between P5 members of the UNSC. The USA has continued to support Guaido, whilst Russia and China continued to show support for Maduro.⁵⁶⁶

The USA drafted a resolution which sought to address the humanitarian crisis in Venezuela⁵⁶⁷ and urged the start of new and credible presidential elections⁵⁶⁸ which was vetoed by both China and Russia.

Moreover, the UK and the USA have historically vetoed draft resolutions relating to South Africa, which condemned the Apartheid regimes attacks against other African states⁵⁶⁹, imposing economic sanctions for blatant racism, human rights violations⁵⁷⁰ and the deterioration of South Africa.⁵⁷¹

The USA has invoked its veto on many occasions often to protect Israel in its continuing hostilities with Palestine. The USA throughout its time in the UNSC has vetoed 80 resolutions, 14 of which were regarding Israel building illegal settlements in Palestinian occupied lands⁵⁷² which was most recently vetoed by the USA in 2011.⁵⁷³

⁵⁶⁴ UNSC Res 508 (8 July 2015) UN Doc S/2015/508.

⁵⁶⁵ Ruby Mellen, 'What's Going on In Venezuela?' *Washington Post* (Washington, 25 February 2019) <<https://www.washingtonpost.com/world/2019/02/25/venezuelas-political-crisis-is-getting-worse-heres-what-you-need-know/>> accessed 02 September 2019.

⁵⁶⁶ Andrew Roth, Lily Kuo, David Agren, Ed Augustin and Peter Walker, 'Russia and Key Allies Vow to Stand by Maduro In Venezuela Crisis' *The Guardian* (London, 24th January 2019) <<https://www.theguardian.com/world/2019/jan/24/juan-guaido-venezuelas-opposition-leader-declares-himself-interim-president>> accessed 02 September 2019.

⁵⁶⁷ UNSC Draft Res 186 (28 February 2019) UN Doc S/2019/186, para 5.

⁵⁶⁸ *Ibid* para 2.

⁵⁶⁹ UNSC Draft Res 18163 (17 June 1986) UN Doc S/18163.

⁵⁷⁰ UNSC Draft Res 18705 (19 February 1987) UN Doc S/18705.

⁵⁷¹ UNSC Draft Res 19585 (7 March 1988) UN Doc S/19585.

⁵⁷² Noha El-Tawil, 'United States History of Veto at UN Security Council' (*Egypt Today*, 19 December 2017) <<https://www.egypttoday.com/Article/2/37501/United-States-history-of-veto-at-U-N-Security-Council>> accessed 03 September 2019.

⁵⁷³ UNSC Draft Res 24 (18 February 2011) UN Doc S/2011/ 24.

Since 2002, the USA's practice of protecting Israel from critical draft resolutions has come to be known as the 'Negroponte Doctrine'⁵⁷⁴ named after Ambassador John D. Negroponte, the former USA permanent representative to the UN, asserting Israel be given equal treatment in the UNSC or the USA will use its ability to veto unbalanced resolutions.⁵⁷⁵

The USA has vetoed many draft resolutions to prevent the Israeli government and individuals in the Israeli Defense Force (IDF) being accountable for violations of IHL in pursuit of its GWOT against the military wing of the Palestinian political group Hamas, which Israel⁵⁷⁶ and the USA consider to be a terrorist organisation.⁵⁷⁷

This has involved the deliberate destruction of a world food programme warehouse in Beit Lahiya in the occupied Palestinian territory in 2002⁵⁷⁸, the Israeli killing of six Palestinian civilians⁵⁷⁹ and numerous UNSC resolution demanding the IDF cease military operations in 2004⁵⁸⁰, 2006⁵⁸¹ and 2009⁵⁸² in an attempt to respond to the dire humanitarian situation in Gaza.

The most recent example of the IDF violating IHL and IHRL is observed in 2018, after 'disproportionate and indiscriminate use of force'⁵⁸³ was used killing 16 Palestinians and hundreds more civilians being wounded in Gaza, during a planned six-week demonstration demanding the right for Palestinian refugees to be returned from Israeli custody.⁵⁸⁴

⁵⁷⁴ Billy Ray Wilson, *Republic Lost: Zionists Destroy the Union* (1st edn, Author House 2011) 234.

⁵⁷⁵ Justine S Gruenberg, 'An Analysis of United Nations Security Council Resolutions: Are all Countries Treated Equally?' (2009) 41 (2) *Case W.Res.J.Int'l L.* 469, 508-509.

⁵⁷⁶ Or Honig and Ido Yahel, 'Entity-Elimination or Threat Management? Explaining Israel's Shifting Policies Towards Terrorist Semi-States' (2020) 32 (5) *Terrorism and Political Science* 901, 903.

⁵⁷⁷ Corinna Mullin, 'Islamist Challenges to the Liberal Peace Discourse: The Case of Hamas and the Israel-Palestine Peace Process' (2010) 39 (2) *Millennium: Journal of International Studies* 525, 530

⁵⁷⁸ UNSC Draft Res 1385 (19 December 2002) UN Doc S/2002/1385

⁵⁷⁹ UNSC Draft Res 240 (24 March 2004) UN Doc S/2004/240.

⁵⁸⁰ UNSC Draft Res 783 (5 October 2004) UN Doc S/2004/783.

⁵⁸¹ UNSC Draft Res 878(10 November 2006) UN Doc S/2006/878.

⁵⁸² UNSC Draft Res 11 (7 January 2009) UN Doc S/2009/11

⁵⁸³ UNHRC Res S-28/1 (22 May 2018) UN Doc A/HRC/RES/S-28/1.

⁵⁸⁴ Hazem Bolousha and Oliver Holmes, 'Palestinians Say Over A Dozen Killed in Gaza Border Protest' *The Guardian* (London, 31 March 2018)

In response to this Kuwait drafted a resolution⁵⁸⁵ deploring the excessive, disproportionate and indiscriminate force used by the IDF against Palestinian civilians⁵⁸⁶ and urged Israeli forces to allow previously obstructed humanitarian access, was also vetoed by the USA.⁵⁸⁷

In addition, the USA has used its veto privilege in support of Israel in circumstances other than its illegal conduct in counter-terrorism operations against Hamas. In 2017, President Donald Trump formally recognised Jerusalem as the capital of Israel.⁵⁸⁸ This has since led the USA moving its diplomatic embassy from Tel Aviv to Jerusalem⁵⁸⁹ in accordance with the USA's previously enacted legislation.⁵⁹⁰

In 2018, the USA vetoed a draft resolution by Egypt which concerned the inadmissibility of acquiring territory by force by calling upon states to refrain from the establishment of diplomatic missions in the holy city of Jerusalem.⁵⁹¹ Both Russia and Israel's territorial acquisition by military force is prohibited and condemned under the Geneva Convention.⁵⁹²

2.2.4 The Veto Privilege and its Legality in Accordance with the Peremptory Norm of *Jus Cogens*

The above examples of China, Russia, USA and the UK, historically invoking their right to veto has served as an effective mechanism serving their own ambitions and also providing political support for their allies by protecting them

<<https://www.theguardian.com/world/2018/mar/30/palestinians-march-to-gaza-border-for-start-of-six-week-protest-israel>> accessed 03 September 2019.

⁵⁸⁵ UNSC Draft Res 516 (1 June 2018) UN Doc S/2018/516.

⁵⁸⁶ *ibid* para 2

⁵⁸⁷ n 585 paras 8, 10 and 11.

⁵⁸⁸ Oliver Holmes, 'Jerusalem Gives Thanks to Trump by Naming A Roundabout In His Honour' *The Guardian* (London, 8 May 2018) <<https://www.theguardian.com/world/2018/may/08/israel-trump-jerusalem-embassy-roundabout-thanks-mayor>> accessed 03 September 2019.

⁵⁸⁹ Moran Yarchi and Ami Ayalon, 'Fighting Over the Image: The Israeli-Palestinian Conflict in the Gaza Strip 18-19' (2020) *Studies in Conflict and Terrorism* 1, 7.

⁵⁹⁰ Jerusalem Embassy Act 1995 s 3 and s 7.

⁵⁹¹ UNSC Draft Res 1060 (1 June 2018) UN Doc S/2017/1060.

⁵⁹² Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 49

from any scrutiny and accountability for their apparent violations of IL, IHL, IHRL and CIL which has been successful in promoting a culture of impunity.

Thus, the legality of veto privilege granted by article 27 of the UN Charter⁵⁹³ further questions the legality of this privilege and whether it is compatible with the IL peremptory norm of '*Jus Cogens*'.

The principle of *Jus Cogens* is a part of IL that is obligatory, non-derogable which prevails over any other inconsistent legal obligations⁵⁹⁴ which is deemed to be hierarchically superior to all other norms of general IL.⁵⁹⁵

It is widely accepted that the entire body of human rights norms are norms of *Jus Cogens*⁵⁹⁶ which include the prohibition of: 'slavery, torture, genocide, murder, cruel inhuman and degrading treatment or punishment and systematic racial discrimination with quasi-constitutional status *vis-a-vis* ordinary conventional and customary norms'.⁵⁹⁷

This commits every state to be bound by the *Jus Cogens* norm, whilst reflecting the commitment of the international community to protect against the very worst human rights atrocities, its breach affronts every state and triggers universal jurisdiction.⁵⁹⁸

The importance of *Jus Cogens* has been argued to unconditionally bind the UNSC and require member states to respect its core values which are not derogable or waivable and is applicable when passing resolutions.⁵⁹⁹

⁵⁹³ Charter of the United Nations [1945] art 27.

⁵⁹⁴ Jens David Ohlin, 'In Praise of Jus Cogens Conceptual Incoherence' (2018) 63 (4) McGill L.J. 3, 3

⁵⁹⁵ Kamrul Hossain, 'The Concept of Jus Cogens and the Obligation Under the UN Charter' (2005) 3 (1) Santa Clara Journal of International Law 72, 73.

⁵⁹⁶ Anthony D'Amato, 'It's A Bird, It's a Plane, Its Jus Cogens!' (2010) 6 (1) Connecticut Journal of International Law 1, 1

⁵⁹⁷ Evan J Criddle and Evan Fox-Decent, 'A Fiduciary Theory of Jus Cogens' (2009) 34 (2) Yale J.Int'l L. 331, 331- 332.

⁵⁹⁸ Ursula Tracy Doyle, 'The Cost of Territoriality: Jus Cogens Claims Against Corporations' (2018) 50 (1) Case W.Res.J.Int'l L. 225, 228.

⁵⁹⁹ Alexander Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 (1) EJIL 59, 63

This also means the prohibition of use of force is undeniably peremptory and places a limitation on the powers of the UNSC, meaning that it is not free to disregard the basic prohibition of the use of force. The use of force is legal as soon as it is authorised, in compliance with the principle of proportionality; it is illegal unless it is so authorised and authorisation cannot be presumed unless there is an explicit intention of the UNSC.⁶⁰⁰

A state's sovereignty can only be infringed, if use of force has been explicitly authorised by the UNSC if not, this violates *Jus Cogens* but also general IL.⁶⁰¹ Thus, article 27 of the UN Charter⁶⁰² and the veto privilege it confers upon the P5 is in direct contravention of the peremptory norm of *Jus Cogens*⁶⁰³ but it is also rendered void as per article 53 of the VCLT.⁶⁰⁴

2.3 The International Criminal Court

This segment of the legal framework will critique the role of the ICC highlighting the strengths and weaknesses of the court in order to assess the court's ability to effectively detain, indict and prosecute individuals for international crimes.

The findings of the ICC in this segment of the legal framework will also be advanced throughout the subsequent chapters of the thesis, identifying that the court possesses great difficulty in enforcing arrest warrants which has adversely affected the reputation of the court⁶⁰⁵ whilst undermining its ability to administer international criminal justice.⁶⁰⁶

The legal framework will also highlight the ICC's continued focus and interest in prosecuting individuals including political heads of states in the African

⁶⁰⁰ *ibid* 64.

⁶⁰¹ Orakhelashvili (n 599) 64.

⁶⁰² Charter of the United Nations [1945] art 27.

⁶⁰³ Jennifer Trahan, 'Questioning Unlimited Veto Use in the Face of Mass Atrocity Crimes' (2020) 52 (1) *Case.W.Res.J.Int'l L.* 73, 93-95.

⁶⁰⁴ Vienna Convention on the Law of Treaties [1969] art 53.

⁶⁰⁵ Dapo Akande, 'Symposium on the Rome Statute at Twenty, the Immunity of Heads of States of Non-Parties in the Early Years of the ICC' (2018) 112 *AJIL Unbound* 172, 172.

⁶⁰⁶ Thomas Obel Hansen, 'Opportunities and Challenges Seeking Accountability for War Crimes in Palestine Under the International Criminal Court's Complementarity Regime' (2019) 9 (2) *Notre Dame Journal of International and Comparative Law* 1, 30.

continent and its inability to prosecute individuals from more powerful states, particularly, western states.

The shortcomings of both the UNSC and the ICC as demonstrated in this chapter will guide the thesis' objective to introduce a new configuration and structure to improve the efficiency of both of these international organisations.

2.3.1 The ICC, Enforcement, Complementarity and Its Controversial Relationship with Africa

The objective of the ICC is to put an end to impunity and the perpetrators of serious international crimes and to contribute to the prevention of such crimes.⁶⁰⁷

The ICC can prosecute any individual anywhere in the world, but for suspected criminals who are nationals of a state which has not ratified the Rome Statute of the international Criminal Court (Rome Statute)⁶⁰⁸, a UNSC resolution is necessary to grant the ICC jurisdiction to investigate crimes.⁶⁰⁹

The Rome Statute enables the ICC to investigate and prosecute individuals for the most serious of international crimes, specifically the crimes of: genocide, crimes against humanity, war crimes and the crime of aggression.⁶¹⁰

The Rome Statute established the ICC and was held to be a 'constitutional monument'⁶¹¹, receiving praises for being a revolutionary institution representing a significant building block in the construction of a truly international legal community.⁶¹²

⁶⁰⁷ Natalie Knyeswood, 'Limits of Law in Ending Impunity for State Crime: Time to Re-Frame the International Criminal Court's Mandate' (2019) 8 (2) State Crime Journal 219, 220.

⁶⁰⁸ Catherine Gegout, 'The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace' (2013) 34 (5) Third World Quarterly 800, 800.

⁶⁰⁹ Rome Statute of the International Criminal Court [1998] art 13 (b).

⁶¹⁰ Rome Statute of the International Criminal Court [1998] art 5.

⁶¹¹ Jason Ralph, 'International Society, The International Criminal Court and American Foreign Policy' (2005) 31 (1) Review of International Studies 27, 27.

⁶¹² Anthony Cassese, 'The Statute of the International Criminal Court': Some Preliminary Reflections' (1999) 10 (1) EJIL 144, 145.

However, proposals of creating a permanent international criminal tribunal have been advanced since the end of World War I (WWI)⁶¹³ after the allied powers (USA, UK, France and Italy)⁶¹⁴ defeated the central powers (Germany, Austria-Hungary, Turkey and Bulgaria).⁶¹⁵ The Treaty of Versailles⁶¹⁶ sought to create a 'special tribunal' to try the former German *Kaiser* (emperor) William II⁶¹⁷ and other persons accused of having committed violations of the laws and customs of war.⁶¹⁸

Although, this led to the 'Leipzig Trials', this is considered to be the prologue to ICL and the Nuremberg Tribunals⁶¹⁹ which were created after WWII as mentioned earlier in the thesis.⁶²⁰ After the establishment of the UNSC, the International Law Commission⁶²¹ had repeatedly⁶²² along with the UNGA⁶²³ endorsed the creation of the ICC, which ultimately led state delegates assembling in Rome to draft the Rome Statute.⁶²⁴

The conference recognised the involvement of member states, intergovernmental organisations⁶²⁵ and specialised bodies⁶²⁶ to develop the

⁶¹³ William A. Schabas, 'International War Crimes Tribunals and the United States' (2011) 35 (5) *Diplomatic History* 769, 769.

⁶¹⁴ Paul M. Kennedy, 'The First World War and the International Power System' (1984) 9 (1) *International Security* 7, 20-21.

⁶¹⁵ T.S. Woolsey, 'The Relations Between the United States and the Central Powers' (1917) 11 (3) *AJIL* 628, 628.

⁶¹⁶ Treaty of Versailles [1919] art 227-230.

⁶¹⁷ Leila Sadat Wexler, 'The Proposed Permanent International Criminal Court: An Appraisal' (1996) 29 (3) *Cornell Int'l L.J.* 665, 670.

⁶¹⁸ Howard S. Levie, 'The History and Status of the International Criminal Court' (2000) 75 (1) *International Law Studies* 247, 249.

⁶¹⁹ Claus Cress, 'Versailles-Nuremberg-The Hague Germany and International Criminal Law' (2006) 40 (1) *The International Lawyer* 15, 16.

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⁶²¹ ILC, 'Report of the International Law Commission on the Work of its Thirty-Fifth Session' (3 May-22 July 1983) UN Doc A/38/10, s 69 (c) (i).

⁶²² ILC, 'Report on the International Law Commission on the Work of its Thirty-Eighth Session' (5 May-July 1986) UN Doc A/41/10, s 185.

⁶²³ UNGA Res 51/207 (16 January 1997) UN Doc A/RES/51/207.

⁶²⁴ 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) (14 April 1998) UN Doc A/CONF.183/2/Add.1, Preamble.

⁶²⁵ 'Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole' United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) UN Doc A/CONF.183/13 (vol II) 3-47.

⁶²⁶ UNGA Res 52/160 (28 January 1998) UN Doc A/RES/52/160.

procedural⁶²⁷, administrative and interpretative characteristics of the court⁶²⁸, which was subsequently approved after securing a two-third majority vote.⁶²⁹

Hence, the establishment of the ICC as a permanent court⁶³⁰ was regarded as a 'giant step forward in the march to universal human rights and the rule of law'.⁶³¹ As it wove together several specialised bodies of law including: ICL, IHL, IHRL and the law of the UN.⁶³²

The court's purpose to punish individuals bearing the greatest responsibility for serious crimes against humankind was initially perceived to have drastically changed the paradigm of international criminal justice in a positive manner, due to the overwhelming support of the international community increasingly calling for individual accountability by way of criminal prosecution of those who ordered and committed serious violations of IHRL and IHL.⁶³³

This 'new, independent, effective and fair court'⁶³⁴, sought to replace a culture of impunity for the commission of very serious crimes⁶³⁵ by forming: 'The blueprint for an international criminal justice system, representing the culmination of a process that began when the UN first considered the establishment of an international criminal jurisdiction'.⁶³⁶

⁶²⁷ 'Summary Record of the 2nd Plenary Meeting' United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (15 June-17 July 1998) (20 November 1998) UN Doc A/CONF.183/SR.2, s 1 and s 2.

⁶²⁸ 'Summary Record of the 6th Plenary Meeting' United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (15 June-17 July 1998) (19 June 1998) UN Doc A/CONF.183/SR.6, s 1.

⁶²⁹ 'Summary Record of the 9th Plenary Meeting' United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (15 June-17 June 1998) (25 January 1999) UN Doc A/CONF.183/SR.9, s 8, s 9 and s 10.

⁶³⁰ Patricia M. Wald, 'International Criminal Court's: Some Kudos and Concerns' (2006) 150 (2) Proceedings of the American Philosophical Society 241, 241.

⁶³¹ K.C. Joshi, 'The International Criminal Court – A Hope Against Hope?' (2003) 45 (2) Journal of the Indian Law Institute 239, 239.

⁶³² William A. Schabas, The Dynamics of the Rome Conference in Margaret M. DeGuzman and Valerie Oosterveld (eds), *The Elgar Companion to the International Criminal Court* (Edward Elgar Publishing 2020) 3.

⁶³³ Charles Majinge, 'The International Criminal Court and the Question of Alternative Justice System in Africa: A Case of Be Careful of What You Wish For?' (2009) 42 (2) Law and Politics in Africa, Asia and Latin America 151, 151.

⁶³⁴ Jelena Pejic, 'The international Criminal Court Statute: An Appraisal of the Rome Package' (2000) 34 (1) Int'l Law 65, 65.

⁶³⁵ Phillipe Kirsch, 'The International Criminal Court: Current Issues and Perspectives; (2001) 64 (1) LCP 3, 3.

⁶³⁶ Payam Akhavan, 'Review: The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability' (2003) 97 (3) AJIL 712, 712.

To this effect, the ICC was seen as a decisive and necessary step forward for the enforcement of IL and the protection of human rights, whilst being described as: 'the missing link in the international system, designed to pierce the national shield of impunity, wherever it is erected to protect perpetrators by identifying the individuals responsible and hold them personally to account'.⁶³⁷

The potential of the ICC having worldwide jurisdiction was considered to be 'enormous'⁶³⁸, operating efficiently, effectively and appropriately within a global system in harmony with the UNSC's mandate to maintain international peace and security.⁶³⁹

Initially, the ICC represented a quantum-leap in the enforcement of ICL and a monumental response to the most serious international crimes of concern to the international community by ending impunity ensuring that cases are tried even when states are unwilling or unable to do so themselves.⁶⁴⁰

However, the ICC has also succumbed to much reproof and opprobrium as the limitations and shortcomings of the court have been demonstrated in the exiguous number of prosecutions throughout the past two decades of the court's existence.⁶⁴¹

Appel shares this animadversion, positing this is attributed to the ICC's incapability to enforce arrest warrants as the court does not have its own police and relies mainly on party states and third-party co-operation to comply with ICC requests, all of which have contributed to the current culture of impunity.⁶⁴²

⁶³⁷ Helen Duffy, 'Toward Eradicating Impunity: The Establishment of an International Criminal Court' (1999) 26 (4) *Social Justice* 115, 115.

⁶³⁸ *ibid.*

⁶³⁹ David J. Scheffer, 'The United States and the International Criminal Court' (1999) 93 (1) *AJIL* 12, 12.

⁶⁴⁰ Thomas Hethe Clark, 'The Prosecutor of the International Criminal Court, Amnesties and the Interests of Justice: Striking A Delicate Balance' (2005) 4 (2) *Wash. U. Global Stud. L.Rev.* 389, 389.

⁶⁴¹ Henrietta Mensa-Bonsu, 'The ICC, International Criminal Justice and International Politics' (2015) 40 (2) *African Development Review* 33, 34.

⁶⁴² Benjamin J. Appel, 'In the Shadow of the international Criminal Court: Does the ICC Deter Human Rights Violations?' (2018) 62 (1) *Journal of Conflict Resolution* 3, 6.

The author concurs with this reasoning, as the ICC's impotence to enforce arrest warrants⁶⁴³ and its reliance on state cooperation⁶⁴⁴ has often presented a great challenge for the court in prosecuting individuals⁶⁴⁵ as numerous⁶⁴⁶ suspects⁶⁴⁷ still remain at large⁶⁴⁸ after many years.⁶⁴⁹

For example, Sudan's refusal to co-operate and enforce ICC arrest warrants against individuals in the aftermath of the 'Darfur Genocide' between 2003-2008, resulted in an estimated 200,000 – 400,000 civilian deaths, with two to three million people being involuntarily displaced because of the hostilities which ensued between the *Janjaweed* militia and the Sudanese People's Army.⁶⁵⁰

At present, the leader of the *Janjaweed* militia Ali Muhammad Ali Abd-Al-Rahman has since voluntarily surrendered himself into ICC custody⁶⁵¹, after the ICC issued a second warrant for his arrest in 2020⁶⁵², some 13 years after his first arrest warrant being issued.⁶⁵³

However, no other individual from Sudan at present has been surrendered into ICC custody, namely: the former Sudanese interior minister Ahmad

⁶⁴³ Rome Statute of the International Criminal Court [1998] art 57 (3).

⁶⁴⁴ Rome Statute of the International Criminal Court [1998] art 87.

⁶⁴⁵ *Prosecutor v Paul Gucheru and Phillip Kipkoeh Bett* (Pre-Trial Chamber II) ICC-01/09-01/15 (10 March 2015).

⁶⁴⁶ *Prosecutor v Walter Osapiri Barasa* (Pre-Trial Chamber II) ICC-01/09-01/13 (2 August 2013), *Prosecutor v Sylvestre Madacumura* (Pre-Trial Chamber II) ICC-01/04-01/12 (13 July 2012).

⁶⁴⁷ *Prosecutor v Paul Gucheru and Phillip Kipkoeh Bett* (Pre-Trial Chamber II) ICC-01/09-01/15 (10 September 2015).

⁶⁴⁸ *Prosecutor v Joseph Kony and Vincent Otti* (Pre-Trial Chamber II) ICC-02/04-01/05-56-tAC (8 July 2005).

⁶⁴⁹ *Prosecutor v Joseph Kony and Vincent Otti* (Pre-Trial Chamber II) ICC-02/04-01/05-53 (28 September 2005).

⁶⁵⁰ John Hagan and Joshua Kaiser, 'The Displaced and Dispossessed of Darfur: Explaining the Sources of a Continuing State Led Genocide' (2011) 62 (1) *British Journal of Sociology* 1, 1-2.

⁶⁵¹ 'Ali Muhammad Ali Abd-Al-Rahman' (*International Criminal Court*) <<https://www.icc-cpi.int/darfur/abd-al-rahman>>accessed 24 March 2021.

⁶⁵² *Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* (Pre-Trial Chamber II) ICC-02/05-01/07 (16 January 2018).

⁶⁵³ *Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* (Pre-Trial Chamber I) ICC-02/05-01/07 (27 April 2007).

Muhammad Harun⁶⁵⁴ and the current national defence minister Abdel Raheem Muhammad Hussein for their involvement in the genocide.⁶⁵⁵

This also includes the former President of Sudan Omar Hassan Ahmad Al-Bashir, after a referral was made by the UNSC in 2005 granting the ICC jurisdiction to investigate the situation in Sudan.⁶⁵⁶

This marked the first time a case was referred to the ICC by the UNSC to indict a head of state, however the ICC has consistently failed to bring Al-Bashir into their custody and try him as he is suspected of perpetrating genocide and crimes against humanity.⁶⁵⁷

This is due to the principle of complementarity, which only grants the ICC the right to interpose, only if a state's judiciary is unable or unwilling to conduct a fair trial⁶⁵⁸ as confirmed by the Rome Statute.⁶⁵⁹

The complementarity principle refers to the 'idea that states, rather than the ICC, will have priority in proceeding with cases within their jurisdiction'.⁶⁶⁰ Hence, the court is only meant to act when domestic authorities fail to take the necessary steps in the investigation and prosecution of crimes.⁶⁶¹

This principle is considered to be a cornerstone of international criminal justice⁶⁶² serving as both an obligation upon state parties to comply with the ICC and international standards of criminal procedure⁶⁶³ and as a compromise

⁶⁵⁴ *ibid.*

⁶⁵⁵ *Prosecutor v Abdel Raheem Muhammad Hussein* (Pre-Trial Chamber I) ICC-02/05-01/12 (1 March 2012).

⁶⁵⁶ UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593.

⁶⁵⁷ Angela Mudukuti, 'Prosecutor v Omar Hassan Ahmad Al-Bashir, Judgement in the Jordan Referral re Al-Bashir Appeal' (2020) 114 (1) AJIL 103, 103.

⁶⁵⁸ Allard Duursma and Tanja R. Muller, 'The ICC Indictment Against Al-Bashir and Its Repercussions for Peacekeeping and Humanitarian Operations in Darfur' (2019) 40 (5) Third World Quarterly 890, 893.

⁶⁵⁹ Rome Statute of the International Criminal Court [1998] art 17 (1) (a).

⁶⁶⁰ Linda E. Carter, 'The Principle of Complementarity and the International Criminal Court: The Role of *Ne Bis In Idem*' (2010) 8 (1) Santa Clara Journal of International Law 165, 167.

⁶⁶¹ Markus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and The Fight Against Impunity' (2003) 7 (1) Max Planck Yearbook of United Nations Law 591, 592.

⁶⁶² Elinor G. Fry, 'Between Show Trials and Sham Prosecutions: The Rome Statute's Potential Effect on Domestic Due Process Protections' (2012) 23 (1-3) *Crim.L.F.* 35, 36.

⁶⁶³ Sascha Dominik Dov Bachmann and Eda Luke Nwibo, 'Pull and Push – Implementing the Complementarity Principle of the Rome Statute of the ICC Within the AU: Opportunities and Challenges' (2018) 43 (2) *Brook Journal of International Law* 457, 467

between respect for the principle of state sovereignty and respect for the principle of universal jurisdiction⁶⁶⁴ as confirmed under article 1 of the Rome Statute.⁶⁶⁵

However, in practice this has proven deleterious in the ICC's ability to arrest and prosecute the former president as Sudanese authorities previously agreed to try Al-Bashir domestically, and refused to transfer him into ICC custody.⁶⁶⁶

In 2019, Sudanese authorities arrested and convicted the former president on political corruption charges and is currently serving a two-year sentence in Sudan.⁶⁶⁷ However, transfer to ICC custody has not yet taken place despite Sudanese authorities stating they will co-operate with the ICC.⁶⁶⁸

As of 2021, Al-Bashir has not been prosecuted for international crimes since the first arrest warrant was issued in 2009⁶⁶⁹ and the second arrest warrant being issued in 2010.⁶⁷⁰

In addition, a number of African states which are party to the ICC have been found to have shielded their officials on grounds of immunities and resisting ICC requests for any assistance pertaining to them.⁶⁷¹

⁶⁶⁴ Xavier Phillipe, 'The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?' (2006) 88 (862) *International Review of the Red Cross* 375, 380.

⁶⁶⁵ Rome Statute of the International Criminal Court [1998] art 1.

⁶⁶⁶ Yousif Mansour Ahmed Abdalla Al Zarouni, 'Why Sudan Won't Hand Over Former President Al-Bashir to the International Criminal Court' (*The Conversation*, 28 May 2019) <<http://theconversation.com/why-sudan-wont-hand-over-former-president-al-bashir-to-the-international-criminal-court-117810>> Accessed 20 September 2019.

⁶⁶⁷ 'Omar Al-Bashir: Sudan Agrees Ex-President Must Face ICC' (*BBC News*, 11 February 2020) <<https://www.bbc.com/news/world-africa-51462613>> accessed 16 March 2020.

⁶⁶⁸ 'Sudan Opens Door for ICC Prosecutions: Ex-President May Finally Face Trial for Alleged Darfur Crimes' (*Human Rights Watch*, 12 February 2020) <<https://www.hrw.org/news/2020/02/12/sudan-opens-door-icc-prosecutions>> accessed 16 March 2020.

⁶⁶⁹ *Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-1 (4 March 2009).

⁶⁷⁰ *Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09-95 (12 July 2010)

⁶⁷¹ Guenael Mettraux, John Duggard and Max Du Plessis, 'Heads of State Immunities, International Crimes and President Al-Bashir's Visit to South Africa' (2018) 18 (4) *International Criminal Law Review*. 577, 622

Indeed, many African states have openly repudiated the arrest of Al-Bashir on a regular basis, despite being bound⁶⁷² to co-operate with the ICC in accordance with the state obligations which arise out of the UN Charter.⁶⁷³

However, this reluctance by states has largely been attributed to the decisions reached by the highest recognised regional authority in the African continent, the Assembly of the African Union (AAU).⁶⁷⁴

The AAU has fiercely opposed the ICC's previous decisions relating to Al-Bashir's Head of State status which entitles him to immunity from prosecution.⁶⁷⁵ Notably after the first arrest warrant was issued by the ICC, the AAU in response to this decided:

[t]hat in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan.⁶⁷⁶

The ICJ has previously ruled that heads of state are entitled to immunity, which exempts them from being charged with a criminal offence(s) and protects them from any authority of another state which is likely to cumber their duties.⁶⁷⁷

The AAU reached a similar decision following its request to the ICC to immediately suspend⁶⁷⁸ the trial of Kenyan President Uhuru Kenyatta who was allegedly charged for crimes against humanity for the violence which ensued

⁶⁷² UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593, para 5.

⁶⁷³ Charter of the United Nations [1945] art 103.

⁶⁷⁴ The Constitution Act of The African Union [2000] art 9 (e) & 9 (g).

⁶⁷⁵ Alexander K A Greenawalt, 'Introductory Note to the International Criminal Court: Decisions Pursuant to Article 87 (7) of the Rome Statute on The Failure by The Republic of Malawi and the Republic of Chad to Comply with The Co-Operation Requests Issued by The Court with Respect to The Arrest and Surrender of Omar Hassan Ahmad Al Bashir and African Union Republic' (2012) 51 (2) ILM 293, 393.

⁶⁷⁶ Assembly of the African Union (13th Ordinary Session) 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)' (AU Sirte, Libya 2009) AAU Doc. Assembly/AU/11 (XIII), para 10.

⁶⁷⁷ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgement) [2008] ICJ Rep 177, paras 170 – 174.

⁶⁷⁸ Assembly of the African Union (Extraordinary Session) 'Decision on Africa's Relationship with the International Criminal Court (ICC)' (AU Addis Ababa 2013) AAU Doc. Ext/Assembly/AU/Dec.1 (October 2013) para 10 (x).

in the Kenyan elections between 2007-2008⁶⁷⁹. These charges were later withdrawn by ICC.⁶⁸⁰ The AAU also decided that no charges shall be commenced against any serving AAU Head of State.⁶⁸¹

However, heads of state and government officials have no exemption from individual criminal responsibility under the Rome Statute⁶⁸² and immunities attached to the official capacity of a person both nationally and internationally does not bar the ICC from exercising its jurisdiction.⁶⁸³

The ICC has demonstrated this by previously issuing arrest warrants against politicians⁶⁸⁴ and heads of states.⁶⁸⁵ An example being the former Ivorian President Laurent Gbagbo and militia commander Charles Blé Goudé⁶⁸⁶ for the violence which ensued in the 2010 post-presidential elections in Côte d'Ivoire.⁶⁸⁷ The case was acquitted⁶⁸⁸, however, the prosecutor has appealed this decision.⁶⁸⁹

The ICC has also reiterated this position in 2011 confirming that Al-Bashir's immunity does not apply when international courts seek a Head of State's arrest for the commission of international crimes after Malawi's unwillingness to arrest him.⁶⁹⁰

Furthermore, the Democratic Republic of Congo's (DRC) refusal to arrest Al-Bashir the ICC in 2014, changed its approach by stating the UNSC 'implicitly

⁶⁷⁹ Yvonne Dutton and Tessa Alleblas, 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 91 (1) St Johns Law Review 105, 108.

⁶⁸⁰ *Prosecutor v Uhuru Muigai Kenyatta* (Trial Chamber V B) ICC-01/09-02/11-983 (5 December 2014).

⁶⁸¹ n 678 para 10 (i).

⁶⁸² Rome Statute of the International Criminal Court [1998] art 27 (1).

⁶⁸³ Rome Statute of the International Criminal Court [1998] art 27 (2).

⁶⁸⁴ *Prosecutor v Simone Gbagbo* (Pre-Trial Chamber II) ICC-02/11-01/12 (29 February 2012).

⁶⁸⁵ *Prosecutor v Laurent Koudou Gbagbo* (Pre-Trial Chamber III) ICC-02/11-01/11-1 (23 November 2011)

⁶⁸⁶ *Prosecutor v Charles Blé Goudé* (Pre-Trial Chamber III) ICC-02/11-02/11-1 (25 December 2011).

⁶⁸⁷ 'Case Information Sheet: Situation in Côte d'Ivoire' (*International Criminal Court*) <<https://www.icc-cpi.int/CaselInformationSheets/gbagbo-goudeEng.pdf>> accessed 24 March 2021.

⁶⁸⁸ *Prosecutor v Laurent Gbagbo and Charles Blé Goudé* (Trial Chamber I) ICC-02/11-01/15 (15 January 2019).

⁶⁸⁹ *Prosecutor v Laurent Gbagbo and Charles Blé Goudé* (Appeals Chamber) ICC-02/11-01/15 (17 September 2019).

⁶⁹⁰ *Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09 (13 December 2011), para 43.

lifted the immunities of Omar Al Bashir⁶⁹¹ and the decisions of the AAU could not invoke any other decision⁶⁹², whilst also finding the DRC to be in breach of its obligations by failing to co-operate with the court.

The unwillingness of African states to arrest and detain Al-Bashir has been a consistent trend. In 2015, South Africa also failed to arrest Al-Bashir, following a judgment which was handed down by the South African High Court⁶⁹³, which required authorities to arrest and surrender Al-Bashir to the ICC.⁶⁹⁴ This still led to him leaving the country.⁶⁹⁵

This happened despite the ICC reminding South Africa of its obligations to comply with the ICC.⁶⁹⁶ In 2016, the AAU following South Africa's refusal to arrest Al-Bashir was commended for not co-operating with the ICC's arrest warrant.⁶⁹⁷

Thus, it is clear that the ICC's reliance on African states and their refusal to enforce ICC arrest warrants has allowed Al-Bashir elusion from being criminally accountable.⁶⁹⁸

Since leaving South Africa the former president has travelled to Djibouti⁶⁹⁹, Uganda⁷⁰⁰ and most recently Jordan in 2017.⁷⁰¹ All of these states have been

⁶⁹¹ *Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09 (9 April 2014), para 31.

⁶⁹² *ibid.*

⁶⁹³ *Minister of Justice and Constitutional Development v Southern African Litigation Centre* (27740/2015) [2015] ZAGPPHC 402 (24 June 2015).

⁶⁹⁴ *Minister of Justice and Constitutional Development v Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016).

⁶⁹⁵ Ntombizozuko Dyani-Mhango, 'South Africa's Dilemma: Immunity Law's, International Obligations and The Visit by Sudan's President Omar Al Bashir' (2017) 26 (3) *Washington International Law Journal* 535, 538-539.

⁶⁹⁶ *Prosecutor v Omar Hassan Ahmad Al Bashir* (Pre-Trial Chamber II) ICC-02/05-01/09-242 (13 June 2015).

⁶⁹⁷ Assembly of the African Union Assembly (26th Ordinary Session) 'Decision on The International Criminal Court' (AU Addis Ababa 2016) Doc. EX.CL/952 (XXVIII) para 3.

⁶⁹⁸ Gwen P Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Al Bashir' (2011) 36 (6) *Fordham Int'l L.J.* 1584, 1586-1587.

⁶⁹⁹ *Prosecutor v Omar Hassan Ahmad Al Bashir* (Pre-Trial Chamber II Decision) ICC-02/05-01/09-266 (11 July 2016).

⁷⁰⁰ *Prosecutor v Omar Hassan Ahmad Al Bashir* (Pre-Trial Chamber II Decision) ICC-02/05-01/09-267 (11 July 2016).

⁷⁰¹ *Prosecutor v Omar Hassan Ahmad Al Bashir* (Pre-Trial Chamber II Decision) ICC-02/05-01/09-309 (11 December 2017).

found to be in breach of their obligations to comply with the ICC⁷⁰², further demonstrating the limitations and challenges the court continues to face.

2.3.2 The ICC, Western Imperialism and the African Union's Response

The main reason for the AAU and African states refusal to comply with the ICC to enforce arrest warrants has been due to the ICC's unfair and biased focus on prosecuting individuals solely in the African continent.⁷⁰³

This continued practice of selective justice aimed at targeting less economically wealthier African states has dampened the perception of court to administer justice fairly.⁷⁰⁴

The controversial relationship between the ICC and Africa complements the rhetoric that the court is targeting African individuals by being a tool used for the enforcement of neo-colonialism by western powers. There is a sentiment that the court is being abused to push self-serving agendas like unconstitutional regime change.⁷⁰⁵

As of 2021 the court has only managed to secure nine convictions, four acquittals, and issued 35 active arrest warrants.⁷⁰⁶ These arguments of bias and unfairness are credible as the ICC has only managed to prosecute individuals from African states over the past two decades.

In 2012, the ICC for the first time successfully managed to convict the founder and President of the *Union des Patriotiques Congolais* for committing the war

⁷⁰² Rome Statute of the International Criminal Court [1998] art 86.

⁷⁰³ Jeremy Sarkin, 'Reforming the International Criminal Court (ICC) to Achieve Increased Cooperation in Investigations and Prosecutions of International Crimes' (2020) 9 (1) International Human Rights Law Review 27, 59.

⁷⁰⁴ Daglous Makumbe, 'African Response to The International Criminal Court. Implications for International Justice' (2015) 20 (8) Journal of Humanities and Social Sciences 16, 16.

⁷⁰⁵ Emmanuel Okurut and Hope Among, 'The Contentious Relationship Between Africa and the International Criminal Court (ICC)' (2018) 10 (3) Journal of Law and Conflict Resolution 19, 23.

⁷⁰⁶ 'The International Criminal Court: Facts and Figures' (*The International Criminal Court*, 30 September 2019) <<https://www.icc-cpi.int/about>> accessed 23 March 2021.

crimes of enlisting and conscripting child soldiers under the age of 15 in the *Prosecutor v Thomas Lubanga Dyilo*.⁷⁰⁷

In 2014, the ICC convicted the former leader of the Congolese *Force de Resistance Patriotique d'Ituri* for being an accessory to war crimes and crimes against humanity in the *Prosecutor v Germain Katanga*.⁷⁰⁸

The ICC initially convicted the President and Commander in Chief of the *Patriotiques pour la Liberation du Congo*, Jean-Pierre Bemba Gombo⁷⁰⁹ in 2016 for crimes against humanity, war crimes and rape, but was later acquitted of all charges in 2018.⁷¹⁰

In 2016, the ICC in the *Prosecutor v Al-Mahdi case*⁷¹¹ convicted the defendant an alleged Ansar Eddine/Al-Qaeda member for war crimes after destroying religious buildings in Timbuktu and has since been issued a reparations order of 2.7 million euros.⁷¹²

In the 2019 case of, *Prosecutor v Bosco Ntaganda*⁷¹³ the former chief of staff and commander of operations of the *Forces Patriotiques pour la Liberation du Congo*, was found guilty of war crimes and crimes against humanity.

Many appellations have been advanced against the ICC in light of its prosecutorial record for being a western imperial master exercising racist, imperial and colonialist power over African subjects which has influenced the AAU's decision's not to comply with the court in arresting heads of state⁷¹⁴ and

⁷⁰⁷ *Prosecutor v Thomas Lubanga Dyilo* (Judgement) ICC-01/04-01/06 (14 March 2012).

⁷⁰⁸ *Prosecutor v Germain Katanga* (Judgement) ICC-01/04-01/07 (7 March 2014).

⁷⁰⁹ *Prosecutor v Jean-Pierre Bemba Gombo* (Trial Chamber III Judgement) ICC-01/05-01/08 (21 March 2016).

⁷¹⁰ *Prosecutor v Jean-Pierre Bemba Gombo* (Appeals Chamber Decision) ICC-01/05-01/08 (08 June 2018).

⁷¹¹ *Prosecutor v Ahmed Al-Faqi Al-Mahdi* (Judgement) ICC-01/12-01/15 (27 September 2016).

⁷¹² *Prosecutor v Ahmed Al-Faqi Al-Mahdi* (Appeals Chamber Decision) ICC-01/12-01/15-A (8 March 2018).

⁷¹³ *Prosecutor v Bosco Ntaganda* (Trial Chamber IV) ICC-01/04-02/06 (8 July 2019).

⁷¹⁴ Dire Tladi, 'The African Union and the International Criminal Court: The Battle for the Soul of International Law' (2009) 34 (1) South African Yearbook of International Law 57, 58.

influenced the regional African practice of enacting 'anti-ICC African customary law'.⁷¹⁵

The court has previously attempted to improve and change its patronising imperialistic image of 'white people prosecuting black people'⁷¹⁶ after the appointment of the former ICC chief prosecutor Fatou Bensouda of The Gambia since 2012⁷¹⁷ (which has since been replaced with British Muslim Barrister of mixed Pakistani and British descent Karim Khan as of 2021)⁷¹⁸ but to no avail.

In 2016, South Africa and the Gambia have previously expressed their intention to withdraw from the ICC⁷¹⁹ with the support of the AAU criticising the court for promoting neo-colonial oppression for being an 'International Caucasian Court', set up expressly for the persecution and humiliation of people of colour, especially Africans.⁷²⁰

Since then, the first state to withdraw from the ICC was Burundi in 2017⁷²¹ after an investigation was authorised by the pre-trial chamber into alleged international crimes to have been perpetrated since 2015 by state police, intelligence and military services.

This is believed to have been sanctioned by President Pierre Nkurunziza against the civilian population, after civil unrest and protests ensued after

⁷¹⁵ Benedict Abrahamson Chigara and Chidebe Matthew Nwankwo, 'To Be or Not to Be? The African Union and Its Member States Parties' Participation as High Contracting Parties to the Rome Statute of the International Criminal Court (1998)' (2015) 33 (3) *Nordic Journal of Human Rights* 243, 246.

⁷¹⁶ Mohamed Elewa Badar, El Sayed M.A. Amin and Noelle Higgins, 'The International Criminal Court and the Nigerian Crisis' (2014) 3 (1) *International Human Rights Law Review* 29, 60.

⁷¹⁷ Fatou Bensouda, 'Reflections from the International Criminal Court Prosecutor' (2012) 45 (1-2) *Case W.Res.J.Int'l L.* 505, 505.

⁷¹⁸ 'Laws of Humanity: Karim Khan QC' (Counsel Magazine, 2 July 2021) <<https://www.counselmagazine.co.uk/articles/laws-of-humanity-karim-khan-qc>> accessed 5 July 2021.

⁷¹⁹ Manisuli Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and The Gambia' (2018) 29 (1) *Crim.L.F.* 63, 64.

⁷²⁰ Joseph Powderly, 'International Criminal Justice in An Age of Perpetual Crisis' (2019) 32 (1) *LJIL* 1, 7.

⁷²¹ Lucrecia Garcia Iommi, 'Whose Justice? The ICC Africa Problem' (2019) 34 (1) *International Relations* 105, 105.

running a third time in the presidential elections, which was deemed to be unconstitutional in contravention to the national laws of Burundi.⁷²²

Subsequently this has led a second state to withdraw, specifically the Philippines in 2019⁷²³ after a preliminary examination was initiated by the former chief prosecutor Fatou Bensouda in 2018 against President Rodrigo Duterte.⁷²⁴

The examination endeavoured to review the head of states sanctioning of 'death squads' to execute suspected drug criminals through its domestic 'war on drugs' initiative. This led to thousands of deaths through extrajudicial killings conducted by police forces within the state since 2016.⁷²⁵ As of 2021 the pre-trial chamber has authorised an investigation into the situation in the Philippines.⁷²⁶

The AAU's solution in an attempt to avoid this imperialist and colonialist agenda, introduced an alternative to the ICC that consisted of extending and strengthening the jurisdiction of the African Court on Human and Peoples' Rights (ACHPR), to deal with international crimes committed in Africa.⁷²⁷

In 2014, the AAU adopted a 'Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' (ACJHPR)⁷²⁸ more commonly referred to as the 'Malabo Protocol'.⁷²⁹

⁷²² Situation in the Republic of Burundi (Pre-Trial Chamber III) ICC-01/17-X (9 November 2017).

⁷²³ Emma Palmer, 'Complementarity and the Implementation of International Criminal Law in the Philippines' (2019) 17 (1) *New Zealand Journal of Public and International Law* 67, 69.

⁷²⁴ 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on Opening Preliminary Examinations into the Situations in the Philippines and Venezuela' (*International Criminal Court*, 8 February 2018) <<https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat>> accessed 21 June 2016.

⁷²⁵ Palmer (n 723) 67-68.

⁷²⁶ Situation in the Republic of Philippines (Pre-Trial Chamber) ICC-01/21 (14 June 2021).

⁷²⁷ Eden Matiyas, 'What Prospects for An African Court Under the Malabo Protocol?' (*Justice Info*, 31 May 2018) <<https://www.justiceinfo.net/en/other/37633-what-prospects-for-an-african-court-under-the-malabo-protocol.html>> accessed 30 September 2019.

⁷²⁸ Eki Yemisi Omorogbe, 'The Crisis of International Criminal Law in Africa: A Regional Regime in Response?' (2019) 66 (2) *NILR* 287,293.

⁷²⁹ Assembly on the African Union (23rd Ordinary Session) 'Decision on The Draft Legal Instruments' (2014) AAU Doc. Assembly/AU/8 (XXIII) para 2 (e).

The purpose of this protocol sought to replace the ACHPR as the main judicial organ of the AAU⁷³⁰, urging 'all African member states to ratify the protocol to enter it into force'.⁷³¹ The Malabo protocol provides a structure for a new court dividing the ACJHPR into three separate sections which will comprise of: (1) A general matters section (2) A human rights/peoples section and (3) An international criminal section.⁷³²

However, despite the AAU's proposal, African states have been reluctant to welcome the ACJHPR and the Malabo Protocol, despite the legitimate concerns and shortcomings of the ICC. Even though African states have demonstrated their continued commitment to the ICC, this position is likely to change, if the court continues to exclusively pursue African individuals including heads of state.⁷³³

This has since led to the AAU in 2017 adopting the 'withdrawal strategy' which sought to propose the following amendments to be made to the Rome Statute, these are:

- a) Ensure that international justice is conducted in a fair and transparent manner devoid of any perception of double standards;
- b) Institution of legal and administrative reforms of the ICC;
- c) Enhance the regionalisation of international criminal law;
- d) Encourage the adoption of African Solutions for African problems;
- e) Preserve the dignity, sovereignty and integrity of Member States.⁷³⁴

However, this perceived bias and double standard is further exacerbated in the ICC's continued practice of prosecuting and convicting individuals mainly

⁷³⁰ Gino J. Naldi and Konstantinos D. Magliveras, 'The African Court of Justice and Human Rights: A Judicial Curates Egg' (2012) 9 (2) International Organizations Law Review 383, 383.
⁷³¹ n 729 para 3.

⁷³² Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights [2014] annex art 16.

⁷³³ Omorogbe (n 728), 309.

⁷³⁴ 'Withdrawal Strategy Document Draft 2' (*Assembly of the African Union*, 12 January 2017) 2<https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf> accessed 21 June 2021.

from African states which is reflected in the courts current proceedings⁷³⁵ and in the 2021 conviction of, *Prosecutor v Dominic Ongwen*⁷³⁶ where the former commander of the Ugandan Lord's Resistance Army was found guilty of 61 counts of crimes against humanity and war crimes which were committed in northern Uganda in 2002.

The discussion in this section has demonstrated the tempestuous relationship between the ICC and the AAU, including states in the African continent due to the ICC's continued focus on prosecuting individuals from this region.

2.3.3 The Relationship Between the ICC and the UNSC and the Problem of Imperialism

In order to prevail the concerns of the ICC's purported lack of impartiality, rigidity⁷³⁷, administration of selective justice which has been demonstrated by its issuance of arrest warrants against individuals from African states⁷³⁸ and its prosecutorial record over the course two decades⁷³⁹ suggests it must be reformed to improve its current position.

However, improving the ICC also requires reforming the UNSC given the controversial relationship between the two organisations, which has also attracted much obloquy and animadversion from African leaders and academics alike.

As mentioned in the previous section⁷⁴⁰, the main reason the ICC has been branded as an imperialist institution, which is mainly because of the court's continued focus on prosecuting individuals from economically middle to low-

⁷³⁵ *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Trial Chamber X) ICC-01/12-01/18-1364 (12 March 2021), *Prosecutor v Mahamat Said Abdel Kani* (Pre-Trial Chamber II) ICC-01/14-01/21 (26 January 2021).

⁷³⁶ *Prosecutor v Dominic Ongwen* (Trial Chamber IX) ICC-02/04-01/15 (4 February 2021).

⁷³⁷ Maartje Weerdesteijn and Barbora Hola, 'Tool in the R2P Toolbox? Analysing the Role of the International Criminal Court in the Three Pillars of the Responsibility to Protect' (2020) 31 (3) *Crim.L.F.* 377, 379.

⁷³⁸ Allard Duursma, 'Pursuing Justice, Obstructing Peace: The Impact of ICC Arrest Warrants on Resolving Civil Wars' (2020) 20 (3) *Conflict, Security and Development* 335, 335.

⁷³⁹ Lucrecia Garcia Iommi, 'Whose Justice? The ICC Africa Problem' (2020) 34 (1) *International Relations* 105, 105.

⁷⁴⁰ Section 2.3.2 to n 706.

level African states, instead of pursuing individuals from western states which have proven effective in pacifying conflicts.⁷⁴¹

This has been demonstrated earlier in the chapter as the P5, have used their permanent membership in the UNSC and/or their veto privileges to forestall and obviate individuals from prosecution from international crimes which they (or their allies) have committed in pursuit of their own ambitions and interests.

This unfairness and selectiveness of the ICC and its pursual of less powerful individuals from Africa states, further demonstrates the court's inability to prosecute IHL violations which have been committed by individuals belonging to the USA and other major powers effectively promoting a double-standard.⁷⁴²

The ICC's inability to prosecute powerful western states is attributed to the referral procedure under article 13 (b) of the Rome Statute, which has attracted much chiding and disapproval⁷⁴³ for institutionalising the power of the UNSC through the Rome Statute perpetuating its legalised hegemony.⁷⁴⁴

The investigations and prosecutions resulting from article 13(b) referrals have given validity to arguments suggesting the ICC has become a politicised institution by granting the UNSC direct juridical privileges to a narrow group of states (P5) who hold the power of veto. Thus, the veto exempting individuals from the P5 (and allied states) from individual criminal responsibility underscores the inability of the court to fairly administer international criminal justice, which in turn has rendered the ICC being labelled an imperialist institution.⁷⁴⁵

⁷⁴¹ Mattia Cacciatori, 'When Kings Are Criminals: Lessons from The ICC Prosecutions of African Presidents' (2018) 12 (3) *International Journal of Transnational Justice* 386, 386-387.

⁷⁴² Hiroyuki Tosa, 'Global Constitution Order and the Deviant Other: Reflections on the Dualistic Nature of the ICC Process' (2018) 18 (1) *International Relations of the Asia-Pacific* 45, 56-57.

⁷⁴³ Kai Ambos and Ignaz Stegmler, 'Prosecuting International Crimes at the International Criminal Court: Is There A Coherent and Comprehensive Prosecution Strategy' (2012) 58 (4) *Crime, Law and Social Change* 391, 392.

⁷⁴⁴ Frederick Cowell, 'Inherent Imperialism: Understanding the Legal Roots of Anti-imperialist Criticism of the International Criminal Court' (2017) 15 (4) *JICJ* 667, 680.

⁷⁴⁵ *ibid.*

Despite, the ICC not being an organ of the UN, it has been argued the court's activities have succumbed to the control of the P5 since its inception⁷⁴⁶, which is attributed to the early negotiations which took place prior to the establishment of the court, demanding the ICC's jurisdiction would only be activated subject to the approval of the UNSC.⁷⁴⁷

Thus, resulting in the UNSC being given powers to refer non-states parties to the ICC under article 13(b) of the Rome Statute. These provisions have led to significant controversies in the ICC's relationships with states and regional entities, especially the AAU. Critics have argued that this controversy has the potential to undermine the judicial independence of the ICC.⁷⁴⁸

Thus, the referral procedure and the veto privilege are instrumental in administering selective justice and absolving any individual(s) from a P5 state from being held criminally responsible and liable for the violations of IL, IHL, CIL and *Jus Cogens* in humanitarian peace-keeping and counter-terrorism operations.

The UNSC's referral powers to the ICC have not only been lambasted for being imperialistic, but also the discriminative nature of such a resolution calling for an individual of particular state to be investigated conforms exclusively to the whim and interests of the P5.⁷⁴⁹

In practice, the P5 have used the veto in one of two ways, firstly by obviating their own nationals from criminal liability and secondly as method of administering selective justice, by using the ICC to refer individuals from other states such as Africa, effectively using the court to subject other state actors

⁷⁴⁶ Nada Ali, 'Through the Glass Darkly, 'The ICC, The UNSC and the Quest for Justice in International Law' (2019) 19 (4) International Criminal Law Review 669, 670.

⁷⁴⁷ Kamari Maxine Clarke and Sarah Jane Koulen, 'The Legal Politics of the Article 16 Decision: The International Criminal Court, The UN Security Council and Ontologies of a Contemporary Compromise' (2014) 7 (3) African Journal of Legal Studies 297, 298.

⁷⁴⁸ *ibid.*

⁷⁴⁹ Evelyne Owiye Asaala, 'Rule of Law or Realpolitik? The Role of the United Nations Security Council in the International Criminal Court Processes in Africa' (2017) 17 (1) AHRLJ 265, 278.

to the jurisdiction of the court, whilst exempting themselves implementing a policy of 'double standard'.⁷⁵⁰

The subsequent chapters of the thesis will demonstrate the ICC, which was created to administer international criminal justice has succumbed to the manipulation of dominant actors (P5)⁷⁵¹ in the UNSC and will also be adduced in the thesis' analysis of: Afghanistan, Iraq, Palestine, Syria and Libya.

The remaining chapters of the thesis will further exhibit the ICC's inability to prosecute individuals⁷⁵² from P5 states due to the veto privileges granted to them, the court's inability to execute arrest warrants because of the complementarity principle and both organisations inability to deal with the threat of terrorism highlighting the need for institutional reform.⁷⁵³

The thesis before entrancing its conclusion will propose a new structure of both institutions in an attempt to improve the effectiveness of both the UNSC and the ICC.

2.4 Islam: The New Global Threat

This segment of the legal framework will analyse the western perception of Islam after the 9/11 terrorist attacks. Particular focus will be made towards the USA and states within the Europe highlighting the negative connotations associated with Islam and Muslims in general.

The social media and western media's role in associating terrorism with Islam will also be discussed by arguing that the media has contributed significantly

⁷⁵⁰ Gabriel M. Lenter, 'The Lasting Legacy of Double Standards: The International Criminal Court and the UN Security Council Referral Mechanism' (2020) 20 (2) International Criminal Law Review 251, 278.

⁷⁵¹ Ugumanim Bassey Obo and Dickson Ekpe, 'Africa and the International Criminal Court: A Case of Imperialism by Another Name' (2014) 3 (10) International Journal of Development and Sustainability 2025, 2034.

⁷⁵² Kirsten Ainsley, 'The Responsibility to Protect and the International Criminal Court: Counteracting the Crisis' (2015) 91 (1) International Affairs 37, 38.

⁷⁵³ Obiora Chinedu Okafor, 'Newness, Imperialism and International Reform in Our Time: A Twail Perspective' (2005) 43 (1-2) Osgoode Hall L.J. 171, 181.

to western societies negative perception of Islam which has essentially demonised the religion.⁷⁵⁴

In turn, the segment will vanguard Islam being perceived as a threat to western culture⁷⁵⁵ and society, which in turn has led Muslim communities to be considered suspicious⁷⁵⁶ and led to stricter and harsher human rights restrictions⁷⁵⁷ as part of continuing counter-terrorism strategies in the UK⁷⁵⁸, Europe⁷⁵⁹, USA and internationally.⁷⁶⁰

This segment of the legal framework will also highlight states have enacted legislation subjecting Muslims to tighter immigration controls and promoted Islamophobic attitudes which has since inspired Muslims to become victims of hate crimes and targeted attacks.

By highlighting Islam and Muslims communities being perceived as a threat, this has also influenced the foreign policies of western states to combat Islamist terrorism globally.⁷⁶¹

Particularly, the USA's continued GWOT along with its allies the UK and France, which has often resulted in counter-terrorism operations being conducted illegally contravening IL, IHL and CIL by acting outside the authority of the UNSC, which has further hindered the UNSC's ability to fulfil its mandate, which will be highlighted in subsequent chapters of the thesis.

⁷⁵⁴ Sabina Civila, Luis M. Romero-Rodriguez and Amparo Civila, 'The Demonization of Islam Through Social Media: A Case Study of #StopIslam in Instagram' (2020) 8 (4) Publications 1, 2.

⁷⁵⁵ Yusuf Nebhan Aydin, 'Western Liberal Democracy: The Struggle of Muslims for Freedom, Equality and Dignity' (2019) 39 (1) Journal of Muslim Minority Affairs 75, 75-76.

⁷⁵⁶ Audrey Courty, Halim Rane and Kasun Ubayasiri, 'Blood and Ink: The Relationship Between Islamic State Propaganda and Western Media' (2019) 25 (1) Journal of International Communication 69, 86.

⁷⁵⁷ Lara-Zuzan Golesorkhi, 'Islamic Garb in Public Employment in Europe and the US-Form Integration to Accommodation to Anti-Discrimination' (2019) 39 (4) Journal of Muslim Minority Affairs 551, 551-552.

⁷⁵⁸ Karen Bullock, 'Police Engagement with Muslim Communities: Breaking Out, Breaking In, and Breaking Through' (2018) 28 (8) Policing and Society 879, 879.

⁷⁵⁹ Joel David Taylor, 'Suspect Categories: Alienation and Counterterrorism: Critically Assessing PREVENT in the UK' (2020) 32 (4) Terrorism and Political Violence 851, 854.

⁷⁶⁰ Mohsin Hassan Khan et al, 'Muslims' Representation in Donald Trump's Anti-Muslim-Islam Statement: Critical Discourse Analysis (2019) 10 (2) Religions 1, 1-3.

⁷⁶¹ Milan Obaidi, 'Living Under Threat: Mutual Threat Perception Drives Anti-Muslim and Anti-Western Hostility in the Age of Terrorism' (2018) 48 (5) European Journal of Social Psychology 567, 567.

2.4.1. The 9/11 New York Terrorist Attacks, Islamophobia, and the Rise of Islamist Terrorism

Global terrorism has been described as ‘one of the most important and pressing issues of our time.’⁷⁶² Despite there being no state consensus on a single definition of terrorism⁷⁶³, it has been described as the ‘premeditated use or threat to use violence by individuals or subnational groups to obtain a political or social objective through the intimidation of a large audience beyond that of the immediate non-combatant victims’.⁷⁶⁴

There are three main types of terrorism. Firstly, ‘domestic terrorism’ which is perpetrated by an individual(s) and/or group/organisation within the state of origin. Secondly, ‘state-sponsored terrorism’ which involves a state aiding and endorsing terrorist acts of an individual(s) and/or group/organisation. Finally, ‘transnational terrorism’ which requires the perpetrator(s) of a group/organisation to commit acts of terrorism across international borders.⁷⁶⁵

The transnational 9/11 terrorist attacks by Al-Qaeda⁷⁶⁶ on the two WTC towers and the Pentagon⁷⁶⁷ have been described as the largest acts of terrorism in the USA’s history.⁷⁶⁸

Reibman described the terrorist attacks as ‘unprecedented’⁷⁶⁹ resulting in tremendous civilian deaths in the wake of the airborne assault and subsequent

⁷⁶² Christian Von Sikorski et al, ‘Muslims Are Not Terrorists: Islamic State Coverage Journalistic Differentiation Between Terrorism and Islam, Fear Reactions and Attitudes Towards Muslims’ (2017) 20 (6) *Mass Communication and Society* 825, 825-826.

⁷⁶³ Mark Malan, ‘Kinetic Responses to Global Terrorism: Lessons from Africa’ (2017) *African Security Review* 341, 342

⁷⁶⁴ Todd Sandler, ‘Terrorism and Counterterrorism: An Overview’ (2015) 67 (1) *Oxford Economic Papers* 1, 1.

⁷⁶⁵ Walter Enders, Todd Sandler and Khusrav Gaibulloev, ‘Domestic Versus Transnational Terrorism: Data, Decomposition, and Dynamics’ (2011) 48 (3) *Journal of Peace Research* 319, 321.

⁷⁶⁶ *ibid.*

⁷⁶⁷ Daniel L Byman, ‘Al-Qaeda As an Adversary: Do We Understand Our Enemy?’ (2003) 56 (1) *World Politics* 139, 139.

⁷⁶⁸ Sandro Galea et al, ‘Psychological Sequelae of the September 11 Terrorist Attacks In New York City’ (2002) 346 (13) *New Eng.J.Med.* 982, 982.

⁷⁶⁹ Jack N Kondrasuk, ‘The Effects of 9/11 and Terrorism on Human Resource Management: Recovery, Reconsideration and Renewal’ (2004) 16 (1) *Employ Respons Rights J* 25, 25.

collapse of the WTC towers released more than a million tons of debris and dust into the surrounding area.⁷⁷⁰ After the attacks it was reported:

[T]he destruction and damage to the WTC Twin Towers and 35 surrounding buildings resulted in almost 3,000 fatalities, 150,000 jobs lost, and \$50 billion to \$100 billion in economic damages. After the attacks, the recovery and clean-up period lasted through June 2003.⁷⁷¹

The devastation and large-scale destruction which emanated from the attack gained significant attention and notoriety worldwide.⁷⁷² It appeared Al-Qaeda had succeeded in its intention to terrorise the USA by inflicting damage to the economy and fulfilling its political objective to instil fear by announcing its presence as a transnational jihadist movement motivated to destroy the USA⁷⁷³ and overthrow Arab governments and establish Islamic caliphates with the eventual goal to rule over states under one caliphate.⁷⁷⁴

In the immediate aftermath of the 9/11 attacks, transnational terrorism was considered the next extreme threat to international security, framing the conflict between 'the west and Islamist terror as World War IV, a perpetual state of conflict between militant Islam and the west'.⁷⁷⁵

Since the events of 9/11 and the emergence of Al Qaeda, western states including the UK, USA and France have had a consistent presence in the Middle East through the GWOT doctrine. The USA State Department at present has recognised 67 foreign terrorist organisations mainly for advancing

⁷⁷⁰ Joan Reibman, 'Destruction of the World Trade Center Towers: Lessons Learned from an Environmental Health Disaster' (2016) 13 (5) *ATS* 577, 577.

⁷⁷¹ Yuval Neria, Laura DiGrande and Ben G Adams, 'Posttraumatic Stress Disorder Following the September 11 2001, Terrorist Attacks' (2011) 66 (6) *The American Psychologist* 429, 430-431.

⁷⁷² Douglas Kellner, '9/11, Spectacles of Terror, and Media Manipulation' (2004) 1 (1) *Critical Discourse Studies* 41, 41.

⁷⁷³ Rohan Gunaratna and Aviv Oreg, 'Al-Qaeda: Then and Now' (2013) 5 (9) *Counter Terrorist Trends and Analyses* 3, 3.

⁷⁷⁴ William McCants, 'Al Qaeda's Challenge: The Jihadists' War with Islamist Democrats' (2011) 90 (5) *Foreign Affairs* 20, 20.

⁷⁷⁵ Meagan Smith and Sean M. Zeigler, 'Terrorism Before & After 9/11 – A More Dangerous World?' (2017) *Research and Politics Research Article* October-December 2017 1, 1 <<https://journals.sagepub.com/doi/full/10.1177/2053168017739757>> accessed 2 October 2020.

radicalised Islamic ideology to justify unprecedented devastation, violence and chaos globally.⁷⁷⁶

British security service, Military Intelligence 5 (MI5), have reported international terrorism has become largely synonymous with Islamist terrorism, originating from Syria and Iraq and other regions besides the Middle East such as the North, South, East, West Africa and South East Asia.⁷⁷⁷

Moreover, the events of 9/11 have created a negative perception of Islam to be a religion which incites and propagates violence and terrorism against non-Muslims which the media and press coverage have proven to be a vital catalyst in proliferating this ideology.⁷⁷⁸

Due to the negative connotations associated with Islam and the increased notoriety of Islamist terrorism, this has perpetuated a controversial phenomenon known as 'Islamophobia'⁷⁷⁹, a term to: 'Identify the presence, dimensions, intensity, causes and consequences of Anti-Islamic and Anti-Muslim sentiments'.⁷⁸⁰

Although, there is no clear, set definition of Islamophobia⁷⁸¹ the term is closely associated to: racism, prejudice and xenophobia.⁷⁸² Other terms include: 'intolerance against Muslims, Anti-Muslimism, Muslimophobia, and Anti-Muslim racism'.⁷⁸³

⁷⁷⁶'Foreign Terrorist Organisations' (US Department of State, 25/03/2019) <<https://www.state.gov/j/ct/rls/other/des/123085.htm>> (accessed 25/03/2019)

⁷⁷⁷'International Terrorism' (*Security Service* MI5, 25 May 2019) <<https://www.mi5.gov.uk/international-terrorism>> accessed 25 May 2019.

⁷⁷⁸ Abu Sadat Nurallah, 'Portrayal of Muslims In the Media: '24' and the 'Othering' Process' (2010) 7 (1) *International Journal of Human Sciences* 1020, 1022.

⁷⁷⁹ Fernando Bravo Lopez, 'Towards A Definition of Islamophobia: Approximations of the Early Twentieth Century' (2010) 34 (4) *Ethnic and Racial Studies* 556, 557.

⁷⁸⁰ Erik Bleich, 'Defining and Researching Islamophobia' (2012) 46 (2) *Review of Middle East Studies* 180, 180.

⁷⁸¹ Craig Considine, 'The Radicalization of Islam In the United States: Islamophobia, Hate Crimes and Flying While Brown' (2017) 8 *Religions* 164, 164.

⁷⁸² Hassan Mahamdallie, 'Islamophobia: The Othering of Europe's Muslims' (2015) 146 *International Socialism: A Quarterly Review of Socialist Theory* <<http://isj.org.uk/islamophobia-the-othering-of-europes-muslims/>> accessed on 23 March 2019.

⁷⁸³ Robin Richardson, 'Islamophobia and anti-Muslim racism – Concepts and Terms and Implications for Education' (2008) 27 (1) *Race Equality Teaching* 11, 11.

The harmfulness of these negative stereotypes which Muslim men and women have faced has significantly influenced societal attitudes and perceptions of Islam within western states.⁷⁸⁴

Indeed, western governments' increasing strategic objectives and responses to counteract Islamic terrorism and sporadic attacks have been voiced publicly and politically. This has since contributed to Islamophobic attitudes as Muslims have been reduced down to being a suspect population, 'as either being terrorists or sympathetic to terrorism'.⁷⁸⁵

This black and white depiction of Muslim men and women has been portrayed in many facets of western society. Sociologists such as Bonino have supported this reasoning, contending:

[A] pervasive culture of risk and social insecurity have shaped western socio-political Islamophobic and discriminating attitudes that cast shadow on Muslims and further their resentment, thus playing into the hands of radical and violent propaganda.⁷⁸⁶

This perception of risk and insecurity towards the Muslim minority communities has only augmented significantly in recent years within western states. This has become even more prevalent following the events of 9/11, which have seen a myriad of terrorist attacks occurring.

⁷⁸⁴ Stefano Tartaglia, Chiara Rollero and Elisa Bergagna, 'The Two Sides of Islamophobia and the Perception of Threat from Islamic Terrorists' (2019) 47 (7) *Journal of Community Psychology* 1772, 1773.

⁷⁸⁵ Md Abu Shahid Abdullah, 'Muslims In Pre and Post 9/11 Contexts' (2015) 3 (3) *International Journal of Comparative Literature and Translation Studies* 52, 52.

⁷⁸⁶ Stefano Bonino, 'Policing Strategies Against Islamic Terrorism in the UK After 9/11: The Socio-Political Realities for British Muslims' (2012) 32 (1) *Journal of Muslim Minority Affairs* 5, 5-6.

Particularly, these have included: the 7/7 bombings in the UK⁷⁸⁷, the 2017 Manchester Arena Bombings⁷⁸⁸, the Westminster in London⁷⁸⁹, the 2015 Paris attacks on Charlie Hebdo⁷⁹⁰ to name a few.

After 9/11, the UK established a comprehensive legislative framework to counter-terrorism which granting enhanced police powers where the use or threat of terrorism is suspected⁷⁹¹, creating offences for membership⁷⁹², support⁷⁹³, possession of terrorist property⁷⁹⁴ and money laundering.⁷⁹⁵ This also includes making devices⁷⁹⁶, training⁷⁹⁷, preparation⁷⁹⁸ and encouraging acts of terrorism.⁷⁹⁹

The discriminatory use and effect of suspicion-less stop and search powers on ethnic minorities⁸⁰⁰ previously granted to senior police officers through counter-terrorism legislation⁸⁰¹ was found to be in violation a person's right to privacy⁸⁰² by the European Court of Human Rights (ECtHR).⁸⁰³

⁷⁸⁷ Henrietta Williams, 'Fortifying the City: Visualising London 2012' (2020) 45 (1) London Journal 106, 106-107.

⁷⁸⁸ Samuel Merrill et al, 'Togetherness After Terror: The More or Less Digital Commemorative Public Atmospheres of the Manchester Arena Bombing's First Anniversary' (2020) 38 (3) Environment and Planning D: Society and Space 546, 547.

⁷⁸⁹ Dajun Dai and Ruixue Wang, 'Space-Time Surveillance of Negative Emotions After Consecutive Terrorist Attacks in London' (2020) 17 (11) International Journal of Environmental Research and Public Health 1, 2.

⁷⁹⁰ Shawn J. McCoy et al, 'The Impact of Terrorism on Social Capital: Evidence From the 2015 Charlie Hebdo Paris Shooting' (2020) 82 (3) Oxford Bulletin of Economics and Statistics 526, 527.

⁷⁹¹ Terrorism Act 2000 s 1

⁷⁹² Terrorism Act 2000 s 11

⁷⁹³ Terrorism Act 2000 s 12

⁷⁹⁴ Terrorism Act 2000 s 14

⁷⁹⁵ Terrorism Act 2000 s 18.

⁷⁹⁶ Terrorism Act 2006 s 9.

⁷⁹⁷ Terrorism Act 2006 s 6.

⁷⁹⁸ Terrorism Act 2006 s 5.

⁷⁹⁹ Terrorism Act 2006 s 1.

⁸⁰⁰ Rachel Herron, 'A Social Systems Approach to Understanding the Racial Effect of the Section 44 Counter-Terror Stop and Search Powers' (2015) 11 (4) International Journal of Law in Context 383, 385.

⁸⁰¹ Terrorism Act 2000 s 44.

⁸⁰² Convention for the Protection of Human Rights and Fundamental Freedoms [1950] art 8.

⁸⁰³ *Gillan and Quinton v United Kingdom* App no 4158/05 (ECHR, 12 January 2010).

These police powers gave rise to ‘Institutional Islamophobia’ as UK Muslim communities were deliberately targeted and subjected to more stringent and discriminate stop and search powers and police presence after 9/11.⁸⁰⁴

Abuse of human rights after the events of 9/11 have also become apparent, as the UK’s response led to the enactment of stricter measures being implemented by indefinitely detaining suspected foreign terrorists.⁸⁰⁵ The only right of appeal for those detained or facing deportation⁸⁰⁶ was through the Special Immigration Appeals Commission (SIAC) tribunal.⁸⁰⁷

However, it was established the UK’s indefinite detention of suspected terrorists in Belmarsh prison⁸⁰⁸ was a breach of human rights⁸⁰⁹ as it contravened the European Convention on Human Rights (ECHR)⁸¹⁰ in *A and others v United Kingdom*.⁸¹¹

Further human rights violations by UK authorities were prevalent where challenges by detained suspects pertained to certifications of suspected terrorism.⁸¹² The case of, *A v Secretary of State for the Home Department (No 2)* found that certifications obtained through torture were inadmissible.⁸¹³ This position has also been reaffirmed by the European Court of Human Rights (ECtHR).⁸¹⁴

The UK government’s introduction and use of control orders⁸¹⁵ sought to restrict the movement and freedom⁸¹⁶ of suspected terrorists by subjecting eighteen-hour long curfews, was also found to be in violation of human rights.⁸¹⁷

⁸⁰⁴ Julian Hargreaves, ‘Police Stop and Search Within British Muslim Communities: Evidence From the Crime Survey 2006-11’ (2018) 58 (6) *Brit.J.Criminol.* 1281, 1285.

⁸⁰⁵ Anti-Terrorism, Crime and Security Act 2001 s 23.

⁸⁰⁶ *Secretary of State for the Home Department v Rehman* [2001] UKHL 47.

⁸⁰⁷ Special Immigration Appeals Commission Act 1997.

⁸⁰⁸ *A and Others v Secretary of State for the Home Department* [2004] UKHL 56.

⁸⁰⁹ Human Rights Act 1998 s 4.

⁸¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms [1950] art 5.

⁸¹¹ *A and Others v United Kingdom* (2009) App no 3455/05 (ECHR, 19 February 2009).

⁸¹² Anti-Terrorism, Crime and Security Act 2001 s 25.

⁸¹³ [2005] UKHL 71.

⁸¹⁴ *Othman (Abu Qatada) v United Kingdom* App no 8139/09 (ECHR, 17 January 2014).

⁸¹⁵ Prevention of Terrorism Act 2005 s 1.

⁸¹⁶ *ibid.*

⁸¹⁷ *Secretary of State for the Home Department v JJ and Others* [2007] UKHL 45.

Control orders were subsequently abolished⁸¹⁸ and replaced with terrorism prevention and investigation measure notices (TPIM) allowing various restrictions⁸¹⁹ to be imposed on an individual suspected of terrorism.⁸²⁰

In addition, the growing threat of terrorism, terrorist organisations and their far-reaching tactics in recruiting members, particularly from western European states⁸²¹ to become foreign fighters⁸²² has also contributed to the resentment towards Islam and Muslims further promoting Islamophobic attitudes.⁸²³

The re-surfacing of Shamima Begum (SB) known as the 'ISIS Bride' who left to join ISIS in 2015, at age 15 has been the subject of much controversy, as she has sought to return back to the UK, but has since had her British citizenship revoked by the former home secretary Sajid Javed⁸²⁴ under the British Nationality Act 1981⁸²⁵ rendering her stateless⁸²⁶ justifiably under IL.⁸²⁷

As SB is of Bangladeshi descent, the UK's justification for depriving her citizenship is that she automatically holds Bangladeshi citizenship from birth in accordance with Bangladeshi law.⁸²⁸ This justification to deprive British citizenship from another individual of Bangladeshi descent was also upheld by SIAC on the grounds of security risks terrorism posed in the G3 case.⁸²⁹

However, rather confusingly state legislation in Bangladesh places a further requirement to apply to a local governmental office within the state in order to apply and obtain citizenship.⁸³⁰ Bangladesh has since refused SB entry into

⁸¹⁸ Terrorism Prevention and Investigation Measures Act 2011 s 1.

⁸¹⁹ Terrorism Prevention and Investigation Measures Act 2011 s 2

⁸²⁰ Terrorism Prevention and Investigation Measures Act 2011 schedule 1.

⁸²¹ Maarten P. Bolhuis and Joris Van Wijk, 'Citizenship Deprivation as a Counterterrorism Measure in Europe; Possible Follow Up Scenarios, Human Rights Infringements and the Effect on Counterterrorism' (2020) 22 (3) European Journal of Migration and Law 338, 341-349.

⁸²² UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178.

⁸²³ Rita Floyd, 'Parels with the Hate Speech Debate: The Pros and Cons of Criminalising Harmful Securitising Effects' (2018) 44 (1) Review of International Studies 43, 43-46.

⁸²⁴ Ariane De Waal, 'Living Suspiciously: Contingent Belonging in British South Asian Theater' (2020) 9 (85) Humanities 1, 1-2.

⁸²⁵ British Nationality Act 1981, s 40A

⁸²⁶ Convention Relating to the Status of Stateless Persons [1954] art 1 (1).

⁸²⁷ Convention Relating to the Status of Stateless Persons [1961] art 3 (a) (ii).

⁸²⁸ Citizenship Act 1951 s 5.

⁸²⁹ *G3 v Secretary of State for the Home Department* SC/140/2017.

⁸³⁰ Bangladesh Citizenship Rules 1952 rule 9.

the state and confirmed she does not hold Bangladeshi citizenship, therefore rendering her stateless.⁸³¹

Interestingly, despite SB's desire to return to the UK by challenging SIAC's decision for refusing her entry into the UK⁸³² to appeal the revocation of her citizenship.⁸³³ The UK supreme court in 2021⁸³⁴ dismissed her appeal⁸³⁵ due to national security concerns and the risk she is likely to pose to the public safety.⁸³⁶

Shamima Begum has previously expressed that she did not regret joining ISIS.⁸³⁷ This adds to the growing concern of young Muslims from the west being radicalised, which contributes to the Muslim minority population being perceived as the terrorist threat.⁸³⁸

Due to the steady increase of terrorist activity, many European Union (EU) member states including: Belgium, Denmark, France and the UK (prior to withdrawing its membership⁸³⁹ from the EU⁸⁴⁰ referred to as 'Brexit' on the 31st January 2020)⁸⁴¹ had made significant financial contributions targeting Muslim communities to fund research and counter-radicalisation programmes to counter-act jihadist threats.⁸⁴²

⁸³¹ Mercedes Masters, 'Human Rights and British Citizenship: The Case of Shamima Begum as Citizen to Homo Sacer' (2020) 12 (2) *Journal of Human Rights Practice* 341, 347.

⁸³² *R (on the application of Begum) v Secretary of State for the Home Department* [2020] All ER (D) 43 (Feb).

⁸³³ *R (Begum) v Special Immigration Appeals Commission and UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism Intervening* [2020] EWCA Civ 918.

⁸³⁴ *R (on the application of Begum) v Secretary of State for the Home Department* [2021] All ER (D) 116 (Feb).

⁸³⁵ *R (on the application of Begum) v Secretary of State for the Home Department* [2021] UKSC 7 [137] (Reed LJ).

⁸³⁶ *ibid* [135] (Reed LJ).

⁸³⁷ Anthony Lloyd, 'Shamima Begum: Bring Me Home Says Bethnal Green Girl Who Left to Join ISIS' *The Times* (London, 13 February 2019) <<https://www.thetimes.co.uk/article/shamima-begum-bring-me-home-says-bethnal-green-girl-who-fled-to-join-isis-hgvqw765d>> accessed 30 September 2019.

⁸³⁸ Conrad Nyamutata, 'Young Terrorists or Child Soldiers? ISIS Children, International Law and Victimhood' (2020) 25 (2) *Journal of Conflict and Security Law* 237, 242.

⁸³⁹ European Communities Act 1972 s 2.

⁸⁴⁰ European Union (Withdrawal) Act 2018 s 1.

⁸⁴¹ Joris Larik, 'Brexit, the EU-UK Withdrawal Agreement, and Global Treaty (Re-) Negotiations' (2020) 114 (3) *AJIL* 443, 443.

⁸⁴² Katherine E. Brown, 'Introduction: Radicalisation and Securitisation Of Muslims In Europe' (2018) 7 (2) *Journal of Muslims In Europe* 139, 139-140.

In turn, the perceived threat of Islam in the west has also made Muslims the subject of Islamophobic attacks carried out by individuals as revenge.

A notable example of revenge attacks and the vilification of Muslims has taken a new dimension since the 2011 bombings and shooting by Anders Behring Breivik on the Utøya island in Norway, which was committed in the name of Islamophobia, misogyny and hate of the liberal left.⁸⁴³

The attacker's 1,500-page 'manifesto', which he posted online on the day of the attacks stated that he aimed to defend Norway from an Islamic takeover and also warned against feminists and cultural Marxists.⁸⁴⁴

The most recent and highly controversial attack against Muslims, was carried out in 2019 by Brendan Tarrant, a 28-year-old Caucasian male at two Mosques located in Christchurch, New Zealand recording and livestreaming the event with a body cam strapped to the chest.⁸⁴⁵ The attack was carried out in Al-Noor Mosque and the Linwood Mosque during the Friday prayers opening gun fire in the mosques killing 50 people and injuring 48.⁸⁴⁶

The western mainstream media's lack of clarification, has for a long time served an inimical perception essentially demonising Islam.⁸⁴⁷ This type of discrimination by mainstream western media has been labelled the 'Bin Laden Effect' which perceives Muslims as security threats or the 'enemy' within the USA and Europe.⁸⁴⁸

⁸⁴³ Mette Wiggen, 'Rethinking Anti-Immigration Rhetoric After the Oslo and Utøya Terror Attacks' (2012) 34 (4) *New Political Science* 585, 585-586.

⁸⁴⁴ *ibid.*

⁸⁴⁵ Eleanor Ainge Roy and Lisa Martin, '49 Shot Dead in Attack on Two Christchurch Mosques' *The Guardian* (London, 15 March 2019) <<https://www.theguardian.com/world/2019/mar/15/multiple-fatalities-gunman-christchurch-mosque-shooting>> accessed 30 September 2019.

⁸⁴⁶ Tina Besley and Michael A. Peters, 'Terrorism, Trauma, Tolerance: Bearing Witness to White Supremacist Attack on Muslims in Christchurch, New Zealand' (2020) 52 (2) *Educational Philosophy and Theory* 109, 109.

⁸⁴⁷ Daya Kishan Thussu, 'How Media Manipulates Truth About Terrorism' (1997) 32 (6) *Economic and Political Weekly* 264, 264

⁸⁴⁸ Richard Wike and Brian J Grim, 'Western View Towards Muslims: Evidence from 2006 Cross National Survey' (2010) 22 (1) *International Journal of Public Opinion and Research* 4, 7.

In support of this argument, the UK has since introduced the Counter Terrorism and Security Act 2015⁸⁴⁹ which has been criticised for curtailing free speech on university campuses and introducing new legal powers to limit wider freedoms, meaning nursery school staff and registered childminders potentially having to report on young children who they regard as being radicalised.⁸⁵⁰

This localised and national Islamophobia has been argued to cause radicalisation, causing further Islamophobia, such that it becomes a vicious circle of agony, intolerance and zealous behaviour affecting Muslims not only at a cultural level but also at societal, institutional, legal and organisational level.⁸⁵¹

The western media's depictions of Islamic terrorism⁸⁵² and inaccurate perception of Islam, has been argued to decrease tolerance and increase fear of Muslims which in turn leads to radicalisation.⁸⁵³ Some scholars have even coined the term 'Anti-Muslim Racism' as not being 'exclusively biologically determined, but that it is something which is a socio-politically produced experience'.⁸⁵⁴

In addition, western states perception of Islam posing a risk to western culture has proven to be the subject of much contention, particularly, the implementation of bans prohibiting certain articles of Muslim attire which has been voiced by politicians regionally across European states and reflected in judicial decisions.

⁸⁴⁹ Counter Terrorism and Security Act 2015.

⁸⁵⁰ Tahir Abbas and Imran Awan, 'Limits of UK Counterterrorism Policy and Its Implications for Islamophobia and Far Right Extremism' (2015) 4 (3) *International Journal for Crime, Justice and Social Democracy* 16, 17-18.

⁸⁵¹ *ibid.*

⁸⁵² Maryem Jahedi, Faiz Sathi Abdullah and Jayakaran Mukundan, 'Review of Studies on Media Portrayal of Islam, Muslims and Iran' (2014) 2 (2) *International Journal of Education and Research* 297, 298.

⁸⁵³ John H Shaver et al, 'News Exposure Predicts Anti-Muslim Prejudice' (2017) 12 (3) *PLOS One* 1, 1.

⁸⁵⁴ Tina G. Patel, 'It's Not About Security, It's About Racism: Counter Terror Strategies, Civilizing Processes and the Post-Race Fiction' (2017) 3 (1) *Palgrave Communications* 1, 1.

A notable example of this can also be observed in the UK court decision of, *Azmi v Kirklees Metropolitan Borough Council*⁸⁵⁵ where the appellant, a bilingual support worker in a school, was refused permission to wear a face veil (*Burka/Niqab*) when assisting male teachers. The court found that there was no direct or indirect discrimination, as the veil was found to obscure communication preventing effective learning.

A similar decision was reached, in the UK House of Lords (HoL) decision in *R (Begum) v Headteacher and Governors Denbigh High School*⁸⁵⁶ where the court found a secondary high school did not breach the claimants statutory right⁸⁵⁷ to manifest her religion under article 9⁸⁵⁸ and right to education under article 2⁸⁵⁹ of the ECHR.⁸⁶⁰

In this case, the school prohibited the claimant from wearing a *Jilbab* (loose gown) for concealing the contours of her body as required by her Islamic faith and demanded she wear a close fitting *Shalwar Kameez* (South Asian Dress) which was allowed under the school's dress code.

In contrast to this decision, the case of, *Mandla v Dowell Lee*⁸⁶¹ The HoL held that the appellant a practicing Sikh, was found to be indirectly discriminated against for being asked to remove his turban and shorten his hair in accordance with the rules of a private school.

The decision in the *Begum* case⁸⁶² differs from the *Mandla* case.⁸⁶³ The statutory protection afforded to other religions regarding religious dress, particularly Sikhism. Practicing Sikhs wearing a turban are exempt from wearing motorcycle crash helmets⁸⁶⁴, wearing helmets in the course of

⁸⁵⁵ [2007] ICR 1154.

⁸⁵⁶ [2006] 2 All ER 487.

⁸⁵⁷ Human Rights Act 1998.

⁸⁵⁸ Convention for the Protection of Human Rights and Fundamental Freedoms [1950] art 9.

⁸⁵⁹ Convention for the Protection of Human Rights and Fundamental Freedoms [1950] protocol art 2.

⁸⁶⁰ Manisuli Ssenyonjo, 'Limits on the Freedom to Manifest One's Religion in Educational Institutions in Uganda and the United Kingdom' (2009) 7 (2) International Journal of Constitutional Law 275, 286.

⁸⁶¹ [1982] UKHL 7.

⁸⁶² *Begum* (n 856).

⁸⁶³ *Mandla* (n 861).

⁸⁶⁴ Road Traffic Act 1988 s 16 (2).

employment⁸⁶⁵ including statutory protection from any racial discrimination as a result of this exemption.⁸⁶⁶

Further exemptions include a defence to the criminal offence of possessing a *Kirpan* (ceremonial knife) in public⁸⁶⁷ and private spaces⁸⁶⁸ including religious ceremonies.⁸⁶⁹

Moreover, the ban of the *Burqa/Niqab* and the *Hijab* (headscarf) has been implemented by: France, Belgium, Italy, Germany, Austria, Netherlands, Turkey, Denmark⁸⁷⁰ and Switzerland.⁸⁷¹ by garnering support from all aspects of the political spectrum encouraging secularism and cultural integration of Muslim minorities to western values and traditions, which may be interpreted as Islamophobic.⁸⁷²

The decision reached by the ECtHR in *Sahin v Turkey*⁸⁷³ where the court held Turkey's ban on headscarves in universities did not violate article 9⁸⁷⁴, because the ban was necessary to protect the rights and freedoms of others and to protect public order.

In *SAS v France*⁸⁷⁵ the court held that France's ban on the full-face veil despite being a valid exercise of religion, prevented people from living together, justifying the ban that when a woman covers her entire face is breaking the rights of others to live in the space of socialisation.

⁸⁶⁵ Employment Act 1989 s 11.

⁸⁶⁶ Employment Act 1989 s 12.

⁸⁶⁷ Criminal Justice Act 1988 s 139.

⁸⁶⁸ Offensive Weapons Act 2019 s 47 (8)

⁸⁶⁹ Criminal Justice Act 1988 s 141.

⁸⁷⁰ Matthew Weaver, 'Burqa Bans, Headscarves and Veils: A Timeline of Legislation in the West' *The Guardian* (London, 31 May 2018) <<https://www.theguardian.com/world/2017/mar/14/headscarves-and-muslim-veil-ban-debate-timeline>> accessed 30 September 2019.

⁸⁷¹ *Dahlab v Switzerland* App no 42393/98 (ECHR, 15 February 2001).

⁸⁷² Adrianna Piatti Crocker and Laman Tasch, 'Veil Bans in Western Europe: Interpreting Policy Diffusion' (2015) 16 (2) *Journal of Women's Studies* 15, 15.

⁸⁷³ *Sahin v Turkey* (2005) ECHR 819.

⁸⁷⁴ Convention for the Protection of Human Rights and Fundamental Freedoms [1950] art 9.

⁸⁷⁵ *SAS v France* (2014) ECHR 695

The twin cases of, *Dakir v Belgium*⁸⁷⁶ and *Belkacemi and Oussar v Belgium*⁸⁷⁷ also concerned the legality of the full-face veil ban, which the ECtHR approached a similar decision in both cases stating the ban did not violate articles 8⁸⁷⁸ or 9 of the ECHR.⁸⁷⁹

In 2015, the ECtHR in *Ebrahimian v France*⁸⁸⁰ considered an employer's decision not to renew the employment contract of a hospital social worker because of her refusal to stop wearing a headscarf. The claimant argued that the employer's decision not to renew her contract breached her right to manifest her religion under article 9 of the ECHR.⁸⁸¹

The court upheld a public sector ban of Muslim women wearing the headscarf on the basis of secularism and neutrality of public services. However, the reasoning of the above cases has been inconsistent with the decision reached by the ECtHR's relating to practicing Christian employees in public facing roles.

The court's decision in *Eweida v United Kingdom*⁸⁸² found British Airways (BA) discriminated against the claimants right to manifest her religion under article 9⁸⁸³, after BA sent the claimant home for four months without pay for refusing to remove a cross pendant and necklace which was not permissible under the airlines uniform policy for check in staff.

In 2017, a decision reached by the Court of Justice of the European Union (CJEU) took a similar approach to the ECtHR in *Achbita v G4S Secure Solutions NV*⁸⁸⁴ where the court upheld a ban of a headscarf in the private sector due to the internal rule of the company which aimed at establishing a neutral image through the ban of all visible religious symbols of its workers in

⁸⁷⁶ *Dakir v Belgium* (2017) ECHR 656

⁸⁷⁷ *Belkacemi and Oussar v Belgium* (2017) ECHR 655.

⁸⁷⁸ Convention for the Protection of Human Rights and Fundamental Freedoms [1950] art 8.

⁸⁷⁹ Convention for the Protection of Human Rights and Fundamental Freedoms [1950] art 9.

⁸⁸⁰ *Ebrahimian v France* (2015) ECHR 1041.

⁸⁸¹ Convention for the Protection of Human Rights and Fundamental Freedoms [1950] art 9.

⁸⁸² *Eweida and Others v United Kingdom* (2013) ECHR 37.

⁸⁸³ Convention for the Protection of Human Rights and Fundamental Freedoms [1950] art 9.

⁸⁸⁴ Case C-157/15 *Achbita v G4S* [2017] 3 CMLR 21

contact with customers, by relying on Directive 2000/78⁸⁸⁵ concerning 'Occupational Requirements' which deems such restriction proportionate.⁸⁸⁶

A similar decision was reached by the CJEU in *Asma Bouganoui v Micropole SA*.⁸⁸⁷ Even though religion⁸⁸⁸ is legislatively a protected characteristic in the UK⁸⁸⁹, the decisions rendered by the ECtHR and the CJEU could potentially allow discrimination of the *Hijab, Burqa and the Jilbab* if it is justified to promote secular society, protect public order or allow private sector companies to uphold such bans for the purposes of establishing a neutral image of its employees.

These decisions have been argued to accommodate xenophobic/Islamophobic tendencies⁸⁹⁰ as employers have complemented state policies of banning the headscarf after the GWOT doctrine coming into effect. The perception of Muslims as terrorists and terrorist sympathisers in European states have led to an increase in discrimination in schools, workplaces, and society in general.⁸⁹¹

This practice is not just exclusive to European states, the USA has previously implemented a controversial restriction after a decision was made by former President Donald Trump on the 27th January 2017 in the first week of his presidency enacting Executive Order No.13769⁸⁹² pursuant to USA

⁸⁸⁵ Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Equality Framework Directive).

⁸⁸⁶ *ibid* art 4 (1).

⁸⁸⁷ Case C-188/15 *Asma Bougnaoui v Micropole SA* (Grand Chamber, 14 March 2017).

⁸⁸⁸ Equality Act 2010 s 10.

⁸⁸⁹ *ibid* s 4.

⁸⁹⁰ Stephanie Hennette-Vauchez, 'Equality and the Market: The Unhappy Fate of Religious Discrimination in Europe: ECJ 14 March 2017, Case C-188/15, *Asma Bougnaoui & ADDH V Micropole SA*; ECJ 14 March 2017, Case C-157/15, *Samira Achbita and Centrum Voor Gelijkheid Van Kansen En Voor Racismebetrijding v G4S Secure Solutions NV*' (2017) 13 (4) *EuConst* 744, 758.

⁸⁹¹ Adrien Katherine Wing and Monica Nigh Smith, 'Critical Race Feminism Lift the Veil? Muslim Women, France and the Headscarf Ban' (2006) 39 (3) *U.C.Davis L.Rev.* 743, 746

⁸⁹² Executive Order No. 13769 – 'Protecting the Nation from Foreign Terrorist Entry into the United States' 82 FR 8977 (27 January 2017).

immigration law⁸⁹³ named 'Protecting the Nation from Foreign Terrorists Entry into the United States'⁸⁹⁴ most popularly known as the 'Muslim Ban'.⁸⁹⁵

The order itself named citizens from seven Muslim majority nations being restricted admission for 90 days, suspended the USA Refugee Admissions Program for 120 days with restrictions on Syrian refugees being made indefinitely, with Muslim passengers who were previously approved to travel to the USA were detain upon arrival to the USA effective immediately.⁸⁹⁶

President Trump by implementing the 'Muslim Ban', has been criticised for fulfilling a promise made in his presidential campaign, whilst injecting Islamophobia into American Immigration Law and Policy.⁸⁹⁷ An injunction was subsequently granted by the USA Supreme Court as the bans were deemed to be discriminatory and unconstitutional.⁸⁹⁸

The refusal of entry based on ethnic, physical, racial and gender grounds is considered degrading treatment in violation of IL⁸⁹⁹, which has been confirmed previously by the United Nations Human Rights Committee (UNHRC)⁹⁰⁰ and the European Commission on Human Rights (ECtHR) tribunal.⁹⁰¹

This executive decision also contravened IHRL by rejecting refugees, this is found to be in breach of article 14 of the UDHR which recognises the rights of persons to seek asylum from persecution.⁹⁰²

In addition, the Executive Order pertaining to the refoulement of refugees contravenes the Refugee Convention⁹⁰³ essentially allowing them to be

⁸⁹³ Immigration and Nationality Act 1952 s 212 (f).

⁸⁹⁴ n 892.

⁸⁹⁵ Abed Ayoub and Khaled Beydoun, 'Executive Disorder: The Muslim Ban, Emergency Advocacy and the Fires Next Time' (2017) 22 (2) Michigan Journal of Race and Law 215, 217.

⁸⁹⁶ Paul Babe, 'Politics!?' Of Course! A Reflection of Washington v Trump' (2017) 67 Emory L.J.2001, 2001-2002.

⁸⁹⁷ Ayub and Beydoun (n 895).

⁸⁹⁸ *State of Washington v Donald Trump* 853 F.3d 933 (2017).

⁸⁹⁹ Vincent Chetail and Celine Bauloz (ed), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 59.

⁹⁰⁰ *Aumeeruddy-Cziffra and 19 other Mauritian women v Mauritius* (1984) Comm No 35/1978, UN Doc CCPR/C/12/D/35/1978.

⁹⁰¹ *East African Asians v United Kingdom* (1973) 3 EHRR 76.

⁹⁰² Universal Declaration of Human Rights [1948] art 14.

⁹⁰³ Convention Relating to the Status of Refugees [1951] art 33.

persecuted within their home state. By subjecting refugees to face imminent harm or torture also contravenes the United Nations Convention Against Torture⁹⁰⁴ which the USA is signatory to.

The Islamophobic rhetoric used by former President Donald Trump as a head of state is considered direct securitisation by using language labelling Islam as a threat and danger. The effect of implementing the 'Muslim travel ban' to protect the USA from foreign terrorists portrays Muslims in general as the 'problem' or threat to western democracy.⁹⁰⁵

The international court of justice (ICJ) has ruled the prohibition of racial discrimination constitutes a peremptory norm of general IL.⁹⁰⁶ Thus, it seems the securitisation of Islam has intensified after the 9/11 terrorist attacks.⁹⁰⁷

The political discourses as well as the popular media have quickly securitised Islam as an existential threat to western liberal democracies and other states across the globe⁹⁰⁸ including China and its human rights restrictions on the Uyghur Muslims.⁹⁰⁹

Thus, Islamophobic attitudes have not only been voiced politically but legally, by restricting fundamental human rights of Muslims as demonstrated domestically in the UK, USA, France, regionally in Europe and China.

The next chapter will examine the role of the P5 members and their allies following the events of 9/11 and demonstrate how Islamist terrorism has served as an ideal platform for western states to employ illegal methods of warfare and military occupations in the ongoing and continued GWOT.

⁹⁰⁴ The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1984] art 3.

⁹⁰⁵ Clara Eroukhmanoff, 'It's Not a Muslim Ban! Indirect Speech Acts and The Securitisation of Islam In the United States Post 9-11' (2018) 8 (1) *Global Discourse: An Interdisciplinary Journal of Current Affairs and Applied Contemporary Thought* 5, 5-7.

⁹⁰⁶ *Barcelona Traction (Belgium v Spain)* [1970] ICJ Rep 3, para 34.

⁹⁰⁷ Martijn De Koning, 'The Racialization of Danger: Patterns and Ambiguities in the Relation Between Islam, Security and Secularism in the Netherlands' (2020) 54 (1-2) *Patterns of Prejudice* 123, 129.

⁹⁰⁸ Hedayatullah Siddiqi, 'Securitisation of Islam In the West: Analysing Western Political and Security Relations with Islamic States' (2018) 1 *Hiroshima Journal of Peace* 32, 32.

⁹⁰⁹ Section 2.2.3 n 514.

In doing so, the chapter will highlight the inability of both the UNSC and the ICC's failures to interpose, obviate and prosecute severe violations of IL, IHL and CIL.

Chapter 3 – The Islamic Republic of Afghanistan & The Republic of Iraq

This chapter will demonstrate the consequential effects of the ‘global war on terror’ (GWOT) doctrine by the United States of America (USA) in the immediate aftermath of the 11th September 2001 (9/11) attacks on the twin towers of the World Trade Centre.⁹¹⁰

This is particularly important as the doctrine has served as the main justification for the USA, UK and coalition allies to pursue senior leaders of the terrorist group Al-Qaeda and later the Islamic State of Iraq and Syria – Khorasan Province (ISIS-KP), resulting in substantial violations of International Law (IL), International Humanitarian Law (IHL) and Customary International Law (CIL) in both Afghanistan and Iraq.

This chapter will present similarities between Afghanistan and Iraq, particularly the means used to justify their illegal military occupations in both states. In the 2001 invasion of Afghanistan, this involved the USA and coalition forces using its right of self-defence against the Taliban regime and Al-Qaeda to justify illegal military occupation, which was then legitimised by appointing a USA approved head of state.

The 2003 invasion and subsequent military occupation of Iraq was also illegal, as the USA and the United Kingdom (UK) made unsubstantiated and unevidenced claims of Saddam Hussein supporting Al-Qaeda and being in possession of Weapons of Mass Destruction (WMD). The invasion was justified by relying on a previous United Nations Security Council (UNSC) resolution to use force, which was no longer valid.

The invasion was legitimised after the invasion, as both the UK and the USA used its permanent membership and political affluence within the UNSC to coerce delegates of other states to approve a new resolution justifying use of force

⁹¹⁰ David A. Hughes, ‘9/11 Truth and the Silence of the IR Discipline’ (2020) 45 (2) *Alternatives: Global, Local, Political* 55, 55-56.

Further similarities will be presented as both the USA, UK and coalition allies in both states have killed scores of innocent civilians throughout their military occupation, whilst also being responsible for committing severe human rights violations such as enforced disappearance⁹¹¹, torture, detention⁹¹² without trial through a network of secret prisons located around the globe.⁹¹³

The chapter by demonstrating the above will highlight, despite these violations being apparent, individuals from the UK and the USA have not been prosecuted by the ICC for international crimes, nor is the UNSC capable of holding permanent members of the UNSC (P5) accountable in the ongoing GWOT.

3.1 Al-Qaeda and the USA's 'War on Terror' Post-9/11

The threat of Al-Qaeda prior to the events of 9/11, was openly expressed by the late group leader Osama Bin Laden to wage war or *Jihad* against the USA and its allies, which observed the group carrying out planned attacks on the USA's embassies located in East Africa in August 2000 and the bombing of Navy warship USS Cole stationed in Yemen in October 2000.⁹¹⁴

The arrest of Ahmed Ressam by USA custom agents for attempting to smuggle explosives to bomb Los Angeles airport in December 1999⁹¹⁵ was also a clear indication of Al-Qaeda's intention of bringing its war to the USA.⁹¹⁶

In the days after 9/11, there was widespread condemnation of the terrorist attacks which had occurred in the USA.⁹¹⁷ The former USA President George W. Bush (2001-2009) ordered a number of regulations in response to the

⁹¹¹ Amina Zarrugh, 'The Development of US Regimes of Disappearance: The War on Terror, Mass Incarceration and Immigration Deportation' (2020) 46 (2) *Critical Sociology* 257, 268.

⁹¹² N.K. Aggarwal, 'Government Responses to Physician Involvement in the CIA's Rendition, Detention, and Interrogation Program After 9/11' (2020) 12 (January-March) *Ethics, Medicine and Public Health* 1,2.

⁹¹³ Francesca Laguardia, 'Deterring Torture: The Preventative Power of Criminal Law and Its Promise for Inhibiting State Abuses' (2017) 39 (1) *Hum.Rts.Q.*189, 206.

⁹¹⁴ Gaetano Joe Llardi, 'The 9/11 Attacks – A Study of Al-Qaeda's Use of Intelligence and Counterintelligence' (2009) 32 (3) *Studies in Conflict and Terrorism* 171,177.

⁹¹⁵ Peter Moreno, 'Defusing the Bomb: The Scope of Federal Explosives Statute' (2007) 82 (4) *Wash.L.Rev.* 1007, 1007.

⁹¹⁶ *ibid.*

⁹¹⁷ Elena Katselli and Sangeeta Shah, 'September 11 and the UK Response' (2003) 52 (1) *ICLQ* 245, 245

terrorist attacks including: readying the reserve army of both the USA air force and navy⁹¹⁸, blocking and prohibiting transactions of those who commit, threaten to commit or support terrorism.⁹¹⁹

The speech given by former President Bush in the State of the Union address to the joint session of Congress and the American people stated: 'Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated'.⁹²⁰

Indeed, the Bush administrations declaration of a continued GWOT has been a central theme throughout the former presidency of Barack Obama (2009-2017) and Donald Trump (2017-2021), which has often resulted illegal military conduct by the USA and coalition forces violating IL and IHL.

The USA managed to continue its GWOT collectively with the aid of three other P5 members of the UNSC including UK and France (hereafter referred to as the P3) and members of the North Atlantic Treaty Organisation (NATO) in line with their obligations under the North Atlantic Treaty to provide armed response in the event of a member state being attacked.⁹²¹

The North Atlantic Treaty places obligations on the NATO states to comply with the provisions of the UN Charter⁹²² by preventing the threat and use of force by members in any manner inconsistent with the UN Charter.⁹²³

Despite the explicit prohibition to use force, it has been argued in the previous chapter⁹²⁴ that the P5 have continued to undermine the authority of the UNSC and the ICC by using excessive force in counter-terrorism operations, and nationals of these states have continued to enjoy impunity for the international

⁹¹⁸ Executive Order No. 13223 – 'Ordering the Ready Reserve of the Armed Forces to Active Duty and Delegating Certain Authorities to the Secretary of Defense and the Secretary of Transportation' 66 FR 48201 (14 September 2001) [Section 1].

⁹¹⁹ Executive Order No. 13224 – 'Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit or Support Terrorism' 66 FR 49079 (25 September 2001).

⁹²⁰ 'Test of George Bush's Speech' *The Guardian* (London, 21 September 2001) <<https://www.theguardian.com/world/2001/sep/21/september11.usa13>> accessed 09/10/2019.

⁹²¹ The North Atlantic Treaty [1949] art 7.

⁹²² Charter of the United Nations [1945].

⁹²³ The North Atlantic Treaty [1949] art 1.

⁹²⁴ Section 2.2.3 to n 488 in ch 2.

crimes they have committed. This will be further highlighted throughout the remainder of this chapter.

3.1.1 The UNSC's Response to the Al-Qaeda Terrorist Attack Post 9/11 and the Illegality of Operation Enduring Freedom

The UNSC's response to the 9/11 attacks demonstrated a proactive and eager approach in combating terrorism, which led to the P3 and other member states of the NATO invading Afghanistan.⁹²⁵

The discourse utilised within resolution 1368⁹²⁶ and 1373⁹²⁷ authorised the USA to act in self-defence, under article 51 of the UN Charter.⁹²⁸ UNSC resolution 1373, specifically stated: '*Reaffirming* the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)'.⁹²⁹

The GWOT has become highly controversial, especially since the emergence of threats presented by non-state actors (terrorist organisations) such as Al-Qaeda.⁹³⁰

Although, the use of force by non-state actors continues to pose a serious challenge to the IL paradigm⁹³¹, international armed conflict (IAC) is legally recognised only if it is 'present between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them'.⁹³² Academics such as Balendra have also reiterated this argument.⁹³³

However, despite article 51 of the UN Charter remaining silent on whether states can claim self-defence when attacked by terrorist groups, the

⁹²⁵ Bilal Mahmood and Abdul Majid, '9/11 As A Symbol of Terror: Responses and Actions' (2018) 33 (2) Research Journal of South Asian Studies 335, 337.

⁹²⁶ UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368.

⁹²⁷ UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

⁹²⁸ Charter of the United Nations [1945] art 51.

⁹²⁹ *ibid.*

⁹³⁰ Ademola Abass, *International Law: Text, Cases and Materials* (2nd edn, OUP 2014) 423

⁹³¹ Noelle Higgins, *Regulating the Use of Force in Wars of National Liberation - The Need for a New Regime: A Study of the South Moluccas and Aceh* (Martinus Nijhoff Publishers 2010) 1.

⁹³² Geneva Convention I: For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [1949] art 2.

⁹³³ Natasha Balendra, 'Defining Armed Conflict' (2007) 29 (6) *Cardozo L.Rev.* 2461, 2472.

International Law Commission Statute (ILCS)⁹³⁴ established by the United Nations General Assembly (UNGA)⁹³⁵ codifies IL and CIL⁹³⁶ and provides clear guidance in such circumstances.

Under article 11 the ICLS states: 'Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own'.⁹³⁷

The passing of resolution 1373 authorised Afghanistan's sovereignty to be pierced⁹³⁸ which was justified on the basis that the ruling Taliban regime 'played host to Al-Qaeda, and established a deeply Islamic Shariah-based conservative government'.⁹³⁹

Subsequently, the USA with the support of NATO and a coalition 40 countries⁹⁴⁰ commenced Operation Enduring Freedom (OEF) on the 7th October 2001, which originally sought to eliminate Al-Qaeda and the leader of the terrorist organisation Osama Bin Laden.⁹⁴¹

Instead, the military operation transpired into a long-term invasion of Afghanistan becoming an illegal war against the Taliban regime. The USA endeavoured to eliminate the military capacity of the Taliban and Al-Qaeda whilst preserving the governmental structure created by the Taliban which was criticised for going 'beyond necessary self-defence'.⁹⁴²

⁹³⁴ Statute of the International Law Commission Statute [1947].

⁹³⁵ UNGA Res 174 (21 November 1947) UN Doc A/RES/174 (II).

⁹³⁶ Arman Sarvarian, 'Codifying the Law of State Succession: A Futile Endeavour?' (2016) 27 (3) EJIL 789, 791.

⁹³⁷ Statute of the International Law Commission Statute [1947] art 11.

⁹³⁸ Gareth D Williams, 'Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the Unwilling or Unable Test' (2013) 36 (2) UNSWLJ 619, 619.

⁹³⁹ Shanthie Mariet D'Souza, 'Taliban: The Rebels Who Aspire to Be Rulers' (2016) 3 (1) Journal of Asian Security 20, 22.

⁹⁴⁰ Katharina P. Coleman, 'The Legitimacy Audience Shapes the Coalition: Lessons from Afghanistan, 2001' (2017) 11 (3) Journal of Intervention and Statebuilding 339, 346 - 348.

⁹⁴¹ Waseem Ahmed Qureshi, 'Untangling the Complicated Relationship Between International Humanitarian Law and Human Rights Law in Armed Conflict' (2018) 6 (1) Penn State Journal of Law and International Affairs' 203, 204

⁹⁴² Mary Ellen O'Connell, 'Lawful Self Defence to Terrorism' (2002) 63 (4) U.Pitt.L.Rev. 889, 904.

In order to claim self-defence against the Taliban, the USA had a legal responsibility to demonstrate that the Taliban regime had in fact colluded with Al-Qaeda to justify an armed response by the USA.⁹⁴³

The obligation of a state's legal responsibility has been established by the ICJ in *Nicaragua v United States* where the court commented: 'To give rise to legal responsibility of the United States it would in principle have to be proved that, that state had *effective control* of the military or paramilitary operations in the course of which alleged violations were committed'.⁹⁴⁴

The International Criminal Tribunal for the former Yugoslavia (ICTY) has elaborated in the *Prosecutor v Tadić* case, that IL deems effective control to exist when a state has a role in organising, co-ordinating or planning, providing organisational support, equipping and financing the military actions of a specific group.⁹⁴⁵

The UNGA has prohibited states from intervening and supporting armed groups⁹⁴⁶ and terrorists to overthrow regimes and governments within another state.⁹⁴⁷

The Taliban, publicly condemned the 9/11 attacks and mentioned they had no prior knowledge of the attack⁹⁴⁸, nor were they complicit with the attack claiming that it did not fund Al-Qaeda or provide it with training, weapons, or supplies.⁹⁴⁹

⁹⁴³ *ibid* 896.

⁹⁴⁴ *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 115.

⁹⁴⁵ *Prosecutor v Dusko Tadić* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 137.

⁹⁴⁶ UNGA Res 2131 (XX) (21 December 1976) para 1.

⁹⁴⁷ UNGA Res 2625 (XXV) (24 October 1970) para 1.

⁹⁴⁸ Josh Schott, 'The Differences Between the Taliban and Al-Qaeda' (*E-International Students*, 17 November 2012) <<https://www.e-ir.info/2012/11/17/the-differences-between-the-taliban-and-al-qaeda/>> accessed 21 October 2019.

⁹⁴⁹ Thomas M McDonnell, *The United States, International Law, and the Struggle Against Terrorism* (1st edn, Routledge 2009) 263-264.

Merely, harbouring a terrorist organisation (Al-Qaeda) without any effective control over them does not provide legal justification for the USA to invade and militarily occupy Afghanistan and overthrow the ruling Taliban regime.⁹⁵⁰

Thus, the USA's right to self-defence allowed them to take swift action which was necessary, selective and proportionate military force⁹⁵¹ in response to the non-state actor (Al-Qaeda) who claimed responsibility for the attacks⁹⁵², but did not justify an IAC against the Taliban regime.

In support of this argument, the USA led NATO coalition objective to destroy Al-Qaeda via OEF, claimed in 2001, that it had ousted the Taliban regime, and then told the world that it had eliminated Al-Qaeda.⁹⁵³

Thus, the USA and coalition forces continued military occupation of Afghanistan can only be deemed to be in excess of self-defence, directly contravening article 51 of the UN Charter. Armed military reprisals and renewed use of force are impermissible without the prior authorisation of the UNSC⁹⁵⁴ or approval through the consent doctrine by a head of state.⁹⁵⁵

In an attempt to legitimise military occupation, the USA appointed Hamid Karzai as the interim leader of Afghanistan between 2001-2004 by virtue of the Bonn Agreement⁹⁵⁶ a conference which was convened in Germany and supported by the UN, which decided the political and democratic future of Afghanistan.⁹⁵⁷

⁹⁵⁰ Karl Meesen, 'Unilateral Recourse to Military Force Against Terrorist Attacks' (2003) 28 (2) Yale J.Int'l L. 341, 345.

⁹⁵¹ *The Caroline v United States* 11 U.S. (7 Cranch) 496 (1813).

⁹⁵² Imtiaz Ali, 'Reflections on Al Qaeda and Terrorism' (2004) 57 (2) Pakistan Horizon 21, 21.

⁹⁵³ Mohammad Ayesha, 'Daesh Cannot Be Defeated by War' (*Middle East Monitor*, 12 February 2019) <<https://www.middleeastmonitor.com/20190212-daesh-cannot-be-defeated-by-war/>> accessed 21 October 2019.

⁹⁵⁴ Jules Lobel, 'The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan' (1999) 24 (2) Yale J.Int'l L. 537, 540.

⁹⁵⁵ Ryan T. Williams, 'Dangerous Precedent: Americas' Illegal War in Afghanistan' (2012) 33 (2) University of Pennsylvania Journal of International Law 563, 607.

⁹⁵⁶ UNSC Res 1383 (6 December 2001) UN Doc S/RES/1383.

⁹⁵⁷ Purnima Sharma, 'Security Challenges in Afghanistan, Post-2014' (2019) 23 (3-4) Himalayan and Central Asian Studies 71, 73.

Hamid Karzai became the ideal candidate due to his leadership of the Popalzai Pashtun tribe and the support he provided the USA during OEF, which was instrumental in dismantling the Taliban regime.⁹⁵⁸

After the Taliban government collapsed, Hamid Karzai in 2001 became the interim head of state, and in 2004 he became the President of Afghanistan in an attempt to implement a new governmental structure, administrative machinery, new security forces, improved logistics, and revived economic activities.⁹⁵⁹

This also included the developmental stabilisation and reconstruction of rural areas⁹⁶⁰, which was supported by the NATO led International Security Assistance Force (ISAF).⁹⁶¹ After the appointment of Hamid Karzai as head of state, this changed the USA's initial invasion of Afghanistan from being an IAC to a Non-International Armed Conflict (NIAC).⁹⁶²

However, the consent given by Hamid Karzai allowing the USA's continued military operation has been criticised for being illegitimate, as 'much of the fighting in parts of Afghanistan against local warlords and the Taliban, were not under the control of the USA or Hamid Karzai'.⁹⁶³

The USA has also been heavily criticised for committing election fraud in 2004⁹⁶⁴ which resulted in Karzai becoming the president of Afghanistan.⁹⁶⁵ A similar criticism was forwarded in the 2009 presidential elections, when Hamid Karzai was re-elected until 2014, with amid claims of rampant election fraud

⁹⁵⁸ Jason Burke, 'Hard Man in A Hard Country' *The Guardian* (London, 20 July 2008) <<https://www.theguardian.com/world/2008/jul/20/afghanistan>> accessed 06 August 2020.

⁹⁵⁹ Juergen Kleiner, 'How Many Lives Do the Taliban Have?' (2014) 25 (4) *Diplomacy and Statecraft* 708, 710

⁹⁶⁰ Thomas H. Johnson, 'The Taliban Insurgency and An Analysis of Shabnamah (Night Letters)' (2007) 18 (3) *Small Wars and Insurgencies* 317, 317-318.

⁹⁶¹ John Braithwaite and Ali Wardak, 'Crime and War In Afghanistan: Part I The Hobbesian Solution' (2013) 53 (2) *Brit.J.Criminol.* 179, 179.

⁹⁶² Peter Margulies, 'Constraining Targeting in Noninternational Armed Conflicts: Safe Conduct for Combatants Conducting Informal Dispute Resolution' (2013) 46 (4) *Vanderbilt Journal of Transnational Law* 1041, 1042-1043.

⁹⁶³ Williams (n 955) 599.

⁹⁶⁴ Thomas H Johnson, 'The Myth of Afghan Electoral Democracy: The Irregularities of the 2014 Presidential Election' (2018) 29 (5-6) *Small Wars and Insurgencies* 1006, 1009.

⁹⁶⁵ Declan Walsh, 'Boycott Row Hits Afghan Election Over Fraud Claims' *The Guardian* (London, 10 October 2004) <<https://www.theguardian.com/world/2004/oct/10/afghanistan.declanwalsh>> accessed 21 October 2019.

discrediting the government⁹⁶⁶ which was salted by despotic power structures.⁹⁶⁷

Thus, it can be argued that the USA's illegal war, military occupation and interference in the political affairs of Afghanistan has been justified under the Bush administrations GWOT on Al-Qaeda, yet no individuals have been indicted nor prosecuted for international crimes till present.

3.1.2 Counter-Terrorism, Drone Strikes, State Sovereignty, Violations of IHL and the USA's Continued Illegal Occupation in Afghanistan and the Emergence of ISIS-KP

Similar to its predecessor, the USA's continued GWOT under the administration of former President Barack Obama has enforced this doctrine by continuing its presence in the border regions between Afghanistan and Pakistan.

This was especially the case, after the death of Osama Bin Laden in 2011 by the USA special forces in Pakistan after a compound was raided in Abbottabad near a Pakistani military base.⁹⁶⁸ The raid is considered illegal⁹⁶⁹ as it was conducted without the prior consent of the former Prime Minister of Pakistan Yousaf Raza Gilani⁹⁷⁰ breaching Pakistan's states sovereignty and territorial integrity.⁹⁷¹

⁹⁶⁶ Michael Callen and James D Long, 'Institutional Corruption and Election Fraud: Evidence from a Field Experiment in Afghanistan (2015) 105 (1) American Economic Review 354, 357.

⁹⁶⁷ Justin Mankin, 'Gaming the System: How Afghan Opium Underpins Local Power' (2009) 63 (1) J. Int'l Aff. 195, 195.

⁹⁶⁸ Peter Baker, Helene Cooper and Mark Mazzetti, 'Bin Laden is Dead, Obama Says' *New York Times* (New York, 1 May 2011) <<https://www.nytimes.com/2011/05/02/world/asia/osama-bin-laden-is-killed.html?mtrref=www.google.com&gwh=B023427EE16DD9731B960886ECE11328&gwt=pay&assetType=REGIWALL>> accessed 21 October 2019.

⁹⁶⁹ Hannah Strange, 'US Raid That Killed Bin Laden Was An Act of War' says Pakistani Report' *The Telegraph* (London, 9 July 2013) <<https://www.telegraph.co.uk/news/worldnews/asia/pakistan/10169655/US-raid-that-killed-bin-Laden-was-an-act-of-war-says-Pakistani-report.html>> accessed 21 October 2019.

⁹⁷⁰ Paul J. Smith, 'The China-Pakistan-United States Strategic Triangle: From Cold War to the War on Terrorism' (2011) 38 (4) *Asian Affairs: An American Review* 197, 198.

⁹⁷¹ APV Rogers and Dominic McGoldrick, 'Assassination and Targeted Killing - The Killing of Osama Bin Laden' (2011) 60 (3) *ICLQ* 778, 787.

The death of Osama Bin Laden further accentuates the USA's illegal presence in Pakistan, but also demonstrates that breaching state sovereignty and territorial integrity of foreign states and committing the international crime of aggression⁹⁷² has become a norm in the continued GWOT, which the UNSC has still not referred this matter to the ICC.⁹⁷³

The use of 'drone warfare' has become increasingly popular after the events of 9/11 in Afghanistan and Pakistan, by both the Bush and Obama administration to eliminate terrorist threats.⁹⁷⁴

The ongoing drone strikes in pursuit of terrorist targets have been found to have violated the sovereignty of Pakistan, which has been voiced on many occasions by the Pakistani government.⁹⁷⁵ The 2019, targeted drone strike assassination of Hamza Bin Laden the son of the late Osama Bin Laden in the tribal regions of Pakistan further supports this argument.⁹⁷⁶

Since Osama Bin Laden's demise, the appointed successor Ayman Al-Zawahiri became the leader of Al-Qaeda and is suspected to have hidden somewhere in Pakistan. Although, Al-Qaeda is thought to be operating underground and considered to be far less active and dangerous than in 2001, there remains a substantial risk of it branching out in central Asia and Africa⁹⁷⁷

It seems Al-Qaeda and the threat it once presented has subsided. This is mainly due to the emergence of a rival terrorist group ISIS-KP and its rapid expansion in the Afghanistan and Pakistan border regions since 2015, has since resulted in six other terrorist groups pledging allegiance to it.⁹⁷⁸

⁹⁷² Rome Statute of the International Criminal Court [1998] art 8 *bis*.

⁹⁷³ Rome Statute of the International Criminal Court [1998] art 13 (b).

⁹⁷⁴ Gloria Shkurti, 'Making Drones Illegal Based on A Wrong Example: The US Dronified War' (2016) 3 (1) Turkish Journal of Middle Eastern Studies 39, 41.

⁹⁷⁵ Amna Mahmood, Sadaf Farooq and Asia Karim, 'US Drone Attacks in Pakistan: An International Law Perspective' (2015) 6 (6) International Journal of Business and Social Science 165, 170.

⁹⁷⁶ Alex Horton, 'Osama Bin Laden's Son, Once the Probable Heir to Al-Qaeda Leadership, Killed in US Operation, Trump Confirms' *The Washington Post* (Washington, 14 September 2019) <<https://www.washingtonpost.com/national-security/2019/09/14/hamza-bin-laden-once-possible-heir-al-qaeda-was-killed-us-operation-trump-says/>> accessed 06 August 2020.

⁹⁷⁷ Daniel Byman, 'Does Al-Qaeda Have A Future?' (2019) 42 (3) Washington Quarterly 65, 65-66.

⁹⁷⁸ Abdul Basit, 'IS Penetration in Afghanistan -Pakistan: Assessment, Impact and Implications' (2017) 11 (3) Perspectives on Terrorism 19, 19.

This alliance is perceived to be a substantial threat as it is believed the objective of ISIS-KP is to establish a caliphate through its foothold in Asia⁹⁷⁹, which has directly resulted in the escalation of hostilities and violence in the region and resulted in significant civilian deaths.

Since 2016, the USA-led coalition has pursued a counter-terrorism strategy against ISIS-KP consisting of raids, lethal strikes, and clearance operations in partnership with Afghan forces, as well as sparking hostilities between Taliban forces and ISIS-KP, which has incidentally complemented the USA's military objectives.⁹⁸⁰ The violence between the groups has turned the Nangarhar province border region of Afghanistan into a frequent battlefield.⁹⁸¹

In 2019, reports emerged of increased airstrikes being conducted by the USA, which have been found to be in violation of IHL by targeting civilian infrastructures, residences and medical facilities particularly in the Helmand province of Afghanistan, which have become a frequent occurrence in attempt to eradicate Taliban fighters.⁹⁸²

In 2019, drone strikes conducted by the USA military to eradicate ISIS-KP and reclaim territorial control in the Kunar and Nangarhar provinces have targeted civilian objects, particularly a pine nut farm which led to the deaths of 30 innocent civilian farm workers.⁹⁸³

The USA government and the USA Department of Defense (DoD) have been previously criticised by Professor of criminal justice Asthappan for contributing to the complexity and lack of transparency in reporting the conduct of USA

⁹⁷⁹ Asaad Al-Mohammad and Charlie Winter, 'From Directorate of Intelligence to Directorate of Everything: The Islamic State's Emergent Amni-Media Nexus' (2019) 13 (1) Perspectives on Terrorism 41, 41.

⁹⁸⁰ Paul Lushenko, Lance Van Auken and Garrett Stebbins, 'ISIS-K: Deadly Nuisance or Strategic Threat' (2019) 30 (2) Small Wars and Insurgencies 265, 265.

⁹⁸¹ Nlmatullah Ibrahim and Shahram Akbarzadeh, 'Intra-Jihadist Conflict and Cooperation: Islamic State -Khorasan Province and the Taliban in Afghanistan' (2020) 43 (12) Studies in Conflict and Terrorism 1086, 1096-1097.

⁹⁸² 'Afghanistan: Events of 2019' (Human Rights Watch) <<https://www.hrw.org/world-report/2020/country-chapters/afghanistan>> accessed 02/07/2020.

⁹⁸³ Ahmad Sultan and Abdul Qadir Sediqi, 'US Drone Strike Kills 30 Pine Nut Farm Workers in Afghanistan' (Reuters, 19 September 2019) <<https://uk.reuters.com/article/uk-afghanistan-attack-drones/u-s-drone-strike-kills-30-pine-nut-farm-workers-in-afghanistan-idUKKBN1W4009>> accessed 02/07/2020.

military operations and have estimated the ratio of deaths of innocent Afghan civilians compared to USA losses to be in the region of 1,000 to 1.⁹⁸⁴

Another report which was published by Brown University in 2018, relating to OEF (later renamed Operation Freedom's Sentinel in 2015)⁹⁸⁵ found the USA's invasion and occupation of Afghanistan between October 2001-October 2018 GWOT to eradicate Al-Qaeda, ISIS-KP and the Taliban estimated 61,852 civilians being killed by USA military forces around the Afghanistan and Pakistan area⁹⁸⁶ with over 4,000,000 persons being displaced in Afghanistan.⁹⁸⁷

The author of the report in publishing these figures has expounded that this tally is an incomplete and undercounted estimate of the human toll of killing in these wars, due to limited reports available providing a more accurate figure of the total number of people killed by the USA military post-9/11 wars.⁹⁸⁸

Australia's existing security arrangements⁹⁸⁹ and treaty obligations⁹⁹⁰ to support the USA's GWOT since 2001 through its continued military support under ISAF established by the UNSC⁹⁹¹ have also found individuals from its military responsible for violations of IHL.

In 2016, a report published by military Sociologist Dr Sophie Compvoets investigated Australian special forces conduct in Afghanistan which found a

⁹⁸⁴ Jibey Asthappan, 'The Cost of War: Weighing Civilian Losses in the Afghan War' (2016) 6 (1) SAGE Open 1, 1-3.

⁹⁸⁵ 'Lead Inspector General for Operation Freedom's Sentinel I Quarterly Report to the United States Congress I April 1, 2019-June 30, 2019' (*Department of Defense Office of Inspector General*) <<https://www.dodig.mil/In-the-Spotlight/Article/1938932/lead-inspector-general-for-operation-freedoms-sentinel-i-quarterly-report-to-th/>> accessed 22 October 2019.

⁹⁸⁶ Neta C. Crawford, 'Costs of War: Human Cost of the Post 9-11 Wars: Lethality and the Need for Transparency' (Brown University: Watson Institute of International and Public Affairs, 8 November 2018) 1. <<https://watson.brown.edu/costsofwar/files/cow/imce/papers/2018/Human%20Costs%2C%20Nov%208%202018%20CoW.pdf>> accessed 02/07/2020.

⁹⁸⁷ 'Afghanistan' (ACAPS) <<https://www.acaps.org/country/afghanistan/crisis/complex-crisis>> accessed 22 October 2019.

⁹⁸⁸ Crawford (n 986) 2.

⁹⁸⁹ Christine M. Chinkin, 'Suspension of Treaty Relationship: The ANZUS Alliance' (1990) 7 (1-2) UCLA Pacific Basin Law Journal 114, 115,

⁹⁹⁰ Australia, New Zealand and United States Treaty [1951] art IV and art V.

⁹⁹¹ UNSC Res 1510 (13 October 2003) UN Doc S/RES/1510.

number of disturbing patterns of unacceptable behaviour by military personnel.⁹⁹²

These findings included: 'Alcohol and drug use, domestic violence, unsanctioned and illegal application of violence on operations, disregard for human life and dignity, and ultimately a perception, at times, of complete lack of accountability'.⁹⁹³

Based on these findings, a further inquiry was undertaken known as the 'Brereton Report' which sought to investigate alleged war crimes committed by Australian special forces, specifically the Australian Defence Force (ADF) by Major General Justice Paul Brereton.

The heavily redacted report published in 2020 found a number of violations of IHL committed by individuals of the ADF against Afghan civilians.⁹⁹⁴ Known as Operation SLIPPER between 2005 – 2014⁹⁹⁵, the report found credible information identifying 23 incidents of alleged war crimes by 25 ADF personnel killing 39 individuals.⁹⁹⁶

Moreover, the United Nations Assistance Mission in Afghanistan (UNAMA) was established by the UNSC in 2002⁹⁹⁷ to support the implementation of the Bonn agreement and provide critical humanitarian and recovery efforts in Afghanistan⁹⁹⁸, which has since had its mandate extended until September 2021.⁹⁹⁹

In 2020, UNAMA published a ten-year record between 2009-2019 finding 35,518 civilian deaths were recorded with an additional 66, 546 civilian

⁹⁹² Samantha Cromptoets, 'Special Operations Command (SOCOMD) Culture and Interactions: Perceptions, Reputations and Risk' (*Australian Government Department of Defence*, February 2016) <<https://afghanistandinquiry.defence.gov.au/sites/default/files/2020-11/SOCOMD-Culture-and-Interactions-Perceptions-Reputation-and-Risk-Feb-16.pdf>> accessed 5 January 2021, 27.

⁹⁹³ *ibid.*

⁹⁹⁴ Paul Brereton, 'Inspector-General of the Australian Defence Force Afghanistan Inquiry' (*Australian Government Department of Defence*, 19 November 2020) 29 <<https://afghanistandinquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>> accessed 5 January 2021.

⁹⁹⁵ *ibid* 266.

⁹⁹⁶ *Brereton* (n 994) 28-29.

⁹⁹⁷ UNSC Res 1401 (28 March 2002) UN Doc S/RES/1401.

⁹⁹⁸ UNGA Report of the Secretary-General 56/875 (2002) UN Doc A/56/875, para 94.

⁹⁹⁹ UNSC Res 2543 (15 September 2020) UN Doc S/RES/2543.

casualties being reported resulting from the ongoing and intensified hostilities between USA in partnership with Afghan forces against ISIS-KP and Taliban forces.¹⁰⁰⁰

The USA and coalition forces have been found to be in breach of IHL throughout the occupation in Afghanistan, as aerial bombardments have deliberately and discriminately killed¹⁰⁰¹ and injured civilians¹⁰⁰² in addition to conducting extrajudicial killings, rape, sexual violence¹⁰⁰³ arbitrary arrests, detention, mistreatment and torture.¹⁰⁰⁴

In August 2008, reports emerged detailing the deaths of 15 men, 15 women and 60 children in Azizabad at the hands of USA soldiers in an attempt to capture a Taliban commander.¹⁰⁰⁵

Similarly, in 2009 the coalition bombing of Bala Baluk by USA and Afghan forces killed an estimated 140 civilians¹⁰⁰⁶ demonstrating a complete disregard for civilian lives who are immune from such attacks.¹⁰⁰⁷

The USA-led invasion since 2001, has led to a mass refugee crisis initially creating an influx of 200,000 to 300,000 Afghans which surged to 2.15 million people by 2002, which were mainly hosted by neighbouring countries such as Iran, Pakistan, Turkey and various European countries. By 2004 the United Nations Commission on Human Rights organised the largest assisted

¹⁰⁰⁰ Afghanistan: Civilian Casualties Exceed 10,000 for Sixth Straight Year' (UN News, 22 February 2020) <<https://news.un.org/en/story/2020/02/1057921>> accessed 2 July 2020.

¹⁰⁰¹ Astri Suhrke, 'From Principle to Practice: US Military Strategy and Protection of Civilians in Afghanistan' (2015) 22 (1) *International Peacekeeping* 100, 114-115.

¹⁰⁰² 'Afghan Casualties from Airstrikes Rise by 39PC' (*Pakistan Today*, 10 October 2018) <<https://www.pakistantoday.com.pk/2018/10/10/afghan-casualties-from-air-strikes-rise-by-39pc/>> accessed 22 October 2019.

¹⁰⁰³ Ash Narain Roy, 'US Violation of Human Rights in Afghanistan' (2006) XLVI (28) *Mainstream Weekly* <<https://www.mainstreamweekly.net/article779.html>> accessed 22 October 2019.

¹⁰⁰⁴ 'Enduring Freedom: Abuses by US Forces in Afghanistan' (2004) 16 (3C) *Human Rights Watch* 1, 2 <<https://www.hrw.org/reports/2004/afghanistan0304/afghanistan0304.pdf>> accessed 22 October 2019.

¹⁰⁰⁵ Thomas Gregory, 'Potential Lives, Impossible Deaths: Afghanistan, Civilian Casualties and the Politics of Intelligibility' (2012) 14 (3) *International Feminist Journal of Politics* 327, 330.

¹⁰⁰⁶ *ibid.*

¹⁰⁰⁷ Thomas Gregory, 'Civilian Casualties, Non-Combatant Immunity and the Politics of Killing: Review Essay' (2017) 10 (1) *Critical Studies on Terrorism* 187, 187.

repatriation operation, facilitating the return of a total of over six million Afghan refugees.¹⁰⁰⁸

In response to the refugee crisis, a report by the European Commission in 2016 detailed its commitment to provide humanitarian support to Iran, estimating Iran housed between 2-3 million Afghan and Iraqi refugees and encouraged a long-term objective and strategy to ensure Afghanistan's co-operation and readmission of its civilians.¹⁰⁰⁹

This segment of the chapter has demonstrated throughout the two-decade conflict in Afghanistan both the UNSC and ICC have been unable to prevent the P3 and additional coalition forces from conducting its illegal military occupation and GWOT on Afghan soil.

It however seems that the USA and NATO forces were initially authorised by the UNSC to collectively act in self-defence against Al-Qaeda, without any explicit authorisation permitting a military invasion of Afghanistan or in fact interfere with its political affairs.

In the absence of any prior authorisation by the UNSC or recognised government, the USA in its initial pursuit against Al-Qaeda and continued 'GWOT effort has justified its counter-terrorism objectives to eradicate the Taliban and ISIS-KP whilst breaching the UN Charter.¹⁰¹⁰

Furthermore, the present and continuing hostilities have also demonstrated the USA clearly breaching the fundamental principles of IL including state sovereignty and territorial integrity of Afghanistan and its bordering neighbour Pakistan. Whilst flouting the fundamental principles of IHL of distinction, proportionality and military necessity to mitigate any unnecessary civilian suffering.¹⁰¹¹

¹⁰⁰⁸ Ahmet İçduygu and Sibel Karadağ, 'Afghan migration through Turkey to Europe: Seeking Refuge, Forming Diaspora, and Becoming Citizens' (2018) 19(3) Turkish Studies 482, 482-487.

¹⁰⁰⁹ Commission, 'Establishing a new Partnership Framework with third countries under the European Agenda on Migration' (Communication) COM (2016) 385 final 1, 16.

¹⁰¹⁰ Charter of the United Nations [1945] art 2 (4).

¹⁰¹¹ Vivek Sehrawat, 'Legal Status of Drones Under LOAC and International Law' (2017) 5 (1) Penn State Journal of Law and International Affairs 164, 175.

In addition to war crimes, without valid consent from a recognised government authorising the USA and NATO allies to pursue terrorist groups such as: Al-Qaeda, invasion of a state and bombardment by armed forces attracts the international crime of aggression under the Rome Statute.¹⁰¹²

The next segment of the chapter will demonstrate academic literature highlighting the USA abusing its permanent membership in the UNSC following the illegal invasion of the Iraq with the P3.

3.2 The USA and UK's Illegal Invasion of Iraq

Subsequent to the USA's success in removing the Taliban regime from power and dismantling Al-Qaeda's operation in Afghanistan in 2001, The next phase of the GWOT involved the 2003 invasion of Iraq, which displayed proactive rather than reactive force as the USA did not intend to wait until it was attacked before initiating a military operation.¹⁰¹³

The USA's controversial relationship with Iraq and President Saddam Hussein has been largely attributed to the conflict between Iraq and Kuwait during the early 1990's and Iraq's development and proliferation of weapons of mass destruction (WMD).

The USA and the UK using their influence and permanent membership in the UNSC, and their reliance on previous UNSC resolutions authorising use of force against Iraq justified their illegal pre-emptive invasion of Iraq in 2003¹⁰¹⁴ which will be highlighted throughout the remainder of this segment.

¹⁰¹² Rome Statute of the International Criminal Court [1998] art 8 *bis* (2) (a) - (b)..

¹⁰¹³ Andrew Garwood Gowers, 'Pre-Emptive Self-Defence: A Necessary Development or the Road to International Anarchy' (2004) 23 (1) Australian Yearbook of International Law 51, 51.

¹⁰¹⁴ Ian Johnstone, 'US-UN Relations After Iraq: The End of the World (Order) As We Know It?' (2004) 15 (4) EJIL 813, 830.

3.2.1 The USA, the UNSC, WMD's and the Events Prior to the 2003 Invasion of Iraq

Prior to the 2003 invasion of Iraq, the USA's continued interest in Iraq stems from the Persian Gulf War which lasted between August 1990 until March 1991 involving Saddam Hussein's military invasion of Kuwait.¹⁰¹⁵

The main motivation of Saddam Hussein's military action was attributed to the economic and financial crisis Iraq was in after it accumulated significant debts from Kuwait and surrounding Gulf Monarchies because of the prolonged war with Iran between 1980-1988.¹⁰¹⁶

Ayatollah Khomeini and the emergence of Iran's Islamic Shiite revolution overthrew the former regime of the Iranian Shah Mohammad Reza Khan Pahlavi in 1979, causing uprisings and problems in neighbouring states such as: Bahrain, Kuwait and Saudi Arabia.¹⁰¹⁷

Saddam Hussein pleaded forgiveness of state debts owed to these Gulf states, expounding that the war with Iran inadvertently helped protect their monarchies. This plea was met with firm rejection.¹⁰¹⁸

Thus, the trigger for the invasion was predicated on Saddam Hussein's allegation that Kuwait and other Gulf states were producing oil in excess of quotas established by the Organisation of Petroleum Exporting Countries, which caused oil prices to fall depriving Iraq of the much-needed revenue.¹⁰¹⁹

¹⁰¹⁵ Qiqi Zhou et al, 'Evidence for Somatic Hypersensitivity in Veterans with Gulf War Illness and Gastrointestinal Symptoms' (2018) 34 (10) *Clinical Journal of Pain* 944, 944.

¹⁰¹⁶ Md Mudassir Quamar and P.R. Kumaraswamy, 'The Kuwait Crisis of 1990-1991: The Turning Point in India's Middle East Policy' (2019) 6 (1) *Contemporary Review of the Middle East* 75, 76.

¹⁰¹⁷ Reza Ekhtiari Amiri and Fakhreddin Soltani, 'Iraqi Invasion of Kuwait as Turning Point in Iran-Saudi Relationship' (2011) 4 (1) *Journal of Politics and Law* 188, 188.

¹⁰¹⁸ Quamar and Kumaraswamy (n 934).

¹⁰¹⁹ George N. Grammas, 'Multilateral Responses to the Iraqi Invasion of Kuwait: Economic Sanctions and Emerging Proliferation Controls' (1991) 15 (1) *Maryland Journal of International Law* 1, 2.

In August 1990, Iraq invaded and swiftly occupied its neighbour, Kuwait. Within hours, the UNSC condemned the invasion, demanding immediate and unconditional Iraqi withdrawal¹⁰²⁰ by virtue of UNSC resolution 660.¹⁰²¹

Soon after the UNSC adopted Resolution 678¹⁰²² demanding and authorising all states to use 'all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area'.¹⁰²³ The P3 and a coalition of 30 states liberated Kuwait from the control of Iraqi forces.¹⁰²⁴

However, further concerns emerged of Iraq purchasing materials to develop and proliferate WMD's, which led to the adoption of resolution 687¹⁰²⁵ allowing weapons inspectors to report the presence of any nuclear weapons and activities¹⁰²⁶ as well as forming a commission to insist the immediate inspection of biological, chemical and missile capabilities.¹⁰²⁷

Further demands by the UNSC were made for Iraq to reveal its weapons programs.¹⁰²⁸ Further monitoring and inspections were authorised¹⁰²⁹ after the UN Special Commission (UNSCOM) inspectors discovered documents relating to Iraq's weapons programs.

Several years after the invasion of Kuwait, Iraq's further failure to reveal its weapons programs led to the passing of resolution 1137¹⁰³⁰ which observed the UNSC condemning Iraq for its continued violations of its obligations, to cooperate fully with UNSCOM and on-site inspections pursuant to Resolution 687.¹⁰³¹ This resolution also imposed mandatory travel restrictions on Iraqi

¹⁰²⁰ Mary Ellen O'Connell, 'Enforcing the Prohibition on the Use of Force: The UN's Response to Iraq's Invasion of Kuwait' (1991) 15 Southern Illinois University Law Journal 453, 453.

¹⁰²¹ UNSC Res 660 (2 August 1990) UN Doc S/RES/660

¹⁰²² UNSC Res 678 (29 November 1990) UN Doc S/RES/678.

¹⁰²³ *ibid* para 2.

¹⁰²⁴ N Greenberg and S Wessely, 'Gulf War Syndrome: An Emerging Threat or a Piece of History?' (2008) 1 Emerging Health Threats Journal 1, 1.

¹⁰²⁵ UNSC Res 687 (3 April 1991) UN Doc S/RES/687.

¹⁰²⁶ *ibid* para 13.

¹⁰²⁷ *n* 1025 para 9a.

¹⁰²⁸ UNSC Res 707 (15 August 1991) UN Doc S/RES/707.

¹⁰²⁹ UNSC Res 715 (11 October 1991) UN Doc S/RES/715.

¹⁰³⁰ UNSC Res 1137 (12 November 1997 UN Doc S/RES/1137.

¹⁰³¹ *n* 1025.

officials and armed forces members who were responsible for the violations or participated in them.¹⁰³²

After Iraq's failure and lack of co-operation, UN chief weapons inspector Richard Butler delivered a report to the UNSC in 1998¹⁰³³ which led to the introduction of the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) in 1999¹⁰³⁴ tasked to disarm Iraq's WMD's.¹⁰³⁵

In his speech before the UN in September 2002, President Bush characterised the possible use of force against Iraq as necessary to enforce existing UNSC resolutions and to eliminate a dangerous threat to international peace and security.¹⁰³⁶

In November 2002, UNSC resolution 1441¹⁰³⁷ was passed giving Iraq a final opportunity to comply with UN weapons inspectors to comply with disarmament obligations¹⁰³⁸ and give unrestricted access to all facilities and weapons programmes.¹⁰³⁹

In February 2003, the USA Secretary of State Colin Powell addressed the UNSC by arguing Saddam Hussein posed a threat by concealing WMD's¹⁰⁴⁰, despite UNMOVIC chairman Dr Hans Blix tasked with investigating and inspecting Iraq for WMD's, promulgating Iraq did not possess any weapons of mass destruction.¹⁰⁴¹

¹⁰³² Frederick L Kirgis, 'The Legal Background on the Use of Force to Induce Iraq to Comply with Security Council Resolutions' (1997) 2 (1) American Society of International Law <<https://www.asil.org/insights/volume/2/issue/1/legal-background-use-force-induce-iraq-comply-security-council-resolutions>> accessed 21 October 2019.

¹⁰³³ 'Iraq Weapons Inspections Fast Facts' (CNN, 1 April 2019) <<https://edition.cnn.com/2013/10/30/world/meast/iraq-weapons-inspections-fast-facts/index.html>> accessed 21/10/2019.

¹⁰³⁴ UNSC Res 1284 (17 December 1999) UN Doc S/RES/1284.

¹⁰³⁵ 'United Nations Monitoring, Verification and Inspection Commission' (UNMOVIC) <<https://www.un.org/Depts/unmovic/>> accessed 21 October 2019.

¹⁰³⁶ John Yoo, 'International Law and the War in Iraq' (2003) 97 (3) AJIL 563, 563.

¹⁰³⁷ UNSC Res 1441 (8 November 2002) S/RES/1441.

¹⁰³⁸ *ibid* para 3.

¹⁰³⁹ *n* 1037 para 5.

¹⁰⁴⁰ 'Full Text of Colin Powell's Speech' *The Guardian* (London, 5 February 2003) <<https://www.theguardian.com/world/2003/feb/05/iraq.usa>> accessed 21 October 2019.

¹⁰⁴¹ 'Iraq Inquiry: Former UN Inspector Blix Says War Illegal' (BBC News, 27 July 2010) <<https://www.bbc.co.uk/news/uk-politics-10770239>> accessed 20/08/2020.

Despite no WMD's being found, President Bush in March 2003 publicly threatened Saddam Hussain to leave Iraq within 48 hours or face invasion of 250,000 USA and UK soldiers on Iraq's borders.¹⁰⁴²

3.2.2 Operation Iraqi Freedom and the Illegal Invasion of Iraq

On the 20th March 2003, President Bush and the USA, UK and coalition allies commenced Operation Iraqi Freedom by launching a series of attacks on Baghdad aimed at decapitating the Iraqi leadership.¹⁰⁴³

After swiftly defeating the Iraqi army and overthrowing the ruling Ba'athist party of Iraqi President Saddam Hussein¹⁰⁴⁴, the former president and dictator was hanged in 2006 after being sentenced to death following a judicial decision reached by the Iraqi High Tribunal.¹⁰⁴⁵

However, the Bush administrations rationale to invade Iraq has been heavily criticised for being unlawful. The deception practiced by the Bush administration was clear as ex-weapons inspectors and Iraq specialists had found that Saddam Hussein had no serious WMD capability to threaten the USA.¹⁰⁴⁶

This was evidenced from the findings of the chief weapons inspector Dr. David Kay between June-December 2003 on behalf of the Iraq Survey Group responsible for the USA's search for WMD's¹⁰⁴⁷ detailing in a comprehensive

¹⁰⁴² Julian Borger, 'Bush Gives Saddam and His Sons 48 Hours to Leave Iraq' *The Guardian* (London, 18 March 2003) <<https://www.theguardian.com/world/2003/mar/18/iraq.usa1>> accessed 21 October 2019.

¹⁰⁴³ Alex J. Bellamy, 'Feature- Legality of the Use of Force Against Iraq' (2003) 4 (2) *Melbourne Journal of International Law* <<http://www.austlii.edu.au/au/journals/MelbJIL/2003/6.html>> accessed 22 October 2019.

¹⁰⁴⁴ Mahmoud Hmoud, 'The Use of Force Against Iraq: Occupation and Security Council Resolution 1483' (2003) 36 (3) *Cornell International Law Journal* 435, 435.

¹⁰⁴⁵ Michael J. Kelly, 'The Anfal Trial Against Saddam Hussein' (2007) 9 (2) *Journal of Genocide Research* 235, 235.

¹⁰⁴⁶ Raymond Hinnebusch, 'The US invasion of Iraq: Explanations and Implications' (2007) 16 (3) *Critique: Critical Middle Eastern Studies* 209, 209.

¹⁰⁴⁷ Charles Duelfer, 'WMD Elimination in Iraq 2003' (2016) 23 (1-2) *The Non-proliferation Review* 163, 170-171.

report authored by special advisor to the CIA, Charles Duelfer (Duelfer Report) in 2004 that no WMD's had been present nor found in Iraq.¹⁰⁴⁸

In 2005, the Commission on the Intelligence Capabilities of the United States¹⁰⁴⁹ reached the same conclusion which subsequently led to the UNSC introducing resolution 1762 effectively terminating the United Nations Monitoring Verification and Inspection Commission's (UNMOVIC) mandate.¹⁰⁵⁰

In support of this argument, the wording used in the 2002 UNSC resolution 1441¹⁰⁵¹ presented many similarities in terms of the language used in previous UNSC resolutions to justify the use of force. It specifically stated: 'the need for full compliance with all of the relevant council resolutions'.¹⁰⁵²

Iraq's non-compliance of its disarmament obligations will result in 'consequences', can be interpreted broadly to suggest any previous use of force authorised by the UNSC (such as UNSC resolution 678)¹⁰⁵³ would be sufficient to warrant military intervention by the USA, despite the resolution not explicitly authorising the use of force.¹⁰⁵⁴ Thus, it appears the USA, UK and coalition forces did not have any legal justification for initiating military action or use of force against Iraq.

This argument has been supported by UN Law expert Professor Kirgis, stating: 'The United Kingdom/United States legal justification for the invasion was based primarily on UNSC resolution 678 dating back to 1990, which was the

¹⁰⁴⁸ Charles Duelfer, 'Comprehensive Report of the Special Advisor to the DCI on Iraq's WMD, With Addendums' (*Duelfer Report*, 12 September 2004) <<https://www.govinfo.gov/content/pkg/GPO-DUELFERREPORT/pdf/GPO-DUELFERREPORT-1.pdf>> accessed 21 October 2009.

¹⁰⁴⁹ Laurence H Silberman and Charles S Robb, 'Report to the President of the United States (Commission on Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (Washington, 31 March 2005) < https://fas.org/irp/offdocs/wmd_report.pdf> accessed 21 October 2009.

¹⁰⁵⁰ UNSC Res 1762 (27 June 2007) UN Doc S/RES/1762.

¹⁰⁵¹ n 1037.

¹⁰⁵² n 1037.

¹⁰⁵³ n 1022.

¹⁰⁵⁴ Frederic L. Kirgis, 'Security Council Resolution 1483 on the Rebuilding of Iraq' (2003) 8 (13) *American Society of International Law* <<https://www.asil.org/insights/volume/8/issue/13/security-council-resolution-1483-rebuilding-iraq>> accessed 20 April 2020.

basis for the military action against Iraq in 1991. That justification has not been universally accepted'.¹⁰⁵⁵

Another justification presented by the USA for its use of force against Iraq was manifested in the 2002 Joint Resolution to the House of Congress dubbed the 'Iraqi Resolution' which stated:

[W]hereas Iraq's demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself.¹⁰⁵⁶

Indeed, the Bush administration's development of a new, multifaceted strategic doctrine, known as the 'Bush Doctrine', advocates pre-emptive or preventive strikes against terrorists, states that support terrorists, and hostile states possessing WMD's.¹⁰⁵⁷

The USA's justification to take pre-emptive action in Iraq¹⁰⁵⁸ was based on the premise that Saddam Hussein had possessed WMD's, which was later proven to be unfounded.

This claim to exercise the right of pre-emptive self-defence is a radical step by the USA and its continued efforts to loosen IL's constraints on the use of force by expanding the scope for unilateral military action by extending the right of self-defence.¹⁰⁵⁹

In support of this argument, former President Bush openly encouraged the violation of the IL principle of state sovereignty by promoting pre-emptive self-

¹⁰⁵⁵ *ibid.*

¹⁰⁵⁶ Authorization for Use of Military Force against Iraq: Resolution of 2002, HJ Res 114, 107th Cong (2002)

¹⁰⁵⁷ Patrick McLain, 'Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force Against Iraq' (2003) 13 (1) *Duke Journal of Comparative and International Law* 233, 236.

¹⁰⁵⁸ Gerry Simpson, 'The War in Iraq and international Law' (2005) 6 (1) *Melbourne Journal of International Law* <<http://www.austlii.edu.au/au/journals/MelbJIL/2005/7.html#fn23>> accessed 20 April 2020.

¹⁰⁵⁹ Andrew Garwood Gowers, 'Pre-Emptive Self-Defence: A Necessary Development or the Road to International Anarchy' (2004) 23 (1) *Australian Yearbook of International Law* 51, 51.

defence as part of his National Security Strategy in 2002. Prior to the invasion of Iraq, the former president stated:

[T]he United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction— and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.¹⁰⁶⁰

However, Professor of Law Kretzmer has argued that pre-emptive self-defence poses a significant risk to the territorial integrity and sovereignty of other states giving a significant military advantage having catastrophic consequences, whilst also undermining certain provisions under the UN Charter.¹⁰⁶¹

Prior to the invasion of Iraq many of the P5 including: France, China and Russia were sceptical and objected against any use of force against Iraq and expressed concerns that no imminent threat was present to justify a military attack, nor did the UNSC authorise the UK or the USA to use such force.¹⁰⁶²

The Bush administration's attempt to persuade politicians, the public and member states of the UN led to fabricated assertions that there was a link between Saddam Hussein and Al-Qaeda and the threat of terrorism and use of WMD's against the USA justified the invasion of Iraq in a continued GWOT effort.¹⁰⁶³

This subsequently led former President Bush publicly stating: 'You can't distinguish between Al-Qaeda and Saddam when you talk about the war on

¹⁰⁶⁰ 'The National Security Strategy 2002: Chapter V. Prevent Our Enemies from Threatening Us, Our Allies and Our Friends with Weapons of Mass Destruction' (*The White House*) <<https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss5.html>> accessed 22 October 2019.

¹⁰⁶¹ David Kretzmer, 'The Inherent Right to Self Defence and Proportionality in Jus Ad Bellum' (2013) 24 (1) *European Journal of international Law* 235, 247.

¹⁰⁶² Mahmoud Hmoud, 'The Use of Force in Iraq: Occupation and Security Council Resolution 1483' (2004) 36 (3) *Cornell International Law Journal* 435, 436.

¹⁰⁶³ Jeffrey Record, 'Why the Bush Administration Invaded Iraq: Making Strategy After 9/11' (2002) 2 (2) *Strategic Studies Journal* 63, 65.

terror...I can't distinguish between the two, because they're both equally as bad and equally as evil and equally as destructive'.¹⁰⁶⁴

Thus, by making an indistinguishable link between Saddam and Al-Qaeda, this concoction was developed for the purposes of convincing the international community to justify the GWOT.¹⁰⁶⁵ Whereas, if the Bush administration had not asserted this connection, mobilising the public, USA congressional approval and support for a war would otherwise have been impossible to secure.¹⁰⁶⁶

In addition, the USA and the UK justified their use of force following Iraq's non-compliance with resolution 1441.¹⁰⁶⁷ This material breach of Iraq's obligations was enough for the UK and the USA's reliance of resolution 678, which previously authorised use of force against Iraq, if it did not retreat from Kuwait by the 15th January 1991¹⁰⁶⁸ which did not concern Iraq's possession of WMD's.

Understandably, this justification to use force by relying on resolution 678, some 13 years later, has been rejected by lawyers and a large number of UN member states for abusing the UNSC's authority over Iraq and flouting the key principle to respect the sovereignty of another state.¹⁰⁶⁹

The result of the proposed use of resolution 678 as a basis for action, led to Kuwait distancing itself from the USA and its justification to use force against Iraq further accentuating the illegality of its actions, stating: 'First Kuwait reaffirms that it has not participated and will not participate in any military operation against Iraq and that all measures we are undertaking are aimed at protecting our security, safety and territorial integrity'.¹⁰⁷⁰

¹⁰⁶⁴ Daniel Benjamin, 'Saddam Hussein and Al Qaeda Are Not Allies' *The New York Times* (New York, 30 September 2002) <<https://www.nytimes.com/2002/09/30/opinion/saddam-hussein-and-al-qaeda-are-not-allies.html>> accessed 22 October 2019.

¹⁰⁶⁵ Michael J. Barker, 'Democracy or Polyarchy? US-Funded Media Developments in Afghanistan and Iraq Post 9/11' (2008) 30 (1) *Media, Culture and Society* 109, 110.

¹⁰⁶⁶ Record (n 1063) 65.

¹⁰⁶⁷ n 1037

¹⁰⁶⁸ n 1022 para 2.

¹⁰⁶⁹ Justin Morris and Nicholas J Wheeler, 'The Security Council's Crisis of Legitimacy and the Use of Force' (2007) 44 (2-3) *International Politics* 214, 222.

¹⁰⁷⁰ UNSC Verbatim Record (26 March 2003) UN Doc S/PV.4726, para 14.

Thus, the USA and the UK invading Iraq without any credible justification¹⁰⁷¹ and prior authorisation renders the 2003 Iraq war illegal.¹⁰⁷² Military occupation of a state by use of force¹⁰⁷³ is considered to be an act of aggression which is an international crime.¹⁰⁷⁴

Indeed, the wars of aggression have been deemed to be the most destructive to human life and the most supreme of international crimes, which the UN Charter obligates states to refrain from employing aggressive military force in their international relations.¹⁰⁷⁵

Article 2 (4) of the UN Charter¹⁰⁷⁶ prohibits states from the threat or use of force and states assisting such use of force¹⁰⁷⁷ unless otherwise authorised under chapter VII of the UN Charter.¹⁰⁷⁸

However, the approval of UNSC resolution 1483¹⁰⁷⁹ presented much controversy as it validated the military occupation and the mandate to rebuild Iraq, which effectively legitimised the illegitimate use of force by the USA, UK and coalition forces. The approval of resolution 1483¹⁰⁸⁰ by the UNSC has been criticised for building peace on prior illegal and unlawful force by endorsing the consequences of illegal intervention.¹⁰⁸¹

In addition, the UK's involvement in the passing of resolution 1483 also added to the controversy in its instrumental role in abusing its permanent membership to coerce other members states of the UNSC to vote for the resolution to legitimise its use of force and occupation in Iraq.

¹⁰⁷¹ Gerald R. Webster, 'American Nationalism, The Flag and the Invasion of Iraq' (2011) 101 (1) *Geographical Review* 1, 1.

¹⁰⁷² Owen David Thomas, 'Security in the Balance: How Britain Tried to Keep its Iraq War Secrets' (2020) 51 (1) *Security Dialogue* 77, 77.

¹⁰⁷³ Declaration on the Principles of International Law Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) (adopted without vote).

¹⁰⁷⁴ Rome Statute of the International Criminal Court [1998] art 8 *bis* (1) & 8 (2).

¹⁰⁷⁵ Ronald Kramer, Raymond Michalowski and Dawn Roth 'The Supreme International Crime: How the US War in Iraq Threatens the Rule of Law' (2005) 32 (2) *Social Justice* 52, 52.

¹⁰⁷⁶ Charter of the United Nations [1945] art 2 (4).

¹⁰⁷⁷ Charter of the United Nations [1945] art 2 (5).

¹⁰⁷⁸ Charter of the United Nations [1945] art 2 (7).

¹⁰⁷⁹ UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483.

¹⁰⁸⁰ *ibid.*

¹⁰⁸¹ Wolfgang Weib, 'Security Council Powers and the Exigencies of Justice After War' (2008) 12 (1) *Max Planck Yearbook of United Nations Law* 45, 49.

In the lead up to the Iraqi invasion, the government of former UK Prime Minister Tony Blair's desperation for the UNSC to approve the war in Iraq, resulted in a memo being leaked by former employee Katharine Gun of the British intelligence agency; Government Communications Headquarters (GCHQ).¹⁰⁸²

In 2003, Gun exposed top-secret information forwarded by the USA's National Security Agency (NSA).¹⁰⁸³ The information contained instructions to the UK intelligence agencies by the USA in an attempt to seek leverage over other UNSC state delegates to approve the initial invasion of Iraq.¹⁰⁸⁴

The *Observer* newspaper detailed the leaked memo on 31st January 2003, which was sent by Frank Koza, the former defence chief of staff of the NSA¹⁰⁸⁵ which highlighted the USA's illicit tactics campaign targeting UNSC delegates in New York as part of its battle to win votes in favour of war against Iraq by using aggressive surveillance operation.¹⁰⁸⁶

This included the interception of home, office telephones and emails of UN delegates and sought the UK's assistance in providing up-to-the-minute intelligence for Bush officials on the voting intentions of UN members regarding the issue of Iraq.¹⁰⁸⁷

The invasive surveillance, targeted delegations from Angola, Cameroon, Chile, Mexico, Guinea and Pakistan at the UN headquarters in New York, which were referred to as the 'middle six' delegations whose votes were being

¹⁰⁸² Roslyn Fuller, 'A Matter of National Security: Whistleblowing in the Military as a Mechanism for International Law' (2014) 15 (2) San Diego Journal of International Law 249, 252.

¹⁰⁸³ Nigel West, 'The Gun as a Whistle: A Misfire' (2009) 22 (3) International Journal of Counter Intelligence 556, 556-557.

¹⁰⁸⁴ *ibid.*

¹⁰⁸⁵ 'US Plan to Bug Security Council: The Test' *The Guardian* (London, 02 March 2003) <<https://www.theguardian.com/world/2003/mar/02/iraq.unitednations1>> accessed 22 October 2019.

¹⁰⁸⁶ Martin Bright, Ed Vulliamy and Peter Beaumont, 'Revealed: US Dirty Tricks to Win Vote on Iraq War' *The Guardian* (London, 02 March 2003) <<https://www.theguardian.com/world/2003/mar/02/usa.iraq>> accessed 22 October 2019.

¹⁰⁸⁷ *ibid.*

fought over by the pro-war party, led by the USA and the UK and the party arguing for more time for UN inspections led by France, China and Russia.¹⁰⁸⁸

The authenticity of these leaked memos is further demonstrated after Katharine Gun's arrest, whereby charges were brought against her for disclosing security and intelligence information¹⁰⁸⁹ protected under the Official Secrets Act 1989.¹⁰⁹⁰

These charges were later dropped by the Crown Prosecution Service (CPS) who failed to provide a full explanation for dropping the charges, despite the defence counsel in court, repeatedly demanding an explanation from the prosecution.¹⁰⁹¹

3.2.3 The UK's Role in the Illegal Invasion of Iraq and the Chilcot Report

A report published by Sir John Chilcot in 2016 titled 'The Report of the Iraq Inquiry' (the Chilcot Report) commissioned by former British Prime Minister Gordon Brown in 2009 provided a detailed account of former British Prime Minister Tony Blair's role in the Iraq war.¹⁰⁹²

The executive summary of the report noted: 'In the Inquiry's view, the diplomatic options had not at that stage been exhausted. Military action was therefore not a last resort'.¹⁰⁹³ Moreover, a public statement made by Sir John Chilcot stated:

¹⁰⁸⁸ n 1085.

¹⁰⁸⁹ Ian Leigh, 'Changing the Rules of the Game: Some Necessary Legal Reforms to United Kingdom Intelligence' (2009) 35 (4) *Review of International Studies* 943, 951.

¹⁰⁹⁰ Official Secrets Act 1989, s 1.

¹⁰⁹¹ Shenai Raif and Pat Clarke, 'Whistleblower Walks Free After Charge Is Dropped' *The Independent* (London, 25 February 2004) <<https://www.independent.co.uk/news/uk/crime/whistleblower-walks-free-after-charge-is-dropped-70930.html>> accessed 22 October 2019.

¹⁰⁹² 'The Enquiry' (*The Iraq Enquiry*, 23 November 2017) <<https://webarchive.nationalarchives.gov.uk/20171123123857/http://www.iraqinquiry.org.uk/the-inquiry/>> accessed 22 October 2019.

¹⁰⁹³ Committee of Privy Counsellors, *The Report of the Iraq Inquiry (Executive Summary)* (2009-16, HC 264) para 20.

[A]fter the attacks on 11 September 2001, Mr Blair urged President Bush not to take hasty action on Iraq. By early December, USA policy had begun to shift and Mr Blair suggested that the US and the UK should work on what he described as a 'clever strategy for regime change in Iraq, which would build over time.'¹⁰⁹⁴

The Chilcot report revealed notes exchanged between Tony Blair and George W. Bush prior to the invasion of Iraq, detailing plans to oust Saddam Hussein and strategised this by using the UNSC as a perfect platform to achieve this objective, the report states:

[M]r Blair's Note to President Bush of 28 July sought to persuade President Bush to use the UN to build a coalition for action by seeking a partnership between the UK and the US and setting out a framework for action.¹⁰⁹⁵

The Note began: '[I] will be with you, whatever. But this is the moment to assess bluntly the difficulties. The planning on this and the strategy are the toughest yet. This is not Kosovo. This is not Afghanistan. It is not even the Gulf War'. The military part of this is hazardous but I will concentrate mainly on the political context for success'.¹⁰⁹⁶

Mr Blair stated that getting rid of Saddam Hussein was "... the right thing to do. He is a potential threat. He could be contained. But containment ... is always risky. His departure would free up the region. And his regime is ... brutal and inhumane ...".¹⁰⁹⁷

Mr Blair told President Bush that the UN was the simplest way to encapsulate a "casus belli" in some defining way, with an ultimatum to Iraq once military forces started to build up in October. That might be backed by a UN resolution.¹⁰⁹⁸

The Chilcot report also detailed that the Blair government and the Bush administration, also used 9/11 and the threat of terrorism to justify its invasion of Iraq, despite no credible evidence of any biological, chemical or nuclear WMD's being found by weapons inspectors. No link between Al-Qaeda and

¹⁰⁹⁴ John Chilcot, 'Statement by Sir John Chilcot' (*The Iraq Inquiry*, 06 July 2016) 2 <<https://webarchive.nationalarchives.gov.uk/20171123122743/http://www.iraqinquiry.org.uk/the-report/>>

accessed 22 October 2019.

¹⁰⁹⁵ *Iraq Inquiry* (n 1093) para 93.

¹⁰⁹⁶ *Iraq Inquiry* (n 1093) para 94.

¹⁰⁹⁷ *Iraq Inquiry* (n 1093) para 95.

¹⁰⁹⁸ *Iraq Inquiry* (n 1093) para 96.

Iraq was apparent to justify a coalition military invasion to act against international terrorism.¹⁰⁹⁹

Sir John Chilcot also concluded in his public statement: 'The judgements about the severity of the threat posed by Iraq's weapons of mass destruction – WMD – were presented with a certainty that was not justified'.¹¹⁰⁰

Indeed, a similar conclusion was reached by biological and chemical weapons scientist Dr David Kelly following the invasion of Iraq in May 2003, an ex-UN weapons Inspector in Iraq between 1991-1998.¹¹⁰¹

Dr Kelly gave information to a reporter Andrew Gilligan at the British Broadcasting Corporation (BBC) claiming the former Prime Minister Tony Blair had 'sexed up' a dossier on Iraq's weapons capability¹¹⁰² deliberately misleading Parliament with the claim that Iraq could deploy WMD's within 45 minutes.¹¹⁰³

The controversy behind this disclosure was further met after the sudden death of Dr David Kelly, some weeks after he had explained himself before a televised Foreign Affairs Committee at Westminster, and then in secret, before the Intelligence and Security Committee.¹¹⁰⁴

Furthermore, Sir Chilcot highlights the UK's reliance on resolution 1441 as a means to carry out military action despite being informed that a further UNSC resolution would be required to justify military action in Iraq, stating:

[I]n mid-January 2003, Lord Goldsmith told Mr Blair that a further Security Council resolution would be necessary to provide a legal basis for military action. He did not advise No.10 until the end of February

¹⁰⁹⁹ *Iraq Inquiry* (n 1093) para 54.

¹¹⁰⁰ *Iraq Inquiry* (n 1093).

¹¹⁰¹ 'UN Iraq Inspections Body Mourns Death of Former Team Member David Kelly' (*UN News*, 19 July 2003) <<https://news.un.org/en/story/2003/07/74802-un-iraq-inspections-body-mourns-death-former-team-member-david-kelly>> accessed 22 October 2019.

¹¹⁰² 'Dr David Kelly: Controversial Death Examined' (*BBC News*, 17 December 2011) <<https://www.bbc.com/news/uk-13716127>> accessed 22 October 2019.

¹¹⁰³ 'Iraq, Gilligan, Kelly and the Hutton Report 2003' (*BBC News*) <<https://www.bbc.com/historyofthebbc/research/editorial-independence/hutton-report>> accessed 22 October 2019.

¹¹⁰⁴ *ibid.*

that, while a second resolution would be preferable, a “reasonable case” could be made that resolution 1441 was sufficient’.¹¹⁰⁵

The report further highlighted that by the 12th March 2003 there was no chance of securing majority support from UNSC members for a second resolution before the USA took military action as Iraq had not failed to co-operate with weapons inspectors or commit any violations to justify military invasion.¹¹⁰⁶

The report also found:

[M]r Blair and Mr Straw blamed France for the “impasse” in the UN and claimed that the UK Government was acting on behalf of the international community “to uphold the authority of the Security Council”. In the absence of a majority in support of military action, we consider that the UK was, in fact, undermining the Security Council’s authority.¹¹⁰⁷

Although, the Chilcot report remained silent on the legality of the military invasion of Iraq, insisting that this determination could only be resolved by a ‘properly constituted and internationally recognised court’.¹¹⁰⁸ Throughout this segment of the chapter, it has demonstrated the USA and the UK’s (both P5 members of the UNSC) invasion of Iraq was unjustified and in fact illegal.

It can be further argued that the USA and the UK used the terrorist attacks of 9/11 and the USA’s GWOT to justify its invasion in Iraq by fictitiously claiming Iraq possessed WMD’s and associated Al-Qaeda with Saddam Hussein which was completely unfounded.

The integrity of the UNSC has also become compromised following the UK and the USA abusing their permanent membership to coerce members of the UNSC to pass resolution 1483 validating USA and coalition allies’ occupation of Iraq to topple the Iraqi government of Saddam Hussein after it had invaded Iraq without any prior authorisation creating a ‘legitimacy vacuum’.¹¹⁰⁹

¹¹⁰⁵ Chilcott (n 1094) 4.

¹¹⁰⁶ Chilcott (n 1094) 4.

¹¹⁰⁷ Chilcott (n 1094) 4.

¹¹⁰⁸ Chilcott (n 1094) 4.

¹¹⁰⁹ Hikaru Yamashita, ‘The Iraq War, The United Nations Security Council and The Legitimacy of the Use of Force’ (2005) 6 NIDS Security Reports 38, 92.

This corresponds with the argument that the UNSC has become an institution serving the interests of the P5 by legitimising illegal use of force through its resolutions to exempt heads of states (namely George Bush and Tony Blair) from more powerful western states (UK and USA) to be referred to the ICC for the international crimes which have been committed in Iraq.

This practice of the P5 specifically the UK and the USA manipulating resolutions in such a manner promotes impunity reducing the UN Charter to a 'scrap of paper'¹¹¹⁰ by subverting the UNSC,

3.3 The IHL Breaches Following the Military Occupation in Iraq

The use of force employed by the USA, UK and other states have not only breached IL, but have also breached IHL as the occupying coalition forces have committed a myriad of violations contravening the Geneva Convention 1949¹¹¹¹ and 1977 Additional Protocol.¹¹¹²

The illegal use of force by the USA and the UK amounts to the crime of aggression under the Rome Statute.¹¹¹³ Although it has been stated that:

It is irrelevant whether the territory was occupied pursuant to an unlawful use of force in international law, it is the fact of occupation which creates the legal regime. Occupation is a matter of fact resting upon the assertion of authority and control.¹¹¹⁴

The Convention Respecting the Laws and Customs of War on Land regarding 'occupying power' states: 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to

¹¹¹⁰ Carsten Stahn, 'Enforcement of the Collective Will After Iraq' (2003) 97 (4) AJIL 804, 804.

¹¹¹¹ Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949].

¹¹¹² 1977 Additional Protocol I to the Geneva Conventions [1949].

¹¹¹³ n 1074.

¹¹¹⁴ Christine Chinkin, 'Laws of Occupation' (Western Sahara Conference Proceedings, South Africa, December 2008) <<http://removethewall.org/wp-content/uploads/2014/05/Laws-of-Occupation-Christine-Chinkin-2009.pdf>> accessed 22 October 2019, page 198.

the territory where such authority has been established and can be exercised'.¹¹¹⁵

Operation Iraqi Freedom (later renamed Operation New Dawn in 2010)¹¹¹⁶ which lasted between 2003 and 2011 after President Obama's withdrawal of the USA's military¹¹¹⁷ has resulted in 1.7 million Iraqis emigrating abroad since the start of the war, 1.3 million persons have been internally displaced within Iraq and a death estimate for the wartime period to be 461,000, just under half a million people.¹¹¹⁸

In addition, IHL violations by USA, UK coalition airstrikes have disproportionately killed thousands of civilians in the first few weeks of airstrikes in Baghdad¹¹¹⁹ and also through the use of cluster munitions¹¹²⁰ and incendiary weapons¹¹²¹ which are prohibited under IL have been frequently used.¹¹²²

One of the most notorious examples of IHL violations committed by the USA military in Iraq occurred in 2005, which is referred to as the 'Haditha Massacre' after eight USA Marine soldiers randomly and deliberately killed 24 innocent

¹¹¹⁵ The Hague Convention IV: Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War and Land [1907] art 42.

¹¹¹⁶ 'Operation Iraqi Freedom and Operation New Dawn Fast Facts' (*CNN News*, 08 March 2018) <<https://edition.cnn.com/2013/10/30/world/meast/operation-iraqi-freedom-and-operation-new-dawn-fast-facts/index.html>> accessed 22 October 2019.

¹¹¹⁷ Joseph Logan, 'Last U.S. Troops Leave Iraq, Ending War' (*Reuters*, 18 December 2011) <<https://www.reuters.com/article/us-iraq-withdrawal/last-u-s-troops-leave-iraq-ending-war-idUSTRE7BH03320111218>> accessed 22 October 2019.

¹¹¹⁸ Amy Hagopian et al, 'Mortality in Iraq Associated with the 2003-2011 War and Occupation: Findings from A National Cluster Sample Survey by the University Collaborative Iraq Mortality Study' (2013) 10 (10) *PLOS Medicine* 1, 9-10.

¹¹¹⁹ 'Off Target, The Conduct of the War and Civilian Casualties in Iraq' (*Human Rights Watch*, 11 December 2003) <<https://www.hrw.org/report/2003/12/11/target/conduct-war-and-civilian-casualties-iraq>> accessed 22 October 2019.

¹¹²⁰ Convention on Cluster Munitions [2008] art 1.

¹¹²¹ Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons [1980] art 2 [1].

¹¹²² Chapter 3' (Global Policy Forum) <<https://www.globalpolicy.org/component/content/article/168/37184.html>> accessed 22 October 2019.

civilians which included women and children¹¹²³, several hours after a roadside bomb exploded killing Lance Corporal Miguel Terrazas.¹¹²⁴

Initially, criminal charges were brought against these individuals, however, following an investigation into the massacre¹¹²⁵ seven of the soldiers involved were granted amnesty and led Staff Sergeant Wuterich being charged with the lesser offence of 'negligent dereliction of duty' as opposed to pre-meditated murder after a plea deal was struck resulting in him serving zero years in prison.¹¹²⁶

This lack of accountability has remained a consistent theme in Iraq, particularly where civilians have been killed by private security contractors employed by the USA government.

The 2007 'Nisour Square Massacre' in Baghdad is the most prominent example, which involved individuals working for the private security company Blackwater carrying out an unprovoked attack by randomly discharging gunfire into a crowd¹¹²⁷ killing 17 Iraqi civilians and wounding a further 24.¹¹²⁸

Three individuals (Dustin Heard, Evan Liberty and Paul Slough) were convicted for voluntary and attempted manslaughter, in addition to Nicholas Slatten being found guilty of murder in 2018 for killing 14 unarmed civilians and was sentenced to life in prison in 2019.¹¹²⁹

¹¹²³ Neta C. Crawford, 'Individual and Collective Moral Responsibility for Systemic Military Atrocity' (2007) 15 (2) *Journal of Political Philosophy* 187, 187.

¹¹²⁴ Lupe Laguna, 'To Be Judged by Twelve or Carried by Six? Quasi-Involuntariness and the Criminal Prosecution of Service Members for the Use of Force in Combat – A Grunt's Perspective' (2015) 105 (2) *J.Crim.L. & Criminology* 431, 433-434.

¹¹²⁵ Uniform Code of Military Justice 1950 art 32

¹¹²⁶ Jessica Peake, 'Judicial Action and Accountability for Law of War Violations in the War on Terror' (2020) 12 (1) *HJRL* 167, 169.

¹¹²⁷ Katia Snukal and Emily Gilbert, 'War, Law, Jurisdiction and Juridical Othering: Private Military Security Contractors and the Nisour Square Massacre' (2015) 33 (4) *Society and Space* 660, 660.

¹¹²⁸ Justin H. Whitten, 'They're Getting Away with Murder: How the International Criminal Court Can Prosecute U.S. Private Security Contractors for the Nisour Square Tragedy and Why It Should Be' (2012) 11 (2) *Wash. U. Global Stud. L. Rev.* 503, 503.

¹¹²⁹ Peake (n 1126) 170.

However, former President Donald Trump in 2020 granted clemency to all four perpetrators, effectively pardoning them for the violations of IHL and crimes committed against innocent civilians.¹¹³⁰

Since the emergence of the Islamic State (ISIL) in 2015, major groups of armed insurgents such as: Ba'athists, Iraqi Nationalists, Sunni Islamists, Salafi/Wahabi Jihadists, Shi'a Militias and foreign Islamist volunteers have only further intensified the hostilities, which in turn has influenced USA coalition forces military strategy to eradicate these threats resulting in the deaths of more innocent civilians.¹¹³¹

The USA-led occupation post-9/11 have also been in breach of women's rights as sexual violence, rape, assault and abduction were common practice throughout.¹¹³² IHL prohibits and condemns these violations of protected persons¹¹³³ under the Geneva Convention.¹¹³⁴

Further IHL abuses have been prevalent post-9/11 and reflected in the death rates which have resulted in the displacement of millions of Iraqis¹¹³⁵ and the torturing of detainees in the Abu Ghraib prison complex in Iraq by coalition forces.¹¹³⁶

¹¹³⁰ 'Pardons Granted by President Donald Trump' (*The United States Department of Justice*, 22 December 2020) <<https://www.justice.gov/pardon/pardons-granted-president-donald-trump>> accessed 06 January 2021.

¹¹³¹ Lily Hamourtziadou, 'Iraq: Wars and Casualties, 13 Years On (*Iraq Body Count*, 19 March 2016) <<https://www.iraqbodycount.org/analysis/beyond/13-years-on/>> accessed 22 October 2019.

¹¹³² 'At A Crossroads, Human Rights in Iraq Eight Years After the US-Led Invasion' (*Human Rights Watch*, 21 February 2011) <<https://www.hrw.org/report/2011/02/21/crossroads/human-rights-iraq-eight-years-after-us-led-invasion>> accessed 22 October 2019.

¹¹³³ Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 27.

¹¹³⁴ Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 47.

¹¹³⁵ 'Staggering Civilian Death Toll in Iraq- UN Report' (*United Nations Human Rights Office of the High Commissioner*, 19 January 2016). <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16964&LangID=E>> accessed 22 October 2016.

¹¹³⁶ Seymour M Hersh, 'Torture at Abu Ghraib Prison' (*The New Yorker*, 10 May 2004) <<https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>> accessed 22 October 2019.

The USA considers detained individuals who are either known or suspected terrorists as unlawful combatants or unprivileged belligerents¹¹³⁷, which have often been subjected to severe human rights violations such as torture¹¹³⁸ around various detention centres operated by intelligence agencies from the USA and the UK.

These detention centres are referred to as black sites (secret prisons) scattered across different states around the globe, for example: Iraq (Abu Ghraib Prison)¹¹³⁹, Afghanistan (Bagram Prison)¹¹⁴⁰ and Cuba (Guantanamo Bay).¹¹⁴¹

After the events of 9/11, claims of human rights abuse significantly increased as suspected terrorists claimed they were unlawfully detained¹¹⁴², were not given a fair trial¹¹⁴³, tortured¹¹⁴⁴ and even refused diplomatic assistance where a UK national suffered at the hands of a USA authorities.¹¹⁴⁵

An example of human rights abuse can be referenced to a British citizen named Moazzam Begg who spent three years in Guantánamo Bay before his release in 2005 and was never charged for any crime. An interview with Begg revealed that he was seized by security forces in Pakistan.¹¹⁴⁶

Initially, he was held in Islamabad, Pakistan and interrogated by the USA Central Intelligence Agency (CIA) and the UK Military Intelligence 5 (MI5) before being transferred to a USA detention facility in Kandahar, Afghanistan, then to Bagram Prison before finally arriving in Guantanamo Bay. For the

¹¹³⁷ Ryan Goodman, 'The Detention of Civilians in Armed Conflict' (2009) 103 (1) AJIL 48, 48.

¹¹³⁸ United Nations Convention Against the Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment [1984] art 1 (1).

¹¹³⁹ Adam Lankford, 'Promoting Aggression and Violence at Abu Ghraib: The U.S. Military's Transformation of Ordinary People into Torturers' (2009) 14 (5) Aggression and Violent Behaviour 388, 388 – 369.

¹¹⁴⁰ Caron E. Gentry, 'The Mysterious Case of Aafia Siddiqui: Gothic Intertextual Analysis of Neo-Orientalist Narratives' (2016) 45 (1) Millennium: Journal of International Studies 3, 19.

¹¹⁴¹ Elena Chachko, 'Administrative National Security' (2020) 108 (5) Geo.L.J. 1063, 1090.

¹¹⁴² *Rasul v Myers* 512 F.3d 644 (D.C. Cir. 2008).

¹¹⁴³ *Al-Bahlul v United States* 840 F.3d 757 (D.C. Cir. 2016).

¹¹⁴⁴ *Ali v Rumsfeld* 649 F.3d 762 (D.C. Cir. 2011), *El-Masri v Tenet* 437 F.Supp. 2d 530 (E.D. Va 2006).

¹¹⁴⁵ *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598.

¹¹⁴⁶ Claire Chambers, 'Guantanamo Boy: An Interview with Moazzam Begg' (2011) 6 (2) Postcolonial Text 1,1.

majority of his detention, he was kept in solitary confinement, whilst being subjected to 300 interrogations, death threats and torture.¹¹⁴⁷

A similar account¹¹⁴⁸ was provided by Mohamedou Ould Slahi¹¹⁴⁹ a Mauritanian national who was detained without trial¹¹⁵⁰ for being suspected to be an Al-Qaeda operative recruiting militants and money laundering funds, while working as an Engineer in Germany and Canada.¹¹⁵¹ In 2002 Slahi was taken to Bagram Prison¹¹⁵² then finally taken to Guantanamo Bay¹¹⁵³ where he was tortured¹¹⁵⁴ before his release in 2016.¹¹⁵⁵

Moreover, deprivation of detainee's human rights in Guantanamo Bay have been a common occurrence following the introduction of the Military Commissions Act (MCA)¹¹⁵⁶ enacted by the Bush administration allowing the President to subject enemy combatants to military commissions¹¹⁵⁷ to try unlawful combatants¹¹⁵⁸ and restricting courts from hearing cases concerning *Habeas Corpus*¹¹⁵⁹ (whether a person is lawfully detained)¹¹⁶⁰ which was found to be unconstitutional.¹¹⁶¹

¹¹⁴⁷ George Kassimeris, 'Conversations in Critical Studies on Terrorism' (2008) 1 (3) *Critical Studies on Terrorism* 405, 405.

¹¹⁴⁸ Mohamedou Ould Slahi, *Guantanamo Diary* (Larry Siems ed, rev edn, Cannongate Books 2017).

¹¹⁴⁹ Christopher Langlois, 'Living Literally in Terror: Mohamedou Ould Slahi's Guantanamo Diary and the Autoimmunitary politics of dehumanization in the War on Terror' (2018) 22 (2) *European Journal of English Studies* 154, 154-155.

¹¹⁵⁰ Mary Pappalardo, 'Writing from the New Colony: Place, Subjectivity and Textual Production in Guantanamo Diary' (2019) 50 (1) *Research in African Literatures* 20, 20.

¹¹⁵¹ Neil Krishan Aggarwal, 'Nation, Narration and Health in Mohamedou Ould Slahi's Guantanamo Diary' (2018) 39 (3) *Journal of Medical Humanities* 263, 264.

¹¹⁵² Alexandra Schultheis Moore, 'Teaching Mohamedou Ould Slahi's Guantanamo Diary in the Human Rights and Literature Classroom' (2016) 104 (0) *Radical Teacher* 27, 30.

¹¹⁵³ Daniel Roux, 'Mohamedou Ould Slahi's Guantanamo Diary and Prison Writing from Africa' (2020) 63 (2) *African Studies Review* 430, 431-432.

¹¹⁵⁴ Eleni Coundouriotis, 'Torture and Textuality: Guantanamo Diary as Postcolonial Text' (2020) 34 (7) *Textual Practice* 1061 1061.

¹¹⁵⁵ *ibid* 1068.

¹¹⁵⁶ Military Commissions Act 2006.

¹¹⁵⁷ Military Commissions Act 2006 s 2.

¹¹⁵⁸ Military Commissions Act 2006 s 2 (1).

¹¹⁵⁹ Richard L. Abel, 'Law's Wars, Law's Trials (2020) 47 (S1) *Journal of Law and Society* S14, S23.

¹¹⁶⁰ Charles E. Wyzanski, 'The Writ of Habeas Corpus' (1946) 243 (1) *Annals Am.Acad.Pol.& Soc.Sci.* 101, 101.

¹¹⁶¹ *Boumediene v Bush* 533 U.S. 723 (2008).

The USA supreme court in *Hamdi*¹¹⁶² and *Hamdan*¹¹⁶³ ruled that the provisions of the MCA denied Guantanamo detainees that were classified as unlawful combatants to appeal their detention and such procedures were found to be in violation of the four Geneva Conventions¹¹⁶⁴ and the Uniform Code of Military Justice.¹¹⁶⁵

Article 75 (1) of AP I clearly states: 'persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances'.¹¹⁶⁶ Under this article, a non-combatant or enemy combatant enjoys freedom from torture¹¹⁶⁷ and is entitled to be tried under judicial procedure before a sentence is made.¹¹⁶⁸

However, interestingly the USA has continued to deprive detainees of their human rights using the justification that the wars in Afghanistan and Iraq were classified as Non-International Armed Conflicts (NIAC)¹¹⁶⁹, meaning that known or suspected terrorists were not given the same protection to be treated humanely in comparison to wars, which would have classified such individuals as IAC's.¹¹⁷⁰

It has been established that the initial 2001 invasion and occupation¹¹⁷¹ of Afghanistan by the USA, UK and coalition forces in pursuit of the GWOT¹¹⁷²

¹¹⁶² *Hamdi v Rumsfeld* 542 U.S. 507 (2004).

¹¹⁶³ *Hamdan v Rumsfeld* 548 U.S. 557 (2006).

¹¹⁶⁴ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [1949], Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces Sea [1949], Geneva Convention Relative to the Treatment of Prisoners of War [1949], Geneva Convention Relative to the Protection of Civilian Persons in Time of War [1949].

¹¹⁶⁵ Uniform Code of Military Justice 1950 art 2.

¹¹⁶⁶ 1977 Additional Protocol I to the Geneva Conventions [1949] art 75 (1).

¹¹⁶⁷ 1977 Additional Protocol I to the Geneva Conventions [1949] art 75 (2) (b).

¹¹⁶⁸ 1977 Additional Protocol I to the Geneva Conventions [1949] art 75 (4).

¹¹⁶⁹ 1977 Additional Protocol II to the Geneva Conventions [1949] art 1 (2).

¹¹⁷⁰ Kieran O'Reilly and Noelle Higgins, 'The Role of the Russian Federation in the Pridnestrovian Conflict: An International Humanitarian Perspective' (2008) 19 (1) *Irish Studies in International Affairs* 57, 60.

¹¹⁷¹ The Hague Convention IV: Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War and Land [1907] art 42

¹¹⁷² Leoni Connah, 'US Intervention in Afghanistan: Justifying the Unjustifiable?' (2021) 41 (1) *South Asia Research Journal* 70, 70.

was widely accepted to be an IAC.¹¹⁷³ After the appointment of Hamid Karzai as head of state in 2004, the USA's military occupation changed to an NIAC.¹¹⁷⁴

Similarly, in Iraq the initial invasion and occupation¹¹⁷⁵ of Iraq by the UK, USA and coalition forces through the Coalition Provisional Authority (CPA)¹¹⁷⁶ between April 2003-June 2004¹¹⁷⁷ was an IAC. After the handover of power from the CPA to the interim Iraqi government¹¹⁷⁸ the military presence changed to an NIAC.¹¹⁷⁹

Since then, courts in the USA have rendered judicial decisions denying detainee's prisoner of war status and combatant immunity¹¹⁸⁰ in contravention of Geneva Convention.¹¹⁸¹

These violations of IHL which have been committed by individuals belonging to the militaries and intelligence agencies of the USA and the UK have been criticised for committing war crimes in contravention of the Rome Statute.¹¹⁸²

The former ICC chief prosecutor Fatou Bensouda has previously declared there is 'reasonable basis' to believe that UK soldiers have committed war crimes against detainees and for the unlawful killing of prisoners after the USA led invasion.¹¹⁸³

¹¹⁷³ Annyssa Bellal, Gilles Giacca and Stuart Casey-Masien, 'International Law and Armed Non-State Actors in Afghanistan' (2011) *International Review of the Red Cross* 47, 51.

¹¹⁷⁴ Robin Geiss and Michael Siegrist, 'Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?' (2011) 93 (881) *International Review of the Red Cross* 11, 15.

¹¹⁷⁵ Hague Convention IV (n 1171).

¹¹⁷⁶ UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483, UNSC Res 1511 (16 October 2003) UN Doc S/RES/1511.

¹¹⁷⁷ David Turns, 'The International Humanitarian Law Classification of Armed Conflicts in Iraq since 2003' (2010) 86 (1) *International Law Studies* 97, 98.

¹¹⁷⁸ UNSC Res 1546 (8 June 2004) UN Doc S/RES/1546.

¹¹⁷⁹ Knut Dormann and Laurent Colassis, 'International Humanitarian Law in the Iraq Conflict' (2004) 47 *German Yearbook of International Law* 293, 327.

¹¹⁸⁰ *United States v Irek Ilgiz Hamidullin* 888 F.3d 62 (4th Cir.2018).

¹¹⁸¹ Geneva Convention Relative to the Treatment of Prisoners of War [1949] art 3, 1977 Additional Protocol I to the Geneva Conventions [1949] art 46.

¹¹⁸² Rome Statute of the International Criminal Court [1998] art 8.

¹¹⁸³ Owen Bowcott, 'The Hague Says Claims War Crimes by UK Troops Have Reasonable Basis' (*The Guardian*, 04 December 2017) <<https://www.theguardian.com/law/2017/dec/04/icc-to-continue-investigation-into-claims-of-war-crimes-by-british-troops>> accessed 22 October 2019.

The USA is not currently a signatory to the Rome Statute, therefore in order for the ICC to acquire jurisdiction it must seek the approval of the UNSC. Since both the UK and the USA are both P5 members of the UNSC, any potential resolution demanding their nationals be held accountable for international crimes is likely to be met with a veto, effectively allowing individuals from the USA and the UK to evade international criminal justice.

3.4 Presidential Directives, Black Sites and Judicial Decisions: The USA, UK and European State's Human Rights Abuses in the War on Terror

The USA congress in the wake of the 9/11 twin tower attacks¹¹⁸⁴ introduced the USA Patriot Act¹¹⁸⁵ to complement the Bush administrations global GWOT initiative to counter terrorist threats applicable both abroad and nationally¹¹⁸⁶ by increasing powers¹¹⁸⁷ and financial resources for the USA security agencies.¹¹⁸⁸

The enacted legislation has been criticised for discriminately restricting and grossly violating the rights and civil liberties of Muslims of all nationalities by allowing governmental bodies to carry out warrantless surveillance¹¹⁸⁹ to monitor, investigate, detain and deport Muslims legally in the name of security without any rudimentary due process of the law.¹¹⁹⁰

Discriminative legislation and executive decisions have remained a consistent theme throughout the duration of the former Bush administration by encouraging the USA intelligence agencies to actively commit violations of IHL by using torture as a tactic against detained terrorists.

¹¹⁸⁴ Jothie Rajah, 'Law, Politics and Populism in the U.S.A. P.A.T.R.I.O.T. Act' (2019) 26 (1) Indiana Journal of Global Legal Studies 61, 61.

¹¹⁸⁵ The USA Patriot Act 2001.

¹¹⁸⁶ Mark Fox, 'The PATRIOT Act: Liberty Afire' (2013) 1 (3) Themis: Journal of Justice Studies and Forensic Science 21, 31.

¹¹⁸⁷ The USA Patriot Act 2001 s 202-214.

¹¹⁸⁸ The USA Patriot Act 2001 s 101.

¹¹⁸⁹ Tiberiu Dragu, 'Is There a Trade-Off Between Security and Liberty? Executive Bias, Privacy Bias, Privacy Protections and Terrorism Prevention' (2011) 105 (1) American Political Science Review 64, 64.

¹¹⁹⁰ Kam C. Wong, 'The USA Patriot Act: A Policy of Alienation' (2006) 12 (1) Michigan Journal of Race and Law 161, 165.

A controversial presidential directive in the USA's pursuit of its GWOT has led to the United Nations Human Rights Council (UNHRC) reporting that former President Bush authorised the CIA to use black sites in agreement with public officials of other states, approving physical and mental torture of known or suspected terrorists through the use of 'enhanced interrogation techniques', which was often approved on the personal authority of the president.¹¹⁹¹

The CIA's torturous practice of 'waterboarding' often referred to as 'simulated drowning' is designed to produce the perception of suffocation and incipient panic, by actually drowning a person.¹¹⁹²

The prohibition on torture features prominently in IL and it is widely accepted to be prohibited by the peremptory norm of *Jus Cogens*.¹¹⁹³ If such human rights are violated it is considered to be an international crime triggering universal jurisdiction which allows states to try individuals for breaching IHRL, IHL and international criminal law.¹¹⁹⁴

The Bush administration has openly disregarded IHL and respect for human rights in relation to detained terrorists. It has been previously reported that President Bush signed an executive memorandum on 7th February 2002, concluding that the Geneva Convention¹¹⁹⁵ was 'obsolete' and would not protect 'unlawful combatants' detained by the USA and allied forces during the conflict.¹¹⁹⁶

Moreover, the USA began programs of extraordinary rendition, used to relocate enemy combatants for interrogation purposes, which many critics

¹¹⁹¹ UNHRC (Sub-Commission), 'Report by Special Rapporteur Ben Emmerson' 22/52 (2013) UN Doc A/HRC/22/52.

¹¹⁹² Getting Away with Torture, The Bush Administration and Mistreatment of Detainees' (*Human Rights Watch*, 12 July 2011) <<https://www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees>> accessed 22 October 2019.

¹¹⁹³ John Ip, 'Two Narratives of Torture' (2009) 7 (1) *North Western Journal of International Human Rights* 35,36.

¹¹⁹⁴ Nina H. B. Jorgensen, 'Complicity in Torture in A Time of Terror: Interpreting the European Court of Human Rights Extraordinary Rendition Cases' (2017) 16 (1) *Chinese JIL* 11, 16.

¹¹⁹⁵ Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949]

¹¹⁹⁶ Laura K Mehalko, 'Hooded: Binyam Mohamed and the State Secret Privilege' (2011) 34 *B.C.Int'l & Comp.L.Rev.* 81, 86.

believed that these programs were used as a way to subject prisoners to practices which would be considered illegal in America.¹¹⁹⁷

The UN Torture Convention condemns the use of torture as a mean to acquire a confession from a prisoner or detainee.¹¹⁹⁸ Article 7 of the ICCPR reiterates the prohibition of torture stating: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'.¹¹⁹⁹

Despite President Bush issuing Executive Order No.13440¹²⁰⁰ in 2007, making interrogation techniques in detention facilities compliant with the Geneva Convention.¹²⁰¹ it is widely understood that acts of torture against persons are prohibited under the Geneva Conventions¹²⁰² and deemed to be war crimes under the Rome Statute¹²⁰³, yet no formal charges have been brought forth by the ICC to the former president.

In 2009, President Barack Obama authorised Executive Order No.13491¹²⁰⁴ which revoked all previous Bush Administrations executive directives, orders, and regulations inconsistent with this order. This included the CIA's attempt to:

[I]mprove the effectiveness of human intelligence gathering, to promote the safe, lawful, and humane treatment of individuals in United States custody and of United States personnel who are detained in armed conflicts, to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions.¹²⁰⁵

¹¹⁹⁷ *ibid.*

¹¹⁹⁸ United Nations Convention Against the Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment [1984] art 1 (1).

¹¹⁹⁹ International Covenant on Civil and Political Rights [1966] art 7.

¹²⁰⁰ Executive Order No. 13440 – 'Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agencies' 72 FR 40707 (20 July 2007).

¹²⁰¹ *Ibid* 1000-1001.

¹²⁰² Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 3.

¹²⁰³ Rome Statute of the International Criminal Court [1998] art 8 (2) (a) (ii).

¹²⁰⁴ Executive Order No. 13491 – 'Ensuring Lawful Interrogations' 74 FR 4893 (22 January 2009).

¹²⁰⁵ *ibid* 1-2.

In addition, President Obama issued Executive Order No. 13492¹²⁰⁶ ordering the closure of all detention facilities including the Guantanamo Bay site.¹²⁰⁷

The UK has supported the USA and believed to have been complicit in the extraordinary rendition and torture of detainees. Extraordinary rendition involves state sponsored abduction from one country and transferring the individual to another country with or without the co-operation of the government in order to detain, interrogate, torture and deny access to consular official and impartial tribunals.¹²⁰⁸

This state-sponsored abduction after 9/11 has been often denied by states, especially the UK and USA, which has been reflected in a series of judicial decisions relating to Binyam Mohamed (BM).

BM an Ethiopian citizen and legal resident of the UK was arrested in Karachi airport, Pakistan in 2002. He was suspected to be an Al-Qaeda operative and was taken by the CIA to various detention facilities in Morocco, Afghanistan and Guantanamo Bay, Cuba, where he was viciously tortured. He was imprisoned for 7 years before his release in 2008 despite not being tried or convicted for any crime.¹²⁰⁹

Subsequent to BM's release, proceedings were brought forth against a company based in the USA named Jeppesen Dataplan a subsidiary of Boeing (aircraft manufacturer) in *Mohamed v Jeppesen Dataplan Inc.*¹²¹⁰

In this case, BM and five other detainees alleged that the company had aided the rendition and torture of the detainees by arranging transportation, flight planning and other logistical support to the CIA.¹²¹¹

¹²⁰⁶ Executive Order No. 13492 – 'Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities' 74 FR 4897 (22 January 2009).

¹²⁰⁷ *ibid* 1.

¹²⁰⁸ David Weissbrodt and Amy Bergquist, 'Extraordinary Rendition: A Human Rights Analysis' (2006) 19 Harv.Hum.Rts.J. 123, 127.

¹²⁰⁹ Daniel R. Cassman, 'Keep It A Secret, Keep It Safe: An Empirical Analysis of the State Secrets Doctrine' (2015) 67 (5) Stan.L.Rev. 1173, 1174.

¹²¹⁰ *Mohamed v Jeppesen Dataplan Inc* 539 F Supp 2d 1128, 1129-32 (N.D. Cal 2008)

¹²¹¹ *ibid*.

The USA government intervened on behalf of *Jeppesen* claiming any information relating to the CIA's practices and other sensitive information would be compromised and motioned the case to be dismissed under the doctrine of state secret privilege.¹²¹² The Northern District of California rendered a decision to dismiss the case.¹²¹³

On appeal the decision was reversed¹²¹⁴ but the Ninth Circuit Court of Appeal decided to hear the case *en banc* (a hearing consisting of a large panel of judges).¹²¹⁵

The court enforced the original decision reached by the California district court and dismissed the case on the grounds that information relating to the CIA's practices would risk divulging state secrets.¹²¹⁶ An application was subsequently made to the USA supreme court to hear the case, however the court refused.¹²¹⁷

The Bush administrations practice of using state secret privilege¹²¹⁸ to avoid accountability has similarly been displayed by the Obama administration as seen above in the *Binyam* case¹²¹⁹ which the USA congress have debated and disapproved.¹²²⁰

In addition, whilst the litigation in the USA was taking place, BM simultaneously initiated legal proceedings in the UK to obtain evidence from the UK government, which was given by the USA intelligence services after confessions were made regarding BM's conspiracy to commit terrorism which were obtained by torture.¹²²¹

¹²¹² *Mohamed v Jeppesen Dataplan Inc* 614 F.3d 1070, 1074 (9th Cir.2010) (en banc).

¹²¹³ *Mohamed* (n 1210).

¹²¹⁴ *Mohamed v Jeppesen Dataplan Inc* 563 F.3d 992, 996-97 (9th Cir.2009).

¹²¹⁵ Stephen L Wasby, 'Why Sit En Banc?' (2012) 63 (3) *Hastings L.J.* 747, 748.

¹²¹⁶ *Cassman* (n 1209) 1175.

¹²¹⁷ *Mohamed v Jeppesen Dataplan Inc* 131 S. Ct.2442 (2011).

¹²¹⁸ *States Secrets Protection Act* 2008.

¹²¹⁹ *Mohamed* (n 1217).

¹²²⁰ Sudha Setty, 'Judicial Formalism and the State Secrets Privilege' (2012) 38 (5) *Wm.Mitchell L.Rev.* 1629, 1630.

¹²²¹ *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin) [38] - [47] (Thomas LJ).

In the case of, *R (on the application of Mohamed v Secretary of State for Foreign and Commonwealth Affairs (No.1))*¹²²² the court ruled in favour of BM¹²²³ but redacted a summary of the USA intelligence report, after the former UK Foreign Secretary David Miliband issued a public interest immunity (PII) certificate on the grounds that state secrets would be at risk of being disclosed.¹²²⁴

In *R (on the application of Mohamed v Secretary of State for Foreign and Commonwealth Affairs (No.2))*¹²²⁵ the court reconsidered the previous decision regarding the Foreign Secretary's issuance of the PII certificate.

The former Foreign Secretary asserted that the summary report must remain undisclosed because the USA government had threatened to 're-evaluate its intelligence sharing relationship with the United Kingdom' and possibly withhold vital national security information from the UK should the summary be disclosed to BM's legal counsel.¹²²⁶ The court upheld the Foreign Secretary's issuance of the public interest immunity certificate.¹²²⁷

However, in *R (on the application of Mohamed v Secretary of State for Foreign and Commonwealth Affairs (No.3))*¹²²⁸ the case was reopened and the court reversed its previous decision to withhold the information regarding BM's treatment.¹²²⁹ The court determined the likelihood of the Obama administration withholding intelligence from the UK was unlikely in comparison to threats presented by the Bush administration.¹²³⁰

During the case it was decided, 'a vital public interest requires, for reasons of democratic accountability and the rule of law in the United Kingdom, that a summary of the most important evidence relating to the involvement of the

¹²²² *ibid.*

¹²²³ *Mohamed* (n 1221) [105] (Thomas LJ).

¹²²⁴ *Mohamed* (n 1221) [150] - [160] (Thomas LJ).

¹²²⁵ *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin).

¹²²⁶ *ibid* [62] (Thomas LJ).

¹²²⁷ *Mohamed* (1225) [107] (Thomas LJ).

¹²²⁸ *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 2549 (Admin)

¹²²⁹ *ibid* [7] (Thomas LJ).

¹²³⁰ *Mohamed* (n 1228) [104] (Thomas LJ).

British security services in wrongdoing be placed in the public domain in the United Kingdom'.¹²³¹

Although, in *R (on the application of Mohamed v Secretary of State for Foreign and Commonwealth Affairs (No.4))*¹²³² the Court of Appeal upheld the divisional court's decision, by making reference to the USA case of *Mohammed v. Obama*¹²³³ where the court found the detention and torture of BM, while in USA custody rendered his testimony regarding BM training with Al-Qaeda member Farhi Saeed bin Mohammed unreliable and inadmissible.¹²³⁴

The Court of Appeal used the findings in *Mohamed v Obama*¹²³⁵ to order the UK government to disclose information regarding BM's mistreatment.

The significance of the BM's case is that the CIA had in fact detained and tortured BM and the UK intelligence services, particularly, MI5 were aware of the illegal practice and human rights abuses. Perhaps even more significant is the fact that the former Bush administration and the UK politicians' efforts to keep the human rights violations and torturous practices secret and confidential.

The UK's involvement with the USA in torturing individuals has been elaborated in depth by International Relations experts Professor Blakely and Senior academic Raphael arguing:

[T]here have been numerous allegations of British torture in the 'war on terror'. As a result, the incoming Coalition government in 2010 former Prime Minister David Cameron launched a judge-led inquiry to examine 'whether Britain was implicated in the improper treatment of detainees, held by other countries, that may have occurred in the aftermath of 9/11'.

Although this was closed down before it had had the chance to call witnesses, the Detainee Inquiry compiled over 20,000 documents from the UK intelligence agencies and government departments, and issued

¹²³¹ *Mohamed* (n 1228) [105] (Thomas LJ).

¹²³² *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 158.

¹²³³ *Mohamed v Obama* 704 F.Supp 2d 1 (D.D.C 2009).

¹²³⁴ *ibid* para 29.

¹²³⁵ *Mohamed* (n 1233).

a preliminary report which made clear that these documents pointed to UK involvement in prisoner mistreatment.¹²³⁶

In addition, Blakely and Raphael comment on MI5's use of the 'good cop/bad cop' strategy during interrogations by exposing detained prisoners to 'harsh' and 'soft' sessions. If prisoners refused to answer questions MI5 officers would step out of the room and would then be tortured repeatedly with an electric drill.¹²³⁷

A UNHRC report in 2010 also confirmed the UK government, MI5 and MI6 were in fact involved in carrying out secret renditions by transferring suspected terrorists to secret detention centres where detainees were subjected to torturous, inhuman and degrading treatment.¹²³⁸

NGO Amnesty International has reported by 2012 three investigations conducted by the CPS and the Metropolitan Police resulted in no prosecutions of MI5 members for their involvement with the interrogation of BM during Operation Hinton.

Subsequently, no indictments or prosecutions were made against MI6 members for their illicit interrogation practices in Bagram prison, Afghanistan, during Operation Iden and its complicity in secret rendition programs during Operation Lydd.¹²³⁹

The release of Shaker Aamer in 2015, the last UK resident released from Guantanamo Bay detention centre after 13 years was never charged for any crime and openly confirmed that both MI5 and CIA agents had tortured him to obtain confession evidence.¹²⁴⁰

¹²³⁶ Ruth Blakeley and Sam Raphael, 'British Torture In the 'War on Terror' (2017) 23 (2) European Journal of International Relations 243, 246.

¹²³⁷ Ibid 259.

¹²³⁸ UNHRC, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development' (20 May 2010) UN Doc A/HRC/13/42.

¹²³⁹ 'The Detainee Enquiry' (*Amnesty International UK*, 16 February 2017) <<https://www.amnesty.org.uk/detainee-inquiry>> accessed 22 October 2019.

¹²⁴⁰ 'Shaker Aamer: 13 years in Guantanamo Bay, Never Charged with Any Crime' (*Amnesty International UK*, 25 September 2018) <<https://www.amnesty.org.uk/shaker-aamer-13-years-guantanamo-bay-torture-uk>> accessed 22 October 2019.

In 2014, The USA Senate Select Committee Study on the 'Central Intelligence Agency's Detention and Interrogation Program'¹²⁴¹ also confirmed the CIA's violations were committed through the use of 'enhanced interrogation techniques'.¹²⁴²

In addition, European states have also been found to have collaborated with the USA in facilitating extraordinary renditions of terrorists and suspected terrorists, denying detainees basic human rights and subjecting them to torturous treatment in interrogations.¹²⁴³

International relations expert Raphael et al, have commented on the scope and extent of the CIA's Rendition, Detention and Interrogation (RDI) program which was carried out across various international 'black site' prison networks, which spanned four continents and found 119 terror suspects being detained in the first five years of the GWOT.¹²⁴⁴

These prisoners were held incommunicado, in conditions which amounted to torture, cruel, inhuman and degrading treatment, and subjected to a regime of interrogation practices which, employed together and in many cases individually, clearly constituted torture.¹²⁴⁵

The practice of enforced disappearance by these intelligence agencies is prohibited in IL¹²⁴⁶ and the European Court of Human Rights (ECtHR) has

¹²⁴¹ Dianne Feinstein, 'Report of the Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program together with Foreword by Chairman Feinstein and Additional and Minority Views' (United States Senate, 09 December 2014) <<https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf>> accessed 22 October 2019.

¹²⁴² *ibid* IV-V

¹²⁴³ Monica Hakimi, 'The Council of Europe Addresses CIA Rendition and Detention Program' (2007) 101 (2) *AJIL* 442, 442.

¹²⁴⁴ Sam Raphael et al, 'Tracking Rendition Aircraft as A Way to Understand CIA Secret Detention and Torture in Europe' (2016) 20 (1) *International Journal of Human Rights* 78, 78-79.

¹²⁴⁵ *ibid*.

¹²⁴⁶ International Convention for the Protection of All Persons from Enforced Disappearance [1992].

reiterated this prohibition¹²⁴⁷ in many of its judicial decisions¹²⁴⁸ relating to Russia¹²⁴⁹ and Turkey.¹²⁵⁰

The ‘global spider’s web’¹²⁵¹ of rendition and black sites have also been found across multiple member states of the Council of Europe (CoE).¹²⁵² It has been firmly established European states have been complicit with the USA DoD and CIA¹²⁵³ subjecting known and suspected terrorists to inhumane, degrading and torturous treatment¹²⁵⁴ in contravention of the CoE’s key human right document¹²⁵⁵ the European Convention of Human Rights (ECHR).¹²⁵⁶

The ECHR is required to be interpreted in a manner consistent with the applicable rules of IL¹²⁵⁷ IHL¹²⁵⁸ which has been reiterated¹²⁵⁹ in various ECtHR¹²⁶⁰ proceedings.¹²⁶¹ This right is considered to be absolute and not subject to derogation even in the most difficult circumstances presented in the age of terrorism.¹²⁶²

In *Soering v United Kingdom*¹²⁶³ the ECtHR summarised there is no exception, nor any derogation to commit torture even in times of war or in any other national emergency.¹²⁶⁴

¹²⁴⁷ *Orhan v Turkey* App no 25656/94 (18 June 2002).

¹²⁴⁸ *Imakayeva v Russia* App no 7615/02 (9 November 2006).

¹²⁴⁹ *Alaskhanova and Others v Russia* App nos 2944/06, 8300/07,50184/07,332/08 and 42509/10 (ECHR, 18 December 2012).

¹²⁵⁰ *Atila Taş v Turkey* App no 72/17 (19 January 2021).

¹²⁵¹ Parliamentary Assembly of the Council of Europe, *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States*, Committee on Legal Affairs and Human Rights Doc.10957 (12 June 2006) paras 24-26.

¹²⁵² Parliamentary Assembly of the Council of Europe, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, Committee on Legal Affairs and Human Rights Doc.11302 (11 June 2007) summary.

¹²⁵³ Raphael (n 1244) 82.

¹²⁵⁴ *Nasr and Ghali v Italy* App no 44883/09 (ECHR, 23 February 2016).

¹²⁵⁵ Wolfgang Benedek, ‘Are the Tools of the Council of Europe Sufficient to Protect Human Rights, Democracy and the Rule of Law from Backsliding?’ (2020) 1 (2) *European Convention on Human Rights Law Review* 151

¹²⁵⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] art 3.

¹²⁵⁷ *Loizidou v Turkey* (1997) 23 EHRR 513, para 43

¹²⁵⁸ *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB) [288-289] (Leggatt LJ).

¹²⁵⁹ *Bankovic v Belgium* (2001) 11 BHRC 435, para 55

¹²⁶⁰ *Jones v United Kingdom* App nos 34356/06, 40528/06 (ECHR, 14 January 2014), para 189.

¹²⁶¹ *Al-Adsani v United Kingdom* (2002) 34 EHRR 11, paras 52 – 67.

¹²⁶² Jorgensen (n 1194) 11-12.

¹²⁶³ *Soering v United Kingdom* App no 14038/88 (ECHR, 07 July 1989).

¹²⁶⁴ *ibid* para 88.

The ECtHR has also reaffirmed this prohibition of torture in *Chahal v United Kingdom*¹²⁶⁵, yet a number of European states have been found to have violated fundamental human rights of detainees by hosting CIA black sites and collaborating with CIA rendition programs where torture practices were carried out on detained terrorists and suspected terrorists.

An example of this includes the case of, *El-Masri v Former Yugoslav Republic of Macedonia*¹²⁶⁶ in 2012, where the ECtHR found Macedonia had violated the applicant's human rights after he was detained by Macedonian border officials in 2003 for sharing the same name as a known Al-Qaeda operative.

The court established that he was detained for 23 days and was denied communication before being transferred to CIA custody in Afghanistan where he was repeatedly beaten.

The court held that Macedonia violated *El-Masri's* human rights as Macedonia was fully aware of the risk of torture after his transfer to the CIA and proactively participated in extraordinary rendition. The significance of this ruling is that a regional human rights court for the first time has held that the CIA's extraordinary rendition program amounts to torture.¹²⁶⁷

A further example in 2014 involved the cases of *Al-Nashiri*¹²⁶⁸ and *Abu Zubaydah*¹²⁶⁹ where the ECtHR established Poland was in breach by secretly detaining both claimants between 2002 and 2003 and co-operated with the CIA by facilitating the rendition and secret detention of both claimants as well as using torture to procure information in interrogations.

¹²⁶⁵ *Chahal v United Kingdom* App no 22414/93 (ECHR, 15 November 1996), para 79.

¹²⁶⁶ *Khaled El-Masri v The Former Yugoslav Republic of Macedonia* App no 39630/09 (ECHR, 13 December 2012).

¹²⁶⁷ Marta A, Orpizewska, 'El Masri v Former Yugoslav Republic of Macedonia: Implications for the CIA Extraordinary Rendition Program' (2014) 39 (4) N.C.J. Int'l L & Com. Reg. 1165, 1167.

¹²⁶⁸ *Abd Al-Rahim Husseyn Muhammad Al-Nashiri v Poland* App no 28761/11 (ECHR, 24 July 2014).

¹²⁶⁹ *Zayn Al-Abidin Muhammad Husayn (Abu Zubaydah) v Poland* App no 7511/13 (ECHR, 24 July 2014).

Most recently in 2018, the case of, *Abu Zubaydah v Lithuania*¹²⁷⁰ observed *Abu Zubaydah's* detention in a CIA 'black site' facility codenamed 'Detention Site Violet' in Lithuania between 2005-2006 for being involved in the 9/11 attacks, where he was tortured and detained without being officially charged.

The ECtHR found Lithuania had co-operated with the USA and participated in the rendition, detention and interrogation program and was also found to be in violation of the ECHR.

In addition, the 2018 case of, *Al-Nashiri v Romania*¹²⁷¹ observed the court resorting to a similar conclusion. The case concerned the applicant's allegations that Romania had let the CIA transport him under the secret extraordinary rendition programme onto its territory between 2003 – 2005 and had allowed him to be subjected to ill-treatment and arbitrary detention in a CIA detention 'black site' codenamed 'Detention Site Black'.

The ECtHR held the applicants 18-month detention in Romania and transfer into CIA custody was found to be in breach of the ECHR on the grounds that the domestic authorities had known the CIA would subject him to torturous and ill treatment contrary to the ECHR. Romania had also permitted him to be moved to another CIA detention site located either in Afghanistan (Detention Site Brown) or in Lithuania (Detention Site Violet) exposing him to further ill-treatment.

Despite these decisions relating to European states breaching the ECHR being prevalent, the USA has consistently held the view,

[t]hat international human rights obligations do not apply to the detention of suspected terrorists as such individuals are not part of a recognised national military and are therefore not protected by international human rights agreements.¹²⁷²

¹²⁷⁰ *Zayn Al-Abidin Muhammad Husayn (Abu Zubaydah) v Lithuania* App no 46454/11 (ECHR, 31 May 2018).

¹²⁷¹ *Abd Al-Rahim Husseyn Muhammad Al-Nashiri v Romania* App no 33234/12 (ECHR, 31 May 2018).

¹²⁷² Orpiszewska (n 1267).

It is understood that states may derogate from certain human rights obligations under the ECHR¹²⁷³ where a crisis may present itself to adversely affect a whole population¹²⁷⁴ such as war or other public emergency¹²⁷⁵ (such as terrorism) which must be determined by government of a specific state¹²⁷⁶ on how such a crisis can be precluded.¹²⁷⁷

However, even in such emergencies, the ECHR places an obligation that any measures to address the exigencies of the situation must not be inconsistent with other obligations of IL.¹²⁷⁸

However, the ECtHR has found detainees being deprived of fundamental human rights by 'host' states that have been complicit in renditions and secret detentions including: Italy¹²⁷⁹, Lithuania¹²⁸⁰, Macedonia¹²⁸¹, Poland¹²⁸² and Romania¹²⁸³ to be in violation of the right to life¹²⁸⁴, the prohibition of torture¹²⁸⁵, right to liberty and security¹²⁸⁶, right to a fair trial¹²⁸⁷, right to respect for private and family life¹²⁸⁸ and right to an effective remedy.¹²⁸⁹

The USA's approach not only contravenes the principle of *Jus Cogens*, which guarantees the fundamental human rights for all individuals where no

¹²⁷³ European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] art 15.

¹²⁷⁴ *Lawless v Ireland (No.3)* App no 332/57 (ECHR, 1 July 1961), para 28.

¹²⁷⁵ *Serdar Mohamed v Ministry of Defence* [2014] EWHC 1369 (QB) [156] - [157]

¹²⁷⁶ *Denmark, Norway, Sweden and the Netherlands v Greece* App no 3321/67, 3322/67, 3323/67, 3344/67 (ECtHR, 10th June 1969).

¹²⁷⁷ *Ireland v United Kingdom* App no 5310/71 (ECHR, 18 January 1978), para 207.

¹²⁷⁸ n 1194.

¹²⁷⁹ *Nasr and Ghali* (n 1254).

¹²⁸⁰ *Abu Zubaydah* (n 1270).

¹²⁸¹ *El-Masri* (n 1266).

¹²⁸² *Al-Nashiri* (n 1268)

¹²⁸³ *Al-Nashiri* (n 1271).

¹²⁸⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] art 2.

¹²⁸⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] art 3.

¹²⁸⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] art 5.

¹²⁸⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] art 6.

¹²⁸⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] art 8.

¹²⁸⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] art 13.

derogation is permitted¹²⁹⁰, but this unwillingness to accept human rights has been demonstrated in USA's lack of co-operation with European courts in judicial proceedings.

This has been exhibited in the 2005 case of, *Sassi and Benchellali v France*¹²⁹¹ where the ECtHR ordered French courts to investigate the circumstances surrounding the complaints made by two French citizens Nizar Sassi and Mourad Benchellali who were detained in Guantanamo Bay detention centre in Cuba and tortured.¹²⁹²

In 2012, the investigative judge submitted a formal request to USA authorities for access to the Guantanamo Bay detention facility records, including all documents relevant to the detention of French citizens and the names of anyone who had contact with them during their detention, however the USA did not respond to the request.¹²⁹³

In 2014, an expert report submitted to the investigative judge of the high court of Paris, led the lawyers for Sassi and Benchellali accusing retired Major General Geoffrey Miller of an authorised and systematic plan of torture and ill-treatment on persons deprived of their freedom without any charge and without the basic rights of any detainee.¹²⁹⁴

Major Geoffrey Miller was the former commander of the Guantánamo Bay prison from 2002 to 2004, bearing individual criminal responsibility for the war crimes and acts of torture inflicted on detainees in USA custody at Guantánamo and in Iraq according to the report.¹²⁹⁵

¹²⁹⁰ Kamrul Hossain, 'The Concept of Jus Cogens and the Obligation Under the UN Charter' (2005) 3 (1) Santa Clara Journal of International Law 72, 73.

¹²⁹¹ *Nizar Sassi Et Mourad Benchellali v France* App no 21015/05 (ECHR, 06 June 2005).

¹²⁹² W. Paul Smith and Maya Goldman, 'No More Excuses: A Roadmap to Justice for CIA Torture' (*Human Rights Watch*, 01 December 2015) <https://www.hrw.org/sites/default/files/report_pdf/us1215web.pdf> accessed 30 November 2019.

¹²⁹³ *ibid.*

¹²⁹⁴ Ben McPartland, 'Guantanamo: Paris Judge Asked to Probe Torture' (*The Local*, 27 February 2014) <<https://www.thelocal.fr/20140227/french-citizens-as-k-judge-to-probe-guantanamo-torture>> accessed 30 November 2019.

¹²⁹⁵ *ibid.*

In 2016, the French court subpoenaed Miller for questioning, regarding his role in the detention and torture of two former Guantánamo detainees. However, he did not appear before the French court, demonstrating the USA governments unwillingness to hold USA officials accountable, effectively by shielding such individuals from criminal and civil liability.¹²⁹⁶

The involvement of former USA Secretary of Defense Donald Rumsfeld for authorising torture practices in CIA black sites and William Haynes for being the main contributor in establishing the Bush administrations torture, interrogation and detention policies have still not been held criminally accountable, despite increasing demands for both individuals to be summoned before French courts.¹²⁹⁷

However, former President Donald Trump in 2017 expressed a desire to reinstate CIA black sites and the torturous interrogation techniques against detained terrorists.¹²⁹⁸ The intent to reverse the restrictions of such torture tactics have previously led to a draft order being enacted entitled 'Detention and Interrogation of Enemy Combatants', which would also revoke the International Committee of the Red Cross' access to wartime detainees.¹²⁹⁹

Thus, there has been growing recognition that the UNSC has endorsed illegal counter-terrorism actions as mentioned throughout this chapter endorsing state violations of IL, through the language used in its resolutions.¹³⁰⁰ Specifically the phraseological expression of 'the need to combat by all

¹²⁹⁶ Alex Emmons, 'Former Guantanamo Commander Ignores Summons from French Court Probing Torture' (*The Intercept*, 01 March 2016) <<https://theintercept.com/2016/03/01/former-guantanamo-commander-ignores-summons-from-french-court-probing-torture/>> accessed 30 November 2019.

¹²⁹⁷ 'France: Court Must Continue to Pursue Guantanamo Torture Cases' (*ECCHR*) <https://www.ecchr.eu/en/case/france-court-must-continue-to-pursue-guantanamo-torture-cases/#case_case> accessed 24 March 2020.

¹²⁹⁸ Jonathan Landay and Mark Hosenball, 'Trump May Reinstate Secret CIA Black Site Prisons: US Officials' (*Reuters*, 25 January 2017) <<https://www.reuters.com/article/us-usa-trump-prisons-idUSKBN15922L>> accessed 22 October 2019.

¹²⁹⁹ Feliks Garcia, 'President Donald Trump Opens Door to Reviving CIA Black Site Prisons in Executive Order Draft' *The Independent* (London, 25 January 2017) <<https://www.independent.co.uk/news/world/americas/donald-trump-cia-black-site-executive-order-torture-waterboarding-latest-a7545786.html>> accessed 22 October 2019.

¹³⁰⁰ Karinne Coombes, 'protecting Civilians During the Fight Against Transnational Terrorism: Applying International Humanitarian Law to Transnational Conflicts' (2009) 46 *Canadian Yearbook of International Law* 241, 242-243.

means¹³⁰¹ in Iraq¹³⁰² which has also been reiterated in UNSC resolution 1822¹³⁰³ pertaining to Afghanistan.¹³⁰⁴

In addition, it has been established that a ‘mutual agreement’¹³⁰⁵ or truce existed between the ICC and the P5, particularly the USA and the former Bush administration, which explained the reluctance and assuagement of the former prosecutor of the ICC Luis Moreno Ocampo’s to avoid investigating cases that involved the USA’s national interests.¹³⁰⁶

Although, in 2017 the current ICC prosecutor Fatou Bensouda requested authorisation from the pre-trial judges to initiate an investigation into alleged war crimes by the USA’s military forces¹³⁰⁷ in relation to the armed conflict in the Islamic Republic of Afghanistan, since 1st May 2003 including the CIA’s use of torture, rape, and sexual violence on detainees.¹³⁰⁸

The ICC prosecutor was met with a harsh response, as the USA Secretary of State Mike Pompeo announced that visas would be denied for ICC personnel, in addition to the USA’s National Security Advisor John Bolton threatening prosecutions and financial sanctions against ICC staff as well as companies and states co-operating with investigations against citizens of the USA and other allied states.¹³⁰⁹

In response to this the former president of the ICC, Chile Eboe-Osuji has expressed the disappointment of the threats made against the ICC in regards

¹³⁰¹ UNSC Res 1618 (4 August 2005) UN Doc S/RES/1618.

¹³⁰² *Ibid* para [1].

¹³⁰³ UNSC Res 1822 (30 June 2008) UN Doc S/RES/1822.

¹³⁰⁴ *Ibid* para [11].

¹³⁰⁵ David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (OUP, 2014) 20.

¹³⁰⁶ Kevin S. Robb and Shan Patel, ‘The United States, the International Criminal Court and Afghanistan: The Rupturing of Mutual Accommodation’ (2020) 20 (6) *International Criminal Law Review* 1068, 1069.

¹³⁰⁷ *Situation in The Islamic Republic of Afghanistan* (Office of the Prosecutor Request) ICC-02/17 (20 November 2017), para 190.

¹³⁰⁸ *Ibid* para 4.

¹³⁰⁹ ‘US Threatens International Criminal Court’ (*Human Rights Watch*, 15 March 2019) <<https://www.hrw.org/news/2019/03/15/us-threatens-international-criminal-court>> accessed 22/01/2020.

to the situation in Afghanistan, describing the relationship between the USA and the ICC as ‘unfortunate’¹³¹⁰ whilst stating:

‘[I]t truly confounds the mind to think that such developments would be something that could, in the strangest happenings, be associated with the government of the United States – a country that the world has grown used to seeing as the most prominent lighthouse of the rule of law and respect for judicial independence’.¹³¹¹

On the 12th April 2019, the pre-trial chamber unanimously rejected the request of the prosecutor to proceed with an investigation, deciding that an investigation into the situation in Afghanistan at this stage would not serve the interests of justice.¹³¹²

However as of 2020, the ICC appeals chamber has overturned the pre-trial chambers’ original decision granting the ICC prosecutor jurisdiction over Afghanistan to investigate international crimes.¹³¹³

The USA in response to this decision openly refused to comply with the ICC prosecutors’ investigations¹³¹⁴, which has since led former president Donald Trump signing Executive Order No.13928¹³¹⁵ blacklisting ICC personnel, imposing a travel suspension on them¹³¹⁶ and blocking all access to their personal property held in the USA.¹³¹⁷ These sanctions have since been rescinded by the current USA president Joe Biden.¹³¹⁸

¹³¹⁰ Chile Eboe-Osuji, ‘The US and the ICC’ (*International Criminal Court*, 14 November 2019) 3 <<https://www.icc-cpi.int/itemsDocuments/191114-president-stat-us-and-icc.pdf>> accessed 15 April 2020.

¹³¹¹ *ibid* 12.

¹³¹² *Situation in the Islamic Republic of Afghanistan* (Pre-Trial Chamber II Decision) ICC-02/17 (12 April 2019).

¹³¹³ *Situation in the Islamic Republic of Afghanistan* (Appeals Chamber Decision) ICC-02/17-138 (5 March 2020).

¹³¹⁴ Owen Bowcott, ‘Senior Judges Authorise Afghanistan War Crimes Inquiry’ *The Guardian* (London, 5 March 2020) < <https://www.theguardian.com/law/2020/mar/05/senior-icc-judges-authorise-afghanistan-war-crimes-inquiry>> accessed 16 March 2020.

¹³¹⁵ Executive Order No. 13928 – ‘Blocking Property of Certain Persons Associated with the International Criminal Court’ 85 FR 36139 (11 June 2020).

¹³¹⁶ *ibid* introductory presidential commentary.

¹³¹⁷ *n* 1315 s 1.

¹³¹⁸ ‘US Rescinds ICC Sanctions’ (*Human Rights Watch*, 02 April 2021) <<https://www.hrw.org/news/2021/04/02/us-rescinds-icc-sanctions>> accessed 22 June 2021.

A similar outcome may arise if the ICC chief prosecutor sought to obtain jurisdiction in Iraq to investigate the UK's involvement between 2003-2008, which is currently under investigation based on new information received on the 13th May 2014.¹³¹⁹

Despite the UK being party to the Rome Statute and ratifying this into domestic legislation¹³²⁰, it has also displayed similar tendencies to that of the USA¹³²¹ by committing human rights violations by unlawfully depriving the liberty¹³²² of a suspected terrorist by subjecting them to indefinite detention in Iraq¹³²³ contrary to IHL.¹³²⁴

Despite the UK government having an obligation to investigate any alleged shortcomings¹³²⁵, unlawful killings and serious international crimes which may have been committed by UK military forces in Iraq¹³²⁶ and Afghanistan, its reluctance to appropriately investigate and prosecute individuals is reflected in the numerous investigative teams and inquiries which have been prematurely terminated.

The ECtHR's 2011 decision in *Al-Skeini v United Kingdom*¹³²⁷ found that the UK had failed its obligation to investigate the deaths of six Iraqi civilians in 2003 during British security operations in Iraq under the ECHR.¹³²⁸

Subsequently, the UK government in 2010 initially created the Iraq Historic Allegations Team (IHAT) which was established to investigate 3,400 allegations of unlawful killings and ill treatment by UK military forces in Iraq

¹³¹⁹ 'Report on Preliminary Examination Activities 2018' (*International Criminal Court: Office of the Prosecutor*, 05 December 2018) <<https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>> accessed 22 January /2020.

¹³²⁰ International Criminal Court Act 2001.

¹³²¹ American Servicemembers Protection Act 2002.

¹³²² European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] art 5.

¹³²³ *Al-Jedda v United Kingdom* App no 27021/08 (ECHR, 7 July 2011).

¹³²⁴ *Hassan v United Kingdom* App no 29750/09 (ECHR, 16 September 2014).

¹³²⁵ *R (Smith) v Ministry of Defence* [2013] UKSC 41.

¹³²⁶ *R (Al-Saadoon) v Secretary of State for Defence* [2016] EWCA Civ 811.

¹³²⁷ *Al-Skeini and Others v United Kingdom* App no 55721/07 (ECHR, 7 July 2011).

¹³²⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] art 2.

between 2003-2009. The investigation was closed down in 2017 after 70 percent of the cases were deemed unworthy of being full investigated.¹³²⁹

The remaining 1260 outstanding investigations were then allocated to the Service Police Legacy Investigations (SPLI), which then dismissed 1213 allegations. This was justified on the grounds of being disproportionate and due to lack of evidence. The SPLI was terminated in 2020.¹³³⁰

In 2013, a high court decision led to the commencement of the Iraq Fatalities Inquiry (IFI) which was restricted to not determining civil or criminal liability but merely to conduct an inquisitorial coronial inquest of deceased Iraqi individuals. The participation and aid of relatives and families of the deceased was sought to ascertain possible circumstances of the deaths¹³³¹ in accordance with the UK's responsibility under the ECHR.¹³³²

The IFI as of 2020 has concluded 8 cases, with the most recent investigation sought to ascertain the suspicious circumstances surrounding the death of Saeed Radhi Shabram Wawi Al-Bazooni. The report found evidence collected from Iraqi witnesses was false in order to pervert the course of justice for the purposes of falsely accusing British soldiers of misconduct alleging they had drowned the deceased victim.¹³³³

A similar conclusion was advanced after the UK government launched the Al-Sweady inquiry in 2009, for the purposes of investigating the death of Hamid Al-Sweady, who was alleged to have been tortured and killed while in the custody of the British military. The inquiry also sought to investigate further

¹³²⁹ Claire Mills and Joanna Dawson, 'Overseas Operations (Service Personnel and Veterans) Bill 2019-21' (House of Commons Briefing Paper No 8983, 22 September 2020) 4 -5 <<https://researchbriefings.files.parliament.uk/documents/CBP-8983/CBP-8983.pdf>> accessed 22 June 2021.

¹³³⁰ *ibid* 5.

¹³³¹ Mills and Dawson (n 1329) 5.

¹³³² *R (Ali Zaki Mousa and Others) v Secretary of State for Defence* [2013] EWHC 1412 (Admin).

¹³³³ 'Independent Report of the Iraq Fatality Investigations: Report into the Death of Saeed Radhi Shabram Wawi Al Bazooni' (*UK Ministry of Defence*, 24 September 2020) paras 5.4 – 5.6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920847/Report_into_the_death_of_Saeed_Radhi_Shabram_Wawi_Al-Bazooni_-_September_2020.pdf> accessed 22 June 2021.

allegations of Iraqi civilians who were alleged to have been killed and tortured after the Battle of Danny Boy in 2004.¹³³⁴

In 2014, the inquiry similarly omitted to comment on the legality of British military conduct¹³³⁵ and concluded its report by finding all the most serious allegations lodged against British soldiers had been found to be ‘wholly without foundation’¹³³⁶ and ‘entirely the product of deliberate lies, reckless speculation and ingrained hostility’.¹³³⁷

From all the investigations conducted by the UK government in Iraq, the first and only UK soldier to be charged with an international crime domestically in the UK was Donald Payne who was sentenced to 12 months in prison¹³³⁸ after being cleared of a manslaughter charge but convicted for war crimes in 2007 for inhuman treatment¹³³⁹, after beating an Iraqi national Baha Mousa to death in British military custody.¹³⁴⁰

The UK authorities have also denied previous allegations of soldiers committing the war crimes of torture and also remained unwilling to prosecute UK soldiers¹³⁴¹, after the Independent Royal Military Police in 2014 led an investigation (Operation Northmoor) into allegations concerning UK soldiers had committed unlawful executions in Afghanistan, which resulted in all of the allegations being dismissed and resulted in the investigation being closed in 2019 with no prosecutions being brought forthwith.¹³⁴²

¹³³⁴ Mills and Dawson (n 1329) 12.

¹³³⁵ Defense Committee, *The Report of the Al Sweady Inquiry: Executive Summary: Chairman Sir Thayne Forbes* (2009-14, HC 819) para 741.

¹³³⁶ *ibid* para 740.

¹³³⁷ n 1335 para 740.

¹³³⁸ ‘Britain’s First War Criminal Jailed’ *Evening Standard* (London, 12 April 2012) <<https://www.standard.co.uk/news/uk/britain-s-first-war-criminal-jailed-7183526.html>> accessed 28 March 2021.

¹³³⁹ Conor Gearty, ‘British Torture, Then and Now: The Role of Judges’ (2021) 84 (1) MLR 118, 130.

¹³⁴⁰ Defense Committee, *The Report of the Baha Mousa Inquiry: Chairman Sir William Gage* (2008-11 HC 1452-I) paras 2.1407- 2.1408.

¹³⁴¹ ‘UK Government and Military Accused of War Crimes Cover-Up’ (*BBC News*, 17 November 2019) <<https://www.bbc.co.uk/news/uk-50419297>> accessed 28 March 2021.

¹³⁴² Mills and Dawson (n 1329) 14.

The UK government has since enacted a parliamentary bill exempting individuals in armed forces¹³⁴³ from any criminal liability in military operations overseas¹³⁴⁴ if they occurred more than five years ago.¹³⁴⁵

This further exemplifies the limitations of the ICC and its inability to administer international criminal justice as the court is unable to pursue investigations against individuals belonging to the P5 and their allies.

This is due to the GWOT doctrine developed by the USA in the wake of 9/11, which operates above the rule of law exempting individuals from such states from any criminal liability allowing impunity to prevail and remain unchallenged.

The USA, UK, France with the aid of coalition allies after 9/11 in pursuit of their own self-interests and military objectives¹³⁴⁶ to eliminate the threat of terrorism at any expense, has been ample justification for their illegal pre-emptive use of force¹³⁴⁷ and the illegal detention, torture and ill treatment of prisoners in Afghanistan and Iraq.¹³⁴⁸ This has led to numerous violations of IL, IHL, IHRL, CIL as presented in this chapter as part of the GWOT further illustrating the reminiscence of these states conformity of realpolitik.¹³⁴⁹

The chapter has highlighted the events of 9/11 have drastically changed the way in which terrorism is addressed. The pre-emptive use of military force without the prior authorisation of the UNSC has complemented the 'GWOT objective as observed in the ongoing conflict in Afghanistan and previously in Iraq.

¹³⁴³ Armed Forces Act 2006 s 369 (2).

¹³⁴⁴ Overseas Operations (Service Personnel and Veterans) Bill, HL Bill (2019-21) [147] s 1 (4) and (6).

¹³⁴⁵ Overseas Operations (Service Personnel and Veterans) Bill, HL Bill (2019-21) [147] s 1 (5).

¹³⁴⁶ David Blagden, 'Two Visions of Greatness: Roleplay and Realpolitik in UK Strategic Posture' (2019) 15 (4) *Foreign Policy Analysis* 470, 470-472.

¹³⁴⁷ Adeed Dawisha, 'Ideology, Realpolitik, and US Foreign Policy: A Discussion of Frank P. Harvey's Explaining the Iraq War: Counterfactual Theory, Logic and Evidence' (2013) 11 (2) *Perspectives on Politics* 578, 579.

¹³⁴⁸ Rhoda E. Howard-Hassman, 'The Skeptical Forsythe: Peace, Human Rights, and Realpolitik' (2012) 11 (3) *Journal of Human Rights* 356, 356.

¹³⁴⁹ Renato Cruz De Castro, 'Territorial Disputes, Realpolitik and Alliance Transformation: The Case of Twenty-First Century Phillipine-U.S. Security Relations' (2013) 49 (1) *Issues and Studies* 141, 144-145.

This highlights P5 members such as the USA and the UK, by using force in this way pre-emptively supersedes the rule of law using its political position and permanent membership in the UNSC to its advantage allowing the nationals of these states including heads of state avoid individual criminal responsibility and liability despite the numerous violations of IL, IHL and CIL which have been committed.

The chapter has also demonstrated the UK government and British intelligence agencies have played a key role in assisting, procuring and co-operating with the USA government and the CIA in committing IHL abuses by detaining suspected terrorists without trial and using torturous methods to obtain confession evidence, which has been established in judicial decisions.

In doing so, the illegal tactics employed by these two members of the P5, contravene the underpinning norm of *Jus Cogens* which has been justified following the Bush administrations GWOT, which at present has not led to any indictments nor any convictions of individuals and remains improbable and unlikely to do so.

The subsequent chapters of the thesis will highlight the P5 and their allied states have also committed violations of IL, IHL, IHRL and CIL in counter-terrorism operations in the continued GWOT in; Palestine, Syria and Libya which have still remained unchallenged.

The thesis in substantiating the P5 and their allied states illegal actions and conduct have promoted impunity abrading the efficiency of both the ICC and the UNSC to maintain international peace and security and administer international criminal justice respectively.

Chapter 4 – The State of Palestine

The conflict between Israel and Palestine is relevant to the central argument of the thesis concerning both the United Nations Security Council (UNSC) and the International Criminal Court (ICC) being ineffective in holding individuals accountable for the international crimes which have been committed in humanitarian and counter-terrorism operations.

This chapter of the thesis will highlight that the conflict between Israel and Palestine is a result of western imperialism and the inability of the UNSC to effectively manage the gradually deteriorating situation, which has often resulted in intense clashes, violence and hostilities between the two states, especially after the emergence of the terrorist threat Hamas.

This has since resulted in three devastating counter-terrorism responses by Israel with the support of the United States of America (USA) and its continued 'global war on terror' (GWOT)¹³⁵⁰: Operation Cast Lead (2008-2009), Operation Pillar of Defense (2012) and Operation Protective Edge (2014). Throughout all three military operations, violations of International Humanitarian Law (IHL) and Customary International Law (CIL) were apparent.

However, this has still not led to any individual being prosecuted for the international crimes committed by the Israeli Defense Force (IDF). This is mainly attributed to the limitations of the ICC being unable to exercise jurisdiction over Israel as it has not ratified the Rome Statute¹³⁵¹

This is also due to the USA's continued support of Israel politically in the UNSC. Through its veto privilege, it has successfully prevented any accountability and referral granting ICC jurisdiction over the situation in Palestine.

¹³⁵⁰ Chen Friedberg and Reuven Y. Hazan, 'Israel's Prolonged War Against Terror: From Executive Domination to Executive-Legislative Dialogue' (2009) *Journal of Legislative Studies* 15 (2-3) *Journal of Legislative Studies* 257, 260.

¹³⁵¹ Rome Statute of the international Criminal Court [1998].

The chapter will also argue that despite Palestine achieving statehood by the ICC and the court's newly found ability to exercise its jurisdiction over Palestine to investigate international crimes, it seems the prospects of the court securing convictions of IDF members remains unlikely and unrealistic.

This is mainly attributed to the courts lack of enforcement capabilities to execute arrest warrants (should any be made in the future) and, also because the USA's veto privilege can still prevent any ICC intervention, thwarting any prospect of international criminal justice to prevail, further exemplifying the impotence of both the UNSC and the ICC.

4.1 Background to the Historic Conflict

Conquests over Jerusalem have dated back to Biblical times¹³⁵², the Roman Empire¹³⁵³, and the Crusades.¹³⁵⁴ For over a century, Jerusalem has been fought over in varying ways, not only by Jewish, Christian and Muslim peoples but also by external powers and, of course, modern-day Israeli's and Palestinians.¹³⁵⁵

Sir Arthur James Balfour the former British Foreign Secretary and former Prime Minister of Great Britain on the 2nd November 1917 signed a letter intended to Baron Rothschild¹³⁵⁶ promising the land of Palestine to the Zionist Federation, a recently established political movement whose goal was the creation of a Jewish state.¹³⁵⁷

¹³⁵² Eyal Lewin, 'The Inevitable Dead End of the Arab-Israeli Conflict' (2016) 2 (1) Cogent Social Sciences 1, 5.

¹³⁵³ Eyal Ben-Eliyahu, 'Cities Surrounded by a Wall from the Time of Joshua Son of Nun as a Rabbinic Response to the Roman Pomerium' (2016) 106 (1) Jewish Quarterly Review 1, 1.

¹³⁵⁴ Daniel Galadza, 'Greek Liturgy in Crusader Jerusalem: Witnesses of Liturgical Life at the Holy Sepulchre and St Sabas Lavra' (2017) 43 (4) Journal of Medieval History 421, 421-422.

¹³⁵⁵ Mona Boshnaq, Sewell Chan, Irit Pashner Garshowitz and Gaia Tripoli, 'The Conflict in Jerusalem Is Distinctly Modern. Heres the History' *The New York Times* (New York, 5 December 2017) <<https://www.nytimes.com/2017/12/05/world/middleeast/jerusalem-history-peace-deal.html>> accessed 23 January 2020.

¹³⁵⁶ Nabeel Shaath, 'Britain Must Atone for its Sins in Palestine' *The Telegraph* (London, 31 October 2012) <<https://www.telegraph.co.uk/news/worldnews/middleeast/palestinianauthority/9645925/Britain-must-atone-for-its-sins-in-Palestine.html>> accessed 23 January 2020.

¹³⁵⁷ Mahmoud Abbas, 'Britain Must Atone for the Balfour Declaration – 100 Years of Suffering' *The Guardian* (London, 1 November 2017) <<https://www.theguardian.com/commentisfree/2017/nov/01/arthur-balfour-declaration-100-years-of-suffering-britain-palestine-israel>> accessed 23 January 2020.

The declaration stated: 'His Majesty's government views with favour the establishment in Palestine of a national home for the Jewish people and will use their best endeavours to facilitate the achievement of this object'.¹³⁵⁸ This led to the swift capture of Jerusalem on the 9th December 1917, by British forces under the command of General Edmund Allenby.¹³⁵⁹

It is important to understand the term Zionist and/or Zionism as it has been described as an: 'ethnonationalist ideology whereby Israel is regarded as the expression of the Jewish people's right to national self-determination'.¹³⁶⁰

After the creation of the United Nations¹³⁶¹, on the 29th November 1947 the United Nations General Assembly (UNGA) adopted Resolution 181 (II)¹³⁶² creating a partition plan, a detailed four-part document attached to the resolution, terminating the British mandate and prompting the withdrawal of British armed forces.¹³⁶³

The plan also sought to: create a divided Arab and Jewish State¹³⁶⁴ to be implemented by the 1st October 1948¹³⁶⁵, the town of Jaffa, was to form an Arab enclave within Jewish territory¹³⁶⁶ and a special international regime designated to discharge responsibilities for Jerusalem, administered by the United Nations Trusteeship Council.¹³⁶⁷

Subsequently, this led to the first Arab-Israeli War, which was 'typically referred to by Israelis as the War of Independence and by the Palestinians as the Nakba or Catastrophe'¹³⁶⁸ which comprised of two stages of fighting. Israeli

¹³⁵⁸ Arthur James Balfour, Franklin D. Roosevelt and Harry S. Truman, 'Background Documents on The Palestine Question' (1946) 109 (1) *Wld.Aff.* 24, 24.

¹³⁵⁹ Philip Mattar, 'The Mufti of Jerusalem and the Politics of Palestine' (1988) 42 (2) *Middle East Journal* 227, 229.

¹³⁶⁰ Rusi Jaspal, 'Representing the 'Zionist Regime': Mass Communication of Anti-Zionism in the English-Language Iranian Press' (2014) 41 (3) *British Journal of Middle Eastern Studies* 287, 288.

¹³⁶¹ Charter of the United Nations [1945].

¹³⁶² UNGA Res 181 (II) (29 November 1947) UN Doc A/RES/181 (II).

¹³⁶³ *ibid* 133.

¹³⁶⁴ n 1362, 133.

¹³⁶⁵ n 1362, 132.

¹³⁶⁶ n 1362, 146.

¹³⁶⁷ n 1362, 146.

¹³⁶⁸ Motti Golani, '1948: A History of the First Arab-Israeli War' (2010) 29 (1) *Journal of Israeli History* 125, 125.

history expert Professor Naor has described the two main stages of fighting as:

[T]he first stage is described as inter-communal confrontation, or as a civil war that took place between the Jewish community (Yashuv) and Palestinian society that began at the end of November 1947 and lasted until the close of the British Mandate and the establishment of the State of Israel on 14th May 1948. The second stage of the war relates to the period beginning the invasion of regular Arab Armies on 15 May 1948 and the military confrontation that continued, with various ceasefires, until the signing of the last armistice agreement in July 1949.¹³⁶⁹

The war has been depicted as the original sin of the Israeli state, which resulted in the displacement of more than 700,000 Palestinian civilians during the 1948 war.¹³⁷⁰ In 1967 the Six-Day War observed further Arab-Israeli conflict emerging again, describing the 1967 war as being: 'one of the briefest in history, yet its consequences were immensely disproportionate to its duration'.¹³⁷¹

Indeed, the conflict involved Egyptian, Jordanian and Syrian forces against Israel, which led to Israel taking over Jordanian territory west of the Jordan River¹³⁷² causing over an estimated 19,000 deaths and over 2,500 wounded.¹³⁷³

The UNSC adopted resolution 242¹³⁷⁴ on the 22nd November 1967, which emphasised 'inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in the Middle East in which every state in

¹³⁶⁹ Moshe Naor, 'Israel's 1948 War of Independence as A Total War' (2008) 43 (2) *Journal of Contemporary History* 241, 241.

¹³⁷⁰ Ricardo Bocco, 'UNRWA and The Palestinian Refugees: A History Within History' (2010) 28 (2 - 3) *Refugee Survey Quarterly* 229, 229.

¹³⁷¹ Dimitrios Machairas, 'The Strategic and Political Consequences of the June 1967 War' (2017) 3 (1) *Cogent Social Sciences* 1, 7.

¹³⁷² David Rodman, 'Friendly Enemies: Israel and Jordan in the 1973 Yom Kippur War' (2012) 6 (1) *Israel Journal of Foreign Affairs* 91, 91.

¹³⁷³ 'Vital Statistics: Total Casualties, Arab-Israeli Conflict: 1860-Present' (*Jewish Virtual Library*) <<https://www.jewishvirtuallibrary.org/total-casualties-arab-israeli-conflict>> accessed 23 January 2020.

¹³⁷⁴ UNSC Res 242 (22 November 1967) UN Doc S/RES/242.

the area can live in security¹³⁷⁵ and demanded the immediate withdrawal of Israeli military from occupied territories.¹³⁷⁶

In December 1987, the first Palestinian *Intifada* (uprising) began and Palestinians in the occupied territories (the Gaza Strip and the West Bank) commenced a revolution against the Israeli occupation.¹³⁷⁷ Within 24 months of the conflict 656 Palestinians were killed by the IDF.¹³⁷⁸

In 1993, the Declaration of Principles on Interim Self-Governing Arrangements (DOP) also known as the Oslo Accords¹³⁷⁹ observed former Israeli Prime Minister Yitzhak Rabin and Palestinian Liberation Organisation (PLO) leader and head of the Fatah independent political movement Yasir Arafat¹³⁸⁰ redrawing the geopolitical map of the entire region, which marked the mother of all breakthroughs in the century-old conflict between the Arabs and Jewish people in Palestine.¹³⁸¹

The Oslo Accords were intended to be an interim agreement to reduce the presence of Israeli forces from occupied Gaza and the West Bank until a permanent peace deal was reached.¹³⁸²

However, this was short-lived and the peace deal 'collapsed'¹³⁸³ some several years later, due to negotiations between former Israeli Prime Minister Ehud Barak and Palestinian leader Yasir Arafat failing during the Camp David Summit hosted by the USA in July 2000.¹³⁸⁴

¹³⁷⁵ *ibid* 8.

¹³⁷⁶ n 1374 para 1 (i).

¹³⁷⁷ Basel El-Khodary, Muthanna Samara and Chris Askew, 'Traumatic Events and PTSD Among Palestinian Children and Adolescents: The Effect of Demographic and Socioeconomic Factors' (2020) 11 (4) *Frontiers in Psychiatry* 1, 2.

¹³⁷⁸ Ronald R. Stockton, 'Intifada Deaths' (1990) 19 (4) *Journal of Palestine Studies* 86, 86.

¹³⁷⁹ UNGA Report of the Secretary General (1993) UN Doc A/48/486.

¹³⁸⁰ Herbert C. Kelman, 'The Israeli-Palestinian Peace Process and Its Vicissitudes: Insights from Attitude Theory' (2007) 62 (4) *American Psychologist* 287, 290.

¹³⁸¹ Avi Schlaim, 'The Oslo Accord' (1994) 23 (3) *Journal of Palestine Studies* 24, 24.

¹³⁸² Alan Dowty, 'Impact of Aqsa Intifada on the Israeli-Palestinian Conflict' (2004) 19 (2) *Israel Studies Forum* 9, 9.

¹³⁸³ Jonathan Rynhold, 'Making Sense of Tragedy: Barak, the Israeli Left and Oslo Peace Process' (2003) 19 (1) *Israel Studies Forum* 9, 9.

¹³⁸⁴ George E Gruen, 'The United States, Israel, and the Middle East' (2001) 101 *The American Jewish Yearbook* 195, 195.

The disappointment and discontent of the failed peace process led to Palestinians carrying out demonstrations and attacks against army posts and settlements¹³⁸⁵ referred to as the Al-Aqsa *intifada* (uprising)¹³⁸⁶ or second *intifada* due to the significant level of violence by extremists committing acts of terrorism by firing rockets directed towards Israeli civilians and detonating suicide bombs in public places.¹³⁸⁷ By the end of September 2001, 557 Palestinians were killed by the IDF¹³⁸⁸

The UN has condemned Israel's illegal occupation in the West Bank, Gaza Strip, East Jerusalem and the Golan Heights which have continued to thwart the management of peace efforts due to the failures and obstacles presented at an official level¹³⁸⁹, particularly, the UNSC's inability to resolve the longstanding conflict.

This has especially become prevalent since 2001, after the emergence of the Palestinian terrorist group which is identified as the military wing of the political group Hamas and its Lebanese military ally Hezbollah, which is dedicated to the destruction of Israel'.¹³⁹⁰

However, Hamas has since failed to be branded a terrorist organisation by the UNGA following a draft resolution enacted by the USA failed to acquire the two third majority vote by states in 2018.¹³⁹¹

Subsequently, this has complemented the USA's continued GWOT effort to prevent individuals in the Israeli Defense Force (IDF) from facing criminal accountability for the serious international crimes they have committed after

¹³⁸⁵ Helena Lindholm Schulz, 'The Al-Aqsa Intifada as A Result of Politics of Transition' (2002) 24 (4) Arab Studies Quarterly 21, 21.

¹³⁸⁶ Jeremy Pressman, 'Visions in Collision: What Happened at Camp David and Taba?' (2003) 28 (2) International Security 5, 5.

¹³⁸⁷ James F. Miskel, 'The Palestinian Intifada: An Effective Strategy?' 2004 21 (4) World Policy Journal 48, 48.

¹³⁸⁸ Alina Korn, 'Reporting Palestinian Casualties in the Israeli Press: The Case of Haaretz and the Intifada' (2004) 5 (2) Journalism Studies 247, 247.

¹³⁸⁹ Maia Hallward, 'Pursuing Peace in Israel/Palestine' (2011) 28 (1) Journal of Third World Studies 185, 185

¹³⁹⁰ 'The Covenant of the Islamic Resistance Movement 18 August 1988' (The Avalon Project: Yale Law School Lillian Goldman Law Library) <https://avalon.law.yale.edu/20th_century/hamas.asp> accessed 15 March 2021.

¹³⁹¹ UNGA 'United States of America Draft Resolution: Activities of Hamas and Other Militant Groups in Gaza' (29 November 2018) 76th Session (2018) UN Doc A/73/L.42.

violating many provisions of IHL in various counter-terrorism operations which have resulted in disproportionate and excessive Palestinian civilian deaths, which will be demonstrated throughout the remainder of chapter.

4.2 Israel and the emergence of the new terrorist threat: Hamas and Hezbollah

The situation and conflict between Israel and Palestine has been described by Zehur as being: 'Heightened since 2001, even as any perceived threat to Israel from Egypt, Jordan, Iraq, or even Syria, has declined.'¹³⁹²

Israel's stance towards the democratically-elected Palestinian government headed by Hamas in 2006, and towards Palestinian national coherence, legal, territorial, political, and economic has been a major obstacle to substantive peacemaking'.¹³⁹³

The emergence of the Sunni Islamist group named Hamas has been described as marking the 'beginning of the true political revival of the Islamic forces in the West Bank and Gaza Strip in the face of Israeli occupation on the one hand and national secular forces led by the PLO on the other'.¹³⁹⁴ Hamas's emergence has been attributed to the 'failure of Fatah which according to Hamas have compromised the speedy actualisation of the Palestinian state'.¹³⁹⁵

Hamas' becoming the ruling party because of the overwhelming electoral victory in 2006, created tensions and internal conflicts with Fatah in 2007, which led to many Palestinian civilian deaths¹³⁹⁶ in the Gaza Strip and the

¹³⁹² Sherifa Zehur, *Hamas and Israel: Conflicting Strategies of Group Based Politics* (Strategic Studies Institute US Army War College 2008) 1.

¹³⁹³ *ibid.*

¹³⁹⁴ Ziad Abu-Amr, 'Hamas: A Historical and Political Background' (1993) 22 (4) *Journal of Palestine Studies* 5, 5.

¹³⁹⁵ Abbas Ali Ibrahim, 'Demystifying the Nature and Dynamics of Hamas as an Islamic Political Movement' (2012) 1 (1) *ANNUR Journal of Arabic and Islamic Studies* 128, 129.

¹³⁹⁶ Aziz Al Masri, 'New Bottles, Old Wine: The Contemporary Palestinian Political Division' (2019) 6 (1) *Journal of Islamic and Middle Eastern Multidisciplinary Studies* 1, 13-14.

West Bank further stalling the peace process.¹³⁹⁷ This also resulted in further IDF intervention and presence in the Gaza Strip.¹³⁹⁸

The 2011 Arab Spring, forced reconciliation between the two rival factions through the Cairo Agreement, which led to Hamas joining the PLO and establishing elections for the Palestinian National Council (PNC).¹³⁹⁹

The international community is divided between classifying Hamas as a legitimate political party or a terrorist group, including the permanent members of the UNSC. At present China¹⁴⁰⁰, Russia¹⁴⁰¹ and Turkey do not identify Hamas *Izz Al-Din Al-Qassem* Brigades in general to be a terrorist organisation.¹⁴⁰²

However, Israel and its western allies consider Hamas to be a terrorist organisation¹⁴⁰³ which many law enforcement and intelligence agencies have in fact blacklisted, these include: the USA¹⁴⁰⁴, the UK¹⁴⁰⁵, Australia¹⁴⁰⁶ and New Zealand.¹⁴⁰⁷

¹³⁹⁷ Frode Lovile, 'Questioning the Secular-Religious Cleavage in Palestinian Politics: Comparing Fatah and Hamas' (2014) 7 (1) *Politics and Religion* 100, 100-101.

¹³⁹⁸ Mada Matta and Rene Rojas, 'The Second Intifada: A Dual Arena Strategy' (2016) 57 (1) *European Journal of Sociology* 65, 106.

¹³⁹⁹ Dag Tuasad, 'Hamas-PLO Relations Before and After the Arab Spring' (2013) XX (3) *Middle East Policy* 86, 86.

¹⁴⁰⁰ Elisabeth Siegel, 'Potential Peacemaker or Just Another Spectator?: China's Relations with Israel and Palestine and Its Prospects as a Broker for Peace' (*The Yale Review of International Studies*, 1 January 2018) <<http://yris.yira.org/comments/2249>> accessed 23 January 2020.

¹⁴⁰¹ Adnan Abu Amer, 'Hamas and Russia, the Benefits of Growing Relations' (*Middle East Monitor*, 28 November 2019) <<https://www.middleeastmonitor.com/20191128-hamas-and-russia-the-benefits-of-growing-relations/>> accessed 23 January 2020.

¹⁴⁰² 'Turkey Denies Allowing Hamas To Plot Terror Attacks from Its Soil' *The Times of Israel* (Jerusalem, 19 December 2019) <<https://www.timesofisrael.com/turkey-denies-allowing-hamas-to-plot-terror-attacks-from-its-soil/>> accessed 23 January 2020.

¹⁴⁰³ Khaled Hroub, 'A Newer Hamas? The Revised Charter' (2017) 46 (4) *Journal of Palestine Studies* <<https://www.palestine-studies.org/jps/fulltext/214551>> accessed 23 January 2020.

¹⁴⁰⁴ 'The World Factbook: Terrorist Groups' (*Central Intelligence Agency*) <<https://www.cia.gov/library/publications/the-world-factbook/fields/397.html>> accessed 23 January 2020.

¹⁴⁰⁵ 'Proscribed Terrorist Organisations' (*UK Home Office*, 1 November 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/849493/20191101_Proscription__SG_.pdf> accessed 23 January 2020.

¹⁴⁰⁶ 'Australian National Security: Listed Terrorist Organisations' (*Australian Government*) <<https://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/default.aspx>> accessed 23 January 2020.

¹⁴⁰⁷ 'Designated Terrorist Entities: Lists Associated with Resolution 1373' (*New Zealand Police*) <<https://www.police.govt.nz/advice/personal-community/counterterrorism/designated-entities/lists-associated-with-resolution-1373>> accessed 23 January 2020.

Hamas and its affiliation with Hezbollah (Arabic for party of god) a powerful Lebanese political, religious and military organisation, has been supported financially by Iran, whose main objective is to expel Israeli western forces from Lebanon and destroy Israel.¹⁴⁰⁸

However, the UN has classified Hezbollah a terrorist organisation by virtue of resolutions 1559¹⁴⁰⁹ and 1701¹⁴¹⁰ condemning states from aiding or supporting its promotion of terrorism in the Middle Eastern region.

In addition, the European Union (EU) following its obligation for identifying and listing individuals and terrorist organisations under UNSC Resolution 1373¹⁴¹¹, Council Regulation 2580/2001¹⁴¹² Common Council Position 2001/931¹⁴¹³ has maintained and most recently listed in 2019¹⁴¹⁴ both the military wing of the political group Hamas¹⁴¹⁵ and Hezbollah¹⁴¹⁶ as terrorist organisations.

Both Hamas and Hezbollah have been argued to dress their overall goals as a *Jihad* for the destruction of Israel¹⁴¹⁷ which has only further intensified the conflict within Palestine, Lebanon and the Middle East since 2006. Hezbollah's support from Syria and Iran supplying long range rockets and financial funding have further furnished Israel's consternation and discontent.¹⁴¹⁸

¹⁴⁰⁸ Mohamad Ghazi Janaby, 'The Legal Status of Hezbollah In the Syrian Conflict: An International Humanitarian Law Perspective' (2016) 33 (2) Arizona Journal of International and Comparative Law 383, 391.

¹⁴⁰⁹ UNSC Res 1559 (2 September 2004) UN Doc S/RES/1559.

¹⁴¹⁰ UNSC Res 1701 (11 August 2006) UN Doc S/RES/1701.

¹⁴¹¹ UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

¹⁴¹² Council Regulation (EC) 2580/2001 of 27 December 2001 on specific restrictive measures directed against persons and entities with a view to combatting terrorism [2001] OJ L344/70, art 2 (3).

¹⁴¹³ Common Council Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism [2001] OJ L344/93, art 2,3 and 4.

¹⁴¹⁴ Common Council Position 2019/1341/CFSP of 8 August 2019 updating the list of persons, groups and entities subject to Article 2,3 and 4 of common position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Decision (CFSP) 2019/25ST/11408/2019/INIT [2019] OJ L209/15

¹⁴¹⁵ *ibid* annex II (9).

¹⁴¹⁶ n 1414, annex II (10).

¹⁴¹⁷ Steve Dobransky, 'Hezbollah and Hamas: A Comparative Study' (2013) 30 (3) International Journal on World Peace 94, 94.

¹⁴¹⁸ Michael Keene, 'Social Justice as A Legitimising Force as Seen in Hamas And Hezbollah' (2007) 3 (1) Rivier Academic Journal 1, 4.

In response to the above, Israeli officials sought to contain the Hezbollah threat, whilst being pre-occupied with a renewed Palestinian uprising in the West Bank and Gaza and a protracted terrorist campaign.¹⁴¹⁹

Israel's conflict with Hamas continued carrying out airstrikes to weaken its presence in favour of the Fatah political party taking control of Gaza.¹⁴²⁰ In June 2007, Hamas seized control of Gaza demonstrating the arrival of Islamist power on Israel's doorstep.¹⁴²¹

Israel's response to this threat, involved Israel imposing a land, sea and air blockade on Gaza, citing security concerns. Despite relaxation of some blockade-related restrictions in recent years, 1.8 million Palestinians in Gaza remain 'locked in', denied free access to the remainder of the territory and the outside world.¹⁴²²

The blockade has undermined the living conditions in the coastal enclave and fragmented the Occupied Palestinian Territory (OPT) and its economic and social fabric. The isolation of Gaza has been exacerbated by restrictions imposed by the Egyptian authorities on Rafah, its single passenger crossing.¹⁴²³

In June 2008, Hamas and Israel agreed to an Egyptian-brokered ceasefire for six-months, this led to a reduction in rocket fire from Gaza, but not a complete halt.¹⁴²⁴

After a truce violation in November 2008 following ground incursions, air strikes and assassinations intended by Israel to send a message to Hamas

¹⁴¹⁹ Efraim Inbar, 'How Israel Bungled the second Lebanon War' (2007) 14 (3) Middle East Quarterly 57, 57.

¹⁴²⁰ Steven Erlanger, 'Israel Strikes at Hamas Compound' *New York Times* (New York, 17 May 2007) <<https://www.nytimes.com/2007/05/17/world/middleeast/17cnd-mideast.html>> accessed 23 January 2020.

¹⁴²¹ Conal Urquart, Ian Black and Mark Tran, 'Hamas Takes Control of Gaza' *The Guardian* (London, 15 June 2007) <<https://www.theguardian.com/world/2007/jun/15/israel4>> accessed 23 January 2020.

¹⁴²² 'Gaza Blockade' (*United Nations Office for Coordination of Humanitarian Affairs*) <<https://www.ochaopt.org/theme/gaza-blockade>> accessed 24 January 2020.

¹⁴²³ *ibid.*

¹⁴²⁴ Elizabeth Wilmhurst, *International Law and the Classification of Conflicts* (OUP 2012) 282.

precipitated a series of reprisals including the resumption of Palestinian rocket, mortar attacks and bulldozing operations.¹⁴²⁵

The Israeli government-imposed blockade restricted humanitarian access and vital aid including fuel, food and medicine further contributing to the dire humanitarian situation in the OPT.¹⁴²⁶

As an occupying power, Israel had a duty to protect civilians. By continuing its blockade its conduct contravenes the Hague Regulations¹⁴²⁷ and article 33 of the Geneva Convention, which states: 'No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible'.¹⁴²⁸

Furthermore, Israel by implementing the blockade has violated CIL¹⁴²⁹ by placing restrictions on the free movement of humanitarian aid personnel¹⁴³⁰ through its aggressive tactics by prohibiting food and forcefully using starvation of civilians¹⁴³¹ in Gaza as a method of warfare¹⁴³² which is considered a war crime under the Rome Statute.¹⁴³³

In addition, the rocket attacks which have been carried out by Hamas militants and Palestinian armed groups in Gaza since 2001, have fired thousands of rockets deliberately or indiscriminately at civilian areas in Israel. The escalation of violence between Hamas militants and Israeli forces in November

¹⁴²⁵ Michele K. Esposito, 'Quarterly Update on Conflict and Diplomacy: 16 November 2008-15 February 2009' (2009) 38 (3) *Journal of Palestine Studies* 286, 286.

¹⁴²⁶ Khalid Manzoor Butt, 'Blockade on Gaza: A Living Hell on Earth' (2016) 23 (1) *Journal of Political Studies* 157, 170.

¹⁴²⁷ The Hague Convention IV: Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War and Land [1907] art 50.

¹⁴²⁸ Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 23.

¹⁴²⁹ Jean-Marie Henckaerts and Louise Doswald Beck, *Customary International Humanitarian Law, Volume I: Rules* (first published 2005, Cambridge University Press 2009) 200.

¹⁴³⁰ *ibid* 105.

¹⁴³¹ Henckaerts and Beck (n 1429) 193.

¹⁴³² Henckaerts and Beck (n 1429) 186.

¹⁴³³ Rome Statute of the International Criminal Court [1998] art 8 (2) (b).

2008 after the military incursion in Gaza, through increased rocket and mortar attacks resulted in the deaths of three Israeli civilians.¹⁴³⁴

The Qassam Rockets named after Izz al-Din al-Qassam (commonly known as the military branch of Hamas)¹⁴³⁵ have used such weapons to attack Israeli cities and areas populated with civilians.

These missiles are considered to be indiscriminate, as they are designed to be unguided to instil fear into Israel's civilian population¹⁴³⁶ violating CIL¹⁴³⁷ and IHL as these weapons are of a nature to strike military objectives, civilians and civilian objects without distinction.¹⁴³⁸ Thus, the continuation of Hamas' attacks resulted in Israel launching 'Operation Cast Lead' on the 27th December 2008.

The next segment of this chapter will analyse the Israeli government and the IDF's military response throughout: Operation Cast Lead, Operation Pillar of Defense and Operation Protective Edge. The IDF's action will be analysed and scrutinised to demonstrate the blatant and severe breaches of IHL and CIL in Israel's continued WOT against Hamas.

The chapter will then analyse the responses of the UNSC and the ICC in all three counter-terrorism operations and assess the effectiveness of each organisations role in the dire humanitarian situation which arose as a result of the mass atrocities which have ensued.

¹⁴³⁴ 'Rockets from Gaza' (*Human Rights Watch*, 6 August 2009) <<https://www.hrw.org/report/2009/08/06/rockets-gaza/harm-civilians-palestinian-armed-groups-rocket-attacks>> accessed 24 January 2020.

¹⁴³⁵ Margaret Weiss, 'Weapon of Terror: Development and Impact of the Qassam Rocket' (*The Washington Institute*, 11 March 2008) <<https://www.washingtoninstitute.org/policy-analysis/view/weapon-of-terror-development-and-impact-of-the-qassam-rocket>> accessed 24 January 2020.

¹⁴³⁶ Alex Spillius, 'Iron Dome Shield Restricts Israeli Casualties' *The Telegraph* (London, 15 November 2012) <<https://www.telegraph.co.uk/news/worldnews/middleeast/israel/9681241/Iron-Dome-shield-restricts-Israeli-casualties.html>> accessed 24 January 2020.

¹⁴³⁷ Henckaerts and Beck (n 1429) 51.

¹⁴³⁸ 1977 Additional Protocol I to the Geneva Conventions [1949] art 51(4).

4.3 Operation Cast Lead: The 22-Day War Between 2008-2009.

Israel's justification for Operation Cast Lead, was based on Hamas' repeated violation of the six-month truce that Israel observed, thus leaving no choice but to destroy Hamas' capacity to launch missiles into Israeli towns by acting out of self-defence on behalf of the international community's struggle to destroy the terrorist organisation and its participation in a global *Jihadi* network.¹⁴³⁹

The 22-day war, which lasted between 27th December 2008 - 18th January 2009 carried out by the IDF resulted in 1391 Palestinians being killed, including 759 civilians which comprised of 344 children and 110 women, who did not take active participation in the hostilities.¹⁴⁴⁰ In addition, the United Nations Relief and Works Agency for Palestine (UNRWA) reported over 5,000 people were injured, and tens of thousands of civilians lost their homes and livelihoods.¹⁴⁴¹

Amongst the dead were nine UNRWA staff members and contractors, and several who were killed when an IDF ordnance landed inside or in the immediate vicinity of UNRWA installations, some of which were being used as emergency shelters.¹⁴⁴²

The war, was accompanied by widespread destruction of Palestinian public and private infrastructure and productive assets, followed by a protracted blockade of Gaza's borders.¹⁴⁴³

In total the 22-day war resulted in 6,400 homes being destroyed, leaving 100,000 Palestinians homeless of which 18,035 were living in UNRWA shelters and 90% of Gaza's population were left entirely dependent on food aid. The

¹⁴³⁹ Avi Shlaim, 'How Israel Brought Gaza to the Brink of Humanitarian Catastrophe, Guardian, 7 January 2009' (2009) *The Guardian* (London, 7 January 2009) <<https://www.theguardian.com/world/2009/jan/07/gaza-israel-palestine>> accessed 02/10/2020.

¹⁴⁴⁰ 'Fatalities During Operation Cast Lead' (*B'Tselem*) <<https://www.btselem.org/statistics/fatalities/after-cast-lead/by-date-of-event>> accessed 24 January 2020.

¹⁴⁴¹ 'UNRWA Emergency Operations in Gaza' (*United Nations Relief and Works Agency for Palestine*, 30 June 2009) <<https://www.unrwa.org/sites/default/files/20100119593.pdf>> accessed 24 January 2020.

¹⁴⁴² *ibid.*

¹⁴⁴³ *ibid.* n 1441.

economic damage is also significant as 34 hospitals, 214 schools, 25 government buildings and 52 religious institutions were destroyed which totalled property damage between and estimated to nearly two billion dollars.¹⁴⁴⁴

4.3.1 The IHL Violations Committed by the IDF

Primarily, it is important to determine whether the conflict between Israel and Hamas was an International Armed Conflict (IAC) or Non-International Armed conflict (NIAC). The test for this is contained in the case of, *Prosecutor v Tadić* where the court stated: 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.¹⁴⁴⁵

The Israeli High Court of Justice (IHCJ) has previously supported the view that the military capabilities and sheer scale of violence perpetrated by Hamas in hostilities effectively reaches the level of an IAC.¹⁴⁴⁶

However, Hamas forces were considered not to represent a recognised state at the time of the conflict, which infers that the conflict should be classified as a NIAC, considering the missiles which were fired into Israel satisfies the 'protracted armed violence' criterion.¹⁴⁴⁷

The attacks carried out by Hamas towards Israeli cities and settlements is considered under international law (IL) to infringe Israel's territorial sovereignty, which justifies Israel's military response to the terrorist organisation¹⁴⁴⁸ and right to self-defence under the UN Charter.¹⁴⁴⁹

¹⁴⁴⁴ 'Damage to Palestinian People and Property during Operation Cast Lead' (2009) 38 (3) Journal of Palestine Studies 210, 210-211.

¹⁴⁴⁵ *Prosecutor v Dusko Tadić* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995), para 70.

¹⁴⁴⁶ *Public Committee Against Torture in Israel v Government of Israel* [2006] HCJ 769/02 (13 December 2006).

¹⁴⁴⁷ Douglas Guilfoyle, 'The Mavi Mamara Incident and Blockade in Armed Conflict' (2011) 81 (1) British Yearbook of International Law 171, 179-180.

¹⁴⁴⁸ George E. Basharat et al, 'Israel's Invasion of Gaza In International Law' (2009) 38 (1) Denver Journal of International Law and Policy 41, 41.

¹⁴⁴⁹ Charter of the United Nations [1945] art 51.

However, the IDF's barbarism in resumption had become normalised behaviour throughout the 22-day war¹⁴⁵⁰, indiscriminately attacking civilians and civilian infrastructure which is highly condemned.¹⁴⁵¹ Since Israel deployed the IDF into Gaza, it essentially took effective control and satisfied the legal requirement for occupation by its military under IL.¹⁴⁵²

Under IHL civilians succumbing to the occupation and control of the IDF are deemed as 'protected persons'¹⁴⁵³ and must not be subjected to intentional killings.¹⁴⁵⁴ Thus, Israel, exercising effective control in Gaza had an obligation to ensure public order and safety for Palestinian civilians, which it had failed to uphold.¹⁴⁵⁵

Also, Israel has not signed or ratified¹⁴⁵⁶ the Additional Protocols of the Geneva Convention¹⁴⁵⁷ or the Hague Convention¹⁴⁵⁸ which governs military conduct and occupation. Although it has ratified the Fourth Geneva Convention¹⁴⁵⁹ and is also bound by the provisions of the Hague Convention and IHL through CIL¹⁴⁶⁰ as it is the primary source responsible for supplying the framework establishing much of the content making up IHL.¹⁴⁶¹

¹⁴⁵⁰ Lori Allen, 'The Scales of Occupation: Operation Cast Lead and the Targeting of the Gaza Strip' (2012) 32 (3) *Critique of Anthropology* 261, 262.

¹⁴⁵¹ Jerome Slater, 'Just War Moral Philosophy and the 2008-09 Israeli Campaign in Gaza' (2012) 37 (2) *International Security* 44, 44.

¹⁴⁵² The Hague Convention IV: Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War and Land [1907] art 42.

¹⁴⁵³ Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 4.

¹⁴⁵⁴ Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 49.

¹⁴⁵⁵ The Hague Convention IV: Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War and Land [1907] art 43.

¹⁴⁵⁶ Adam Roberts, 'Symposium on Revisiting Israel's Settlements Resistance to Military Occupation: An Enduring Problem in International Law' (2017) 111 *AJIL Unbound* 45, 50.

¹⁴⁵⁷ 1977 Additional Protocol I to the Geneva Conventions [1949]; 1977 Additional Protocol II to the Geneva Conventions [1949].

¹⁴⁵⁸ The Hague Convention IV: Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War and Land [1907].

¹⁴⁵⁹ Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 3.

¹⁴⁶⁰ *Suleiman Tawfiq Ayyub et al v Minister of Defence et al* [1979] HCJ 606/78 (15 March 1979), para 6.

¹⁴⁶¹ Nirmala Chandrahasan, 'The Continuing Relevance of Customary International Law In The Development of International Humanitarian Law' (2009) 21 (2) *Sri Lanka Journal of International Law* 55, 55.

Throughout the duration of the conflict, the IDF caused extensive destruction of homes, factories, farms and greenhouses in areas under IDF control without any evident military purpose, of which much of the destruction was carried out during the final days of the campaign when an Israeli withdrawal was imminent.¹⁴⁶²

The indiscriminate nature of these attacks is confirmed by reports of NGO's that were operating in the area. A report by Amnesty International has condemned the IDF's deliberately directed and indiscriminate attacks on civilians and civilian objects throughout the conflict.¹⁴⁶³

By targeting civilians intentionally is a violation of the Geneva Convention¹⁴⁶⁴ and CIL which are obligatory upon states in armed conflict, in addition to the principle's distinction, proportionality and forbiddance of unnecessary suffering.¹⁴⁶⁵

The IDF's actions and conduct throughout the brief war demonstrates disregard for the basic principle of military necessity.¹⁴⁶⁶ Under CIL the principle of distinction demands parties to the conflict must at all times distinguish between civilians and combatants.¹⁴⁶⁷

The attacks carried out by military forces should fulfil legitimate military objectives, thus the IDF's attacks should only be directed towards combatants, not towards civilians.¹⁴⁶⁸

¹⁴⁶² 'I Lost Everything, Israel's Unlawful Destruction of Property During Operation Cast Lead' (*Human Rights Watch*, 13 May 2010) <<https://www.hrw.org/report/2010/05/13/i-lost-everything/israels-unlawful-destruction-property-during-operation-cast-lead>> accessed 24 January 2020.

¹⁴⁶³ 'Israel/Gaza, Operation 'Cast Lead': 22 Days of Death and Destruction' (*Amnesty International*, 2 July 2009) <<https://www.amnesty.org/download/Documents/48000/mde150152009en.pdf>> accessed 24 January 2020.

¹⁴⁶⁴ Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 6.

¹⁴⁶⁵ Yishai Beer, 'Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity' (2016) 26 (4) EJIL 801, 803.

¹⁴⁶⁶ Craig J. S. Forrest, 'The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts' (2007) 37 (2) Cal.W.Int'l L.J. 177, 183.

¹⁴⁶⁷ Henckaerts and Beck (n 1429).

¹⁴⁶⁸ Henckaerts and Beck (n 1429) 29.

In addition, the aerial bombardments and tactics employed by the IDF resulted in mass casualties of Palestinian civilians and those that were not directly involved in the hostilities, contravening the CIL principle of indiscriminate attacks, which is highly condemned in armed conflict.¹⁴⁶⁹

Furthermore, by targeting and destroying the homes of Palestinian civilians and destroying civilian property without being militarily necessary also contravenes IHL¹⁴⁷⁰ and CIL.¹⁴⁷¹ The destruction of schools and prohibiting access to education also violates an occupying authorities' obligations to facilitate the education of children¹⁴⁷² as confirmed by the Geneva Convention.¹⁴⁷³

Evidently the mass destruction caused by the IDF throughout the operation, has resulted in substantial economic disaster. The destruction of governmental, religious and cultural structures¹⁴⁷⁴ as well as farming and agricultural land¹⁴⁷⁵ is also in violation of IHL and deemed excessive to be militarily necessary which is prohibited.¹⁴⁷⁶

The IDF's aerial bombardments and the conduct of ground troops further demonstrates the disproportionality of their conduct in eradicating Hamas by subjecting Palestinians to indiscriminate attacks and causing substantial damage to the Palestinian economy.

[L]aunching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.¹⁴⁷⁷

¹⁴⁶⁹ Henckaerts and Beck (n 1429) 37.

¹⁴⁷⁰ Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 53.

¹⁴⁷¹ Henckaerts and Beck (n 1429) 71.

¹⁴⁷² Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 50.

¹⁴⁷³ Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 55.

¹⁴⁷⁴ Henckaerts and Beck (n 1429) 127.

¹⁴⁷⁵ Henckaerts and Beck (n 1429) 151.

¹⁴⁷⁶ Henckaerts and Beck (n 1429) 178.

¹⁴⁷⁷ Henckaerts and Beck (n 1429) 46.

In addition, further violations of IHL, were showcased by the IDF in terms of the arsenal utilised to carry out the attacks against Hamas. The IDF consistently fired explosive shells containing white phosphorous in densely populated areas in Gaza city, leading to many deaths of innocent civilians and damage to the surrounding areas and environment.¹⁴⁷⁸

The effects of using weapons containing white phosphorous can cause serious injury and death when it comes into contact with the skin, if it is inhaled or is swallowed. The burning effect can cause less than 10 percent of the body to be fatally burned causing damage to internal organs including the liver, kidneys and heart.¹⁴⁷⁹

Throughout the conflict, white phosphorus wedges were scattered all around residential buildings and many were still burning days after the attack, further endangering residents, their property and children playing in the streets and alley ways.¹⁴⁸⁰

Reports of the IDF directing white phosphorous shells towards schools also emerged, which resulted in two young school children being killed whilst severely wounding their mother and their cousin.¹⁴⁸¹

Protocol III of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (PCCW) condemns the use of incendiary weapons on civilian targets¹⁴⁸² and civilian populations.¹⁴⁸³ Israel has not ratified this treaty, but CIL reiterates this prohibition to use incendiary weapons on civilian populations¹⁴⁸⁴ to which Israel is obligated to abide.

¹⁴⁷⁸ 'Rain of Fire: Israel's Unlawful Use of White Phosphorus in Gaza' (*Human Rights Watch*, 25 March 2009) <<https://www.hrw.org/report/2009/03/25/rain-fire/israels-unlawful-use-white-phosphorus-gaza>> accessed 24 January 2020.

¹⁴⁷⁹ *ibid.*

¹⁴⁸⁰ 'Gaza: Indisputable Evidence of Israel's Use of White Phosphorus Against Civilians' (*Amnesty International*, 19 January 2009) <<https://www.amnesty.org.uk/press-releases/gaza-indisputable-evidence-israels-use-white-phosphorus-against-civilians>> accessed 24 January 2020.

¹⁴⁸¹ n 1478.

¹⁴⁸² Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons [1980] art 2 [1].

¹⁴⁸³ Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons [1980] art 2 (3).

¹⁴⁸⁴ Henckaerts and Beck (n 1429) 287.

Further Instances of the IDF killing civilians have also emerged after the events of Operation Cast Lead. On the 31st May 2010, the *Mavi Mamara* along with several other vessels bound for Gaza, staffed 700 civilians¹⁴⁸⁵ from 40 countries¹⁴⁸⁶ which sought to bring humanitarian aid into Gaza in accordance with previous UNSC resolutions.¹⁴⁸⁷

The vessels were met with the Israeli naval blockade¹⁴⁸⁸, prompting IDF forces to board the vessel. Within 45-50 minutes the violence exerted by the IDF killed nine civilians and injured 24 more.¹⁴⁸⁹

The IDF's casual use of brutal force and indiscriminate weaponry have disregarded and violated IHL. It's further failure to exercise 'precaution'¹⁴⁹⁰ in its attacks have resulted in the staggering number of civilian related deaths throughout and after the 22-day war and caused significant human, economic and environmental damage in pursuit of its WOT against Hamas.

4.4 Operation Pillar of Defense: The 8-Day War In 2012

The 8-day war dubbed: 'Operation Pillar of Defense', further demonstrated a war between the sovereign state of Israel on the one hand and Hamas a non-state actor exercising control over the OPT on the other.¹⁴⁹¹

On the 14th November 2012, the IDF launched Operation Pillar of Defense in self-defence¹⁴⁹², with its primary objective to reduce the number of rocket

¹⁴⁸⁵ UNHRC 'Report of the International Fact-Finding Mission to investigate Violations of International Law, Including International Humanitarian Law and Human Rights Law, resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance' (27 September 2010) UN Doc A/HRC/15/21, para 176.

¹⁴⁸⁶ *Ibid* para 231.

¹⁴⁸⁷ UNSC Res 1850 (16 December 2008) UN Doc S/RES/1850; UNSC Res 1860 (8 January 2009) UN Doc S/RES/1860.

¹⁴⁸⁸ S. Bosch, 'Israel Attacks an 'Aid' Flotilla Bound for Gaza: A Dark Day for International Law' (2010) 35 (2) *Journal of Juridical Science* 1, 1-2.

¹⁴⁸⁹ n 1487 para 128.

¹⁴⁹⁰ Henckaerts and Beck (n 1429) 51.

¹⁴⁹¹ Shmuel Tzabag, 'Operation Pillar of Defense: Lesson for Modern Warfare' (2013) 7 (3) *Israel Journal of Foreign Affairs* 79, 79.

¹⁴⁹² *ibid*.

attacks directed at Israeli civilians and settlements as well as eliminating Ahmed Jabari, head of the Hamas' military branch in the Gaza Strip.¹⁴⁹³

Jabari was one of the leaders of the Hamas militants, directly responsible for the attacks on Israel in the past, as well as orchestrating the kidnapping and captivity of Israeli soldier Gilad Shalit with the help of Hezbollah militants.¹⁴⁹⁴

The IDF intended to destroy the Hamas terrorist infrastructure, identifying 1500 terrorist sites after intelligence was collected prior to the conflict in response to Hamas' continuous use of long-range rockets, such as the Iranian-made Fajr-5s being fired into Tel Aviv and Jerusalem.¹⁴⁹⁵

The wide scale military offensive against Gaza, its infrastructure and Hamas resulted in 65% of the deaths throughout the conflict, mainly comprising of Palestinian civilians. By 22nd November 2012, 158 Palestinians were killed which included: 103 civilians consisting of 33 children and 13 women. 1,269 Palestinians were injured, 298 homes were destroyed and 1700 homes were damaged in Gaza.¹⁴⁹⁶

It was reported that the IDF had ramped up their military offensive in the last few days of the conflict, which increased Palestinian fatalities by 80%, directing attacks deliberately towards Palestinian civilians that did not participate in the conflict. The harm to civilians and the damage to civilian property were much less extensive, compared to Operation Cast Lead, as the campaign was mainly conducted entirely from the air and shorter in duration.¹⁴⁹⁷

Despite, the casualties in comparison to the latter operation being minimal, violations of IHL were still prevalent throughout the counter-terrorism

¹⁴⁹³ '2012 Operation Pillar of Defense' (*Israel Defense Force*) <<https://www.idf.il/en/minisites/wars-and-operations/operation-pillar-of-defense-2012/>> accessed 24 January 2020.

¹⁴⁹⁴ *ibid.*

¹⁴⁹⁵ n 1493.

¹⁴⁹⁶ 'Humanitarian Fact Sheet: From Cast Lead to Pillar of Defence' (*Council of Arab British Understanding*) <<https://www.caabu.org/what-we-do/gaza/factsheet-humanitarian-situation-cast-lead-pillar-defense>> accessed 24 January 2020.

¹⁴⁹⁷ 'Israeli Authorities Have Proven They Cannot Investigate Suspected Violations of International Humanitarian Law by Israel In the Gaza Strip' (*B'Tselem*, 5 September 2014) <https://www.btselem.org/accountability/20140905_failure_to_investigate> 24 January 2020.

operation. Primarily, Israel throughout the operation failed to provide advance notice of an impending attack to Palestinian civilians violating IHL.¹⁴⁹⁸

The CIL requirement of 'advance warnings'¹⁴⁹⁹ has been codified in the Hague Regulations¹⁵⁰⁰ and the Hague Convention.¹⁵⁰¹ Israeli forces were obliged to give advance warning to Palestinian civilians under CIL.

Pronouncements were made by Israeli military officials indicating that current technological capacities enabled precise airstrikes and gathering of reliable information to highlight the presence of any uninvolved civilians in the vicinity of the target, immediately prior to the attack.¹⁵⁰²

However, the IDF failed to adequately warn civilians as this led to an increased number of uninvolved Palestinian civilians that were killed in the last four days of the operation, which was more than four times as many as in the first four days.¹⁵⁰³

The IDF deliberately and discriminately targeted and killed civilians that were not actively participating in the hostilities, contravening the CIL principle of indiscriminate attack as such targets were not specific to military objectives and posed no risk or danger towards military forces.¹⁵⁰⁴ The CIL principle of 'target selection' was also obligatory upon the IDF:

[W]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.¹⁵⁰⁵

¹⁴⁹⁸ 'Human Rights Violations During Operation Pillar of Defense, 14-21 November 2012' (*B'Tselem*, 9 May 2013) 39 <https://www.btselem.org/press_releases/20130509_pillar_of_defense_report> accessed 24 January 2020.

¹⁴⁹⁹ Henckaerts and Beck (n 1429) 62.

¹⁵⁰⁰ The Hague Convention III: Respecting the Laws and Customs of War on Land [1899] art 26; The Hague Convention IV: Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War and Land [1907] art 26.

¹⁵⁰¹ Hague Convention IX: Bombardment by Naval Forces in Time of War [1907] art 6.

¹⁵⁰² n 1498.

¹⁵⁰³ n 1498.

¹⁵⁰⁴ Henckaerts and Beck (n 1429) 40.

¹⁵⁰⁵ Henckaerts and Beck (n 1429) 65.

By killing the civilians that were not part of the hostilities, the IDF failed to comply with the Fourth Geneva Convention¹⁵⁰⁶ and CIL by indiscriminately targeting innocent civilians which is considered to be a war crime¹⁵⁰⁷ and the restriction of humanitarian aid and supplies as a method of warfare against the Palestinian population is considered a crime against humanity under the Rome Statute.¹⁵⁰⁸

Despite, the overall death tolls and casualties piling in comparison to Operation Cast Lead, this does not detract from the fact that severe violations of IHL were committed nonetheless and also continued throughout Operation Protective Edge.

4.5 The Events of Operation Brother's Keeper and the Lead Up to Operation Protective Edge

The situation between Hamas militants and Israel intensified throughout mid-2014. Initially, the hostilities reported by the Israeli government lasted between 12th June 2014 and the 7th July 2014, when Hamas and other terror groups launched approximately 300 rockets from the Gaza Strip targeting Israeli civilians, communities and settlements in Southern Israel.¹⁵⁰⁹

On the 12th July 2014, three Israeli teenagers named: Eyal Yifrach, Gilad Shaar, and Naftali Fraenkel were kidnapped from the West Bank.¹⁵¹⁰ The Israeli government responded by launching; Operation Brother's Keeper, a mission which lasted 18 days intended to find and retrieve the three missing teenagers. The IDF's objectives also included establishing the identities of the

¹⁵⁰⁶ Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 2.

¹⁵⁰⁷ Rome Statute of the International Criminal Court [1998] art 8.

¹⁵⁰⁸ Rome Statute of the International Criminal Court [1998] art 7.

¹⁵⁰⁹ 'Operation Protective Edge: The Facts' (*Israel Ministry of Foreign Affairs*) <<https://mfa.gov.il/MFA/ForeignPolicy/FAQ/Pages/Operation-Protective-Edge-The-facts.aspx#blank>> accessed 24 January 2020.

¹⁵¹⁰ 'Behind the Headlines: The Hamas Kidnapping of Three Israeli Teens' (*Israel Ministry of Foreign Affairs*, 19 June 2014) <<https://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Behind-the-Headlines-The-Hamas-kidnapping-of-three-Israeli-teens-15-Jun-2014.aspx>> accessed 24 January 2020.

Hamas operatives responsible for the abduction and identifying the Hamas terrorist infrastructure in the region.¹⁵¹¹

On the 26th June 2014, the Israeli government reportedly identified the kidnapers known as Marwan Kawasme and Amer Abu Aysha both considered to be terrorists and members of the military wing of Hamas.¹⁵¹²

Furthermore, the IDF reportedly seized weapons, arrested 400 suspects of which 250 were associated with Hamas and acted against public institutions which formed part of Hamas' systematic network to recruit terrorists and spread radical Islamic ideology in mosques, schools and hospitals all over Judea and Samaria.¹⁵¹³

On the 30th June 2014, the IDF recovered the dead bodies of the three Israeli teenagers in the northwest city of Hebron, all were killed by Hamas terrorists. Thereafter, the tension escalated rapidly as Hamas continued its aerial attacks and continued attempts to infiltrate Israel through terror tunnels.¹⁵¹⁴

4.6 Operation Protective Edge: The 50-Day Israeli-Palestinian War.

Operation Protective Edge which commenced on the 8th August 2014 and lasted until the 26th August 2014. The military response was justified by the Israeli government acting in self-defence to stop rocket attacks targeting Israeli civilians¹⁵¹⁵ from Gaza in an attempt to restore stability and quiet to the residents of Israel and destroy Hamas' offensive capabilities and terror infrastructures used to direct attacks towards Israel and its citizens.¹⁵¹⁶

¹⁵¹¹ 'Operation Brother's Keeper: 4 Years Later' (*Israel Defense Force*, 1 July 2018) <<https://www.idf.il/en/articles/operation-brother-s-keeper/operation-brother-s-keeper-4-years-later/>> accessed 24 January 2020.

¹⁵¹² *ibid.*

¹⁵¹³ n 1511.

¹⁵¹⁴ n 1511.

¹⁵¹⁵ Ohad Gluck et al, 'Was the Military Operation Protective Edge A Risk Factor for Pregnancy Complications?' (2017) 8 (2) *Rambam Maimonides Medical Journal* 1, 2.

¹⁵¹⁶ n 1509.

The IDF employed a 'comprehensive air, ground and sea assault'¹⁵¹⁷ as an effective strategy to meet these counter-terrorism military objectives against Hamas, stating:

[I]t began with air strikes from July 8th to 17th, followed by ground combat from July 18th to August 4th. Alternating skirmishes and ceasefires ensued from August 5th to 26th, including eight days without rocket fire. The IDF claimed to have destroyed 3,000 rockets on the ground plus other targets'.¹⁵¹⁸

The conflict which lasted several weeks marked the third largest assault launched by Israeli forces against the Gaza Strip, since the imposition of the blockade in 2006¹⁵¹⁹, proving to be: 'the most violent use of force in the Gaza strip since operation Pillar of Defense in 2012 and the ill-famed operation Cast Lead in 2009, and it likely caused even more casualties and destruction than the former operations'.¹⁵²⁰

Despite the IDF's success in targeting and killing senior Hamas commanders and exposing extensive underground attack tunnels penetrating Israel, the 50-day military campaign showcased Israel's failure to adhere to IHL and CIL by attacking thousands of targets in the Gaza Strip, which led to substantial loss of civilian life and considerable destruction.¹⁵²¹

Operation Protective Edge which was originally devised to stop Hamas from firing rockets into Israel, resulted in the deaths of over 2100 Palestinians, which Israel by its own admission numbered civilian casualties to be around 53%.¹⁵²²

¹⁵¹⁷ Raed M.I. Qaddoura, 'Israel's Propaganda Strategies: Case Study of the Protective Edge Operation in Gaza 2014' (2017) 7 (12) *International Journal of Development Research* 17938, 17938.

¹⁵¹⁸ Michael J. Armstrong, 'The Effectiveness of Rocket Attacks and Defenses In Israel' (2018) 3 (2) *Journal of Global Security Studies* 113, 117.

¹⁵¹⁹ Qaddoura (n 1517).

¹⁵²⁰ Marco Longobardo, 'Some Developments in the Prosecution of International Crimes Committed in Palestine: Any Real News?' (2015) XXXV *Polish Yearbook of International Law* 109, 115.

¹⁵²¹ Harel Cboev, 'The Road to Operation Protective Edge: Gaps in Strategic Perception' (2014) 8 (3) *Israel Journal of Foreign Affairs* 9, 9.

¹⁵²² Ann Rogers, 'Investigating the Relationship Between Drone Warfare and Civilian Casualties in Gaza' (2014) 7 (4) *Journal of Strategic Security* 94, 95.

The key figures published by the United Nations Special Commission (UNOCHA) regarding the IDF's conduct throughout the 50-day war reported 1,462 Palestinian civilians were killed including women and children, 11,231 Palestinians were injured including women and children and 500,000 Palestinians were internally displaced. The IDF found 32 Tunnels, 14 of which extended the Green Line into Israel.¹⁵²³

The Palestinian deaths found by the UNOCHA further elaborates the excessive use of force adopted by the IDF in pursuit of the Hamas militants. The UNOCHA also published in its key figures relating to the methods used by the IDF, which involved deliberately targeting residential areas destroying 18,000 housing units, 73 medical facilities, and ambulances following the 6,000 airstrikes carried out by the IDF throughout the campaign.¹⁵²⁴

The IDF's use of civilians as human shields as a warfare technique throughout its military campaign have also been reported.¹⁵²⁵ This weaponisation of human bodies in contemporary warfare¹⁵²⁶ is prohibited¹⁵²⁷ and has been condemned previously by the IHCJ¹⁵²⁸ and considered a war crime under the Rome Statute.¹⁵²⁹

The colossal loss of life and the damage caused to Palestine's economy and landscape as a result of the 50-day war has been well documented on social media, exhibiting the destruction the conflict had wrought.

Academics such as El Zein and Abusalem argued the importance social media platforms have served in raising awareness internationally, stating:

¹⁵²³ 'Occupied Palestinian Territory' (*United Nations Office for Coordination of Humanitarian Affairs*, 23 June 2015) <<https://www.ochaopt.org/content/key-figures-2014-hostilities>> accessed 24 January 2020.

¹⁵²⁴ *ibid.*

¹⁵²⁵ Neve Gordon and Nicola Perugini, 'The Politics of Human Shielding: on the Resignification of Space and Civilians as Shields in Liberal Wars' (2016) 34 (1) *Environment and Planning D: Society and Space* 168, 170.

¹⁵²⁶ Nicola Perugini and Neve Gordon, 'Introduction to Symposium on Critical Perspectives on Human Shields' (2016) 110 *AJIL Unbound* 296, 296.

¹⁵²⁷ 1977 Additional Protocol I to the Geneva Conventions [1949] art 51 (7).

¹⁵²⁸ *Adalah: The Legal Center for Arab Minority Rights in Israel and Others v GOC Central Command and Others* [2005] HCJ 3799/02 (23 June 2005).

¹⁵²⁹ Rome Statute of the International Criminal Court [1998] art 8 (2) (b) (xxii).

[T]he broadcasted images of the killed Palestinian civilians on the social media platforms from Gaza Strip during the war led to a widespread campaign of sympathy and raised the international voices that demand Israel to stop its war.¹⁵³⁰

In support of this argument, social media has documented one of the major events of the 50-day war, which occurred on the 20th July 2014 in Shu'jaiya which underwent brutal and intense military bombardment.¹⁵³¹

The IDF adopted a ground assault which observed soldiers firing heavy artillery and rocket shells from tanks and mortar fire within the residential neighbourhood, killing 67 people including 17 children, 14 women, four elderly and wounding 400 civilians within a 24-hour period.¹⁵³²

Although, this deliberate attack on civilians is not an isolated incident, another major event in the 50-day war occurred after the capture of Lieutenant Hadar Goldin, whilst infiltrating an underground tunnel by Hamas militants in the southern district of Rafa. The IDF responded by implementing its 'General Staff Directive for Contending with Kidnappings Attempts' also referred to as the 'Hannibal Directive'.¹⁵³³

The activation of the 'Hannibal Directive' military protocol permits IDF commanders to take violent measures to open fire without formal approval.¹⁵³⁴

In Gaza 2014, this involved the IDF discharging heavy fire with the aim of killing the captured soldier in order to prevent a hostage and screen-off any

¹⁵³⁰ Hatem El Zein and Ali Abusalem, 'Social Media and War on Gaza: A Battle on Virtual Space to Galvanise Support and Falsify Israel Story' (2015) 1 (2) Athens Journal of Mass Media and Communications 109, 114.

¹⁵³¹ Gary Bratchford, 'Operation Protective Edge 2014: Holding Language and Gaza Hostage' (2015) 8 (2) Networking Knowledge: Journal of the MeCCSA Postgraduate Network <<https://ojs.meccsa.org.uk/index.php/netknow/article/view/372/202>> accessed 20/01/2020.

¹⁵³² Peter Beaumont, 'Israel Kills Scores in Gaza City Suburb in Deadliest Assault of Offensive So Far' *The Guardian* (London, 20 July 2014) <<https://www.theguardian.com/world/2014/jul/20/israeli-attack-suburb-gaza-city-palestinians-shujaiya>> accessed 20/01/2020.

¹⁵³³ Hilly B. Moodrick Even Khen, 'Reaffirming the Distinction Between Combatants and Civilians: The Cases of the Israeli Army's 'Hannibal Directive' and the United States' Drone Airstrikes Against ISIS' (2016) 33 (3) Arizona Journal of International and Comparative Law 765, 765.

¹⁵³⁴ Nitzan Rothem, 'On Temporality and Morality: Negotiating POW Survival in Current Protracted Wars' (2021) Critical Military Studies 1, 12.

consideration of collateral damage. The IDF's countenance of excessive strikes to pursue Hamas¹⁵³⁵ resulted in them killing 200 Palestinians.¹⁵³⁶

The Hannibal Directive has displayed similar tendencies to the IDF's use of the 'Dahiya Doctrine' in 2006 in the southern region of Dahiya, Beirut in Lebanon.¹⁵³⁷

Major General Gadi Eizenkot publicly revealed the 'Dahiya Doctrine' was used for the intentional disproportionate use of force which led to the wholesale killing of 13,000 people, the majority of which consisted of civilians and large-scale destruction of residential properties, which led hundreds of thousands of civilians displaced.¹⁵³⁸

This method of adopting the 'Hannibal Directive' and the 'Dahiya Doctrine' in the ongoing WOT against Hamas and Hezbollah, demonstrates IDF's apparent lack and disregard for IHL and CIL by killing scores of innocent civilians in pursuit of eliminating the terrorist threat at any expense.

Shkolnik elaborates the adverse effects of these directives and doctrines, which complement Israel and the IDF's long-term strategy in the WOT arguing:

[I]srael's traditional military doctrine facilitated quick and decisive victories against multiple Arab states, the 'mowing the grass' strategic outlook acknowledges a long-term war of attrition with jihadist insurgent organisations notably Hamas and Hezbollah.¹⁵³⁹

The term 'mowing the grass' demonstrates Israel's strategic parlance to respond to non-state entities and terrorist threats by using overwhelming use

¹⁵³⁵ John J. Merriam and Michael N. Schmitt, 'Israeli Targeting: A Legal Appraisal' (2015) 68 (4) *Naval War College Review* 14, 28-29.

¹⁵³⁶ Yoav Golai, 'The Victory Image: Imaging Israeli Warfighting from Lebanon to Gaza' (2019) 50 (4) *Security Dialogue* 295, 308.

¹⁵³⁷ Rashid I. Khalidi, 'The Dahiya Doctrine, Proportionality and War Crimes' (2014) 44 (1) *Journal of Palestine Studies* 5, 7.

¹⁵³⁸ *ibid.*

¹⁵³⁹ Michael Shkolnik, 'Mowing the Grass and Operation Protective Edge: Israel's Strategy for Protracted Asymmetric Conflict with Hamas' (2017) 23 (2) *Canadian Foreign Policy Journal* 185, 185.

of force to debilitate the capabilities of the enemy which intend to harm Israel.¹⁵⁴⁰

Such excessive use of force has resulted in the disproportionate and unnecessary deaths and suffering of Palestinian civilians and devastating damage to civilian infrastructures and significant environmental damage to the Palestinian economy.

The excessive use of force as a military strategy referred to as 'mowing the grass' is inextricably linked to the IDF's use of the 'Hannibal Directive' and the 'Dahiya Doctrine' as military strategies. Due to the insensitivity of these strategies they fail to comply with the IHL principles of military necessity by not differentiating between combatants and non-combatants solely focussing on Israel's military and political interests and expectations.¹⁵⁴¹

4.6.1 The Legality of Israeli Forces Conduct Throughout Operation Protective Edge

The attacks carried out again by Hamas and aimed towards Israeli cities and settlements is considered under IHL to violate Israel's territorial sovereignty justifying Israel's right to self-defence¹⁵⁴² and the IDF's response to the threat posed.¹⁵⁴³

Israel still exercised effective control¹⁵⁴⁴ over the West Bank¹⁵⁴⁵ and Gaza's border crossings, aerial, territorial waters, fuel, electric, sewage removal and telecommunications¹⁵⁴⁶ as confirmed previously by the UNGA¹⁵⁴⁷ and the

¹⁵⁴⁰ Efraim Inbar and Eitan Shamir, 'Mowing the Grass: Israel's Strategy for Protracted Intractable Conflict' (2014) 37 (1) *Journal of Strategic Studies* 65, 68-69.

¹⁵⁴¹ Zafer Balpınar, 'The Analysis of Dahiya Doctrine in the Context of Israel's Further Security Claim' (2018) 5 (2) *Journal of Mehmet Akif Ersoy University Economics and Administrative Sciences Faculty* 397, 409.

¹⁵⁴² Charter of the United Nations [1945] art 51.

¹⁵⁴³ Svetlana Sumina and Steven Gilmore, 'The Failure of International Law in Palestine' (2018) 20 (2) *The Scholar: St. Mary's Law Review on Race and Social Justice* 135, 170.

¹⁵⁴⁴ *Ajuri et al v The Commander of IDF Forces in the West Bank and Gaza* [2002] HCJ 7015/02 (3 September 2002), paras 1 - 2.

¹⁵⁴⁵ *Beit Sourik Village Council v The Government of Israel* [2004] HCJ 2056/04 (30 June 2004), paras 1 - 2.

¹⁵⁴⁶ Elizabeth Samson, 'Is Gaza Occupied: Redefining the Status of Gaza Under International Law' (2010) 25 (5) *Am.U.Int'l L.Rev.* 915, 933.

¹⁵⁴⁷ UNGA Res 64/92 (10 December 2009) UN Doc A/RES/64/92.

UNHRC.¹⁵⁴⁸ Thus, Israel, exercising effective control in Gaza had an obligation to ensure public order and safety for Palestinian civilians which it again has failed to uphold.¹⁵⁴⁹

On the 4th December 2012, Palestine was recognised as a state with non-membership observer status by the UNGA¹⁵⁵⁰ and acceded the Geneva Conventions on the 2nd April 2014.¹⁵⁵¹ This is important as the armed conflict entitled: Operation Protective Edge between Israel in pursuit of Hamas in Palestine changed from being an NIAC to an IAC as both states are now legally considered 'high contracting parties'.¹⁵⁵²

Israel is still bound by the Fourth Geneva Convention and CIL¹⁵⁵³ and had a legal obligation to observe and comply with the principles of: distinction, prohibition of unnecessary suffering, proportionality, military necessity and humanity as standards guiding and governing the conduct of hostilities.¹⁵⁵⁴

The IDF's counter-terrorism strategy throughout the 50-day war has violated military necessity¹⁵⁵⁵ by specifically making civilians subjects of attack¹⁵⁵⁶, by intentionally¹⁵⁵⁷ and inhumanely¹⁵⁵⁸ targeting civilians which cannot be considered a legitimate military objective.¹⁵⁵⁹

¹⁵⁴⁸ UNHRC 'Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967' (13 January 2014) UN Doc A/HRC/25/67, para 8.

¹⁵⁴⁹ The Hague Convention IV: Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War and Land [1907] art 43.

¹⁵⁵⁰ 'Palestine Declares Acceptance of ICC Jurisdiction Since 13 June 2014' (*International Criminal Court*, 5 January 2015) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1080>> accessed 25 January 2020.

¹⁵⁵¹ UNGA Res 67/19 (4 December 2014) A/RES /67/19.

¹⁵⁵² Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 2.

¹⁵⁵³ *Gaza Coast Regional Council v The Knesset* [2005] HCJ 1661/05 (9 June 2005).

¹⁵⁵⁴ Viola Vincze, 'Taming the Untameable: The Role of Military Necessity in Constraining Violence' (2016) 2 ELTE Law Journal 93, 95.

¹⁵⁵⁵ Forrest (n 1466).

¹⁵⁵⁶ Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 4.

¹⁵⁵⁷ Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 49.

¹⁵⁵⁸ Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 3.

¹⁵⁵⁹ Henckaerts and Beck (n 1429) 37.

The CIL principle of distinction reiterates this view as parties to the conflict must at all times distinguish between civilians and combatants. The attacks carried out by the IDF may only be directed against combatants, attacks must not be directed against civilians.¹⁵⁶⁰

The IDF had a responsibility when carrying out attacks to distinguish between civilian objects and military objects at all times throughout the conflict.¹⁵⁶¹ However, the IDF's indiscriminate bombardments resulted in significant deaths and casualties of Palestinian civilians which CIL condemns.¹⁵⁶²

Assaults on hospitals have become part of a widespread warfare strategy¹⁵⁶³ by the IDF which has involved deliberately targeting and bombing hospital facilities¹⁵⁶⁴, medical transports¹⁵⁶⁵ and residential areas which are densely populated and even more so following the implementation of the 'Hannibal Directive'.¹⁵⁶⁶

Moreover, the IDF's ground attacks which were directed towards Palestinian civilians and destruction of homes in Shu'Jaiya (neighbourhood district) and Rafah (Palestinian city) and civilian property deliberately in the OPT¹⁵⁶⁷ without being militarily necessary also violated IHL.¹⁵⁶⁸ The IHL¹⁵⁶⁹ and CIL principle of 'proportionality' states:

[L]aunching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.¹⁵⁷⁰

¹⁵⁶⁰ Henckaerts and Beck (n 1429) 3.

¹⁵⁶¹ Henckaerts and Beck (n 1429) 25.

¹⁵⁶² Henckaerts and Beck (n 1429) 37.

¹⁵⁶³ Neve Gordon and Nicola Perugini, 'Hospital Shields and the Limits of international Law' (2019) 30 (2) EJIL 439, 439.

¹⁵⁶⁴ Henckaerts and Beck (n 1429) 119.

¹⁵⁶⁵ Henckaerts and Beck (n 1429) 98.

¹⁵⁶⁶ Gordon and Perugini (n 1563).

¹⁵⁶⁷ Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 55.

¹⁵⁶⁸ Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 53.

¹⁵⁶⁹ 1977 Additional Protocol I to the Geneva Conventions [1949] art 51 (5) (b).

¹⁵⁷⁰ Henckaerts and Beck (n 1429) 46.

This segment of the chapter has demonstrated the IDF throughout its three counter-terrorism campaigns between 2009 – 2014, have consistently demonstrated an unwillingness to abide by the obligations and prohibitions set forth in IHL and CIL by failing to exercise precaution against the effects of attack on civilians and civilian objects.¹⁵⁷¹

Instead, it has deliberately and indiscriminately made civilians the subject of its attacks¹⁵⁷² in its WOT against Hamas and Hezbollah militants. Thus, a credible argument can be leveraged against Israeli nationals in the IDF, as the methods used throughout the aforementioned military operations amount to war crimes¹⁵⁷³ and crimes against humanity under the Rome Statute.¹⁵⁷⁴

4.7 The Failure of the UNSC to Respond to Israel's Counter-Terrorism Operations

The military campaigns endorsed by the Israeli government and administered by the IDF, have demonstrated many violations of IHL and CIL and render individual criminal responsibility of both Palestinian (Hamas) and Israeli (IDF) nationals.

Despite these violations being apparent, it seems the UNSC and the ICC have failed in adequately responding to the mass atrocity crimes in the wake of the IDF's counter-terrorism operations, which the remainder of the chapter will adduce.

4.7.1 Operation Cast Lead

An example of the UNSC's failure to stop the conflict can be observed in Operation Cast Lead following the introduction of UNSC resolution 1860¹⁵⁷⁵, which stressed: 'the urgency of and calls for an immediate, durable and fully

¹⁵⁷¹ Henckaerts and Beck (n 1429) 68.

¹⁵⁷² Yoav Galai, 'The Victory Image: Imaging Israeli Warfighting from Lebanon To Gaza' (2019) 50 (4) Security Dialogue 295, 295.

¹⁵⁷³ Rome Statute of the International Criminal Court [1998] art 8.

¹⁵⁷⁴ *ibid* art 7.

¹⁵⁷⁵ UNSC Res 1860 (8 January 2009) UN Doc S/RES/1860.

respected ceasefire, leading to the full withdrawal of Israeli forces from Gaza'.¹⁵⁷⁶

Despite the UNSC demanding an immediate ceasefire on the 8th January 2009, the conflict lasted a further 10 days until the 18th January 2009, before Operation Cast Lead was officially concluded.¹⁵⁷⁷

The United Nations Human Rights Council (UNHRC) on 12th January 2009, responded by introducing a resolution which established the United Nations Fact Finding Mission on the Gaza Conflict.¹⁵⁷⁸ Dubbed the 'Goldstone Report' authored by the UN appointed South African Judge, Justice Richard Goldstone.¹⁵⁷⁹ The published document concluded Operation Cast Lead was:

[a] continuum of policies aimed at pursuing Israel's political objectives with regard to Gaza and the Occupied Palestinian Territory as a whole. Many such policies are based on or result in violations of international human rights and humanitarian law. Military objectives as stated by the Government of Israel do not explain the facts ascertained by the Mission, nor are they congruous with the patterns identified by the Mission during the investigation.¹⁵⁸⁰

The report also concluded the blockade that preceded the operations was enforced by the Israeli forces to intentionally and collectively punish Palestinian civilians and prevent essential food supplies, provisions, medical supplies and basic amenities.¹⁵⁸¹

The report further elaborates the mass civilian deaths which were caused by the IDF in the wake of the 22-day, recommending, 'It is important that the international community asserts formally and unequivocally that such violence to the most basic fundamental rights and freedoms of individuals should not be overlooked and should be condemned'.¹⁵⁸²

¹⁵⁷⁶ *ibid* para 10.

¹⁵⁷⁷ Guilfoyle (n 1447) 188.

¹⁵⁷⁸ UNHRC Res S-91 (2009) UN Doc A/HRC/RES/S-91.

¹⁵⁷⁹ UNHRC 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (25 September 2009) UN Doc A/HRC/12/48.

¹⁵⁸⁰ *ibid* para 1877.

¹⁵⁸¹ n 1579 para 1878.

¹⁵⁸² n 1579 para 1885.

The findings of the report provided a synopsis into the gravity of IHL violations which had been committed by the IDF, all of which amounted to war crimes and crimes against humanity.¹⁵⁸³

With this being prevalent, the UNHRC were urged to report these findings to the UNSC¹⁵⁸⁴ and refer the matter to the ICC and conduct periodic reviews for Israel to comply with human rights obligations.¹⁵⁸⁵

The report further stressed UNSC intervention¹⁵⁸⁶ and advised Israel should launch independent investigations to establish the violations of IHL and IHRL, which have been committed and share its findings with the UNSC within three months.¹⁵⁸⁷

The investigative nature of the Goldstone report and its conclusive findings were still not enough to warrant UNSC intervention, nor has the council complied with any of the recommendations. To date, no credible, independent investigations have occurred, nor has the conduct been investigated further highlighting the impotency of UNSC.¹⁵⁸⁸

The UNSC's ineffectiveness can also be observed following a draft resolution being circulated by Libya on the 7th January 2009, demanding an immediate and permanent ceasefire in the Gaza Strip, an immediate lifting of the blockade to allow humanitarian aid and supplies to be delivered without any restriction, as well as achieving just and lasting peace and establish the independent state of Palestine side by side with Israel with recognized borders, was vetoed and rejected by Israel's ally, the USA.¹⁵⁸⁹

The scope of the draft resolution sought to address the current issues which were prevalent during Operation Cast Lead, in addition to addressing the root cause of the conflict demanding a two-state solution by giving Palestine its

¹⁵⁸³ n 1579 para 1968 (b).

¹⁵⁸⁴ Charter of the United Nations [1945] art 99.

¹⁵⁸⁵ n 1579 para 1968.

¹⁵⁸⁶ Charter of the United Nations [1945] art 40.

¹⁵⁸⁷ n 1579 paras 1969 (a) (i) and (ii).

¹⁵⁸⁸ Emily Christian, 'Violations of international Criminal Law in the Israeli-Palestinian Conflict: Why the International Criminal Court Should Not Prosecute in The Interests of Justice' (2015) 29 (2) *Temp.Int'l & Comp.L.J.* 275, 291.

¹⁵⁸⁹ UNSC Draft Res 11 (7 January 2009) UN Doc S/2009/11

own independent state which potentially could have ended historic conflict with Israel.

Yet, the USA's veto privilege by virtue of the UN Charter¹⁵⁹⁰ has prohibited the UNSC from effectuating accountability and maintaining international peace and security, whilst allowing impunity for the severe violations of IHL and CIL that have occurred throughout the 22-day war by IDF.

4.7.2 Operation Protective Edge

The UNSC's reputation was further besmirched for failing to interpose in the midst of the hostilities to protect civilians from the mass atrocity crimes which occurred in Gaza 2014.¹⁵⁹¹

The council's inability to interpose and hold Israel accountable for the IL, IHL and CIL violations that were committed during Operation Protective Edge is mainly attributed to the USA casting a veto against a draft resolution enacted by Jordan which garnered the support of China, France and Russia.¹⁵⁹²

Thus, the veto privilege restricting accountability and ICC intervention¹⁵⁹³ effectively exempted Israeli commanders¹⁵⁹⁴, government officials¹⁵⁹⁵ and nationals of the IDF from any individual criminal responsibility¹⁵⁹⁶ and investigation.¹⁵⁹⁷ As discussed earlier in the thesis¹⁵⁹⁸ the veto infracts the underpinning norm of *Jus Cogens*, where no derogation is ever permitted.¹⁵⁹⁹

The UNHRC inquiry sought to investigate the extent of the systematic and gross violations of IHL that occurred in 2014.¹⁶⁰⁰ In 2015, the UNHRC

¹⁵⁹⁰ Charter of the United Nations [1945] art 27 (3).

¹⁵⁹¹ Endalchew Bayeh, 'The Current War on Gaza: A Challenge to the Principle of the Responsibility to Protect' (2016) 4 (2) Global Journal of Political Science and Administration 79, 83.

¹⁵⁹² UNSC Draft Res 916 (30 December 2014) UN Doc S/2014/916 Version 2.

¹⁵⁹³ Rome Statute of the International Criminal Court [1998] art 13 (b).

¹⁵⁹⁴ Rome Statute of the International Criminal Court [1998] art 27.

¹⁵⁹⁵ Rome Statute of the International Criminal Court [1998] art 28.

¹⁵⁹⁶ Rome Statute of the International Criminal Court [1998] art 25.

¹⁵⁹⁷ Rome Statute of the International Criminal Court [1998] art 15 (1) and (3).

¹⁵⁹⁸ Section 2.2.4 to n 604 ch 2.

¹⁵⁹⁹ Vienna Convention on the Law of Treaties [1969] art 53.

¹⁶⁰⁰ UNHRC Res S-21/1 (2014) UN Doc A/HRC/RES/S-21/1 para 13.

published its findings in a report which found¹⁶⁰¹ that Israel had in fact used excessive force which led to the deaths of many civilians¹⁶⁰², destroyed civilian infrastructures¹⁶⁰³ and urged accountability for the individuals responsible for these serious violations.¹⁶⁰⁴

The report adduced the IDF had deliberately bombarded medical facilities, levelled urban areas and civilian infrastructures and internally displaced 500,000 people¹⁶⁰⁵ through the use of heavy artillery tank shells being fired into densely populated civilian areas.¹⁶⁰⁶ The report also confirmed the use of the IDF's 'Hannibal Directive' military protocol in Rafah and Shu'Jaiya.¹⁶⁰⁷

The report concluded that the serious violations of IHL and CIL amounted to war crimes¹⁶⁰⁸, and acknowledged Israel's lamentable track record and unwillingness to adequately investigate and prosecute individuals domestically that were responsible for these serious violations in all three counter-terrorism operations since 2009.¹⁶⁰⁹

Another UNHRC report in 2018 presented the developments since the 2014 conflict.¹⁶¹⁰ The report identified a lack of accountability by Israeli and Palestinian authorities to hold any Israelis nationals in the IDF accountable for the serious violations of IHL, CIL and war crimes.¹⁶¹¹ In particular the report states:

[T]he lack of independence, impartiality, promptness and transparency of the Office of the Israeli Military Advocate-General (MAG) is an additional concern. When investigations have taken place, they have rarely resulted in prosecutions, and sentences frequently do not match

¹⁶⁰¹ UNHRC 'Report of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S21-1' UN Doc A/HRC/29/52.

¹⁶⁰² *ibid* para 20.

¹⁶⁰³ UNHRC 'Concluding Observations on the Report by Israel Under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography' (8 June 2015) UN Doc CCPR/C/ISR/CO/4 para 6.

¹⁶⁰⁴ UNHRC Res 29/25 (2015) UN Doc A/HRC/RES/29/25.

¹⁶⁰⁵ *ibid* para 23.

¹⁶⁰⁶ n 1604 para 48.

¹⁶⁰⁷ n 1604 para 57.

¹⁶⁰⁸ n 1604 para 74.

¹⁶⁰⁹ n 1604 para 76.

¹⁶¹⁰ UNHRC 'Ensuring Accountability and Justice for all Violations of International Law in the Occupied Palestinian Territory, including East Jerusalem' (19 March 2018) UN Doc A/HRC/37/41.

¹⁶¹¹ *ibid* para 10.

the gravity of the violation(s) committed by the Israeli Security Forces.¹⁶¹²

The violations of IL, IHL and CIL which have occurred in this counter-terrorism operation against Hamas, have further demonstrated the UNSC's P5 veto handicap have prevented the organisation from holding Israel accountable and prompting ICC intervention. This is oxymoronic, especially since it is mandated to maintain international peace and security.¹⁶¹³

4.8 Israeli Authorities Reluctance to Prosecute Military Personnel Responsible for Serious and Gross International Crimes

The unwillingness of Israeli authorities to investigate and prosecute individuals responsible for committing international crimes has been reflected in its decisions since its first military campaign in 2009 (Operation Cast Lead).

NGO Human Rights Watch (HRW) have previously reported that Israel has failed to conduct credible investigations into policies authorised by senior military leaders and politicians which led to violations of IHL, including the use of heavy artillery and phosphorous munitions being used in civilian populated areas.¹⁶¹⁴

Similarly, the decision by Israel's Military Advocate General Corps not to launch criminal investigations into some 65 cases of alleged misconduct by the IDF, during Operation Pillar of Defense, in the eight-day armed conflict in the Gaza Strip is another step which strengthens impunity.¹⁶¹⁵

The UN High Commissioner Navi Pillay commented on Israel's unwillingness to prosecute individuals of the IDF following the events of Operation Pillar of

¹⁶¹² n 1610 para 11.

¹⁶¹³ Ramesh Thakur, 'Law, Legitimacy and United Nations' (2010) 11 (1) Melbourne Journal of International Law 1, 10.

¹⁶¹⁴ 'Turning A Blind Eye: Impunity for Laws -of-War Violations During the Gaza War' (*Human Rights Watch*, 11 April 2010) <<https://www.hrw.org/report/2010/04/11/turning-blind-eye/impunity-laws-war-violations-during-gaza-war>> accessed 25 January 2020.

¹⁶¹⁵ 'Israel's Military Investigations into Gaza Conflict Violations Strengthen Impunity' (*Amnesty International*, 17 April 2013) <<https://www.amnesty.org/en/latest/news/2013/04/israels-military-investigations-into-gaza-conflict-violations-strengthen-impunity/>> accessed 25 January 2020.

Defense stating: 'With respect to rocket and mortar attacks from Gaza, information available also indicates that no adequate measures have been taken to carry out effective investigations into alleged violations'.¹⁶¹⁶

After the events of Operation Cast Lead, The IDF Chief of General Staff, Lieutenant General Gabi Ashkenazi approved and authorised a publication of an investigation which concluded the findings of five investigative teams regarding the IDF's conduct during Operation Cast Lead, these related to:

1. [I]ncidents where UN and international facilities were fired upon and damaged during Operation Cast Lead. The investigation was conducted by Colonel Itzik Turgeman.
2. Incidents involving shooting at medical facilities, buildings, vehicles and crews. The investigation was conducted by Colonel Erez Katz.
3. Claims regarding incidents in which many uninvolved civilians were harmed. The investigation was conducted by Colonel Tamir Yedai.
4. The use of weaponry containing phosphorous. The investigation was conducted by Colonel Shai Alkalai.
5. Damage to infrastructure and destruction of buildings by ground forces. The investigation was conducted by Colonel Adam Zusman.¹⁶¹⁷

The five investigative teams had concluded, throughout the fighting in Gaza the IDF operated in accordance with international law.¹⁶¹⁸ The IDF maintained a high professional and moral level, while facing an enemy that aimed to

¹⁶¹⁶ 'Statement by Navi Pillay, UN Commissioner for Human Rights at the Human Rights Council 21st Special Session: Human Rights Situation in the Occupied Palestinian Territory, including East Jerusalem' (*United Nations Human Rights Office of the High Commissioner*, 23 July 2014) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14893&LangID=E>> accessed 25 January 2020.

¹⁶¹⁷ 'IDF: Conclusion of Investigations into Claims in Operation Cast Lead-Part 1' (*Israel Ministry of Foreign Affairs*, 22 April 2009) <https://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Pages/IDF_Conclusion_of_investigations_Operation_Cast_Lead_Part1_22-Apr-2009.htm.aspx> accessed 25 January 2020.

¹⁶¹⁸ *ibid.*

terrorise Israeli civilians, whilst taking cover amidst uninvolved civilians in the Gaza strip and using them as human shields.¹⁶¹⁹

The investigations revealed a very small number of incidents in which intelligence or operational errors took place during the fighting.¹⁶²⁰ A similar decision was also rendered by the IHCJ.¹⁶²¹

Despite the evidence presented within the fact-finding mission (Goldstone Report)¹⁶²², including the UNHRC's concerns of the IDF's conduct as an occupying power towards Palestinian civilians in Gaza¹⁶²³ it appears there is no intention to adequately and genuinely investigate or prosecute individuals of the IDF for the serious international crimes which have been committed throughout the conflict.

The UNGA's call upon the Israeli government has also been ignored, demanding Israel take all appropriate steps, to undertake investigations that are independent, credible and in conformity with international standards into the serious violations of IHL and IHRL reported by the fact-finding mission, towards ensuring accountability and justice.¹⁶²⁴

In addition, the joint statement submitted by NGOs with special consultative status to the UNHRC in 2010, highlighted the Military Advocate General (MAG) served as a principal organ in deciding whether or not to investigate the IDF, finding:

[T]his system is open to manipulation, in that the MAG can allow investigations to proceed – to provide an illusion of investigative rigour – only to subsequently close them; it is believed that a number of procedures opened in the context of Operation Cast Lead fulfilled this exact purpose. In many cases, procedures appear to have been undertaken to show Israel's 'significant results'. However, these procedures reached standardised conclusions, which had been consistently iterated before any investigative procedure began, namely

¹⁶¹⁹ n 1617.

¹⁶²⁰ n 1617.

¹⁶²¹ *Yoav Hess et al v Chief of Staff* [2013] HCJ 4146/11 (9 July 2013).

¹⁶²² n 1579.

¹⁶²³ UNHRC Res S-12/1 (2009) UN Doc A/HRC/RES/S-12/1.

¹⁶²⁴ UNGA Res 64/10 (5 November 2009) UN Doc A/RES/64/10.

that: throughout the fighting in Gaza, the IDF operated in accordance with international law.¹⁶²⁵

The report further highlights the bias of the IHCJ in undertaking prosecutions stating:

[T]he HCJ awards an excessive margin of appreciation to the MAG and the Attorney General, particularly with respect to decisions which are based on an examination of the evidence, such as the decision to open or close an investigation. In effect this means that the scope of judicial review is extremely limited, negating the possibility of civilian oversight.¹⁶²⁶

The report summarises:

[T]hat this system is fundamentally flawed, and utilized to frustrate, and not further, accountability. The overwhelming majority of alleged violations simply have not been addressed; Israel has opened only 47 military police investigations, and approximately 103 operational debriefings. Most of these (flawed) procedures appear to have been closed without charge. Only 4 individuals have been indicted for Operation Cast Lead-related crimes: 1 individual for looting, 2 in relation to the use of a child as a human shield, and 1 for the shooting of individuals carrying white flags.¹⁶²⁷

States have obligations to ensure that their judicial systems and trial procedures comply with the existing international standards of criminal procedure.¹⁶²⁸ However, Israeli authorities have remained unwilling to investigate and prosecute soldiers and senior commanders for severe violations of IHL, which is prevalent following Operation Protective Edge in 2014.

A report published by the IDF entitled: 'Legal Divisions 5th report on 2014 Gaza War Crimes Probe' concluded the deaths of 49 civilians was deemed

¹⁶²⁵ UNHRC 'Joint Written Statement Submitted by the Palestinian Centre for Human Rights, Al Haq Law in the Service of Man, the Al-Mezan Centre for Human Rights, BADIL Resource Center for Palestinian Residency and Refugee Rights, Defence for Children International (DCI) and the Federation Internationale des Droits de l'Homme (FIDH), Non-Governmental Organizations in Special Consultative Status' (1 September 2010) UN Doc A/HRC/15/NGO/44, 3

¹⁶²⁶ *ibid* 4.

¹⁶²⁷ *n* 1625

¹⁶²⁸ Sascha Dominik Dov Bachmann and Eda Luke Nwibo, 'Pull and Push – Implementing the Complementarity Principle of the Rome Statute of the ICC Within the AU: Opportunities and Challenges' (2018) 43 (2) *Brook Journal of International Law* 457, 467.

legal. The Israeli authorities closed four cases of allegations which involved killing large numbers of Palestinian civilians. The Israeli military review of 360 incidents concluded 31 cases which led to full investigations, 13 have been closed and one case led to an indictment of theft.¹⁶²⁹

The results of this report demonstrate Israeli authorities' disinclination to prosecute IDF soldiers for the serious and grave crimes which have been committed throughout all three major counter-terrorism operations has encouraged a 'climate of endemic impunity'.¹⁶³⁰

Israeli authorities have a responsibility to investigate serious violations of IHL, but it appears the investigations which taken place have alluded the ICC's complementarity principle to avoid prosecuting IDF soldiers for more serious war crimes.¹⁶³¹

4.9 Justice, Palestine and the Shortcomings of both the UNSC and the ICC

The ICC has been restricted from exercising its jurisdiction automatically over Israel, since it is not party to the Rome Statute.¹⁶³² Thus, the alternative method for the court to obtain jurisdiction is possible if the UNSC refers the matter to the ICC.¹⁶³³

As discussed earlier in the thesis¹⁶³⁴ and in this chapter¹⁶³⁵, Israel's reliance on the political support and veto of the USA¹⁶³⁶ has effectively prevented any accountability and ICC intervention. This is the case despite the

¹⁶²⁹ Yonah Jeremy Bob, 'Israeli Military Clears Israeli Military of War Crimes in Gaza' (*Mondoweiss*, 25 August 2016) <<http://mondoweiss.net/2016/08/israeli-military-allegations/>> accessed 15/07/2017.

¹⁶³⁰ Ardi Imseis, 'State of Exception' (2020) 18 (4) JICJ 905, 910

¹⁶³¹ David Hughes, 'Investigation as Legitimation: The Development, Use and Misuse of Informal Complementarity' (2018) 19 (1) *Melbourne Journal of International Law* 84,86.

¹⁶³² Zachary Saltzman, 'Much Ado About Nothing: Non-Member State Status, Palestine and the International Criminal Court' (2016) 3 (2) *Journal of international and Comparative Law* 163, 164.

¹⁶³³ Rome Statute of the International Criminal Court [1998] art 13 (b).

¹⁶³⁴ Section 2.2.3 to n 572 in ch 2.

¹⁶³⁵ Section 4.7.2 to n 1592 in ch 4.

¹⁶³⁶ Jonathan R Beloff, 'Rwanda, Israel & Operation Protective Edge' (2016) 10 (1) *Israel Journal of Foreign Affairs* 103, 103.

recommendations and evidence presented in the 'Goldstone Report after Operation Cast Lead'.¹⁶³⁷

The former Prosecutor of the ICC Luis Moreno-Ocampo's decision in 2012, refused to accept jurisdiction over Palestine as the prosecutor's report concluded Palestine was not recognised as a state, even though the ICC prosecutor, rather oxymoronically, acknowledged that over 130 countries and some UN bodies recognised Palestine as a state.¹⁶³⁸

For a state to be 'recognised' in IL, the people's right to 'self-determination' to establish a state is required as a paramount principle of international legitimation.¹⁶³⁹ It must also pass certain qualifications particularly: 'a permanent population, a defined territory, a government and the ability to enter into relations with other states'.¹⁶⁴⁰

It is important to note that the size of a population is not a bar to statehood.¹⁶⁴¹ The ICJ in the *Western Sahara Case*¹⁶⁴² found that nomads in the western Sahara region were considered to be an established population.¹⁶⁴³

In terms of a defined territory, the ICJ in the *North Sea Continental Shelf Case*¹⁶⁴⁴ held that there is 'no rule that the land frontiers of a state must be fully delimited or defined'.¹⁶⁴⁵ This approach has been confirmed by:

¹⁶³⁷ n 1579.

¹⁶³⁸ Raji Sourani and Shawan Jabarin, 'Time for the ICC to Act on Palestine' (*Al-Jazeera*, 16 October 2013) <<https://www.aljazeera.com/indepth/opinion/2013/10/time-icc-act-palestine-20131015113944266410.html>> accessed 25 January 2020.

¹⁶³⁹ Uriel Abulof, 'We the Peoples? The Strange Demise of Self-Determination' (2015) 22 (3) *European Journal of International Relations* 536, 536.

¹⁶⁴⁰ Montevideo Convention on the Rights and Duties of States [1933] art 1.

¹⁶⁴¹ UNGA 'Report of the Special Committee with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial People' UN GAOR 65TH Session Supp No 23 UN Doc A/61/23 (2006).

¹⁶⁴² *Case Concerning Western Sahara Advisory Opinion (Western Sahara Case)* [1975] ICJ Rep 12.

¹⁶⁴³ *ibid* paras 63-64.

¹⁶⁴⁴ *Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands (North Sea Continental Shelf Case)* [1969] ICJ Rep 3

¹⁶⁴⁵ *ibid* para 33.

international arbitral tribunals¹⁶⁴⁶, German federal courts¹⁶⁴⁷ and the ICJ's predecessor the Permanent Court of International Justice.¹⁶⁴⁸

In addition, there is no requirement to follow a set structure, organisation or pattern of government¹⁶⁴⁹ as long as the state is independent, sovereign and has the capacity to enter into relations with other states. This means that a state should not be subject to the authority or control of another state in the handling of its foreign affairs.¹⁶⁵⁰

Thus, 'recognition' is imperative as the recognised entity acquires the legal status of a state under IL and subject of IL. On admission as a member of the United Nations, the new state then becomes part of the globally organised community of states by way of co-optation.¹⁶⁵¹

However, in 2011 Palestine sought recognition and pursued admission to the UN, which resulted in a draft resolution being vetoed by the USA in support of its ally Israel.¹⁶⁵²

The ICC has been unable to prosecute individuals in the IDF for serious international crimes that have been committed between 2009-2012, even after the findings of the Goldstone Report. Despite the plight of the international community and NGOs demanding investigations in the aftermath of atrocities, the ICC was unable to take the case because it had no jurisdiction over Israel as it is a non-signatory to the court's statute.¹⁶⁵³

The problematic nature of the veto privilege had again stunted any prospect of the ICC investigating the IDF's crimes in Operation Cast Lead and Pillar of

¹⁶⁴⁶ *Deutsche Continental Gas – Gessellschaft v Polish State* (1929-30) 5 Annual Digest of Public Int'l L 11, paras 14-15.

¹⁶⁴⁷ *Re Duchy of Sealand* [1978] 80 ILR 683, 685.

¹⁶⁴⁸ *Western Sahara Case* (n 1642) paras 43-44.

¹⁶⁴⁹ *The Island of Palmas Arbitration (Netherlands v United States)* (1928) 2 RIAA 829, paras 839.

¹⁶⁵⁰ John Duggard *International Law: A South African Perspective* (3rd edn, Cape Town: Juta and Co. Ltd 2006).

¹⁶⁵¹ Christian Hilgruber, 'The Admission of New States to the International Community' (1998) 9 (3) EJIL 491, 492.

¹⁶⁵² UNSC 'Report of the Committee on the Admission of the New Members Concerning the Application of Palestine for Admission to Membership in the United Nations' (11 November 2011) UN Doc S/2011/705.

¹⁶⁵³ Daniel Benoliel and Ronen Perry, 'Israel, Palestine and the ICC' (2010) 32 (1) Mich.J.Int'l L. 73, 75.

Defence, which can only be perceived as an instrumental catalyst designed to promote impunity.¹⁶⁵⁴

4.9.1 Palestinian Statehood, The ICC's Involvement Following Operation Protective Edge and New Developments and Obstacles Towards Unlikely Palestinian Justice

After the UNSC veto, the second biggest obstacle preventing ICC jurisdiction over Palestine was due to its lack of recognition as a state by the international community. However, the UNGA on 4th December 2012 recognised Palestine as a permanent non-member observer state.¹⁶⁵⁵

In addition, Palestinian Prime Minister Mahmoud Abbas (referred to as Abu Mazen) unified the Palestinian National Authority (PNA), Fatah and Hamas political groups to govern the Gaza Strip and establish a unitary government.¹⁶⁵⁶

In 2014, Palestine by acceding to the Four Geneva Conventions¹⁶⁵⁷ led many states to accept and recognise the 'State of Palestine' including: Sweden, UK, Spain, France, Ireland, Portugal and Italy as noted in the European Parliament (EP) resolution in 2014.¹⁶⁵⁸

Subsequently, on the 1st January 2015, Palestine declared its acceptance of the ICC jurisdiction since the 13th June 2014¹⁶⁵⁹ under article 12 (3) of the Rome Statute.¹⁶⁶⁰

¹⁶⁵⁴ Stuart Ford, 'The ICC and the Security Council: How Much Support is There for Ending Impunity' (2016) 26 (1) *Indiana International and Comparative Law* 33, 48.

¹⁶⁵⁵ UNGA Res 67/19 (4 December 2014) A/RES /67/19.

¹⁶⁵⁶ Longobardo (n 1520) 111.

¹⁶⁵⁷ Geneva Convention I: For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [1949], Geneva Convention II: For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces Sea [1949], Geneva Convention III: Relative to the Treatment of Prisoners of War [1949], and Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949].

¹⁶⁵⁸ European Parliament, European Parliament Resolution of 17 December 2014 on Recognition of Palestine Statehood, 2014/2964 (RSP), 17 December 2014.

¹⁶⁵⁹ 'Palestine Declares Acceptance of ICC Jurisdiction Since 13 June 2014' (*International Criminal Court*, 5 January 2015) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1080>> accessed 25 January 2020.

¹⁶⁶⁰ Rome Statute of the international Criminal Court [1998] art 12 (3).

On the 2nd January 2015, Palestine deposited the instrument of accession by state to join the Rome Statute, which the United Nations Secretary General Ban Ki Moon approved as depositary¹⁶⁶¹ to the Agreement on the Privileges and Immunities of the International Criminal Court (APIC) on 6th January 2015. On the 7th January 2015, the ICC registrar addressed a letter to the state of Palestine accepting this declaration.¹⁶⁶²

On the 16th January 2015, the ICC Prosecutor Fatou Bensouda began a preliminary examination into the alleged crimes committed by individuals and senior military figures which occurred throughout Operation Protective Edge.¹⁶⁶³

On the 20th December 2019, the Prosecutor at the end of her examination¹⁶⁶⁴ decided to proceed under article 53 of the Rome Statute¹⁶⁶⁵ to investigate the situation in Palestine having reasonable basis to believe war crimes had been committed by the IDF in the Gaza Strip, West Bank and East Jerusalem¹⁶⁶⁶ during Operation Protective Edge 2014.¹⁶⁶⁷

The Pre-Trial Chambers decision on the 5th February 2021, found that Palestine is a recognised state party to the Rome Statute and succumbs to the courts territorial jurisdiction allowing the prosecutor to investigate international crimes which have been committed by Israel.¹⁶⁶⁸

However, despite the decision being regarded as a ‘historic step towards justice’¹⁶⁶⁹, the prospects of pursuing Israeli nationals for war crimes and other

¹⁶⁶¹ Rome Statute of the International Criminal Court [1998] art 125 (3).

¹⁶⁶² The State of Palestine Accedes to the Rome Statute’ (*International Criminal Court*, 7 January 2015) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1082_2> accessed 25 January 2020.

¹⁶⁶³ *Situation in the State of Palestine* (Application for the Extension of Pages for Request Under Article 19 (3) of the Statute) ICC-01/18 (20 December 2019), para 93.

¹⁶⁶⁴ Rome Statute of the International Criminal Court [1998] art 15 (3).

¹⁶⁶⁵ Rome Statute of the International Criminal Court [1998] art 53 (1).

¹⁶⁶⁶ n 1663 para 1.

¹⁶⁶⁷ n 1663 para 94.

¹⁶⁶⁸ *Situation in State of Palestine* (Decision on the ‘Prosecution Request Pursuant to Article 19 (3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine’) ICC-01/18 (5 February 2021).

¹⁶⁶⁹ ‘Israel/OPT: ICC Investigation into War Crimes A Historic Step Towards Justice’ (*Amnesty International*, 20 December 2019) <<https://www.amnesty.org/en/latest/news/2019/12/israel-opt-icc-investigation-into-war-crimes-a-historic-step-towards-justice/>> accessed 25 January 2020.

international crimes committed throughout the 50-day war still seem unlikely and unrealistic.

This is because Israel's response to the prosecutor's decision to investigate the OPT has previously received a harsh response from the Israeli authorities refusing entry visas for ICC employees including revocation of the visa formerly held by Fatou Bensouda.¹⁶⁷⁰

This poses a striking resemblance and similarity to the USA as discussed earlier in the thesis¹⁶⁷¹ in preventing the ICC from investigating individuals of the USA and UK military/intelligence agencies who participated in the war in Afghanistan¹⁶⁷² which rendered the Pre-Trial Chamber of the ICC to deny the prosecutor's request for authorisation to conduct further investigations.¹⁶⁷³

The USA has previously threatened the ICC with financial sanctions and prosecutions against ICC staff in 2019, warning them not to conduct further investigations against its allies¹⁶⁷⁴ (including Israel). Since Israel is the occupying power, at present it controls the Gaza Strip, West Bank, Jerusalem and all of Palestine's borders, airspace and sea.¹⁶⁷⁵

Thus, Israel's unwillingness to co-operate with the prosecutor's investigation may prove to be a substantial barrier, preventing any prospect to carry out preliminary investigations including issuing and enforcing arrest warrants and initiating proceedings against Israeli citizens.

This seems highly credible and realistic, considering states which are party to the Rome Statute have refused to execute international arrest warrants issued

¹⁶⁷⁰ Oliver Holmes, 'Netanyahu Calls for Sanctions Over ICC War Crimes Investigation' *The Guardian* (Jerusalem, 21 January 2020) <<https://www.theguardian.com/world/2020/jan/21/netanyahu-calls-for-sanctions-over-icc-war-crimes-investigation-israel>> accessed 25 January 2020.

¹⁶⁷¹ Section 3.4 n 1314 in ch 3.

¹⁶⁷² 'US Threatens International Criminal Court' (*Human Rights Watch*, 15 March 2019) <<https://www.hrw.org/news/2019/03/15/us-threatens-international-criminal-court>> accessed 22/01/2020.

¹⁶⁷³ *Situation in the Islamic Republic of Afghanistan* (Decision Pursuant to Article 15 on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17 (12 April 2019).

¹⁶⁷⁴ n 1672.

¹⁶⁷⁵ Leila Farsakh, 'Independence Cantos or Bantustans: Whither the Palestinian State?' (2005) 59 (2) *Middle East Journal* 230, 244.

by the ICC and openly refused transferring individuals into ICC custody presenting a substantial challenge for the ICC in practice.¹⁶⁷⁶

Secondly, if member states of the UNSC attempt to enact a draft resolution and attempt to circulate it within the council, urging Israel to co-operate with the ICC prosecutor to enforce warrants issued against individuals, there remains a strong likelihood the USA would veto such a resolution, preventing any possibility of international criminal justice prevailing¹⁶⁷⁷ as demonstrated in the current and preceding chapters thus far.

Thirdly, if Israel decided to co-operate with the ICC in the prosecutor's investigation, it may invoke the complementarity principle to proceed with investigations and prosecutions domestically, rather than allowing the ICC to investigate and prosecute independently.

Thus, if Israel were to invoke the complementarity principle as discussed earlier in the chapter¹⁶⁷⁸, this may significantly reduce the prospect of any indictments, trials or prosecutions from international crimes from taking place, instead it may try only relatively minor offences as it has done so previously.

The USA has consistently abused its veto privilege contrary to the purpose and principles of the UNSC¹⁶⁷⁹ by vetoing draft resolutions for its ally Israel to help evade accountability and intervention by the UNSC to maintain international peace and security.

The veto has been a key instrument in preventing the UNSC from referring the situation in Palestine to the ICC to conduct preliminary investigations for war crimes and genocide, a privilege afforded under the UN Charter¹⁶⁸⁰ which

¹⁶⁷⁶ Thomas Weatherall, 'Inviolability Not Immunity: Re-Evaluating the Execution of International Arrest Warrants by Domestic Authorities of Receiving States' (2019) 17 (1) JICJ 45, 45.

¹⁶⁷⁷ Sarah M. H. Nouwen and Wouter G Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2011) 21 (4) EJIL 941, 956.

¹⁶⁷⁸ Section 2.3.1 to n 658 in ch 2.

¹⁶⁷⁹ Hannah Yu, 'Jus Cogens, The Veto and the Responsibility to Protect: A New Perspective' (2009) 7 New Zealand Yearbook of International Law 207, 244.

¹⁶⁸⁰ Charter of the United Nations [1945] art 27 (3).

contradicts the principle of *Jus Cogens* which also renders such privilege legally void and ineffective.¹⁶⁸¹

Previously, the Court of Justice of the European Union (CJEU) has confirmed the importance of the peremptory norm of *Jus Cogens* and its binding nature in both the *Yusuf*¹⁶⁸² and *Kadi*¹⁶⁸³ cases stating:

[I]nternational law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that might be, they would bind neither the Member States of the United Nations nor, in consequence, the community.¹⁶⁸⁴

In conclusion, the chapter has demonstrated the violations of IHL and CIL committed by the IDF in its three counter-terrorism campaigns against the terrorist threat posed by Hamas. The chapter has highlighted Israel's continued WOT has served as a means to use excessive force and violence against Palestinian civilians and civilian infrastructures in pursuit of counter-terrorism objectives, without any accountability.

This is mainly due to the USA's political support that it provides to Israel through the use of the veto, which has proven successful in preventing the UNSC in denying Palestinian statehood and preventing the council from holding individuals of Israel accountable, nor being able to interpose in any humanitarian situation which may arise from the IDF's counter-terrorism military operations further illustrating the reminiscence of *realpolitik*.¹⁶⁸⁵

In addition, Israel not ratifying the Rome Statute continues to benefit from the jurisdictional limitations of the ICC by shielding its nationals from the ICC, further hampering any prospect of accountability and justice to prevail.

¹⁶⁸¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina) (Provisional Measures)* [1993] ICJ Rep 325, para 104.

¹⁶⁸² Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council* [2005] ECR II-03533, para 281.

¹⁶⁸³ Case T-315/01 *Yasin Abdullah Kadi v Council* [2005] ECR II-03649, para 230.

¹⁶⁸⁴ *ibid.*

¹⁶⁸⁵ Eden Paul, 'II. Palestinian Statehood: Trapped Between Rhetoric and Realpolitik' (2013) 62 (1) ICLQ 225, 237.

This besmirches the reputation and credibility of both the UNSC and the ICC and further demonstrates the shortcomings and the limitations of both international organisations, as they are unable to fulfil their respective mandates.

The findings in this chapter reiterate the objective of thesis, which is to reform, remedy and improve both international organisations to hold states and the nationals of the P5 and their allies accountable for the severe violations of IL, IHL, CIL which have been committed in humanitarian and counter-terrorism operations.

The subsequent chapter of the thesis will also endeavour to assess the effectiveness of both institutions and their respective roles in response to the humanitarian disaster which has ensued from the decade long armed conflict and counter-terrorism efforts against the terrorist group ISIS by the Russian and Syrian forces and the separate campaign spearheaded by the USA and coalition allies in its continued GWOT.

Chapter 5 – The Syrian Arab Republic

The Syrian Arab Republic like the state of Palestine, has historically been subjected to western imperialism. The remnants of former French rule over the state have resulted in political instability and violence leading to the generational succession of authoritarian rule. The Syrian conflict which has advanced incessantly since the inception of the 'Arab Spring' protests and uprisings in 2011 is an example of the consequential effects of autocratic rule.

Despite the protests having a positive effect ending decades long authoritarian dictatorships in several Middle Eastern states, Syria has remained an exception to any such change as the state has descended into a violent territorial battlefield marred with chaos and turmoil.

The continuing Syrian conflict is relevant to the central argument of the thesis concerning the United Nations Security Council (UNSC) and the International Criminal Court (ICC) requiring significant improvements to respond expediently in humanitarian disasters and where the formidable threats of terrorism become apparent.

This chapter will further adduce and evidence the UNSC's inability to interject in the mass deaths and humanitarian crises resulting from the violence used by Syrian governmental forces against civilians under the command and authority of the current head of state Bashar Al-Assad with the military and political succour of Russia and China.¹⁶⁸⁶

The institutions shortcomings will also be demonstrated after the emergence of the terrorist group the Islamic State of Iraq and Syria (ISIS) acquiring and assuming significant territorial control in Syria, resulting in counter-terrorism operations being conducted by the Russian and Syrian forces and a separate campaign being conducted by the United States of America (USA) and coalition allies.

¹⁶⁸⁶ Jenna B. Russo, 'R2P in Syria and Myanmar: Norm Violation and Advancement' (2020) 12 (2) *Global Responsibility to Protect* 211, 218.

The substantial systematic violations of International law (IL), International Humanitarian Law (IHL), International Human Rights Law (IHRL) and Customary International Law (CIL) have been the direct result of the Russian and Syrian counter-terrorism efforts¹⁶⁸⁷, the USA's continuing 'global war on terror' (GWOT) and the unremitting and unrelenting hostilities between rival factions/terrorist groups seeking to assert and assume control over the war-torn state.¹⁶⁸⁸

Similar to the situation in Afghanistan, Iraq and Palestine, this has not prompted any accountability or ICC involvement for the international crimes which have been committed by individuals that are nationals of the permanent member states (P5) of the UNSC due to the frequent invocation of the veto privilege further exemplifying the limitations and impotence of both institutions.¹⁶⁸⁹

5.1 Background to the Conflict

Syria has a rich and longstanding history of conflict, violence and political regime change, thus in order to fully comprehend the present-day conflict, it is fundamental to review and observe Syria's political history as the state has been subjected to imperial and colonial rule.

The Ottoman Empire was the last great Muslim world empire to survive into the age of modernity, which struggled for survival towards the last quarter of the 19th century following external pressure from world powers.¹⁶⁹⁰

Throughout the early 19th and early 20th century, many Arab provinces fell under the domination of European rule and in the spoils of war were

¹⁶⁸⁷ Klearchos A. Kyriakides, 'Syria, Sarin and Cyprus: An Open Letter to the Prime Minister of the United Kingdom' (2020) 22 (3) *Journal of Balkan and Near Eastern Studies* 372, 378.

¹⁶⁸⁸ Michael M. Gunter, 'The October 2019 Turkish Incursion into the Kurdish Syria: Its Background and Broader Implications' (2020) XXVII (1) *Middle East Policy* 86, 86.

¹⁶⁸⁹ Kirsten J. Fischer, 'The Problem with the Crime of Forced Migration as a Loophole to ICC Jurisdiction' (2020) 11 (2) *Journal of International Humanitarian Legal Studies* 385, 398-399

¹⁶⁹⁰ Selim Deringil, 'They Live in a State of Nomadism and Savagery: The Late Ottoman Empire and The Post-Colonial Debate' (2003) 45 (2) *Comparative Studies in Society and History* 311, 311.

incorporated into empires.¹⁶⁹¹ The demise of the Ottoman Empire's rule after four centuries, led to Syria succumbing to French rule after World War I.¹⁶⁹²

French rule was granted by the League of Nations mandate in 1922¹⁶⁹³ which lasted until Syria gained independence in 1946.¹⁶⁹⁴ Syria's government then consisted of parliamentary and semi-parliamentary rule followed by 16 military coups which were staged between 1949-1970 with only nine being successful.¹⁶⁹⁵

The most successful *coup d'état* was observed in 1970 led by former Syrian defence minister Hafez al-Assad seizing power. Assad, a member of the Alawite religious minority and the socialist Ba'ath party, eventually held a referendum that solidified his position as president.¹⁶⁹⁶

The authoritarian regime of Hafez-Al-Assad was met with much contention by opposition groups such as the Syrian Muslim Brotherhood (SMB) an Islamic movement which advocated that Syria should be governed in accordance with Sunni ideology, as the predominant population of Syria were Sunni.¹⁶⁹⁷

Subsequently, the Assad regime introduced legislation which condemned membership to the SMB and prohibited affiliation and association with the group. Anyone aligning themselves with group would be punished to death.¹⁶⁹⁸

In 1982 the Assad regime responded to an uprising staged by the SMB with an 'iron-fisted military response'¹⁶⁹⁹, which has come to be known as the 'Hama

¹⁶⁹¹ J.P. Spagnolo, 'French Influence in Syria Prior To World War I: The Functional Weaknesses of Imperialism' (1969) 23 (1) Middle East Journal 45, 45.

¹⁶⁹² Phillip S. Khoury, 'Continuity and Change in Syrian Political Life: The Nineteenth and Twentieth Centuries' (1991) 96 (5) American Historical Review 1374, 1374.

¹⁶⁹³ Ayse Tekdal Fildis, 'The Troubles in Syria: Spawned by French Divide and Rule' (2011) 18 (4) Middle East Policy 129, 136.

¹⁶⁹⁴ Eliezer Be'eri, 'The Warning of Military Coup in Arab Politics' (1982) 18 (1) Middle Eastern Studies 69, 69.

¹⁶⁹⁵ Amos Perlmutter, 'From Obscurity to Rule: The Syrian Army and the Ba'th Party' (1969) 22 (4) Western Political Quarterly 827, 827.

¹⁶⁹⁶ David Wallace, Amy McCarthy and Shane R. Reeves, 'Trying to Make Sense of the Senseless: Classifying the Syrian War Under the Law of Armed Conflict' (2017) 25 (3) Michigan State Law Review 555, 557-558.

¹⁶⁹⁷ Yvette Talhamy, 'The Syrian Uprising: The Muslim Brotherhood Reborn' (2012) 19 (2) Middle East Quarterly 33, 34.

¹⁶⁹⁸ Emergency Law Issued Through Legislative Degree No.15 [1980] Law Number 49.

¹⁶⁹⁹ S.Edward Boxx, 'Observations On The Air War In Syria' (2013) 27 (2) Air & Space Power Journal 147, 150.

Massacre'¹⁷⁰⁰ which lasted 27 days and resulted in the deaths of 20,000 people consisting mainly of civilians, women and children.¹⁷⁰¹

Two decades later, the death of Hafez-Al-Bashar in 2000 led to presidency of his son Bashar Al-Assad following the decision of a referendum vote.¹⁷⁰² The expectation of the Syrian public was that the new regime would usher a period of reform. Instead, economic policies were introduced to benefit the minority Alawite population as opposed to the majority Sunni Muslim population leading to further civil unrest, violence and political protests which was swiftly and harshly curtailed by the Assad regime.¹⁷⁰³

The government held firm control of the Syrian state, until one of the most significant events of the Middle East¹⁷⁰⁴ ushered in new forms of political articulation and significantly new forms of political practice taking root in the Arab world.¹⁷⁰⁵

This was the 'Arab Spring' uprisings which were the concomitant outcome of Tunisian fruit seller Mohamed Bouazizi dousing oil on himself and fatally immolating himself on the 17th December 2010.¹⁷⁰⁶ His death sparked an unstoppable torrent of protests across the North African and Middle Eastern region.¹⁷⁰⁷

¹⁷⁰⁰ Dara Conduit, 'The Syrian Muslim Brotherhood and the Spectacle of Hama' (2016) 70 (2) Middle East Journal 211, 211.

¹⁷⁰¹ Jon Lee Anderson, 'The War Within' *The New Yorker* (New York, 20 August 2012) <<https://www.newyorker.com/magazine/2012/08/27/the-war-within-2>> accessed 26 January 2020.

¹⁷⁰² Joshua Stacher, 'Reinterpreting Authoritarian Power: Syria's Hereditary Succession' (2011) 65 (2) Middle East Journal 197, 197-198.

¹⁷⁰³ Wallace, McCarthy and Reeves (n 1557) 558-559.

¹⁷⁰⁴ Peter Jones, 'The Arab Spring: Opportunities and Implications' (2012) 67 (2) International Journal 447, 447.

¹⁷⁰⁵ Tarik Ahmed Elseewi, 'A Revolution of Imagination' (2011) 5 International Journal of Communication 1197, 1197.

¹⁷⁰⁶ Aaron Brady, 'Spectators to the Revolution: Western Audiences and the Arab Spring's Rhetorical Consistency' (2012) 52 (1) Cinema Journal 137, 137.

¹⁷⁰⁷ Ufuophu-Biri Emmanuel and Ojoboh Lucky, 'Social Media as a Tool for Political Resistance: Lessons from the Arab Spring and the Nigerian Protests' (2017) 6 (1) Academic Journal of Interdisciplinary Studies 61, 61.

Initially, this led to the rapid downfall of the Tunisian authoritarian government of Zine El-Abidine Ben Ali and his regime on the 14th January 2011.¹⁷⁰⁸

At the outset of 2011, the 'Arab Spring' hit global headlines¹⁷⁰⁹, effectuating constitutional change in Tunisia, reviving a long-established system of rule in Egypt and initiated an internationalised civil war in Yemen and continued demands for reform in monarchical states including Morocco, Jordan, Bahrain and Saudi Arabia.¹⁷¹⁰

The 2011 Arab Springs also triggered the civil war in Syria as the current authoritarian dictatorship of Bashar Al-Assad led to significant economic and social deterioration and human rights abuses. The increased level of violence and humanitarian disaster was the result of anyone that opposed the regime as they were branded as terrorists and met with a harsh military response.¹⁷¹¹

The current Assad regime's response to the peaceful Syrian protests at the height of the Arab Springs in 2011 is comparable to its predecessor's response which resulted in over 20,000 people being killed at the hands of Syrian forces in the 'Hama Massacre'.¹⁷¹²

The Assad regime has continued to use the state military and enlisted the support of Russia to remain in political power and control. The Russian and Syrian forces have unleashed devastating violence upon the civilian population¹⁷¹³, branding the Syrian civil war as 'one of the worst humanitarian

¹⁷⁰⁸ Fadhel Kaboub, 'The Making of the Tunisian Revolution' (2013) 5 (1) Middle East Development Journal 1350003-1, 1350003-1.

¹⁷⁰⁹ Karamatullah K. Ghori, 'The Arab Spring: How Will It Blossom?' (2011) 64 (3) Pakistan Horizon 13, 13.

¹⁷¹⁰ Adam Roberts, 'The Fate of the Arab Spring: Ten Propositions' (2018) 12 (3) Asian Journal of Middle Eastern and Islamic Studies 273, 273.

¹⁷¹¹ Mahdi Karimi, 'Poor Governance and Civil War in Syria' (2018) 5 (1) Turkish Journal of Middle Eastern Studies 49, 67.

¹⁷¹² Dara Conduit, 'The Syrian Muslim Brotherhood and the Spectacle of Hama' (2016) 70 (2) Middle East Journal 211, 211.

¹⁷¹³ Xu Zhang and Catherine A. Cluster, 'Transnational News Media Coverage of Distant Suffering in the Syrian Civil War: An Analysis of CNN, Al-Jazeera English and Sputnik Online News' (2020) 13 (4) Media, War and Conflict 399, 412.

disasters¹⁷¹⁴ of the 'twenty-first century'¹⁷¹⁵ rendering any chance of democracy remaining a distant and unlikely outcome.¹⁷¹⁶

5.2 The Syrian Civil War

The Syrian civil war that began in March 2011 with peaceful protests for reform and civil rights transpired into a militarised confrontation¹⁷¹⁷, which was triggered after the governmental detention and torture of a group of teenage boys¹⁷¹⁸ who had written anti-regime governmental graffiti in the southern city of Deraa.¹⁷¹⁹

They were arrested, held for days and tortured, which prompted local demonstrations that called for their release. Peaceful protests rapidly spread across Syria as the focus shifted to the regime of President Bashar Al-Assad. As the marches gained momentum, the regime unleashed its military firepower¹⁷²⁰ which resulted in the death of several demonstrators.¹⁷²¹

Violence escalated and the country descended into civil war as rebel brigades were formed to battle government forces for control of cities, towns and the countryside. Fighting reached the capital of Damascus and the city of Aleppo in 2012.¹⁷²²

¹⁷¹⁴ Miriam Orcutt et al, 'International Failure in Northwest Syria: Humanitarian Health Catastrophe Demands Action' (2019) 394 (10193) *The Lancet* 100, 100.

¹⁷¹⁵ Manar Nabolsi et al, 'The Health-Related Quality of Life of Syrian Refugee Women in their Reproductive Age' (2020) 8 *PeerJ* 1, 1.

¹⁷¹⁶ Benedict Doherty, Xavier Mathieu and Jason Ralph, 'R2P and the Arab Spring: Norm Localisation and the US Response to the Early Syria Crisis' (2020) 12 (3) *Global Responsibility to Protect* 246, 257-258.

¹⁷¹⁷ Scott Lucas, 'A Beginners Guide to Syria's Civil War' (2016) 7 (1) *Political Insight* 12, 12.

¹⁷¹⁸ Dustin Johnson, Shelly Whitman and Hannah Sparwasser Soroka, 'Prevent to Protect: Early Warning, Child Soldiers and the Case of Syria' (2018) 10 (1-2) *Global Responsibility to Protect* 239, 249-250.

¹⁷¹⁹ Jonah Schulhofer-Wohl, 'On-Side Fighting Civil War: The Logic of Mortal Alignment in Syria' (2020) 32 (4) *Rationality and Society* 402, 414.

¹⁷²⁰ Mona Yacoubian, 'Syria Timeline: Since the Uprising Against Assad' (*United States Institute for Peace*, 2 July 2019) <<https://www.usip.org/publications/2019/02/syria-timeline-uprising-against-assad>> accessed 26 January 2020.

¹⁷²¹ Lucy Rodgers, David Gritten, James Offer and Patrick Assare, 'Syria: The Story of the Conflict' (*BBC News*, 11 March 2016) <<http://www.bbc.co.uk/news/world-middle-east-26116868>> accessed 26 January 2020.

¹⁷²² *ibid.*

As the government lost territory in 2013, Lebanon's Hezbollah openly deployed its fighters and the Iranian Revolutionary Guard Corps (IRGC) dispatched military advisors to support the Assad government.¹⁷²³

The joint collaboration between the Arab League and the UN's response to the ongoing violence in Syria led to Kofi Annan presenting his six-point peace plan to end Syria's escalating conflict to the UNSC on the 16th March 2012.¹⁷²⁴

By 2013, Annan resigned as the envoy of the UN, however, the chances of success diminished month after month, while the number of war dead in Syria had risen from considerably fewer than 10,000 in March 2012 to over 70,000 twelve months later. The Annan plan was considered to be a failure.¹⁷²⁵ Shengxiang and Hui have commented on Syrian conflict, stating:

[T]he conflicts between the Syrian government and the opposition have threatened regional and global security and stability for several years since 2011. It is not only a domestic political problem, but also an international crisis with sectarian conflicts, intervention of Great powers, and terrorism intertwined.¹⁷²⁶

In 2014, the emergence of the terrorist organisation known as the Islamic State of Iraq and Syria (ISIS) claimed roughly a third of Syrian territory, which has been argued to have occurred due to the power vacuum created by the upheaval of the 2011 Arab Spring uprisings and the ensuing civil war.¹⁷²⁷ Meanwhile, moderate rebel groups fighting the government were increasingly eclipsed by extremist factions, further intensifying the violence and conflict.¹⁷²⁸

ISIS has been reported to have carried out indiscriminate attacks on civilians, in certain instances reportedly through the use of chemical agents,

¹⁷²³ Yacoubian (n 1720).

¹⁷²⁴ Richard Gowen, 'Kofi Annan, Syria and the Uses of Uncertainty in Mediation' (2013) 2 (1) *Stability* 1, 1.

¹⁷²⁵ *ibid.*

¹⁷²⁶ Liu Shengxiang and He Hui, 'China's Solution to Security Governance in the Middle East: An Assessment (2017) 11 (4) *Asian Journal of Middle Eastern and Islamic Studies* 32, 36.

¹⁷²⁷ Waleed Hazbun, 'A History of Insecurity: From Arab Uprisings to ISIS' (2015) XXII (3) *Middle East Policy* 55, 63-65.

¹⁷²⁸ Yacoubian (n 1720).

perpetrating numerous unlawful killings and subjecting thousands of women and girls to sexual slavery and other abuses. USA-led coalition forces carried out attacks against ISIS, which also discriminately led to the deaths of many civilians.¹⁷²⁹

Between 2015-2018, the Russian and Syrian forces increased their military presence in the Syrian conflict deploying some of its most sophisticated weaponry and air defence systems, aiding the recapture of major cities from ISIS and armed factions such as Aleppo and Daraa including the western regions of Syria.¹⁷³⁰

Amnesty International has deplored the international community's failure to interpose in the brutality exerted by Russian and Syrian forces at the behest of the Assad regime, by directing and indiscriminately attacking the civilian population causing further destruction to the economy and environment of Syria.¹⁷³¹

The Syrian civil war has adversely impacted and destabilised the Middle Eastern region as the hostilities have displaced millions of Syrians, whilst large areas have been depopulated suffering from a degraded rule of law and severe humanitarian hardship, providing the ideal staging ground for terrorist organisations.¹⁷³²

The UNHRC established an Independent Commission of Inquiry on the Syrian Arab Republic by virtue of resolution S-17/1¹⁷³³ to investigate all alleged violations since March 2011 in the Syrian Arab Republic. In its 2019 report, the

¹⁷²⁹ 'Amnesty International Report 2017/2018: The State of the World's Human Rights' (*Amnesty International*, 22 February 2018) <<https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF>> accessed 26 January 2020.

¹⁷³⁰ Yacoubian (n 1720).

¹⁷³¹ 'Syria: Flagrant War Crimes Being Committed in Eastern Ghouta' (*Amnesty International*, 20 February 2018) <<https://www.amnesty.org.uk/press-releases/syria-flagrant-war-crimes-being-committed-eastern-ghouta>> accessed 26 January 2020.

¹⁷³² Magnus Lundgren, 'Mediation in Syria: Initiatives, Strategies and Obstacles 2011 – 2016' (2016) 37 (2) *Contemporary Security Policy* 273, 273.

¹⁷³³ UNHRC 'The Human Rights Situation in the Syrian Arab Republic' (22 August 2011) UN Doc A/HRC/S-17/1 para 12.

independent commission had found all parties to the ongoing Syrian conflict, continued to employ tactics that violated basic principles of IHRL and IHL.¹⁷³⁴

The Syrian civil war and its continued violence has had far reaching effects across states and the international community as internally displaced Syrians have fled the war-torn state due to the excessive deaths and torture of civilians. The flow of millions of refugees has also adversely affected the rhetoric of far-right groups in Europe.¹⁷³⁵

The up-to-date figures published in January 2020 by the United Kingdom based monitoring group, the Syrian Observatory for Human Rights (SOHR) suggests 585,000 have been killed of which 115,490 civilians including women and children have been killed in the decade long conflict.¹⁷³⁶

The UNCHR has reported that the ongoing conflict has internally displaced 6.6 million people with 5.6 million people escaping Syria in search of safety.¹⁷³⁷ This humanitarian crisis has been branded the 'Syrian Refugee Crisis'¹⁷³⁸ and it has been described for being the 'epitome of a health and humanitarian crisis, constituting the largest displacement crisis in the world.'¹⁷³⁹

Indeed, the influx of refugees has placed enormous strain on its neighbouring countries, with Jordan, Lebanon, and Turkey shouldering the largest burden.¹⁷⁴⁰

¹⁷³⁴ UNHRC 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (15 August 2019) UN Doc A/HRC/42/51.

¹⁷³⁵ Ingrid Habets, 'Obstacles to A Syrian Peace: The Interference of Interests' (2016) 15 (1) *European View* 77, 78.

¹⁷³⁶ 'Nearly 585,000 People Have Been Killed Since the Beginning of the Syrian Revolution' (*Syrian Observatory for Human Rights*, 4 January 2020) <<https://www.syriahr.com/en/152189/>> accessed 03 March 2021.

¹⁷³⁷ 'Syria Emergency' (*UNCHR*, 19 April 2018) <<https://www.unhcr.org/uk/syria-emergency.html>> accessed 26 January 2020.

¹⁷³⁸ Sarah Kenyon Lischer, 'The Global Refugee Crisis: Regional Destabilization and Humanitarian Protection' (2017) 146 (4) *Daedulus* 85, 85.

¹⁷³⁹ Rahma Aburas, Amina Najeeb, Laila Baageel and Tim K Mackay, 'The Syrian Conflict: A Case Study of the Challenges and Acute Need for Medical Humanitarian Operations for Women and Children Internally Displaced Persons' (2018) 16 (1) *BMC Medicine* 65, 66.

¹⁷⁴⁰ Nicole Ostrand, 'The Syrian Refugee Crisis: A Comparison of Responses by Germany, Sweden, The United Kingdom and the United States' (2015) 3 (3) *Journal on Migration and Human Security* 255, 256.

Moreover, the relentless violence by Russian and Syrian forces which have led experts in Global Affairs such as Professor Mason to argue:

[T]he intervention of external actors and foreign fighters, has caused the greatest humanitarian crisis since the second World War and a new wave of refugees seeking asylum in the European Union (EU), along with other economic migrants.¹⁷⁴¹

The impact of the Syrian Refugee Crisis has affected states globally as the conflict has progressively escalated, with more than four million refugees residing in bordering countries such as Turkey, Lebanon, Jordan and Iraq. A further 797,605 refugees have been recorded in the European Union, 10,000 in the USA and 30,000 in Canada.¹⁷⁴²

The blatant disregard for IHL, IHRL and CIL is reflected by the catastrophic civilian casualties to date as much of the violence is largely attributed to the Russian, Syrian and Iranian forces using prohibited weapons, indiscriminate attacks, and placing restrictions on humanitarian aid forcing anti-government groups to surrender in these areas, resulting in mass displacement.¹⁷⁴³

Anti-government groups and non-state terrorist organisations such as ISIS and Hay'at Tahrir Al-Sham (an Al-Qaeda affiliate) have also been involved in kidnapping, executions, assassinations and bombings within Idlib and Raqqa, leading to a response by the Syrian Democratic Forces (SDF) and its ally the USA.¹⁷⁴⁴

¹⁷⁴¹ Robert Mason, 'The Syria Conflict and the Euro-Med Refugee Crisis: An Opportunity to Enhance the Common Foreign and Security Policy' (2018) 23 (1) *European Foreign Affairs Review* 81, 81.

¹⁷⁴² Srividya Ramasubramanian and Caitlin Miles, 'Framing the Syrian Refugee Crisis: A Comparative Analysis of Arabic and English News Sources' (2018) 12 *International Journal of Communication* 4488, 4489.

¹⁷⁴³ 'Syria Events of 2018' (*Human Rights Watch*) <<https://www.hrw.org/world-report/2019/country-chapters/syria>> accessed 26 January 2020.

¹⁷⁴⁴ *ibid.*

5.2.1 Alliances and Oppositions, State and Non-State Actors: Prevailing the Confusion of the Power Struggle in the Syrian Civil War

At present, the ongoing Syrian civil war has entered its tenth year, yet the horrors of the conflict have continued to remain at the forefront of media and academic discourse, considering its prolonged continuation and devastating ferocity.¹⁷⁴⁵

Syria's political difficulties and continuing civil war are attributed by complex interrelated factors, including: religious, sociopolitical tensions and the erosion of the economic health of the country.¹⁷⁴⁶ Whilst many narratives of Syria's war have only emphasised the conflict, mainly through the prisms of military strategy, weapons supply, territorial control and external alliances.¹⁷⁴⁷

Indeed, the Syrian civil war has observed many armed groups and militias contributing to the mass atrocities which have ensued, notably the rise and fall of ISIS, the largest refugee migration since World War II and chemical weapon attacks by Russian and Syrian forces.¹⁷⁴⁸

It has been estimated that over 1500-armed groups and militias are active in the Syrian conflict with governmental air, naval and ground forces are estimated to be 100,000 – 125,000.¹⁷⁴⁹

Considering the large number of armed groups operating throughout the Syrian conflict, it is important to understand the main actors and non-state actors which have partaken in an attempt to assume control and regain control of Syrian territory which has resulted in multiple violations of IHL and CIL throughout the conflict.

¹⁷⁴⁵ Jonah Schulhofer-Wohl, 'Syria, Productive Antinomy, and The Study of Civil War' (2018) 16 (4) *Perspectives on Politics* 1085, 1085.

¹⁷⁴⁶ Peter H. Gleick, 'Water, Drought, Climate Change, and Conflict in Syria' (2014) 6 (3) *Water, Climate and Society* 331, 331.

¹⁷⁴⁷ Jose Ciro Martinez and Brent Eng, 'Struggling to Perform the State: The Politics of Bread in the Syrian Civil War' (2017) 11 (2) *International Political Sociology* 130, 130.

¹⁷⁴⁸ Michael P. Scharf, 'Striking A Grotian Moment: How Syria Airstrikes Changed International Law Relating to Humanitarian Intervention' (2019) 19 (2) *Chicago Journal of International Law* 586, 588.

¹⁷⁴⁹ Terry D Gill, 'Classifying the Conflict in Syria' (2016) 92 *International Law Studies* 353, 354-355.

Primarily, Bashar Al-Assad's Syrian Government and its Syrian Arab Army (SAA), have been supported by the pro-government militia the National Defense Force (NDF), the Lebanese Shiite militia Hezbollah (also considered to be a terrorist group)¹⁷⁵⁰ as well as Iraqi and Afghani Shiite militias fighting alongside pro-government forces.¹⁷⁵¹

In opposition to the Assad Regime, the secular Islamist group known as the Free Syrian Army (FSA) also known as the Islamic Front. The FSA emerged from the early stages of the anti-government insurgency in 2011 and is partly comprised of former members of the armed forces. The Islamic Front is represented by the Syrian Coalition Authority as well as being deemed the legitimate representative of the Syrian people by 80 states including: the European Union and represented by the Arab League.¹⁷⁵²

Moreover, the two main terrorist organisations and groups in opposition to the Assad regime include: ISIS and Al-Nusra, both Jihadist groups are associated with the Al Qaeda movement in Iraq. Al-Nusra and its coalition of allies has been opposed to the government with an objective to overthrow the present government and establish a Salafist theocratic government.¹⁷⁵³ In 2019 Al-Nusra, has collaborated with several jihadist groups and renamed itself Hay'at Tahrir Al-Sham (HTS).¹⁷⁵⁴

ISIS a self-proclaimed caliphate endeavored to overthrow the Syrian government to form an ultra-radical Salafist state. Since 2014, the group has controlled large swathes of territory in Syria and Iraq and established headquarters in Raqqa. ISIS has directly fought with Russian/Syrian forces and also the Kurdish and Iraqi forces with the military support of the USA.¹⁷⁵⁵

ISIS managed to seize territory in Iraq due to its coordinated expansion and ability to administer a large-scale military operation, which led to the capture

¹⁷⁵⁰ Section 4.2 to n 1409 in ch 4.

¹⁷⁵¹ Gill (n 1749) 356.

¹⁷⁵² Gill (n 1749) 357.

¹⁷⁵³ Gill (n 1749) 358.

¹⁷⁵⁴ 'Syria: Who's in Control of Idlib?' (*BBC News*, 22 June 2019) <<https://www.bbc.com/news/world-45401474>> accessed 26 January 2020.

¹⁷⁵⁵ Gill (n 1749) 359.

of cities such as: Mosul, Samarra, Fallujah and Tikrit and even threatened to march on Baghdad, leading Iraqi Security Forces to flee the area.¹⁷⁵⁶

The spread of ISIS is seen not only as something tangible in terms of the territory seized in Iraq, Libya and Syria, but also intangible in terms of the power and influence it has over people and groups through its propaganda efforts.¹⁷⁵⁷

However, the efforts of the USA and its coalition forces including the Kurdish Peoples Protection Unit (YPG) a branch of the outlawed Kurdistan Workers Party (PKK) is considered a terrorist organisation by Turkey.¹⁷⁵⁸

Since 2015, the YPG and the SDF have successfully fought against ISIS with the military support of the USA-led coalition, as they managed to regain control of ISIS strongholds in both Iraq and Syria.¹⁷⁵⁹ The USA coalition and Kurdish forces are believed to have destroyed ISIS headquarters and its caliphate in October 2017 after seizing Raqqa.¹⁷⁶⁰

The Kurdish administration have detained and imprisoned foreign national ISIS fighters, their spouses who are also foreign nationals mainly from European states and their children. Many of these individuals have been kept at the Al-Hol detention camp in Northern Syria due to their affiliation with ISIS.¹⁷⁶¹

The remainder of the chapter will analyse in depth the violations of IHL and CIL throughout the Syrian conflict by the Russian and Syrian forces to regain

¹⁷⁵⁶ Tomas Kavalek, 'From Al Qaeda In Iraq to Islamic State: The Story of Insurgency in Iraq and Syria in 2003 – 2015 (2015) 14 (1) *Alternatives: Turkish Journal of International Relations* 1, 2.

¹⁷⁵⁷ Greg Simons, 'Brand ISIS: Interactions of The Tangible and Intangible Environments' (2018) 17 (4) *Journal of Political Marketing* 322, 339.

¹⁷⁵⁸ Fionn Skiotis, 'Syria's Kurds Deserve International Protection' *The Guardian* (London, 22 February 2019) <<https://www.theguardian.com/world/2019/feb/22/syrias-kurds-deserve-international-protection>> accessed 26 January 2020.

¹⁷⁵⁹ *ibid.*

¹⁷⁶⁰ Jason Burke, 'Rise and Fall of ISIS: Its Dream Of A Caliphate Is Over, So What Now?', *The Guardian* (London, 21 October 2017) <<https://www.theguardian.com/world/2017/oct/21/isis-caliphate-islamic-state-raqqa-iraq-islamist>> accessed 26 January 2020.

¹⁷⁶¹ Ana Luquerna, 'The Children of ISIS: Statelessness and Eligibility for Asylum Under International Law' (2020) 21 (1) *Chicago Journal of International Law* 148, 148-149.

control of Syrian territory in addition to the USA-led coalition and its illegal conduct in continuing its GWOT against ISIS.

In highlighting the above, the UNSC will also be scrutinised for its inability to interpose in the dire humanitarian situation in Syria and the organisations handicaps in being able to hold the P5 accountable for the international crimes and mass atrocities their nationals have committed. The limitations of the ICC and its inability to interpose in the conflict will also be demonstrated throughout the remainder of the chapter.

5.2.2 The Violations Committed by Russian and Syrian Forces in the Syrian Civil War

The Syrian civil war is a NIAC as the SAA with the support of Russian forces have fought ISIS¹⁷⁶², rebel factions and other terrorist groups to regain Syrian territory from them.¹⁷⁶³

The test to confirm this is contained in the case of, *Prosecutor v Tadić* where the court stated: ‘an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’.¹⁷⁶⁴

The Russian Air Force began bombing opposition rebel targets within Syria in late September 2015, these airstrikes have succeeded in drastically shifting the momentum of the war in the Assad regime’s favour as the SAA and pro-Assad paramilitary fighters in the NDF have advanced on multiple fronts with the support of Russian air support.¹⁷⁶⁵

¹⁷⁶² Brian Glyn Williams and Robert Souza, ‘Operation Retribution: Putin’s Military Campaign in Syria, 2015-16’ (2016) XXIII (4) Middle East Policy 42, 42.

¹⁷⁶³ Fernando R. Teson, ‘The Case of Armed Intervention Against the Islamic State of Iraq and Syria’ (2016) 21 (2) The Independent Review 181, 191.

¹⁷⁶⁴ *Prosecutor v Dusko Tadić* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995), para 70.

¹⁷⁶⁵ Brendan Delany, ‘Just Wars with Unjust Allies: Use of Force and Human Rights Considerations on the Russian Intervention in Syria’ (2017) 26 (2) Minnesota Journal of International Law 561, 567.

However, the cost of reclaiming Syrian territory has resulted in significant damage to Syria's economic infrastructure, and systematic widespread gross violations of human rights resulting in substantial civilian deaths by the Assad regime and its ally Russia.¹⁷⁶⁶

In 2016, The United Nations Human Rights Council (UNHRC) has identified Russian forces, SAA, pro-government forces and ISIS have frequently bombarded densely populated civilian cities¹⁷⁶⁷ often administering bombing campaigns directed towards hospitals¹⁷⁶⁸ and schools.¹⁷⁶⁹

The UNHRC has also established governmental forces have raped and committed acts of sexual violence against women and children in detention centres.¹⁷⁷⁰ Both Russian forces and the SAA have demonstrated a repeated pattern of bombing healthcare facilities and hospitals which has been documented by local surveillance teams using satellite technology and social media.¹⁷⁷¹

IHL's objective is to mitigate 'the conduct of both states and individuals during armed conflict and seeks to minimise suffering in war by protecting persons not participating in hostilities and by restricting the means and methods of warfare'.¹⁷⁷² The International Court of the Former Yugoslavia (ICTY) in the *Tadić case* stresses the fundamental importance to protect civilian lives in armed conflict.¹⁷⁷³

However, it seems throughout the Syrian civil war, Russian forces and the SAA in fighting armed rebel opposition groups and terrorists (ISIS) have used this as an excuse to carry out indiscriminate aerial bombing campaigns without

¹⁷⁶⁶ UNHRC Res 32 (28 June 2016) UN Doc A/HRC/32/L.9.

¹⁷⁶⁷ UNHRC, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (11 August 2016) UN Doc A/HRC/33/55, paras 21-26.

¹⁷⁶⁸ *ibid* paras 50-51.

¹⁷⁶⁹ *n* 1767 para 124.

¹⁷⁷⁰ *n* 1767 paras 105-108.

¹⁷⁷¹ Sayaka Ri, Alden H Blair, Chang Jun Kim and Rohini J Haar, 'Attacks on Healthcare Facilities as An Indicator of Violence against Civilians in Syria: An Exploratory Analysis of Open Source Data' (2019) 14 (6) PLOS ONE 1, 2

¹⁷⁷² Laurie R Blank, 'Understanding When and How Domestic Courts Apply IHL' (2011) 44 (1) *Case W.Res.J.Int'l L.* 205, 205.

¹⁷⁷³ *Prosecutor v Dusko Tadić* (Judgement in Sentencing Appeals) IT-94-1-A (26 January 2000).

precaution, which has resulted in alarming numbers of civilian casualties and deaths particularly in the Aleppo region.¹⁷⁷⁴

A further example of Russian forces and the SAA's destruction of civilian infrastructures can also be observed in the northern region of Idlib controlled by armed rebels.¹⁷⁷⁵ The UNHRC report in 2018 identified frequent attacks being carried out in the region as well as human rights violations against civilians including: arbitrary arrests¹⁷⁷⁶, enforced disappearances¹⁷⁷⁷, torture¹⁷⁷⁸ all of which have caused deaths.¹⁷⁷⁹

The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) prohibits any individual being subject to enforced disappearance¹⁷⁸⁰ which includes arrest, detention, abduction or any other form of deprivation of liberty.¹⁷⁸¹

This approach has been confirmed in various IHRL decisions by the UN Human Rights Committee¹⁷⁸², the Inter-American Court of Human Rights¹⁷⁸³ and other regional instruments.¹⁷⁸⁴ Syria has not ratified the ICPPED;

¹⁷⁷⁴ UNHRC Res S-25/L.1 (20 October 2016) UN Doc A/HRC/S-25/L.1.

¹⁷⁷⁵ Jose Ciro Martinez, 'Stifling Stateness: The Assad Regime's Campaign Against Rebel Governance' (2018) 49 (4) Security Dialogue 235, 235-237.

¹⁷⁷⁶ UNHRC, Thirty-Seventh Session 26 February-23 March 2018 'Report of the Independent Commission of Inquiry on the Syrian Arab Republic' (1 February 2018) UN Doc A/HRC/37/72 para 18.

¹⁷⁷⁷ *ibid* para 10.

¹⁷⁷⁸ n 1776 para 65.

¹⁷⁷⁹ n 1776 para 18.

¹⁷⁸⁰ International Convention for the Protection of All Persons from Enforced Disappearance [2006] art 1.

¹⁷⁸¹ International Convention for the Protection of All Persons from Enforced Disappearance [2006] art 2.

¹⁷⁸² *Rosario Celis Laureano v Peru* (1996) Comm No 540/1993, UN Doc CCPR/C/56/D/540/1993, para 8.5, *Katombe L. Tshishimbi v Zaire* (1996) Comm No 542/1993, UN Doc CCPR/C/53/D/542/1993, para 5.5, *Mojica v Dominican Republic* (1994) Comm No 449/1991, UN Doc CCPR/C/51/D/449/1991, para 5.7.

¹⁷⁸³ *Velásquez Rodríguez v Honduras*, Merits, Inter-American Court of Human Rights Series C No 4 (29 July 1988); *Gondolez Cruz v Honduras* (Interpretation of the Judgement of Reparations and Costs) Inter-American Court of Human Rights Series C No 10 (17 August 1990); *Blake v Guatemala* (Interpretation of the Judgment of Reparations and Costs) Inter-American Court of Human Rights Series C No 57 (1 October 1999).

¹⁷⁸⁴ American Convention on Human Rights [1969] art 4.

however, it is bound to CIL, which reiterates these obligations in times of conflict.¹⁷⁸⁵

In 2019, the UNHRC reported similar findings, but further elaborated on the destruction of entire villages namely in pursuit of ISIS fighters in Hajin¹⁷⁸⁶ and Baghuz¹⁷⁸⁷ due to Russian and Syrian forces carrying aerial bombardments to oust the HTS terrorist group from northern Hama, Ladhqiqyah¹⁷⁸⁸ and Western Aleppo destroying hospitals, schools, marketplaces and educational facilities and agricultural resources.¹⁷⁸⁹

Further reports of Russian forces and the SAA emerged detailing the deaths of 33 civilians and wounding 100 more, after an airstrike was directed toward a marketplace in Idlib deliberately targeting civilians' sites to eliminate the rebel-held province.¹⁷⁹⁰

Places of worship¹⁷⁹¹, medical facilities¹⁷⁹² and civilian infrastructures have been granted protection under IHL.¹⁷⁹³ Thus, the direct targeting of a civilian population¹⁷⁹⁴ and the destruction of medical facilities restricting civilian access to medicine is considered a war crime¹⁷⁹⁵ and prohibited by CIL.¹⁷⁹⁶

The most recent report issued by the UNHRC in 2020, provided an overwhelming account of human rights abuses and sexual violence against children by SAA forces and terrorist groups. The HTS terrorist group has also

¹⁷⁸⁵ Jean-Marie Henckaerts and Louise Doswald Beck, *Customary International Humanitarian Law, Volume I: Rules* (first published 2005, Cambridge University Press 2009) 340.

¹⁷⁸⁶ UNHRC. Forty-Second Session 9-27 February 2019 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (15 August 2019) UN Doc A/HRC/42/51, para 26.

¹⁷⁸⁷ *ibid* para 32.

¹⁷⁸⁸ n 1786 para 6.

¹⁷⁸⁹ n 1786 para 8.

¹⁷⁹⁰ Martin Chulov, 'Russia and Syria Step Up Airstrikes Against Civilians in Idlib' *The Guardian* (London, 22 July 2019) <<https://www.theguardian.com/world/2019/jul/22/russia-and-syria-step-up-airstrikes-against-civilians-in-idlib>> accessed 26 January 2020.

¹⁷⁹¹ 1977 Additional Protocol II to the Geneva Conventions [1949] art 16.

¹⁷⁹² 1977 Additional Protocol II to the Geneva Conventions [1949] art 12.

¹⁷⁹³ 1977 Additional Protocol II to the Geneva Conventions [1949] art 10 and 11.

¹⁷⁹⁴ Rome Statute of the International Criminal Court [1998] art 8 (b) (ii).

¹⁷⁹⁵ Rome Statute of the International Criminal Court [1998] art 8 (b) (ix).

¹⁷⁹⁶ Henckaerts and Beck (n 1785) 25-43.

been reported to have recruited young boys into combat roles and a large number of girls have been prevented from attending schools.¹⁷⁹⁷

ISIS has been reported to have subjected girls as young as the age of nine to rape, sexual slavery¹⁷⁹⁸ and girls as young as 14 being subjected to forced marriages.¹⁷⁹⁹ Such systematic and widespread practice is considered to be both a war crime¹⁸⁰⁰ and crimes against humanity.¹⁸⁰¹

SAA forces and associated militias are responsible for recruiting and using children under the age of 18 in hostilities many of which were under the age of 15 which is also considered a war crime.¹⁸⁰² The Syrian state has violated its treaty obligations by recruiting children into armed forces¹⁸⁰³ under the age of 18¹⁸⁰⁴ to engage in hostilities.¹⁸⁰⁵

SAA forces have also been found to have raped girls and women at checkpoints and detention centres located in Aleppo, Daraa and Homs, with boys also being subjected to sexual torture.¹⁸⁰⁶

The UNHRC has reported 45,000 children are undocumented and have been born as a result of rape which are currently held in the Al-Hol camp.¹⁸⁰⁷ A further 2.6 million girls and boys have been displaced in Syria.¹⁸⁰⁸ The Syrian Arab Republic is party to the Convention of Child Rights¹⁸⁰⁹ and it has violated its responsibility to protect children from sexual abuse¹⁸¹⁰ and all forms of sexual exploitation¹⁸¹¹ including torture.¹⁸¹²

¹⁷⁹⁷ UNHRC, Forty-Third Session 24 February-20 March 2020 'Conference Room Paper of the Independent International Commission of Inquiry on the Syrian Arab Republic' (13 January 2020) UN Doc A/HRC/43/CRP.6, paras 87-88.

¹⁷⁹⁸ *ibid* summary.

¹⁷⁹⁹ n 1797 para 89.

¹⁸⁰⁰ Rome Statute of the International Criminal Court [1998] art 8 (2) (e) (vi).

¹⁸⁰¹ Rome Statute of the International Criminal Court [1998] art 7 (1) (g).

¹⁸⁰² Rome Statute of the International Criminal Court [1998] art 8 (2) (b) (xxvi).

¹⁸⁰³ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict [2000] art 4.

¹⁸⁰⁴ *ibid* art 1.

¹⁸⁰⁵ n 1803, art 2.

¹⁸⁰⁶ n 1797 para 62.

¹⁸⁰⁷ n 1797 para 77.

¹⁸⁰⁸ n 1797 summary.

¹⁸⁰⁹ United Nations Convention on the Rights of the Child [1989].

¹⁸¹⁰ *ibid* art 19.

¹⁸¹¹ n 1809 art 34.

¹⁸¹² n 1809 art 39.

The prohibition of rape¹⁸¹³, enforced disappearance¹⁸¹⁴, slavery¹⁸¹⁵ and torture has been prohibited by CIL.¹⁸¹⁶ The need to protect civilians and distinguish them from military targets is a fundamental and customary requirement of IHL¹⁸¹⁷ In addition, CIL places significant of targeting strict military objects on for the purposes of achieving a definite military advantage.¹⁸¹⁸

Throughout the Syrian conflict, the IHL principle of distinction has been disregarded by the SAA and Russian forces when carrying out its airstrikes, which is essential for combatants to observe and adhere to in armed conflict.¹⁸¹⁹

This position is reaffirmed in Rule 7 of the ICRC CIL which states: 'The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects'.¹⁸²⁰

International Law Professor Schmitt has previously emphasised the importance of Distinction, stating: 'The principle of 'Distinction' and its key components of indiscriminate attack, proportionality and precautions in attack are fundamental, demonstrating a new sensitivity to the humanity component of IHL'.¹⁸²¹

The Russian and Syrian forces lack of distinction and recognition of a legitimate target is specifically prevalent between 2015 and 2017 which led to Russia and the Assad Regime recapturing large swathes of territory from ISIS. Russian armed forces launched a series indiscriminate air strikes and deployed ground troops to reinforce the government forces in countering the

¹⁸¹³ Henckaerts and Beck (n 1785) 323

¹⁸¹⁴ Henckaerts and Beck (n 1785) 340

¹⁸¹⁵ Henckaerts and Beck (n 1785) 327

¹⁸¹⁶ Henckaerts and Beck (n 1785) 315.

¹⁸¹⁷ Jelena Pejic, 'The Protective Scope of Common Article 3: More Than Meets the Eye' (2011) 93 (881) *International Review of the Red Cross* 189, 220.

¹⁸¹⁸ Henckaerts and Beck (n 1785) 29.

¹⁸¹⁹ Nissim Bar-Yaacov, 'Some Aspects of Prisoner of War Status According to the Geneva Protocol I of 1977' (1985) 20 (2-3) *Israel Law Review*. 243, 251.

¹⁸²⁰ Henckaerts and Beck (n 1785) 25.

¹⁸²¹ Michael N Schmitt, 'Military Necessity and Humanity In International Humanitarian Law: Preserving The Delicate Balance' (2010) 50 (4) *Va.J.Int'l L.* 795, 810.

ISIS. After two years of vigorous battles ISIS was ultimately neutralised, thereby enabling the regime to regain significant control of the country.¹⁸²²

During this period, it has been estimated 34,035 civilians were killed alone by Russian forces and the SAA¹⁸²³ in recapturing major regions of Syria including Raqqa, Aleppo and Mosul.¹⁸²⁴

Human Rights Watch in 2016 documented several attacks on homes, medical facilities, markets, and schools that appeared to be targeted including a major airstrike by Russian and Syrian forces, which destroyed al-Quds Hospital and surrounding areas on the 27th April 2016, killing 58 civilians and patients.¹⁸²⁵

It was further reported in August 2016, the Russian and Syrian forces carried out several attacks which were deliberately directed towards health facilities in Idlib, Aleppo, Hama, and Homs, all of which were destroyed.¹⁸²⁶

In addition, Human Rights Watch in 2017 reported the SAA launched numerous chemical weapons attacks on civilians in opposition-held areas. With Russia and Iran's support, the SAA conducted deliberate and indiscriminate attacks against civilians and civilian infrastructures, withheld humanitarian aid, employed starvation as a war strategy, and forcibly displaced Syrians in contravention of IL.¹⁸²⁷

Moreover, in 2018, the Russian and Syrian forces counter-terrorism operations reclaiming the Eastern Ghouta Region of Damascus, Daraa and Quneitra regions held by ISIS also resulted in 1,600 civilian deaths with further

¹⁸²² Joseph Lutta, 'How Russian Intervention in Syria Redefined the Right to Protect in Armed Conflict' (2018) 6 (2) *Russian Law Journal* 4, 7.

¹⁸²³ 'I Am Syria' (*I Am Syria*) <www.iamsyria.org/death-tolls.html> accessed 26 January 2020.

¹⁸²⁴ 'How Much Territory Have Russia and Syria Recaptured from IS?' (*BBC News*, 27 October 2017) <<https://www.bbc.com/news/world-europe-41766353>> accessed 26 January 2020.

¹⁸²⁵ 'World Report 2017: Events of 2016' (*Human Rights Watch*, 29 January 2017) <https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf> accessed 26 January 2020.

¹⁸²⁶ *ibid.*

¹⁸²⁷ 'World Report 2018: Events of 2017' (*Human Rights Watch*, 9 January 2018) <https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf> accessed 26 January 2020.

destruction of schools, medical facilities and civilian residences being prevalent.¹⁸²⁸

This practice of indiscriminate attacks against civilians and civilian infrastructures has remained a consistent theme in Syria throughout 2019 by the Russian forces and the SAA and the USA-led coalition forces in pursuit of counter-terrorism objectives.¹⁸²⁹

The difficulties of balancing military interests in armed conflicts¹⁸³⁰ often conflict with human rights and IHL as it is inevitable some innocent civilians are killed in hostilities. However, the civilian deaths caused by Russian force, the SAA and allied militias due to their unrefined tactics and brutal strategies exceed the collateral for what is deemed to be militarily necessary and proportionate.¹⁸³¹

The IHL principle of proportionality seeks to protect and mitigate civilian losses which result from attacks carried out by state militaries.¹⁸³² This complements the principle of civilian protection, which advances deaths should not be excessive to the anticipated military advantage.¹⁸³³

Rule 14 of the ICRC reiterates this principle and considers combatants to be in breach of IHL when:

[L]aunching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.¹⁸³⁴

¹⁸²⁸ 'World Report 2019: Events of 2018' (*Human Rights Watch*, 17 February 2019) <https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2019.pdf> accessed 26 January 2020.

¹⁸²⁹ 'World Report 2020: Events of 2019' (*Human Rights Watch*, 13 January 2020) <https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2020.pdf> accessed 26 January 2020.

¹⁸³⁰ Craig J. S. Forrest, 'The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts' (2007) 37 (2) *Cal.W.Int'l L.J.* 177, 177.

¹⁸³¹ Payam Akhavan, 'Reconciling Crimes Against Humanity with the Laws of War' (2008) 6 (1) *JICJ* 21, 22.

¹⁸³² Kristen Dorman, 'Proportionality and Distinction in the International Criminal Tribunal for the Former Yugoslavia' (2005) 12 (12) *Australian International Law Journal* 83, 83.

¹⁸³³ Bernard L Brown, 'The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification' (1976) 10 (1) *Cornell International Law Journal* 134, 134.

¹⁸³⁴ Henckaerts and Beck (n 1785) 46.

However, the above has demonstrated both Russian and SAA forces have intentionally, wilfully and deliberately targeted and attacked heavily populated civilian areas violating IHL whilst also committing war crimes under the Rome Statute.¹⁸³⁵

5.2.3 The Use of Prohibited Weapons and Chemical Attacks in the Syrian Civil War

Chemical weapons 'are, by nature, horrific and fundamentally indiscriminate, and society has historically viewed their use as a violation of international law'.¹⁸³⁶ One of the fundamental rules of IHL seeks to restrict the unlimited choice of means to inflict damage on an enemy.¹⁸³⁷

However, since the Syrian conflict erupted in March 2011, the international community has voiced concerns that Syria's possession and use of sophisticated weapons, including chemical weapons¹⁸³⁸ have included: 'blister agents, like sulfur mustard, and nerve agents, like sarin and VX 1-4'.¹⁸³⁹

Despite the UNSC ordering the destruction of stockpile chemical weapons¹⁸⁴⁰ threats were made by the former USA President Barack Obama in 2012, stating the use of chemical and biological weapons would trigger military action.¹⁸⁴¹

Various ceasefire proposal plans were made in 2013, for the elimination of chemical weapons between the USA, Russia and the Assad regime all of which failed, especially in deterring their use on the civilian population.¹⁸⁴²

¹⁸³⁵ Rome Statute of the International Criminal Court [1998] art 8 (b) (i).

¹⁸³⁶ Michelle Almary, 'The Necessity for A Permanent Disincentive: Examining the Use of Chemical Weapons with A Focus on Syria's Civil War' (2018) 24 (2) Southwestern Journal of international law 301, 301.

¹⁸³⁷ Judith Gail Gardam, 'Proportionality and Force in International Law' (1993) 87 (3) AJIL 391, 402-403.

¹⁸³⁸ Mediel Hove and Darlington Mutanda, 'The Syrian Conflict 2011 to the Present: Challenges and Prospects' (2014) 50 (5) Journal of Asian and African Studies 1, 6

¹⁸³⁹ Rene Pita and Juan Domingo, 'The Use of Chemical Weapons in the Syrian Conflict' (2014) 2 (3) Toxics 391, 392.

¹⁸⁴⁰ UNSC Res 2118 (27 September 2013) UN Doc S/RES/2118.

¹⁸⁴¹ Theodor Tudoroiu, 'The Reciprocal Constitutive Features of a Middle Eastern Partnership: The Russian-Syrian Bilateral Relations' (2015) 6 (2) Journal of Eurasian Studies 143, 147.

¹⁸⁴² Fyodor Lukyanov, 'Putins Foreign Policy: The Quest to Restore Russia's Rightful Place' (2016) 95 (3) Foreign Affairs 30, 30.

Academics such as Schmitt have previously stated: ‘the core reason chemical and biological weapons are prohibited is that they are inherently indiscriminate, as their dissemination is subject to such unpredictable influences’.¹⁸⁴³

The CIL principle of indiscriminate attack prohibits attacks which are not directed at specific military objects and those attacks which may likely cause death or injury to civilian and civilian objects.¹⁸⁴⁴

The conflict in Syria has led the international community to call for an end to the indiscriminate bombings which have been a frequent and ongoing.¹⁸⁴⁵ The earliest example of the use of chemical weapons can be observed in August 2013 when the SAA forces in the Ghouta district of Damascus conducted a Sarin gas attack which led to the deaths of 1400 people.¹⁸⁴⁶

The use of illegal weapons has remained a popular choice of warfare since Russia’s 2015 military intervention in the Syrian civil war.¹⁸⁴⁷ In August 2016, HRW reported both Russian and Syrian forces had used incendiary weapons 18 times in opposition held areas of Aleppo and Idlib, burning their victims and starting fires, in civilian areas of Syria in violation of IL.¹⁸⁴⁸

Article 2 (1) of The Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons Protocol III provides: ‘It is prohibited in all circumstances

¹⁸⁴³ Michael N Schmitt, ‘The Principle of Discrimination In 21st Century Warfare’ (2014) 2 (1) Yale Human Rights and Development Journal 143, 155.

¹⁸⁴⁴ Henckaerts and Beck (n 1785) 40.

¹⁸⁴⁵ Stephen Townley, ‘Indiscriminate Attacks and The Past, Present and Future of the Rules/Standards and Objectives/Subjective Debates in International Humanitarian Law’ (2017) 50 (5) Vanderbilt Journal of Transnational Law 1223, 1224-1225.

¹⁸⁴⁶ Martin Chulov, ‘Sarin Gas Attack on Syrian Civilians Probably Governments, Says UN’ *The Guardian* (London, 6 March 2014) <<https://www.theguardian.com/world/2014/mar/06/sarin-gas-attack-civilians-syria-government-un>> accessed 20 April 2020.

¹⁸⁴⁷ Robert Lawless, ‘A State of Complicity: How Russia’s Persistent and Public Denial of Syrian Battlefield Atrocities Violates International Law’ (2018) 9 (1) Harvard National Security Journal 180, 183.

¹⁸⁴⁸ ‘Syria/Russia: Incendiary Weapons Burn in Aleppo, Idlib’ (*Human Rights Watch*, 16 August 2016) <<https://www.hrw.org/news/2016/08/16/syria/russia-incendiary-weapons-burn-aleppo-idlib>> accessed 26 January 2020.

to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons'.¹⁸⁴⁹

Unless a military objective is not located in a concentration of civilians in a particular area, only then are the use of incendiary weapons permitted.¹⁸⁵⁰ However, both the SAA and Russian forces have disregarded this despite various international treaties and CIL proscribing the use of these lethal chemical and biological weapons in armed conflicts.¹⁸⁵¹

The Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, prohibits the use of chemical weapons in gaseous, liquid or solid and biological agents in warfare which have been derived from living organisms and infective materials.¹⁸⁵²

The ban on the use of chemical weapons also applies to NIAC armed conflicts, the fact that new chemical, bacteriological and biological agents may have been developed subsequent to the date of the Protocol does not detract from its application to new agents.¹⁸⁵³

In support of the above, the chemical weapon attack carried out by the SAA¹⁸⁵⁴ in April 2017, further demonstrates the illegality of these states and their unwillingness to comply with IHL and treaty provisions, posing a humanitarian

¹⁸⁴⁹ Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed Excessively Injurious or to Indiscriminate Effect: The Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) [1980] art 2 (1).

¹⁸⁵⁰ Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed Excessively Injurious or to Indiscriminate Effect: The Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) [1980] art 2 (3).

¹⁸⁵¹ R.R Baxter and Thomas Buergenthal, 'Legal Aspects of the Geneva Protocol of 1925' (1970) 64 (5) AJIL 853, 853.

¹⁸⁵² Protocol for The Prohibition of The Use in War of Poisonous and Other Gasses and Bacteriological Methods of Warfare [1925].

¹⁸⁵³ Johan D. Van Der Vyver, 'Military Intervention in Syria: The American, British and French Alternatives and The Russian Option' (2015) 48 (1) De Jure 36, 40.

¹⁸⁵⁴ Kim Hua Tan and Alirupendi Perudin, 'The Geopolitical Factor in the Syrian Civil War: A Corpus-Based Thematic Analysis' (2019) 9 (2) SAGE Open 1, 1.

and public health crisis further threatening the security of civilians, healthcare personnel and first responders.¹⁸⁵⁵

In 2017, The former USA President Donald Trump responded to the poisonous gas attack attacks in Idlib which killed over 100 people, by authorising tomahawk missiles to be fired on a Syrian airbase located in Shayrat, which marked the first time the USA had become a direct combatant against the Syrian regime.¹⁸⁵⁶

In 2018, the SAA's use of chemical weapons against the opposition in Douma resulted in retaliation by the joint American, British and French force.¹⁸⁵⁷ The USA along with coalition allies carried out airstrikes which targeted weapons facilities, research centres and chemical weapons storages located in Damascus.¹⁸⁵⁸

Chemical agents have been grouped into four categories, with each one having devastating effects on the intended recipient: 1) Nerve agents such as Sarin 2) Blistering agents such as Sulfur Mustard 3) Choking Agents such as Chlorine and 4) Blood agents such as Arsine.¹⁸⁵⁹

The devastating and torturous effect of sarin and other nerve agents has been revealed to attack the nervous system which causes death from asphyxia due to loss of control and paralysis of muscles involved in breathing.¹⁸⁶⁰

Chlorine gas inhalation causes life-threatening respiratory distress and fluid accumulation in the lungs potentially leading to death by suffocation.¹⁸⁶¹ Both

¹⁸⁵⁵ Julia Brooks et al, 'Responding to Chemical Weapons Violations in Syria: Legal, Health and Humanitarian Recommendations' (2018) 12 (12) Conflict and Health 1, 1.

¹⁸⁵⁶ Mikael Blomdahl, 'Changing the Conversation in Washington? An Illustrative Case Study of President Trump's Air Strikes on Syria, 2017' (2019) 30 (3) Diplomacy and Statecraft 536, 536.

¹⁸⁵⁷ Emil Aslan Souleimanov and Valery Dzusati, 'Russia's Syria War: A Strategic Trap?' (2018) 25 (2) Middle East Policy 42, 46.

¹⁸⁵⁸ Julian Borger and Peter Beaumont, 'Syria: US, UK and France Launch Strikes in Response to Chemical Attack' *The Guardian* (London, 14 April 2018) <<https://www.theguardian.com/world/2018/apr/14/syria-air-strikes-us-uk-and-france-launch-attack-on-assad-regime>> accessed 20 April 2020.

¹⁸⁵⁹ Abdulkarim Ekzayez et al, 'Chemical Weapons and Public Health: Assessing Impact and Responses' (2020) 42 (3) Journal of Public Health 334, 336.

¹⁸⁶⁰ Jose M Rodriguez-Llanes, 'Epidemiological Findings of Major Chemical Attacks in the Syrian War Are Consistent with Civilian Targeting: A Short Report' (2018) 12 (16) Conflict and Health 1, 3.

¹⁸⁶¹ *ibid.*

Sarin and Chlorine have been used by Russian and Syrian forces on the civilian population.

The Organisation for the Prohibition of Chemical Weapons (OPCW) since 2013 have taken special procedures and remained dedicated to the destruction of chemical weapons in Syria.¹⁸⁶² On many occasions, investigations by the OPCW have found Russian and Syrian forces using a variety of chemical weapons on the civilian population of Syria.¹⁸⁶³

In 2014, two reports found chlorine was used on civilians in the villages of Kafr Zita¹⁸⁶⁴, Al-Tamana¹⁸⁶⁵ and Talmenes.¹⁸⁶⁶ In 2015, one report confirmed the use of Sulfur Mustard in the civilian populated area of Marea.¹⁸⁶⁷

In 2017, three reports found that Sulfur Mustard had been used in a mortar attack in Um Housh, Aleppo¹⁸⁶⁸, Sarin had been used in Khan Shaykhun¹⁸⁶⁹ and South Ltamenah.¹⁸⁷⁰

In 2018, a report found chlorine was used in Khan Shaykhun after a mortar shell was fired into a hospital.¹⁸⁷¹ Confirmed uses of chemical weapons were also found to have been used by Russian and Syrian forces in the Douma region of Syria in the OPCW's 2019 report.¹⁸⁷²

¹⁸⁶² UNSC Res 2118 (27 September 2013) UN Doc S/RES/2118.

¹⁸⁶³ UNSC Res 2209 (6 March 2015) UN Doc S/RES/2209.

¹⁸⁶⁴ OPCW, 'Summary Report of the Work of the OPCW Fact-Finding Mission in Syria Covering Period From 3 to 31 May 2014' (16 June 2014) S/1191/2014, para 53.

¹⁸⁶⁵ OPCW, 'Second Report of the OPCW Fact-Finding Mission in Syria Key Findings' (10 September 2014) S/1212/2014, paras 29-30.

¹⁸⁶⁶ OPCW, 'Third Report of the OPCW Fact-Finding Mission in Syria' (18 December 2014) S/1230/2014, para 7.19.

¹⁸⁶⁷ OPCW, 'Report of the OPCW Fact-Finding Mission in Syria Regarding Alleged Incidents in Marea, Syrian Arab Republic, August 2015' (29 October 2015) S/1320/2015, para 4.6.

¹⁸⁶⁸ OPCW, 'Report of the OPCW Fact-Finding Mission in Syria Regarding the Incident of 16 September 2016 as Reported in the Note Verbale of the Syrian Arab Republic Number 113 Dated 29 November 2016' (1 May 2017) S/1491/2017, paras 6.3-6.4.

¹⁸⁶⁹ OPCW, 'Report of the OPCW Fact-Finding Mission in Syria Regarding Alleged Incident in Khan Shaykhun, Syrian Arab Republic April 2017' (29 June 2017) S/1510/2017, para 6.

¹⁸⁷⁰ OPCW, 'Note by the Technical Secretariat: Report of the OPCW Fact-Finding Mission in Syria Regarding Alleged Incident in Ltamenah, the Syrian Arab Republic, 30 March 2017' (2 November 2017). S/1548/2017, para 1.5.

¹⁸⁷¹ OPCW, 'Note by the Technical Secretariat: Report of the OPCW Fact-Finding Mission in Syria: Regarding Alleged Incidents in Ltamenah, the Syrian Arab Republic on 24 March and 25 March 2017' (13 June 2018) S/1636/2018, paras, 1.9-1.10.

¹⁸⁷² OPCW, 'Note by the Technical Secretariat: Report of the Fact-Finding Mission Regarding the Incident of Alleged Use of Toxic Chemicals as a Weapon in Douma, Syrian Arab Republic, on 7 April 2018' (1 March 2019) S/1731/2019, para 2.17.

CIL prohibits the use of poisonous¹⁸⁷³, chemical¹⁸⁷⁴ and biological¹⁸⁷⁵ weapons corresponding with the Convention on the of Chemical Weapons and this Destruction.¹⁸⁷⁶ Both Russian and Syrian forces have ratified the PCCW and are bound to the provisions of this treaty and CIL, yet its continued pattern of using chemical weapons upon the civilian population further demonstrates its blatant disregard for IHL.

Use of other prohibited weapons and projectiles such as barrel bombs from helicopters¹⁸⁷⁷ and cluster munitions have also been used throughout the conflict, which ‘scatter submunitions or bomblets over a wide area that leave unexploded remnants in the ground that become landmines’.¹⁸⁷⁸ The development, use and transfer of such weapons have been prohibited.¹⁸⁷⁹

The use of these prohibited weapons by Russian and SAA forces accentuates the disregard for protecting civilians by directing their attacks towards densely populated areas amounting to war crimes under the Rome Statute.¹⁸⁸⁰

In addition, the substantial and widespread damage and exposure caused to both Syria’s economy and natural environment by Russian and SAA forces use of prohibited chemical weapons has led to much disturbance of its natural ecosystem which has caused water sources to become contaminated, deforestation and climate change due to increased exposure of carbon dioxide and nitrogen oxide.¹⁸⁸¹

The legal obligation to protect the environment is mentioned in the Environmental Modification Convention, which provides:

¹⁸⁷³ Henckaerts and Beck (n 1785) 251.

¹⁸⁷⁴ Henckaerts and Beck (n 1785) 259.

¹⁸⁷⁵ Henckaerts and Beck (n 1785) 256.

¹⁸⁷⁶ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction [1992] art 2.

¹⁸⁷⁷ Kristin Fabbe and Tolga Sinmazdemir, ‘Reflections on the Geopolitics of Refugees and Displaced Persons: Syrian Refugees in Turkey and the Politics of Postconflict Reconciliation’ (2018) 52 (2) *Review of Middle East Studies* 249, 256.

¹⁸⁷⁸ C. Hayes Wong and Christine Yen-Ting Chen, ‘Ambulances Under Siege in Syria’ (2018) 3 (6) *BMJ Global Health* 1, 3.

¹⁸⁷⁹ Convention on Cluster Munitions [2008] art 1.

¹⁸⁸⁰ Rome Statute of the International Criminal Court [1998] art 8 (2) (b) (xx).

¹⁸⁸¹ Evan Frauhiger, ‘An Environmental No Man’s Land: The Often-Overlooked Consequences of Armed Conflict on the Natural Environment’ (2018) 42 (3) *William and Mary Environmental Law and Policy Review* 1025, 1026.

[E]ach state party to this convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long lasting or severe effects as the means of destruction, damage or injury to any other state party.¹⁸⁸²

In short, the wilful killing¹⁸⁸³, torture of civilians¹⁸⁸⁴, the direct targeting of aid workers¹⁸⁸⁵, the deliberate destruction of hospital, schools and civilian homes contrary to military objectives¹⁸⁸⁶, employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices¹⁸⁸⁷ and launching attacks which cause long term, widespread damage to the natural environment deemed excessive to the military objective¹⁸⁸⁸ are classified as war crimes under the Rome Statute.

The 2020 report published the findings of the Independent Commission of Inquiry on the Syrian Arab Republic between 11th July 2019 - 10th January 2020¹⁸⁸⁹, was set up by the UNHRC and confirmed many violations of IHL being committed against civilians amounting to war crimes by the Syrian, Turkish¹⁸⁹⁰ and Russian military.¹⁸⁹¹

Human rights abuses and further systematic and widespread attacks carried out on civilians indiscriminately throughout 2020 and 2021 by SAA forces¹⁸⁹² ISIS and HTS¹⁸⁹³ have even continued after the breakout of the Coronavirus Disease 2019 (COVID-19) global pandemic.¹⁸⁹⁴

¹⁸⁸² Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification [1978] art 1.

¹⁸⁸³ Rome Statute of the International Criminal Court [1998] art 8 (2) (a) (i).

¹⁸⁸⁴ Rome Statute of the International Criminal Court [1998] art 8 (2) (a) (ii).

¹⁸⁸⁵ Rome Statute of the International Criminal Court [1998] art 8 (2) (b) (iii).

¹⁸⁸⁶ Rome Statute of the International Criminal Court [1998] art 8 (2) (b) (ix).

¹⁸⁸⁷ Rome Statute of the International Criminal Court [1998] art 8 (2) (b) (xviii).

¹⁸⁸⁸ Rome Statute of the International Criminal Court art 8 (2) (b) (iv).

¹⁸⁸⁹ UNHRC Res 43/57 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (28 January 2020) UN Doc A/HRC/43/57.

¹⁸⁹⁰ *ibid* para 54.

¹⁸⁹¹ n 1889, para 25.

¹⁸⁹² UNHRC, Forty-Sixth Session 22 February-19 March 2021 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (21 January 2021) A/HRC/46/64.

¹⁸⁹³ *ibid* paras 48-53.

¹⁸⁹⁴ n 1892, paras 34-40.

Hostilities have not dissipated and the deliberate destruction of the Syrian healthcare infrastructure including hospitals and medical facilities by government forces has continued, COVID-19 has spread with the UNHRC confirming as of 2021 there are 40,000 confirmed cases in Syria.¹⁸⁹⁵ The UNSC has authorised emergency humanitarian assistance¹⁸⁹⁶ and delivered aid throughout 2020¹⁸⁹⁷, however, shortages of food and medicine nonetheless remain.¹⁸⁹⁸

The above has demonstrated that the methods of warfare and the means employed to recapture territory from rebel opposition groups and terrorist groups such as ISIS in Syria have often resulted in indiscriminate, disproportionate and excessive loss of civilian lives.

Additionally, both Russian and SAA forces throughout the Syrian civil war have consistently and deliberately targeted civilians as a strategy of war in order to meet its counter-terrorism objectives to eliminate ISIS and HTS and other opposition groups resulting in significant civilian deaths and the long term and permanent damage to Syria's economy and natural environment.

5.3 The USA's 'Global War on Terror': The UNSC and the ICC's Inability to respond Expeditiously in the Syrian Crisis

The role of the UNSC and its legitimacy has long been the subject of scrutiny and criticism in terms of its ability to effectively interpose expediently in humanitarian crisis.¹⁸⁹⁹ The organisations has been criticised for succumbing to political pressures, derogating from the fundamental principles of IL, which has in turn eroded its legitimacy to fulfil its mandate to maintain international peace and security.¹⁹⁰⁰

¹⁸⁹⁵ n 1892, para 40.

¹⁸⁹⁶ UNSC Res 2504 (10 January 2020) UN Doc S/RES/2504.

¹⁸⁹⁷ UNSC Res 2533 (13 July 2020) UN Doc S/RES/2533.

¹⁸⁹⁸ n 1892, para 46.

¹⁸⁹⁹ Oona A. Hathaway et al, 'Consent Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign' (2013) 46 (3) Cornell International Law Journal 499, 499.

¹⁹⁰⁰ Neha Jain, 'A Separate Law for Peacekeepers: The Clash Between the Security Council and The International Criminal Court' (2005) 16 (2) EJIL 239, 254.

In addition, the role of the ICC has also been the subject of animadversion because of its jurisdictional limitations and its inability to administer its jurisdiction over states to investigate suspected perpetrators of international crimes to end impunity, all but in a few exemplary cases, which has rendered futile in fulfilling its organisational mandate.¹⁹⁰¹

The criticisms pertaining to both institutions are credible considering the ongoing violence and mass atrocities which have ensued during the Syrian conflict have remained unchallenged.

The relationship between the two organisations, especially the UNSC's inability to refer matters to the ICC to investigate nationals of the P5 states for international crimes has been especially problematic in practice¹⁹⁰², resembling similar challenges encountered in the Palestinian conflict with Israel as highlighted in the preceding chapter.¹⁹⁰³

This is particularly important considering Russia is a permanent member of the UNSC, but no longer a party to the Rome Statute¹⁹⁰⁴, meaning the ICC prosecutor cannot exercise its jurisdiction automatically¹⁹⁰⁵ without a valid referral from the UNSC.¹⁹⁰⁶

The difficulties in obtaining a referral from the UNSC to take action in Syria since 2011, has proven to be an insuperable challenge in holding individuals from the Russian and SAA forces to account, due to the Chinese and Russian vetoes initially placing an obstacle to authorising humanitarian intervention by invoking the principle of 'Responsibility to Protect' (R2P).¹⁹⁰⁷

¹⁹⁰¹ Margaret M DeGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 (2) Michigan Journal of International Law 265, 320.

¹⁹⁰² Jennifer Trahan, 'The Relationship Between the International Criminal Court and the UN Security Council: Parameters and Best Practices' (2013) 24 (4) Crim.L.F. 417, 419

¹⁹⁰³ Section 4.9 to n 1636 in ch 4.

¹⁹⁰⁴ Rome Statute of the International Criminal Court [1998].

¹⁹⁰⁵ Rome Statute of the International Criminal Court [1998] art 15 (1).

¹⁹⁰⁶ Charter of the United Nations [1945] art 39.

¹⁹⁰⁷ Muditha Halliyade, 'Syria-Another Drawback for R2P? An Analysis of R2P's Failure to Change International Law on Humanitarian Intervention' (2016) 4 (2) Indiana Journal of Law and Social Equality 215, 246.

5.3.1 R2P, Aggression and the Syrian Crisis

As mentioned earlier in the thesis¹⁹⁰⁸, the doctrine of R2P was developed, 'to provide a means for the international community to prevent mass atrocity crimes from occurring within the boundaries of a sovereign state'.¹⁹⁰⁹

The UNSC has accepted¹⁹¹⁰ the doctrine of R2P¹⁹¹¹ and confirmed this in the World Summit Outcome Document.¹⁹¹² The principle of R2P rests on three pillars:

- 1) Primary responsibility of states to protect their own population from crimes of Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity.
- 2) The international community's responsibility to assist a state to fulfil its responsibility to protect; and
- 3) The international community's responsibility to take timely and decisive action in accordance with the UN Charter, in cases where the state has manifestly failed to protect its population from one of the mentioned crimes.¹⁹¹³

The third pillar of R2P has proven to be highly controversial in practice¹⁹¹⁴ as states are required to seek the prior approval of the UNSC, through the voting system to authorise use of force to be employed.¹⁹¹⁵ Without this approval from the UNSC a foreign state is prohibited from intervening militarily in another state.¹⁹¹⁶

This approach is also consistent with the obligations of states contained within the UN Charter.¹⁹¹⁷ States failing to comply to with this provision will render

¹⁹⁰⁸ Section 2.1.1 to n 149 in ch 2.

¹⁹⁰⁹ Paul R. Williams, J. Trevor Ulbrick and Jonathan Worboys, 'Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syrian Crisis' (2012) 45 (1-2) *Case W.Res.J.Int'l L.* 473, 474.

¹⁹¹⁰ UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674, para 4.

¹⁹¹¹ UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894.

¹⁹¹² UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, para 139.

¹⁹¹³ Gabija Grigante, 'Responsibility to Protect Concept and Conflict in International Law' (2012) 83 *TEISE* 174, 177.

¹⁹¹⁴ Noele Crossley, 'Is R2P Still Controversial? Continuity and Change in The Debate on Humanitarian Intervention' (2018) 31 (5) *Cambridge Review of International Affairs* 415, 415.

¹⁹¹⁵ Paul D. Williams and Alex J. Bellamy, 'Principles, Politics and Prudence: Libya, The Responsibility to Protect and The Use of Military Force' (2012) 18 (3) *Global Governance* 273,273.

¹⁹¹⁶ Montevideo Convention on the Rights and Duties of States [1933] art 8.

¹⁹¹⁷ Charter of the United Nations [1945] art 2 (4) and 2 (7).

any R2P interventions unlawful as it is deemed to threaten the sovereignty¹⁹¹⁸ and territorial integrity of a state.¹⁹¹⁹ The principle of 'state sovereignty' has previously been defined as:

[T]he principles of external independence, internal authority, and ultimate legal supremacy of the state. A people occupying a defined territory and equipped with institutions of self-rule presents itself to the rest of the world as a sovereign entity, signifying its independence from subjection to any higher authority.¹⁹²⁰

In support of this principle, 'territorial integrity' ensures the protection of a sovereign state from violations of its territory including forceful attacks and non-forceful interventions by another state.¹⁹²¹

Without the approval of the UNSC the USA¹⁹²² with the military support of the UK¹⁹²³, France¹⁹²⁴ with the aid of Kuwait and other Arab states of the Gulf Cooperation Council¹⁹²⁵ have committed frequent acts of the international crime of aggression by carrying out airstrikes against ISIS strongholds¹⁹²⁶ and even where the USA conducted an airstrike in Syria in response to the Assad Regime's continued and repeated use of chemical weapons in 2017.¹⁹²⁷

¹⁹¹⁸ Hannes Peltonen, 'Sovereignty as Responsibility, Responsibility to Protect and International Order: On Responsibility, Communal Crime Prevention and International Law' (2011) 7 (28) *Uluslararası İlişkiler (International Relations)* 59, 60.

¹⁹¹⁹ Michael J. Mazarr, 'Virtual Territorial Integrity: The Next International Norm' (2020) 62 (4) *Survival: Global Politics and Strategy* 101, 103.

¹⁹²⁰ Martin Loughlin, 'The Erosion of Sovereignty' (2016) 45 (2) *Netherlands Journal of Legal Philosophy*. 57, 60.

¹⁹²¹ Christian Marxsen, 'Territorial Integrity in International Law - Its Concept and Implications for Crimea' (2015) 75 *Heidelberg Journal of International Law* 7, 12.

¹⁹²² Hugh Naylor, 'Kurdish Led Force Announces Start of Operation to Reclaim Raqqa from ISIS' *Washington Post* (Washington, 6 November 2016) <https://www.washingtonpost.com/world/kurdish-led-force-announces-start-of-operation-to-reclaim-raqqa-from-isis/2016/11/06/70e52b86-a416-11e6-ba59-a7d93165c6d4_story.html> accessed 26 January 2020.

¹⁹²³ Saeed Kamali, 'Raqqa Recaptured from Islamic State by US Backed Forces' *The Guardian* (London, 17 October 2017) <<https://www.theguardian.com/world/2017/oct/17/raqqa-recaptured-from-islamic-state-us-backed-forces-announce>> accessed 26 January 2020.

¹⁹²⁴ Emmanuel Jarry and Robert-Jan Bartunek, 'France Bombs ISIS Headquarters in Syria' (*Huffington Post*, 16 November 2015) <https://www.huffpost.com/entry/france-bombs-isis-syria_n_5648ef7be4b06037734982c4> accessed 26 January 2020.

¹⁹²⁵ Kylie Baxter, 'Kuwait, Political Violence and the Syrian War' (2017) 71 (2) *Australian Journal of International Affairs* 128, 129.

¹⁹²⁶ 'Syria: Thank You for Demanding Justice for Syrians Killed by US-led Coalition' (*Amnesty International*, 26 September 2019) <<https://www.amnesty.org.uk/syrians-us-led-coalition>> accessed 26 January 2020.

¹⁹²⁷ Anders Henriksen, 'Trump's Missile Strike on Syria And the Legality of Using Force to Deter Chemical Warfare' (2018) 23 (1) *Journal of Conflict and Security Law* 33, 33.

The author contends there may be a moral justification for the USA and coalition forces rationale for its 'use of force' in Syria in confronting the Russian and Syrian forces use of chemical weapons on civilians and also responding militarily to the threat of ISIS and its previously formidable presence, influence and large territorial expansion over Syria posing a significant threat to international peace.¹⁹²⁸

However, the USA and coalition forces by continuing its GWOT¹⁹²⁹ to eliminate the presence of ISIS in Syria¹⁹³⁰ have often committed the crime of aggression under the Rome Statute.¹⁹³¹

The UNGA defines aggression as: 'The use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other matter inconsistent with the charter'.¹⁹³² The USA has continued to use military force against the Assad regime after its chemical weapons use without the approval of the UNSC, which does not justify any R2P intervention.¹⁹³³

The failure of the UNSC to authorise humanitarian intervention through R2P is attributed to its politicisation, which has proven detrimental in its effectiveness as an institution to act expediently in humanitarian crisis¹⁹³⁴ as well as the veto which has often prevented any humanitarian intervention through R2P to be effectuated.¹⁹³⁵

¹⁹²⁸ Vaios Koutroulis, 'The Fight Against the Islamic State and Jus in Bello' (2016) 29 (3) LJIL 827, 830.

¹⁹²⁹ Erik W Goepner, 'Measuring the Effectiveness of America's War on Terror' (2016) 46 (1) Parameters 107, 107.

¹⁹³⁰ Michael P Scharf, 'How the War Against ISIS Changed International Law' (2016) 48 (1) Case W.Res.J.Int'l L. 15, 15.

¹⁹³¹ Rome Statute of the International Criminal Court [1998] art 8 *bis* (1).

¹⁹³² UNGA Resolution 3314 (XXIX) (14 December 1974) art 1.

¹⁹³³ S Krishnan, 'The Alleged Use of Chemical Weapons Against the Syrian People: Does It Justify Forceful Intervention?' (2017) 21 (2) Jadavpur Journal of International Relations 138, 138.

¹⁹³⁴ Fernanda Guimaraes and Patricia Nasser De Carvalho, 'The United Nations Security Council Action in the Syrian Civil War: Conflicts of Interest and Impasses Among the P5 and the Consequent Lack of Resolution for The Question' (2017) 6 (12) Austral: Brazilian Journal of Strategy and International Relations 62, 64.

¹⁹³⁵ Richard Illingworth, 'Responsible Veto Restraint: A Transitional Cosmopolitan Reform Measure for the Responsibility to Protect' (2020) 12 (4) Global Responsibility to Protect 385, 387.

5.3.2 The Veto Privilege and the Continuing Political Challenges in the UNSC

Since the inception of the Syrian civil war, Russia with the support of China have vetoed 20 draft resolutions relating to Syria as of 2021.¹⁹³⁶

This includes draft resolutions calling for an end on the crackdown on Syrian protestors¹⁹³⁷, the facilitation of Syrian led political transition¹⁹³⁸, the proposed cessation of hostilities following the humanitarian crisis in Aleppo as a result of attacks against civilians and civilian objects¹⁹³⁹ have all been vetoed by Russia and China.

In 2017, Russia vetoed a draft UN resolution S/2017/315¹⁹⁴⁰ proposed by the USA, the UK and France that would have imposed sanctions on Syria after a reported chemical weapons attack on the rebel-held town of Khan Shaykhun on the 4th April 2017.¹⁹⁴¹

In 2018, Russia vetoed draft resolution S/2018/321¹⁹⁴² penned by the USA, which would have established a new UN Joint Investigative Mechanism (UNJIM) for one year, as well as identify those responsible for the use of chemical weapons, which was also rejected owing to a negative vote from Russia.¹⁹⁴³

Similarly, a competing draft resolution penned by Russia, sought to establish the mechanism for one year as well, but it would have given the UNSC the responsibility to assign accountability for the use of chemical weapons in Syria, which was also not adopted.¹⁹⁴⁴

¹⁹³⁶ 'UN Documents for Syria' (*Security Council Report: Independent, Impartial, Informative*) <https://www.securitycouncilreport.org/un_documents_type/other-documents/page/1?ctype=Syria&cbtype=syria#038;cbtype=syria> accessed 26 January 2020.

¹⁹³⁷ UNSC Draft Res 612 (4 October 2011) UN Doc S/2011/612.

¹⁹³⁸ UNSC Draft Res 77 (4 February 2012) UN Doc S/2012/77.

¹⁹³⁹ UNSC Draft Res 846 (8 October 2016) UN Doc S/2016/846.

¹⁹⁴⁰ UNSC Draft Res 315 (12 April 2017) UN Doc S/2017/315.

¹⁹⁴¹ *ibid.*

¹⁹⁴² UNSC Draft Res 321 (10 April 2018) UN Doc S/2018/321.

¹⁹⁴³ 'Security Council Fails to Adopt Three Resolutions on Chemical Weapons Use in Syria' (*UN News*, 10 April 2018) <<https://news.un.org/en/story/2018/04/1006991>> accessed 26 January 2020.

¹⁹⁴⁴ UNSC Res 175 (10 April 2018) UN Doc S/2018/175.

In 2019, both China and Russia have vetoed two resolutions. The first resolution acknowledged the violations of IHL in counter-terrorism operations in Idlib and requested the UN Secretary General provide reports of any and all the violations of IHL, which have been committed in Syria¹⁹⁴⁵ demanding cessation of all hostilities¹⁹⁴⁶ and implementing previous UNSC resolutions holding those responsible accountable.¹⁹⁴⁷

The second resolution drafted by Belgium, Germany and Kuwait was vetoed, which demanded cross-line humanitarian assistance to allow safe access for convoys to enter Syria to supply medical and surgical supplies¹⁹⁴⁸, whilst also reiterating all parties including Syrian authorities' violations in Syria amount to war crimes and crimes against humanity.¹⁹⁴⁹

The above has demonstrated the P5 of the UNSC China, France, Russia, the UK and the USA have disagreed profoundly over the handling of the Syrian civil war¹⁹⁵⁰, which has resulted in the failure of the UNSC intervening in the humanitarian disaster and mass atrocities which have been caused by the P5, whilst hindering any possibility of R2P and unnecessarily prolonging the Syrian civil war.¹⁹⁵¹

The underlying issue affecting the inability of the UNSC to perform and fulfil its organisational mandate is due to the veto privilege given to the P5 which allows them to block¹⁹⁵² draft resolutions and R2P peace-keeping interventions from being authorised.

¹⁹⁴⁵ UNSC Draft Res 756 (19 September 2019) UN Doc S/2019/756, para 2.

¹⁹⁴⁶ *ibid* para 5.

¹⁹⁴⁷ *n* 1945 para 4.

¹⁹⁴⁸ UNSC Draft Res 961 (20 December 2019) UN Doc S/2019/961, para 4-6.

¹⁹⁴⁹ *ibid* para 2.

¹⁹⁵⁰ Juraj Medzihorsky, Milos Popovic and Erin K. Jenne, 'Rhetoric of Civil Conflict Management: United Nations Security Council Debates Over the Syrian Civil War' (2017) 4 (2) *Research and Politics* 1, 1.

¹⁹⁵¹ Luljeta Kodra, 'The Civil War in Syria and the International Response' (2015) 2 (4) *European Journal of Social Sciences, Education and Research* 281, 288.

¹⁹⁵² Madeleine O Hosli and Thomas Dorfler, 'Why Is Change So Slow? Assessing Prospects for United Nations Security Council Reform' (2019) 22 (1) *Journal of Economic and Policy Reform* 35, 35.

In relation to the Syrian civil war, this has been a consistent theme throughout the conflict as the veto has become an insurmountable obstacle to effect R2P and humanitarian intervention as Russia and China have often utilised this privilege.¹⁹⁵³

This has allowed violations of IL, IHL, IHRL and CIL to continue, preventing referrals to the ICC from being passed to grant the court jurisdiction to investigate international crimes committed by individuals in the Russian and SAA forces use of military, effectively torpefying the UNSC.¹⁹⁵⁴

A practical example of the UNSC's inability to refer both Russian and SAA forces for war crimes investigation and trigger ICC involvement can be observed in 2014, when a draft resolution penned by France was vetoed by Russia and China.¹⁹⁵⁵ This gives weight to the animadversion pertaining to the inefficiency of the UNSC as Gould and Rablen have argued:

[T]he UNSC is too often impotent, not least because a preference against a resolution by a single P5 member can override a preference for the resolution by all remaining members. For instance, the UNSC is presently under criticism for its inability to respond decisively to the conflict in Syria.¹⁹⁵⁶

This impotency is further demonstrated in holding the USA and coalition forces (UK and France) to account for its illegal use of force within the Syrian territory without the explicit authorisation of the UNSC.

In 2018, eight countries including the USA, UK and France overwhelmingly rejected a draft resolution¹⁹⁵⁷ composed by Russia calling for condemnation

¹⁹⁵³ Jason Ralph and Jess Giffins, 'The Purpose of United Nations Security Council Practice: Contesting Competence Claims in the Normative Context Created by The Responsibility to Protect' (2017) 23 (3) *European Journal of International Relations* 630, 642-643.

¹⁹⁵⁴ Alex Whiting, 'An Investigation Mechanism for Syria: The General Assembly Steps into The Breach' (2017) 15 (2) *Journal of International Criminal Justice* 231, 231-232.

¹⁹⁵⁵ UNSC Draft Res 348 (22 May 2014) UN Doc S/2014/348.

¹⁹⁵⁶ Matthew Gould and Matthew D Rablen, 'Reform of The United Nations Security Council: Equity and Efficiency' (2017) 173 (1-2) *Public Choice* 145, 146-147.

¹⁹⁵⁷ UNSC Draft Res 355 (14 April 2018) UN Doc S/2018/355.

for the USA's aggression after the USA coalition forces carried out airstrikes on chemical sites in Syria.¹⁹⁵⁸

This demonstrates the obstacle which fundamentally prevents the UNSC to refer matters to the ICC is in fact the veto privilege granted to the P5 of the UNSC.¹⁹⁵⁹ The existence of the right to veto granted under the UN Charter¹⁹⁶⁰ contravenes IHL and CIL and most importantly the principle of *Jus Cogens*.

The literal meaning of *Jus cogens*¹⁹⁶¹ is 'compelling law', a technical term given to those norms of general IL that are argued as hierarchically superior. These are, in fact, a set of rules, which are peremptory in nature and from which no derogation is allowed under any circumstances.¹⁹⁶²

Weller elaborates the importance of *Jus Cogens*, stating: 'According to this doctrine, no state can contract out of a common core of international rules, including the prohibition of the use of force and minimum rules for the protection of human beings'.¹⁹⁶³

Thus, the veto of draft resolutions casted by China and Russia have clearly been politically motivated¹⁹⁶⁴ (including the USA, UK and France) to avoid accountability for the severe violations of IL and avoid individual criminal responsibility and investigations by the ICC, which can be construed as a derogation from *Jus Cogens*.

The fact that China and Russia vetoes have violated a peremptory norm, is deemed illegal under *Jus Cogens*.¹⁹⁶⁵ In addition, article 53 of the Vienna

¹⁹⁵⁸ Edith M. Lederer, 'UN Rejects Attempt to Condemn US Aggression in Syria' (*AP News*, 15 April 2018) <<https://www.apnews.com/5ccabb442c8a4c1e9fc02f1c9bccd39e>> accessed 26 January 2020.

¹⁹⁵⁹ Thomas M. Franck, 'Collective Security and UN Reform: Between the Necessary and the Possible' (2006) 6 (2) *Chicago Journal of International Law* 597, 601.

¹⁹⁶⁰ Charter of the United Nations [1945] art 27 (3).

¹⁹⁶¹ Section 2.2.4 to n 595 in ch 2.

¹⁹⁶² Kamrul Hossain, 'The Concept of Jus Cogens and the Obligation Under the UN Charter' (2005) 3 (1) *Santa Clara Journal of International Law* 72, 73.

¹⁹⁶³ Marc Weller, 'Undoing the Global Constitution: UN Security Council Action on the International Criminal Court' (2002) 78 (4) *International Affairs* 693, 693.

¹⁹⁶⁴ Leila Nadya Sadat, 'Genocide in Syria: International Legal Options, International Legal Limits and The Serious Problem of Political Will' (2015) 5 *Impunity Watch Law Journal* 1, 63.

¹⁹⁶⁵ John Heieck, 'Emerging Voices: Illegal Vetoes in the Security Council-How Russia and China Breached Their Duty Under Jus Cogens to Prevent War Crimes in Syria' (*Opinio Juris*, 14 August 2018) <<http://opiniojuris.org/2013/08/14/emerging-voices-illegal-vetoes-in-the->

Convention on the Law of Treaties, considers a treaty void if it conflicts with a peremptory norm of general IL.¹⁹⁶⁶

By virtue of this provision, the right to veto afforded to P5 members not only contravenes *Jus Cogens* but also renders the veto privilege granted by the UN Charter¹⁹⁶⁷ void, as the P5 throughout the Syrian civil war have used this to prevent R2P from being authorised.

Due to severe and dire humanitarian situation in Syria, the UNGA in response to the veto deadlock in the UNSC has since passed a resolution in 2016, creating the 'International, Impartial and Independent Mechanism' (IIIM).¹⁹⁶⁸

The purpose of the IIIM is to collect, consolidate, preserve and analyse evidence of violations of IHL and IHRL in the Syrian Arab Republic in preparation and expedition of fair independent proceedings against individuals and hold them accountable in national, regional and international courts or tribunals, which may have jurisdiction over the state in the future.¹⁹⁶⁹

However, the principle of 'Universal Jurisdiction' allows any court to prosecute certain crimes regardless for where they may have occurred¹⁹⁷⁰ and by whom.¹⁹⁷¹

This principle has proven to be most effective in holding Syrian perpetrators accountable¹⁹⁷² as the first worldwide trial on Syrian state torture commenced

security-council-how-russia-and-china-breached-their-duty-under-jus-cogens-to-prevent-war-crimes-in-syria/> accessed 26 January 2020.

¹⁹⁶⁶ Vienna Convention on the Law of Treaties [1969] art 53.

¹⁹⁶⁷ n 1960.

¹⁹⁶⁸ UNGA Res 71/248 (21 December 2016) UN Doc A/RES/71/248.

¹⁹⁶⁹ *ibid* para 4.

¹⁹⁷⁰ Devika Hovell, 'The Authority of Universal Jurisdiction' (2018) 29 (2) EJIL 427, 428.

¹⁹⁷¹ Melinda Rankin, 'The Responsibility to Prosecute Core International Crimes? The Case of German Universal Jurisdiction and the Syrian Government' (2019) 11 (4) Global Responsibility to Protect 394, 397.

¹⁹⁷² Petya Mitkova Koleva and Henrik Vigh, 'Critical Stasis and Disruptive Performances: ICJ and the Anwar R Trial in Koblenz' (2021) Theoretical Criminology Research Paper 2 <<https://journals-sagepub-com.brad.idm.oclc.org/doi/pdf/10.1177/13624806211008573>> accessed 6 July 2021.

in April 2020 in Germany. Entitled the 'Klobenz Trial' the German court charged two defendants both former Syrian intelligence officers.¹⁹⁷³

The first defendant named Anwar Raslan has currently been charged for being complicit in the torture of at least 4000 between 2011-2012, which resulted in the deaths of 58 people in the General Al-Khatib Branch in Damascus as well as further charges sexual violence being leveraged against him. A verdict is expected to be reached in the fall of 2021.

The second defendant Eyad Al-Gharib has since been found guilty, sentenced and convicted in 2021 to four and a half years in prison for aiding and abetting 30 cases of crimes against humanity.¹⁹⁷⁴

This chapter has demonstrated that the veto privilege incapacitated the UNSC from acting expeditiously and mitigating the effects of humanitarian disasters arising out of armed conflicts as exhibited throughout this chapter in Syrian civil war.

Realpolitik has been illustrated throughout the chapter as the pursuit and elimination of ISIS has remained a primary military objective to reclaim Syrian territory for Russia as an ally to the Assad regime¹⁹⁷⁵, including the USA's pre-emptive use of illegal force with the aid of the UK, France and coalition forces continued GWOT.¹⁹⁷⁶

For all parties involved it seems violations of IL, IHL, IHRL and CIL in relentlessly pursuing counter-terrorism objectives, without any accountability further exacerbates the blatant disregard for moral considerations but instead demonstrates a continued willingness by the P5 to achieve foreign policy

¹⁹⁷³ 'Human Rights Violations' (*European Center for Constitutional and Human Rights*) <https://www.ecchr.eu/en/case/first-criminal-trial-worldwide-on-torture-in-syria-before-a-german-court/#case_case> accessed 22 June 2021.

¹⁹⁷⁴ *ibid.*

¹⁹⁷⁵ Ilan Zelayat, 'Realpolitik and Jihad: The Iranian Use of Shiite Militias in Syria' (2019) 28 (2) *Digest of Middle East Studies* 296, 297.

¹⁹⁷⁶ Shirley V. Scott, 'Is There Room for International Law in Realpolitik?: Accounting for the US Law Attitude Towards International Law' (2004) 30 (1) *Review of International Studies* 71, 72.

objectives to assert their dominance¹⁹⁷⁷ to self-serve their national security and political interests at any expense devoid of any moral consideration.¹⁹⁷⁸

This has been mainly due to the veto privilege which has also adversely affected the ICC's mandate by limiting its potential jurisdictional capabilities through the lack of UNSC referrals¹⁹⁷⁹ to be able to administer international criminal justice rendering the institution futile.¹⁹⁸⁰

The abolishment of the veto privilege¹⁹⁸¹ has been proposed by scholars to improve the efficiency of the UNSC due to its frequent use and abuse¹⁹⁸² and reform of the UN Charter¹⁹⁸³ has previously been proposed to improve the performance of the UNSC in handling humanitarian catastrophe's and authorising R2P.¹⁹⁸⁴

However, whilst the right to veto still exists, the author concurs with the animadversions advanced by academics branding this organisation to be oxymoronicly ineffective to be able to maintain international peace and security.¹⁹⁸⁵

Similar to the findings in the Palestinian conflict in the previous chapter, the veto privilege has continued to subvert, enfeeble, devitalize and besmirch the

¹⁹⁷⁷ Shahbaz Hussain Shahand and Sudheer Singh Verma, 'The US and Russia: Politics Spheres of Influence in the 21st Century' (2018) XII (4) IUP Journal of International Relations 7, 19.

¹⁹⁷⁸ Donnette Murray, 'Military Action but Not as We Know It: Libya, Syria and the making of the Obama Doctrine' (2013) 19 (2) Contemporary Politics 146, 160.

¹⁹⁷⁹ Roy Gutman, 'The View from Syria: In War on Terror, Humanitarian Law Takes the Back Seat' (2020) 52 (1-2) Case W.Res.J.Int'l L. 9, 15.

¹⁹⁸⁰ Marieke De Hoon, 'The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy' (2017) 17 (4) International Criminal Law Review 591, 594.

¹⁹⁸¹ Richard Butler, 'Reform of the United Nations Security Council' (2012) 1 (1) Penn State Journal of Law and International Affairs 23, 39.

¹⁹⁸² Sushil Chandra Singh, 'The Veto Problem in the UN' (1958) 19 (2) Indian Journal of Political Science 129, 129

¹⁹⁸³ Charter of the United Nations [1945].

¹⁹⁸⁴ Nadia Banteka, 'Dangerous Liaisons: The Responsibility to Protect and a Reform Of The UN Security Council' (2016) 54 (2) Colum.J.Transnat'l L. 383, 423.

¹⁹⁸⁵ Mats Berdal, 'The UN Security Council: Ineffective but Indispensable' (2003) 45 (2) Survival: Global Politics and Strategy 7, 7.

UNSC's reputation and credibility, placing its existence and legitimacy in 'peril'¹⁹⁸⁶ by being unable to effectively manage the Syrian crisis.¹⁹⁸⁷

In turn has adversely affected any ICC intervention to indict and prosecute violations of IHL, which have been committed by individuals of P5 states and their allies in counter-terrorism operations. This will also be evinced in the next chapter, which will further analyse and critique the UNSC and the ICC's role throughout the duration of the 2011 Libyan conflict.

¹⁹⁸⁶ Ian Hurd, 'Myths of Membership: The Politics of Legitimation in UN Security Council Reform' (2008) 14 (2) *Global Governance* 199, 199.

¹⁹⁸⁷ Esmira Jafarova, 'Solving the Syrian Knot: Dynamics Within the UN Security Council and Challenges to Its Effectiveness' (2014) 13 (2) *Connections* 25, 25.

Chapter 6 – The Libyan Arab Jamahiriya

The Libyan Arab Jamahiriya¹⁹⁸⁸ similar to Palestine and Syria has also been subjected to western imperialism and political regime changes throughout the 20th century.

The 2011 ‘Arab Spring’ uprisings, initiated violence and conflict between civilians and governmental military forces. However, unlike Syria¹⁹⁸⁹, this swiftly prompted UNSC intervention authorising ‘use of force’ with the objective to protect civilians from the violence propagated by Colonel Muammar Gaddafi.¹⁹⁹⁰

However, the United States of America (USA), the United Kingdom (UK), France (hereafter referred to as the P3) and coalition forces operated outside the authority of the UNSC to implement regime change unjustly, helping rebel groups and militias in Libya overthrow the autocratic leader’s rule.¹⁹⁹¹

After the demise of Colonel Gaddafi Libya has faced considerable challenges in implementing a transitional government¹⁹⁹² as power struggles between armed brigades have resulted in political and criminal violence.¹⁹⁹³ Reports of torture and ill treatment of detainees by state forces¹⁹⁹⁴ and further hostilities between Libyan armed forces and armed groups have become a norm in the state.¹⁹⁹⁵

Libya is ‘widely considered to be a failed state’¹⁹⁹⁶ as it has descended into civil war with anarchy and mayhem contributing to the ensuing adverse

¹⁹⁸⁸ UNSC Res 109 (14 December 1955) UN Doc S/RES/109.

¹⁹⁸⁹ Section 5.1 to n 1706 in ch 5.

¹⁹⁹⁰ Yasmine Nahlawi, ‘The Legality of NATO’s Pursuit of Regime Change in Libya’ (2018) 5 (2) *Journal on the Use of Force and International Law* 295, 295-296.

¹⁹⁹¹ S. Krishnan, ‘UN Peacekeeping, Responsibility to Protect and Humanitarian Intervention’ (2020) 76 (1) *India Quarterly* 120, 131.

¹⁹⁹² UNHRC Res 22/19 (12 April 2013) UN Doc A/HRC/RES/22/19.

¹⁹⁹³ UNHRC ‘Technical Assistance for Libya in the field of Human Rights: Report of the United Nations High Commissioner for Human Rights’ (13 January 2014) UN Doc A/HRC/25/42 [2].

¹⁹⁹⁴ UNHRC Res 25/37 Rights’ (15 April 2014) UN Doc A/HRC/RES/25/37 [9]-[11].

¹⁹⁹⁵ UNHRC ‘Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Libya and on Related Technical Support and Capacity-Building Needs’ (12 January 2015) UN Doc A/HRC/28/51 [2]-[4].

¹⁹⁹⁶ Stephen R. Weissman, ‘The Law: Presidential Deception in Foreign Policy Making: Military Intervention in Libya 2011’ (2016) 46 (3) *Presidential Studies Quarterly* 669, 670.

humanitarian crisis as militias have displayed increased violence amidst the political and economic turmoil¹⁹⁹⁷, whilst becoming a 'safe-haven for terrorists'.¹⁹⁹⁸

The continued presence of the Islamic State of Iraq and Levant (ISIL) publicly executing civilians, beheading men, killing captured fighters¹⁹⁹⁹, commissioning suicide bombings²⁰⁰⁰ and attempting to assume territorial control of Libya through the Benghazi Revolutionaries Shura council after it pledged allegiance to it have significantly contributed to the dire humanitarian situation.²⁰⁰¹

The deteriorating situation in Libya is further exacerbated as state institutions are so weak smugglers, traffickers and criminal gangs have thrived as state authorities have been unable or unwilling to ensure the effective protection for migrants.²⁰⁰²

As of November 2020, 4,500 migrants and refugees including children have been held in government detention centres without any judicial process and unofficial detention centres operated by armed groups.²⁰⁰³ They have been routinely subjected to arbitrary detention, torture, including sexual violence, abduction for ransom, extortion, forced labour and unlawful killings.²⁰⁰⁴

The 2011 Libyan conflict is relevant to the central argument of the thesis as violations which have been committed by states when 'use of force' has been authorised by the United Nations Security Council (UNSC) has not led to any

¹⁹⁹⁷ Jean-Louis Romanet Perroux, 'The Deep Roots of Libya's Security Fragmentation' (2019) 55 (2) Middle Eastern Studies 200, 200.

¹⁹⁹⁸ Siyum Adugna Mamo, 'The Rise and Fall of Liberal Peace in Libya' (2018) 7 (1) Universitepark Bulten 14, 20.

¹⁹⁹⁹ UNHRC 'Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya' (15 February 2016) UN Doc A/HRC/31/47, para 17.

²⁰⁰⁰ *ibid* para 22.

²⁰⁰¹ UNHRC, Thirty-Fourth Session 27 February-24 March 2017 'Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Libya, including on the Effectiveness of Technical Assistance and Capacity-Building Measures Received by the Government of Libya' (13 January 2017) UN Doc A/HRC/34/42, para 6.

²⁰⁰² UNHRC, Thirty-Seventh Session 26 February-23 March 2018 'Situation of Human Rights in Libya, and the Effectiveness of Technical Assistance and Capacity-Building Measures Received by the Government of Libya' (21 February 2018) UN Doc A/HRC/37/46, para 42.

²⁰⁰³ UNHRC, Forty-Third Session 24 February-20 March 2020 'Situation of Human Rights in Libya, and the Effectiveness of Technical Assistance and Capacity-Building Measures Received by the Government of Libya' (23 January 2020) UN Doc A/HRC/43/75, para 37.

²⁰⁰⁴ *ibid* para 36.

accountability for the military conduct which was used outside the remit of its mandate to strictly protect civilians.²⁰⁰⁵

This chapter will make further observations as the USA and coalition forces have committed international crimes by continuing to violate International Law (IL) by using the 'global war on terror' (GWOT) doctrine to justify violating the sovereignty of Libya without the prior authorisation of the UNSC.

In addition, the criminal conduct of individuals belonging to the militaries of the permanent members (P5) for deliberately killing civilians have blatantly violated International Humanitarian Law (IHL), International Human Rights Law (IHRL) and Customary International Law (CIL), yet this has not prompted any involvement of the International Criminal Court (ICC).

The limitations of the ICC will be demonstrated as the court has struggled to enforce arrest warrants against high-ranking political individuals from the former Gaddafi Regime due to the 'complementarity principle', whilst demonstrating the unlikelihood of the UNSC making a referral to the ICC to indict and prosecute individuals belonging to the P5.

This chapter will reiterate the findings of the preceding chapters of the thesis and exhibit the ineptitude of the UNSC and the ICC rendering both inefficacious, inutile, nugatory and impotent in fulfilling their respective institutional purposes.²⁰⁰⁶

6.1 Background to the Conflict

Libya possesses a long history of political regime changes throughout the 19th and 20th century. Immediately prior to its birth as an independent nation-state on 24th December 1951, Libya consisted of three separately administered

²⁰⁰⁵ Ronald Bruce St John, 'From February 17 Revolution to Benghazi: Rewriting History for Political Gain' (2016) *Journal of North African Studies* 357, 360-361.

²⁰⁰⁶ Arif Saba and Shahram Akbarzadeh, 'The ICC and R2P: Complementary or Contradictory?' (2021) 28 (1) *International Peacekeeping* 84, 99-100.

territories: Cyrenaica, Tripolitania and Fezzan²⁰⁰⁷ initially under the control of the Ottoman Empire.²⁰⁰⁸

After a century of defeats and territorial losses sustained by the Ottoman empire²⁰⁰⁹, Libya succumbed to Italian military control, however, Italy's imperialistic ambitions and great power status was short-lived.²⁰¹⁰

In 1940, after Italy's participation in World War II as Germany's ally, Italy was defeated in the battle of El-Alamein in 1942, at the hands of Britain and France which ended three decades of Italian colonial rule of Libya.²⁰¹¹

Shortly after the demise of Mussolini in 1943, this resulted in the loss of Italy's African empire²⁰¹², prompting UK and French occupation²⁰¹³ dividing Libya into three zones; Tripolitania and Cyrenaica were placed under British administration and Fezzan under the French, with each of its territories under the supervision of chief administrators and its own local government.²⁰¹⁴

The Soviet Union (USSR) delivered a proposal at the Postdam Conference in 1945 for it to establish a trusteeship over Tripolitania. Two months later, at the Council of Foreign Ministers meeting in London, the USSR repeated its proposal requesting 10 years of trusteeship would be adequate for preparing Tripolitania for independence. After reconvening in Paris 1946, neither France, nor the UK were prepared to accept this proposal and demanded the immediate independence for Libya.²⁰¹⁵

²⁰⁰⁷ Frank Ralph Golino, 'Patterns of Libyan National Identity' (1970) 24 (3) Middle East Journal 338, 338.

²⁰⁰⁸ Ronald S. Cunsolo, 'Libya, Italian Nationalism and the Revolt Against Giolitti' (1965) 37 (2) Journal of Modern History 186, 186.

²⁰⁰⁹ Mustafa Aksakal, 'The Limits of Diplomacy: The Ottoman Empire and The First World War' (2011) 7 (2) Foreign Policy Analysis 197, 197.

²⁰¹⁰ Christopher Seton-Watson, 'Italy's Imperial Hangover' (1980) 15 (1) Journal of Contemporary History 169, 169.

²⁰¹¹ Yehudit Ronen, 'Libya's Conflict with Britain: Analysis of A Diplomatic Rupture' (2006) 42 (2) Middle Eastern Studies 271, 271.

²⁰¹² William S. Linsenmeyer, 'Italian Peace Feelers Before the Fall of Mussolini' (1981) 16 (4) Journal of Contemporary History 649, 649.

²⁰¹³ Jacob M. Landau, 'Some Russian Publications on Libya' (1979) 15 (2) Middle Eastern Studies 280, 280.

²⁰¹⁴ Lisa Anderson, 'Nineteenth-Century Reform in Ottoman Libya' (1984) 16 (3) International Journal of Middle East Studies 325, 325.

²⁰¹⁵ Ronald Bruce St John, 'The Soviet Penetration of Libya' (1982) 38 (4) The World Today 131, 131.

Thus, the occupation continued by the UK and France until the 15th September 1948, since no agreement could be reached, the matter was referred to the UNGA in accordance with the procedure outlined in the Treaty of Peace with Italy.²⁰¹⁶

In 1949, following the Fourth Session of the UNGA, it adopted resolution 289 (IV)²⁰¹⁷ detailing the disposal of former Italian colonies, and Libya was granted independence and deemed a sovereign state to become effective no later than the 1st January 1952.²⁰¹⁸

Subsequent, to the UNGA's Fifth Session demanding a transfer of powers be conferred to a provisional Libyan government²⁰¹⁹, Libya became 'the first country in North Africa to achieve independence in 1951.'²⁰²⁰

Libya declared its independence as a constitutional, hereditary monarchy under the leadership of Sanusi Said Muhammad Idris (King Idris I). The newly established 'Kingdom of Libya' adopted a federal system of government. Although, the Libyan State ended the federal system of government after a constitutional amendment in 1963, turning Libya into a unitary structure formally renamed to the 'United Kingdom of Libya' bringing together three provinces under one flag.²⁰²¹

6.1.1 The Islamic Kingdom of Libya and the Rise of Muammar Gaddafi

After Libya's independence on the 24th December 1951, the state was ruled autocratically by King Idris I, who held the majority of political power despite having an established legislature, often leading to the king disbanding political parties challenging the central government.

²⁰¹⁶ Benjamin Rivlin, 'Unity and Nationalism in Libya' (1949) 3 (1) Middle East Journal 31, 31.

²⁰¹⁷ UNGA Res 289 (IV) (21 November 1949) UN Doc A/RES/289 (IV) A-C.

²⁰¹⁸ *ibid* para 2.

²⁰¹⁹ UNGA Res 387 (V) (17 November 1950) UN Doc A/RES/387 (V), para 3 (c).

²⁰²⁰ Jacques Romani, 'Review of: The Origins of the Libyan Nation: Colonial Legacy, Exile and The Emergence of a New Nation-State by Anna Baldinetti' (2011) 65 (2) Middle East Journal 339, 339.

²⁰²¹ Abdul-Karim Said and Serdar Yurtsever, 'An Analysis on the Future of Libyan Political System' (2018) 2 (3) International Journal of entrepreneurship and Management Inquiries 16, 22.

In addition, during the early 1950's, the King established closer ties with the UK and the USA, allowing them to operate military bases in Libya in exchange for economic aid.²⁰²²

Although, the Libyan monarchy's dependency on western powers namely the USA and the UK²⁰²³ was perceived to be 'a corrupt regime which had been controlled by the West, being accused of being responsible for the increased concentration of the nation's wealth in the hands of King Idris'.²⁰²⁴

This led to a military coup in 1969²⁰²⁵ by Colonel Muammar Gaddafi and a group of Libyan military officers overthrowing King Idris I, establishing a new administration, headed by the Revolutionary Command Council (RCC) abolishing the monarchy and the constitution and proclaimed the new Libyan Arab Jamahiriya.²⁰²⁶

Despite, 'Colonel Gaddafi claimed not to have any official position in the Libyan state apparatus, he has been widely regarded as the head of state of Libya'.²⁰²⁷ His '42 year rule'²⁰²⁸ over Libya has allowed him to maintain his grip on power longer than most of the other rulers in the world²⁰²⁹, which has been largely attributed to his writing and publishing of *The Green Book* against the systematic, scientific theories of politics which were associated with modern governments.²⁰³⁰

²⁰²² Jacob Abadi, 'Pragmatism and Rhetoric in Libya's Policy Toward Israel' (2000) 20 (1) Journal of Conflict & Cooperation Theory <<https://journals.lib.unb.ca/index.php/JCS/article/view/4313>> accessed 9 March 2020.

²⁰²³ Stephen Blackwell, 'Saving the King: Anglo-American Strategy and British Counter-Subversion Operations in Libya 1953 – 59' (2003) 39 (1) Middle Eastern Studies 1, 1.

²⁰²⁴ Takis Fotopoulis, 'The Pseudo-Revolution in Libya and the Degenerate Left' (2011) 7 (1) International Journal of Inclusive Democracy <https://www.inclusivedemocracy.org/journal/vol7/vol7_no1_takis_Libya_part1_pseudo_revolution.html> accessed 9 March 2020.

²⁰²⁵ *ibid.*

²⁰²⁶ Said and Yurtsever (n 2021).

²⁰²⁷ Stefan Talmon, 'De-Recognition of Colonel Gaddafi as Head of State of Libya?' (2011) 60 (3) ICLQ 759, 759.

²⁰²⁸ Oliver Miles, 'Reviewed Work: Libya: The Rise and Fall of Qaddafi by Pargeter Alison' (2013) 24 (3) Journal of Islamic Studies 398, 398.

²⁰²⁹ 'The World's 7 Longest-Serving Rulers' (Al Jazeera 12 March 2018) <<https://www.aljazeera.com/news/2018/3/12/the-worlds-7-longest-serving-rulers>> accessed 26 February 2021.

²⁰³⁰ Lisa Anderson, 'Muammar Al-Qaddafi: The King of Libya' (2001) 54 (2) Journal of International Affairs 515, 515.

Until the late 1970's, the RCC (under the chairmanship of Colonel Gaddafi) functioned as the state's chief legislative and executive body and was assisted by a council of ministers, which carried out RCC policies and supervised the day-to-day administration of the government.²⁰³¹

Shortly after publishing *The Green Book* the institution of government in its traditional legal-bureaucratic sense was dismantled and the people's authority was exercised through people's congresses and committees commencing the so called-era of *Jamahiriyah*, the era of masses and the practice of direct democracy.²⁰³²

Despite Colonel Gaddafi heralding the *Jamahiriyah* system as 'superior to farcical and fake parliamentary and representative democracies in the west'²⁰³³, allegations of the Gaddafi regime being corrupt were voiced.²⁰³⁴

The regime was renowned for its superficial structure of its public committees dictated by wealth and profit, extravagance, luxury squandering of billions and its lack of transparency and consideration for human and legal rights.²⁰³⁵

A notable example includes the enactment of the Libyan legislation titled the 'Law Concerning the Restitution of Certain Assets to the State' enacted on the 21st July 1970, which agreed to compensate Jewish families for property which had been sequestered and formally expropriated by the previous monarchy, stating the revolutionary government (Gaddafi regime) would issue payments in the form of bonds, which never took place.²⁰³⁶

Another example includes the human rights abuse in the Abu Salim prison in 1996, where more than 1,200 prisoners were murdered. It was reported

²⁰³¹ Mohamed A El-Khawas, 'The New Society in Qaddafi's Libya: Can It Endure?' (1984) 31 (3) *Africa Today* 17, 17.

²⁰³² Sami G Hajjar, 'The Jamahiriyah Experiment in Libya: Qadhafi and Rousseau' (1980) 18 (2) *Journal of Modern African Studies*. 181, 181.

²⁰³³ Karim Mezran and Tiziana Giuliani, 'Libya: Evolution and Prospect of a Democratic Change' (2007) 87 (2) *Oriente Moderno* 457, 457.

²⁰³⁴ Tarek Ladjal, 'Tribe and State in the History of Modern Libya: A Khalidunian Reading of the Development of Libya In the Modern Era 1711 – 2011' (2016) 3 (1) *Cogent: Arts and Humanities* 1, 13

²⁰³⁵ *ibid.*

²⁰³⁶ Michael R Fischbach, 'Jewish Property Claims and Post-Qaddafi Libya' (2012) 263 *Middle East Report* 44, 44.

Gaddafi forces deliberately threw grenades in the prison courtyards and dispensed heavy gunfire targeting prisoners with Kalashnikov rifles.²⁰³⁷

These human rights abuses were not only isolated to the Abu Salim prison attacks, political opponents such as the Islamist fundamentalists were deemed to be a threat to the Gaddafi regime, which were also met with an equally devastating response.²⁰³⁸

The Gaddafi regime uprooted all potential coups between the 1980's – 1990's, often leading such groups to face executions, assassinations, arrests and torture. Severe restrictions were also imposed on freedoms of expression and association, even going so far as to ban all groups who opposed the ideologies of the 1969 revolution²⁰³⁹, which was common practice by African leaders in this period of history.²⁰⁴⁰

6.1.2 Gaddafi's Military Adventurism, International Terrorism and Longstanding Conflict with Western States

The Gaddafi regimes four-decade rule resulted in a myriad of IL violations resulting in longstanding conflicts with western states, as it has often 'advocated and supported anti-imperial revolutions around the world'.²⁰⁴¹ Colonel Gaddafi's anti-western sentiment led to him being branded as a 'rogue criminal'²⁰⁴².

An example of the Gaddafi regime's military adventurism can be observed in the 'Libyan intervention in 1980, which irreversibly internationalised the civil

²⁰³⁷ 'Libya: June 1996 Killings at Abu Salim Prison (*Human Rights Watch*, 27 June 2006) <<https://www.hrw.org/news/2006/06/27/libya-june-1996-killings-abu-salim-prison>> accessed 9 March 2020.

²⁰³⁸ Dennis Sammut, 'Libya and The Islamic Challenge' (1994) 50 (10) *The World Today* 198, 198.

²⁰³⁹ Thomas Keenan, 'The Libyan Uprising and The Right of Revolution in International Law' (2011) 11 (1) *ICLQ* 7, 10.

²⁰⁴⁰ Rita Abrahamsen, 'Return of the Generals? Global Militarism in Africa from the Cold War to the Present' (2018) 49 (1-2) *Security Dialogue* 19, 21-24.

²⁰⁴¹ Lisa Anderson, 'Rogue Libya's Long Road' (2006) 241 *Middle East Report* 42, 42.

²⁰⁴² Hussein Soloman and Gerrie Swart, 'Libya's Foreign Policy in Flux' (2005) 104 (416) *African Affairs* 469, 469.

war in Chad'²⁰⁴³, following Libya's occupation and attempted annexation of the Aouzou strip located in the north of Chad which was reputedly rich in minerals and uranium.²⁰⁴⁴

This prompted the involvement of the USA and France to expel Libyan occupation of Chadian territory, which led to a ceasefire forcing Colonel Gaddafi to give a public statement in 1987, confirming Libya would no longer occupy Chadian territory.²⁰⁴⁵ This was considered a military disaster for Colonel Gaddafi losing 7,500 troops in the hostilities and 1.5 billion in military equipment.²⁰⁴⁶

Another notable example includes the historical tension between the USA under the administration of former President Ronald Reagan in 1981, which involved Libyan fighters attacking and destroying a USA aircraft 60 miles off the coast of Libya in the Gulf of Sidra, resulting in the USA responding in turn by destroying two Libyan aircrafts in 1981.²⁰⁴⁷ This swiftly led to the closure of the Libyan embassy in Washington DC in 1981.²⁰⁴⁸

The regime often used Libya's oil wealth to support international terrorism and revolutionary causes²⁰⁴⁹ around the globe throughout the 1970's and 1980's.²⁰⁵⁰ This included: the Baader-Meinhof Gang, the Moro Islamic

²⁰⁴³ E. G. H. Joffe, 'The International Consequences of the Civil War in Chad' (1980) 9 (25) *Review of African Political Economy* 91, 91.

²⁰⁴⁴ Gino J. Naldi, 'Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)' (1995) 44 (3) *ICLQ* 683, 683.

²⁰⁴⁵ Roger Charlton and Roy May, 'Warlords and Militarism in Chad' (1989) 16 (45-46) *Review of African Political Economy* 12.

²⁰⁴⁶ Stephen Bates, 'Muammar Gaddafi Timeline' *The Guardian* (London, 20 October 2011) <<https://www.theguardian.com/world/2011/oct/20/muammar-gaddafi-timeline>> accessed 9 March 2020.

²⁰⁴⁷ Steven R Ratner, 'The Gulf of Sidra Incident of 1981: A Study of the Lawfulness of Peacetime Aerial Engagements' (1984) 10 (1) *Yale J.Int'l L.* 59, 59.

²⁰⁴⁸ Edward Schumacher, 'The United States and Libya' (1986) 65 (2) *Foreign Affairs* 329, 329.

²⁰⁴⁹ Adrian Hanni, 'Read it in the Papers, Seen it on TV...': The 1981 Libyan Hit Squad Scare as a Case of Simulated Terrorism in the United States' (2016) 9 (1) *Critical Studies on Terrorism* 54, 56.

²⁰⁵⁰ Deepa Kumar, 'Terrorcraft: Empire and the Making of the Racialised Terrorist Threat' (2020) 62 (2) *Race and Class* 34, 50.

Liberation Front in the Philippines²⁰⁵¹, the Japanese Red Army, the YKK Kurdish Separatists²⁰⁵² the Basque separatists *Euskadi Ta Askatasuna*, the Nation of Islam in the USA and the Revolutionary Armed Forces of Colombia.²⁰⁵³

Libya has also been found to have financially supported the African National Congress (ANC), the Anti-Apartheid group situated in South Africa, headed by former President Nelson Mandela²⁰⁵⁴, supplying Argentina with weapons and missiles during the 1982 war against the UK, frequent military confrontations with the USA regarding the territorial air space over the Gulf of Sidra and openly assaulting its bordering neighbour Sudan.²⁰⁵⁵

Most recently, investigations in the UK have unraveled that the Gaddafi regime was responsible for supplying more than 1,000 assault rifles to the 'guerrilla terrorist organisation the Irish Republican Army (IRA)'²⁰⁵⁶, throughout the 1970's enough to arm two infantry battalions, as well as smuggling flame-throwers, USSR-made grenades, mines, anti-aircraft weapons and Czech Republic made Semtex explosives.²⁰⁵⁷

Colonel Gaddafi's support for international terrorism²⁰⁵⁸ as a means to inflict violence upon global governments not only extended to financing and

²⁰⁵¹ Paul Valley, 'The Big Question: He May Be the Subject of A New Opera, But Is Gaddafi Still A Global Pariah?' *The Independent* (London, 8 September 2006) <<https://www.independent.co.uk/news/world/africa/the-big-question-he-may-be-the-subject-of-a-new-opera-but-is-gaddafi-still-a-global-pariah-415062.html>> accessed 9 March 2020.

²⁰⁵² Lukasz Jurenczyk, 'Great Britain Against Libya's State Terrorism in the 1980s' (2018) 24 (31) *Historia I Polityka* 61, 64.

²⁰⁵³ Mia Bloom, 'Constructing Expertise: Terrorist Recruitment and Talent Spotting in the PIRA, Al-Qaeda and ISIS' (2017) 40 (7) *Studies in Conflict and Terrorism* 603, 609.

²⁰⁵⁴ Faith Karimi, 'Gadhafi's Legacy in Africa: Madman or God?' (*CNN*, 5 October 2011) <<https://edition.cnn.com/2011/10/05/world/africa/africa-gadhafi-legacy/index.html>> accessed 9 March 2020.

²⁰⁵⁵ Oye Ogunbadejo, 'Qaddafi and Africa's International Relations' (1986) 24 (1) *Journal of Modern African Studies* 33, 33.

²⁰⁵⁶ W. H. Van Voris, 'The Provisional IRA and The Limits of Terrorism' 16 (3) *The Massachusetts Review* 413, 413.

²⁰⁵⁷ Henry McDonald, 'UK Accused of Failing Victims of IRA Killed by Libya-Supplied Weapons' *The Guardian* (London, 2 May 2017) <<https://www.theguardian.com/world/2017/may/02/uk-accused-of-failing-victims-of-ira-killed-by-libya-supplied-weapons>> accessed 9 March 2020.

²⁰⁵⁸ Schumacher (n 2048).

supplying weapons to terrorist groups, the regimes close association with terrorism has also observed members of its own regime carrying out attacks on the west.

It has previously highlighted that the regime's rather misconceived notion of holy war (misinterpreted as *Jihad*), has been the action element of Arab nationalism as a chosen tool to achieve social justice both inside and outside of the country.²⁰⁵⁹

This has been showcased by the acts of terrorism carried out in different countries by the Gaddafi regime. A notable example can be observed in 1984, where 75 protestors behind crowd barriers in St James Square in London chanted against Colonel Gaddafi. The protestors were met with a Libyan diplomat initiating gunfire from the first floor of the Libyan Embassy with a submachine killing 25-year-old police officer Yvonne Fletcher.²⁰⁶⁰

In the same year, bomb attacks on seven Libyan exiles living in the UK, left 24 people injured and one Libyan journalist opposed to the Gaddafi's regime was assassinated as he walked past London's Regent's Park Mosque.²⁰⁶¹

In 1985, members of the Abi Nidal terrorist organisation sponsored by the Libyan government²⁰⁶² carried out horrific attacks in the Rome and Vienna airports targeting Jewish passengers²⁰⁶³, hurling grenades and firing submachine guns at crowds of holiday travellers at the check-in counters of

²⁰⁵⁹ Ronald Bruce St John, 'Terrorism and Libyan Foreign Policy, 1981-1986' (1986) 42 (7) *The World Today* 111, 111.

²⁰⁶⁰ Arthur J. Goldberg, 'The Shoot-Out at the Libyan Self-Styled People's Bureau: A Case of State Sponsored International Terrorism (1984) 30 (1) *S.D.L.Rev.* 1, 1.

²⁰⁶¹ 'Colonel Muammar Gaddafi: Obituary' *The Telegraph* (London, 20 October 2011) <<https://www.telegraph.co.uk/news/obituaries/8838894/Colonel-Muammar-Gaddafi-obituary.html>> accessed 10 March 2020.

²⁰⁶² John F. Cooke, 'The United States 1986 Emergency Economic Sanctions Against Libya – Have They Worked?' (1990) 14 (2) *Maryland Journal of International Law and Trade* 196, 196.

²⁰⁶³ Ariel Merari, 'Terrorism as A Strategy of Insurgency' (1993) 5 (4) *Terrorism and Political Violence* 213, 214.

Israel Airlines, killing 13 people, including 4 Americans wounding 113 in total in the two attacks.²⁰⁶⁴

In 1986, the Libyan bombing of a west Berlin discotheque²⁰⁶⁵ called the '*La Belle Club*', resulted in the deaths of 2 USA soldiers and injured 229 people, many lost limbs falling victim to state-sponsored terrorism which Colonel Gaddafi admitted took responsibility for.²⁰⁶⁶

In 1988, Pan Am Flight 103 dubbed the 'Lockerbie bombing' took flight from Heathrow airport (UK) and suddenly disappeared over the village of Lockerbie, Scotland.²⁰⁶⁷ It was established that two Libyan nationals had planted the bomb, which led to the destruction of the plane.²⁰⁶⁸ It was believed that the terrorist attack was state-sponsored²⁰⁶⁹ killing 270 people²⁰⁷⁰ which was considered 'one of the worst acts of international terrorism in history'.²⁰⁷¹

However, the Lockerbie bombing was not an isolated incident, in 1989 the Libyan plane bombing of French aircraft UTA Flight 772, exploded over Niger while travelling to Paris from Congo-Brazzaville killing 170 passengers. One of the suspects involved was found to be the head of Libyan external intelligence agency Abdallah Senussi, Colonel Gaddafi's brother-in-law.²⁰⁷²

²⁰⁶⁴ John Tagliabue, 'Airport Terrorists Kill 13 and Wound 113 At Israeli Counters in Rome and Vienna' *The New York Times* (New York, 28 December 1985) <<https://www.nytimes.com/1985/12/28/world/airport-terrorists-kill-13-and-wound-113-at-israeli-counters-in-rome-and-vienna.html>> accessed 10 March 2020.

²⁰⁶⁵ Gregory Francis Intocchia, 'American Bombing of Libya: An International Legal Analysis' (1987) 19 (2) *Case W.Res.J.Int'l L.* 177, 210.

²⁰⁶⁶ Steven Erlanger, '4 Guilty in Fatal 1986 Berlin Disco Bombing Linked to Libya' *The New York Times* (New York, 14 November 2001) < <https://www.nytimes.com/2001/11/14/world/4-guilty-in-fatal-1986-berlin-disco-bombing-linked-to-libya.html>> accessed 10 March 2020.

²⁰⁶⁷ Robert Black, 'The Lockerbie Disaster' (1999) 37 (2) *Archiv des Volkerrechts* 214, 214.

²⁰⁶⁸ Anthony Aust, 'Lockerbie: The Other Case' (2000) 49 (2) *ICLQ* 278, 278.

²⁰⁶⁹ Jonathan A. Frank, 'A Return To Lockerbie and the Montreal Convention in the Wake of the September 11th Terrorist Attacks: Ramifications of Past Security Council and International Court of Justice Action' (2001) 30 (4) *Denv.J.Int'l L.&Pol'y* 532, 532.

²⁰⁷⁰ Elizabeth F. Loftus, 'Eyewitness Testimony in the Lockerbie Bombing Case' (2013) 21 (5) *Memory and the Law: Case Studies* 584, 584.

²⁰⁷¹ Jonathan B. Schwartz, 'Dealing with a Rogue State: The Libya Precedent' (2007) 101 (3) *AJIL* 553, 559.

²⁰⁷² Jon Henley, 'France Finds Six Libyans Guilty of 1989 Airliner Bombing' *The Guardian* (London, 11 March 1999) <<https://www.theguardian.com/world/1999/mar/11/jonhenley>> accessed 10 March 2020.

Subsequently, in 1992 Libya was subjected to UN sanctions²⁰⁷³ which included an arms embargo, for not cooperating with investigations over the plane bombings²⁰⁷⁴ and by failing to hand over the two indicted suspects in the bombing of the Pan Am Flight 103 over Lockerbie.²⁰⁷⁵

However, the Gaddafi regime would continue its 'long Arab winter of authoritarian rule'²⁰⁷⁶ for another two decades until its demise after a wave of protests, uprisings and insurrections known as the Arab Spring.²⁰⁷⁷

6.2 The Arab Spring Protests, Violations by the Gaddafi Regime and the UNSC's Response to the Libyan Civil War

The 2011 Arab Spring Uprisings have been described as 'one of the most significant sets of events in the Arab Middle East since the end of World War II'²⁰⁷⁸, inspiring a 'spontaneous explosion of protest and popular political upheaval'²⁰⁷⁹ across the Arab world rendering no country, republican or monarchical being immune from the pressure by the public for change²⁰⁸⁰ and greater democratic governance.²⁰⁸¹

As mentioned in the preceding chapter²⁰⁸², the protest which was initially sparked in Sidi Bouzid, Tunisia in December 2010, following Mohammed Bouazizi's self-immolation in protest of police corruption and ill treatment²⁰⁸³

²⁰⁷³ UNSC Res 748 (31 March 1992) UN Doc S/RES/748.

²⁰⁷⁴ UNSC Res 731 (21 January 1992) UN Doc S/RES/731.

²⁰⁷⁵ Lyn Boyd-Johnson, 'Strategic Moral Diplomacy: Mandela, Qaddafi, and the Lockerbie Negotiations' (2005) 1 (1) Foreign Policy Analysis 73, 73.

²⁰⁷⁶ Michael J Totten, 'Arab Spring or Islamist Winter? Three Views' (2012) 174 (5) World Affairs 23, 23.

²⁰⁷⁷ Randall Kuhn, 'On the Role of Human Development in the Arab Spring' (2012) 38 (4) Population and Development Review 649, 649.

²⁰⁷⁸ Peter Jones, 'The Arab Spring: Opportunities and Implications' (2012) 67 (2) International Journal 447, 447.

²⁰⁷⁹ Jacqueline S Ismael and Shereen T Ismael, 'The Arab Spring and The Uncivil State' (2013) 35 (3) Arab Studies Quarterly 229, 229.

²⁰⁸⁰ P.R. Kumaraswamy, 'The Arab Spring' (2011) 38 (1) India International Centre Quarterly 52, 52.

²⁰⁸¹ Gamal M Selim, 'The United States and The Arab Spring: The Dynamics of Political Engineering' (2013) 35 (3) Arab Studies Quarterly 255, 255.

²⁰⁸² Section 5.1 to n 1706 in ch 5.

²⁰⁸³ Kamal Eldin Osman Shah, 'The Roots and Causes of the 2011 Arab Uprisings' (2013) 35 (2) Arab Studies Quarterly 184, 184.

initially sparked a countrywide protest resulting in the ousting of Zine El-Abidine Ben Ali's, 23-year dictatorship.²⁰⁸⁴

The 'domino effect'²⁰⁸⁵ of the Arab Springs fully erupted region wide in the Arab middle east throughout the beginning of 2011²⁰⁸⁶ including Libya where 'ragtag bands of armed rebels in eastern provinces ignited the protests, revealing the tribal and regional cleavages which beset the country for decades'.²⁰⁸⁷

Indeed, the popular movement disgorged in the eastern city of Benghazi and then escalated into a civil war between groups of anti-government protesters and Gaddafi's forces.²⁰⁸⁸ The dire humanitarian situation resulted in Libyan armed forces and mercenaries wielding extreme violence against people and the threat of imminent civilian massacre in Benghazi urged the need for humanitarian intervention.²⁰⁸⁹

As protests spread to the western cities of Tripoli, the capital, Misrata, Zawiya, Zuwara, and Zintan²⁰⁹⁰, Gaddafi forces attacked the Libyan people killing civilians leading to scores of deaths, injuries, internal displacement, refugees and other forms of humanitarian crisis raising further humanitarian concerns.²⁰⁹¹

²⁰⁸⁴ Muhammed Kursad Ozekin and Hasan Huseyn Akkas, 'An Empirical Look to the Arab Spring: Causes and Consequences (2014) 13 (1-2) Turkish Journal of International Relations 175, 176.

²⁰⁸⁵ Charles Simpson, 'Assessing the Arab Spring in Libya and Syria: A Compilation of Varying Statements from Key Actors' 11 (1) Connections 55, 66.

²⁰⁸⁶ Armando Salvatore, 'Before (And After) The Arab Spring: Connectedness to Mobilization in The Public Sphere' (2011) 91 (1) Oriente Mod. 5, 5.

²⁰⁸⁷ Lisa Anderson, 'Demystifying the Arab Spring: Parsing the Differences Between Tunisia, Egypt and Libya' (2011) 90 (3) Foreign Affairs 2, 2.

²⁰⁸⁸ Ozekin and Akkas (n 2084) 176.

²⁰⁸⁹ Christopher M Davidson, 'Why Was Muammar Qadahfi Removed?' (2017) 24 (4) Middle East Policy 91, 91.

²⁰⁹⁰ 'World Report 2012: Libya, Events of 2011' (*Human Rights Watch*) <<https://www.hrw.org/world-report/2012/country-chapters/libya>> accessed 10 March 2020.

²⁰⁹¹ Vincent Oyekwere Sunday and Aniche Enerst Toooh, 'A Critical Exploration of the United Nations Security Council Resolution Number 1973 on Libya 2011' (2012) 2 (3) African Journal of Social Sciences 53, 53.

6.2.1. The IHL violations Committed by the Gaddafi Regime in the Libyan Civil War

The Libyan civil war between the Gaddafi Regime and rebel forces falls within the scope a Non-International Armed Conflict (NIAC)²⁰⁹², similar to the ongoing Syrian civil war in the preceding chapter of the thesis²⁰⁹³, as the intensification of hostilities had exceeded and surpassed the internal minor disturbance threshold.²⁰⁹⁴

Reports during the conflict have identified enforced disappearances, torture as well as arbitrary detention of civilians occurred at the hands of governmental forces.²⁰⁹⁵ Enforced disappearance is a clear breach of IHRL²⁰⁹⁶ as confirmed in previous African²⁰⁹⁷ and UN judicial decisions.²⁰⁹⁸

Torture is also prohibited under the UN Convention Against Torture²⁰⁹⁹, the Geneva Convention²¹⁰⁰ and the ICRC's codified CIL.²¹⁰¹ This has also been confirmed in practice by the ICTY in the *Delalić case*²¹⁰² and *Furundžija case*²¹⁰³.

²⁰⁹² Geneva Convention I: For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [1949] art 3.

²⁰⁹³ Section 5.2.2 to n 1762 in ch 5.

²⁰⁹⁴ 1977 Additional Protocol II to the Geneva Conventions [1949] art 1 (2).

²⁰⁹⁵ 'The Battle of Libya: Killings, Disappearances and Torture' (*Amnesty International*, 28 May 2011) 9 <<https://www.amnesty.org/download/Documents/32000/mde190252011en.pdf>> accessed 10 March 2020.

²⁰⁹⁶ International Convention for the Protection of Enforced Disappearance [1992] art 1 and art 2.

²⁰⁹⁷ *Amnesty International and Others v Sudan*, Merits, Comm no 48/90, Comm no 50/91, Comm no 52/91, Comm no 89/93, 26th Ordinary Session (1-15 November 1999).

²⁰⁹⁸ *Youssef El-Magreibi v The Libyan Arab Jamahiriya* (1994) Comm No 440/1990, UN Doc CCPR/C/50/D/440/1990, para 5.4

²⁰⁹⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1984] art 1 and 2.

²¹⁰⁰ Geneva Convention IV: Relative to the Protection of Civilian Persons in Tome of War [1949] art 32.

²¹⁰¹ Jean-Marie Henckaerts and Louise Doswald Beck, *Customary International Humanitarian Law, Volume I: Rules* (first published 2005, Cambridge University Press 2009) 315.

²¹⁰² *Prosecutor v Delalić et al* (Trial Chamber Judgement) IT-96-21-T (16 November 1998), para 452.

²¹⁰³ *Prosecutor v Anto Furundžija* (Trial Chamber Judgement] I5-95-17-/1-T (10 December 1998), para 134.

Moreover, the Libyan air force carried out airstrikes indiscriminately bombing urban areas²¹⁰⁴, targeting civilians by using indiscriminate weapons such as: anti-personnel mines and cluster bombs, in densely populated residential areas. They killed and injured civilians not involved and extra-judicially executed people who had been captured and restrained.²¹⁰⁵

It has also been established Libyan forces were supplied with 'Viagra', an oral therapy²¹⁰⁶ designed mainly to treat males suffering with erectile dysfunction²¹⁰⁷ to enhance sexual performance by enhancing penile erection.²¹⁰⁸

Reports emerged Libyan forces used systematic rape as strategy for warfare, with certain instances being recorded on mobile devices, which the International Criminal Court (ICC) sought to obtain.²¹⁰⁹ A notable example involves Iman Al-Obeidi, who was gang raped multiple times and badly beaten by Libyan forces after being stopped and arrested at a checkpoint in Tripoli.²¹¹⁰

The use of sexual violence and wartime rape has been condemned by the UNSC²¹¹¹ as it is a war crime²¹¹² and a crime against humanity under the Rome Statute.²¹¹³ The ICC has confirmed this in the *Katanga* case²¹¹⁴ and confirmed previously by the ICTR.²¹¹⁵

²¹⁰⁴ Nicola Pedde, 'The Libyan Conflict and Its Controversial Roots' (2017) 16 (1) European View 93, 95.

²¹⁰⁵ Sunday and Tooch (n 2091) 53-54.

²¹⁰⁶ Hassan Chamsi-Pasha, 'Sildenafil (Viagra) and the Heart' (2001) 8 (2) Journal of Family and Community Medicine 63, 63.

²¹⁰⁷ J.S. Saini and M.K. Garg, 'Viagra: Is It A Wonder Drug?'(2001) 57 (1) Medical Journal Armed Forces India 44,44-45.

²¹⁰⁸ Melvin D. Cheitlin et al, 'Use of Sildenafil (Viagra) in Patients with Cardiovascular Disease' (1999) 99 (1) Circulation 168, 168-169.

²¹⁰⁹ Julia Garraio, 'Arresting Gaddafi Will Be the Most Effective Way to Stop These Rapes. Sexual Violence in the Western Media's Coverage of the War in Libya' 16 e-Cadernos CES 111, 112.

²¹¹⁰ Charles Clover, 'Lone, Brave Woman Exposes Truth of Libya' *Financial Times* (London, 28 March 2011) <<https://www.ft.com/content/83912d74-5963-11e0-bc39-00144feab49a>> accessed 10 March 2020.

²¹¹¹ UN Res 1820 (19 June 2008) UN Doc S/RES/1820, para 3.

²¹¹² Rome Statute of the International Criminal Court [1998] art 8 (b) (xxii) and art 8 (c) (vi).

²¹¹³ Rome Statute of the International Criminal Court [1998] art 7 (g).

²¹¹⁴ *Prosecutor v Germain Katanga* (Judgement) ICC-01/04-01/07 (7 March 2014), para 10.

²¹¹⁵ *Prosecutor v Jean-Paul Akeyesu* (Judgement) ICTR-96-4-T (2 September 1998), para 23.

The violence inflicted on civilians by the Gaddafi regime involved collective punishment by unleashing widespread lethal force on the civilian populous deliberately killing civilians, enforcing detention²¹¹⁶ and carrying out torture.²¹¹⁷ This practice is condemned under IHL and renders individuals criminally responsible for war crimes and crimes against humanity.²¹¹⁸

6.2.2 The UNHRC's and the UNSC's Response to The Libyan Civil War

The systematic human rights violations committed against Libyan protestors by the Gaddafi regime in the Arab Spring uprising, resulted in swift intervention by the UN.²¹¹⁹

Initially, the UNGA suspended Libya's right of membership in the United Nations Human Rights Council (UNHRC) by unanimous vote.²¹²⁰ In addition, The UNHRC established an international commission of inquiry on Libya empowering it with a mandate to investigate all alleged human rights violations in Libya.²¹²¹

The UNSC's response to the Libyan crisis has been considered a triumph, due to the passing of both resolutions 1970²¹²² and 1973²¹²³ reinforcing its mandate to react and respond to the humanitarian crisis in Libya, without any of the five permanent members (P5) resorting to a veto.²¹²⁴ UNSC resolution 1970 imposed an arms embargo²¹²⁵, travel ban against Libyan officials²¹²⁶,

²¹¹⁶ Dana M. Moss, 'Transitional Repression, Diaspora Mobilization and the Case of the Arab Spring' (2016) 63 (4) *Social Problems* 480, 493.

²¹¹⁷ Emmanuel De Groof, 'First Things First: R2P Starts with Direct Negotiations' (2016) 51 (2) *International Spectator* 30, 32.

²¹¹⁸ Rome Statute of the International Criminal Court [1998] art 7 (1) (a)-(k).

²¹¹⁹ Mediel Hove, 'Post-Gaddafi Libya and the African Union: Challenges and the Road to Sustainable Peace' (2017) 52 (3) *Journal of Asian and African Studies* 271, 271.

²¹²⁰ UNGA Res 65/265 (3 March 2011) UN Doc A/RES/65/265

²¹²¹ UNHRC Res S-15/1 (2011) UN Doc A/HRC/S-15/1.

²¹²² UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970.

²¹²³ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

²¹²⁴ Patrick C.R. Terry, 'The Libya Intervention (2011): Neither Lawful, Nor Successful' (2015) 48 (2) *Comparative and International Law Journal of Southern Africa* 162, 162.

²¹²⁵ n 2122 para 9.

²¹²⁶ n 2122 paras 15-16 and annex I.

asset freezes against Colonel Gaddafi, his family members and military leaders'²¹²⁷

In addition, the situation in Libya was referred to the ICC giving the court jurisdiction to investigate²¹²⁸ senior governmental officials, including Colonel Gaddafi. This also marked the second time the UNSC granted the ICC jurisdiction to the ICC to investigate a head of state²¹²⁹ as the first was the former Sudanese President Omar Hassan Al-Bashir of Sudan²¹³⁰ after the mass genocide in Darfur.²¹³¹

The Gaddafi regime's refusal to comply with resolution 1970, led to further violations of IHL being committed at the hands of Libyan forces, with increased violence being inflicted upon civilians and anti-Gaddafi rebels in Benghazi, firing heavy weapons indiscriminately into residential areas and carrying out airstrikes intentionally bombing civilians.²¹³²

Colonel Gaddafi's deliberate targeting of civilians, media professionals and rebel groups, prompted the UNSC to interpose in the dire situation, by authorising the North Atlantic Treaty Organisation (NATO) to protect civilians in Libya.²¹³³

UNSC resolution 1973 was passed, authorising use of force against Libyan forces including the Libyan air force.²¹³⁴ This led the NATO to intervene in the Libyan crisis through the doctrine of Responsibility to Protect (R2P) which was

²¹²⁷ n 2122 para 17 and Annex II.

²¹²⁸ n 2122 paras 4-8.

²¹²⁹ Rome Statute of the International Criminal Court [1998] art 12.

²¹³⁰ Section 2.3.1 to n 657 in ch 2.

²¹³¹ Vesselin Popovski, 'Fighting the Colonel: Sanctions and the Use of Force' (2011) 1 (1) *Jindal Journal of International Affairs* 148, 155.

²¹³² Alan J. Kuperman, 'NATO's intervention In Libya: A Humanitarian Success?' (2013) *NATO's Intervention in Libya: A Humanitarian Success?* in: Aidan Hehir, Robert Murray (eds) *Libya, the Responsibility to Protect and the Future of Humanitarian Intervention* (Palgrave Macmillan, London) 192.

²¹³³ Paul R. Williams, 'Security Council Resolution 1973 On Libya: A Moment of Legal and Moral Clarity' (2011) 44 (1) *Case W.Res.J.Int'l L.* 225, 227.

²¹³⁴ Ilan Fuchs and Harry Borowski, 'The New World Order: Humanitarian Interventions from Kosovo To Libya And Perhaps Syria?' (2015) 65 (2) *Syracuse L.Rev.* 303, 306.

entitled 'Operation Unified Protector' (OUP)²¹³⁵ with an objective to protect civilians and civilian populated areas from attack or the threats of attack.²¹³⁶

The UNSC's response to the Libyan crisis was highly commended²¹³⁷, however the next segment of the chapter will adduce NATO's violations of IHL throughout the duration military operation.

6.3 Operation Unified Protector and NATO's Illegal Military Conduct in The Libyan Civil War

On the 19th March 2011, France launched air strikes against a column of Libyan army tanks approaching Benghazi. This marked the beginning of OUP passing under the command and control of NATO. A coalition of states including the USA, the UK, Belgium, Canada, Denmark, Italy, the Netherlands, Norway, Spain, Qatar and the United Arab Emirates participating in the military intervention.²¹³⁸

The NATO-led operations prevented the fall of the rebel stronghold of Benghazi and the widely anticipated massacre. After a period in which the frontline moved backwards and forward with alarming rapidity, the conflict settled into a period of stalemate. During this period, the NATO and its allies continued to use force against Libyan targets, including command and control facilities.²¹³⁹

On the 19th August 2011, forces loyal to the rebel National Transitional Council (NTC) stormed Tripoli and the city was taken within a week. Fighting continued

²¹³⁵ Chuka Euka and Nwambe Chiemela, 'Foreign Military Intervention in Libya: An Analysis of the Just War Principles of Jus Ad Bellum and Jus In Bello' (2018) 8 (6) *Journal of Mass Communication and Journalism* 396, 396.

²¹³⁶ Mitsuhsa Fukutomi, 'Humanitarian Intervention in Libya: Is It Causing Internal War' (2017) 45 *Hitotsubashi Journal of Law and Politics* 23, 23.

²¹³⁷ Ademola Abass, 'The African Union's Response to the Libyan Crisis: A Plea for Objectivity' (2014) 7 (1) *African Journal of Legal Studies* 123, 136.

²¹³⁸ Olivier Corten and Vaïos Koutroulis, 'The Illegality of Military Support to Rebels in the Libyan War: Aspects of Jus Contra Bellum and Jus In Bello' (2013) 18 (1) *Journal of Conflict and Security Law* 59, 59.

²¹³⁹ Alex J. Bellamy, 'International Responses to Human Protection Crises: Responsibility to Protect and The Emerging Protection Regime' (2015) 7 (7) *RCCS Annual Review* 95, 96.

around government strongholds until October 2011, when the town of Sirte fell to rebel forces and Gaddafi himself was captured and executed.²¹⁴⁰

Over the course of the seven-month military campaign, 'over 9,000 strike sorties had been flown and close to 6000 targets had been destroyed'.²¹⁴¹ It appeared NATO's air campaign succeeded in helping a group of rebels lacking formal organisation, overthrow the brutal dictatorship of Colonel Muammar Gaddafi.²¹⁴²

However, NATO has been criticised for violating the principles of IHL by deliberately targeting residential areas and attacking civilians, taking advantage of this resolution to bombard Libya and execute other actions that were not authorised by the UNSC.²¹⁴³ Libyan authorities claimed NATO airstrikes killed 1,108 civilians and wounded 6,362 of which, 717 were critically wounded and 4,537 had light wounds, just before the Gaddafi regime fell.²¹⁴⁴

Although, many of the claims were found to be false and exaggerated as a great number were disproven²¹⁴⁵, not all claims relating to NATO airstrikes were false. Human Rights Watch (HRW) after conducting a field investigation into the Libyan crisis²¹⁴⁶ published a report identifying eight NATO air strikes directed deliberately in residential areas, which resulted in the deaths of 72 innocent civilian deaths, including 20 women and 24 children.²¹⁴⁷

²¹⁴⁰ *ibid.*

²¹⁴¹ Marvin R. Aaron and David R. D. Nauta, 'Operation Challenges of the Law on Warfare. The Example of Operation Unified Protector' (2013) 52 (2) *Military Law and The Law of War Review* 353, 353.

²¹⁴² Victor Menaldo, 'The Middle East and North Africa's Resilient Monarchs' (2012) 74 (3) *Journal of Politics* 707, 707.

²¹⁴³ Nte Timothy Ubelejit, 'Operation Unified Protector: Collective Security or Collective Defense' (2014) 2 (2) *Global Journal of Political Science and Administration* 24, 29.

²¹⁴⁴ Fred Abrahams 'Unacknowledged Deaths Civilian Casualties in NATO's Air Campaign in Libya' (*Human Rights Watch*, 4 May 2012) 21 <https://www.hrw.org/sites/default/files/reports/libya0512webwcover_0.pdf> accessed 10 March 2020.

²¹⁴⁵ Ben Nimmo, 'Lessons from The Air Campaigns Over Libya, Syria and Yemen' (2016) 46 (1) *Parameters* 81, 87.

²¹⁴⁶ 'NATO: Investigate Civilian Deaths in Libya' (*Human Rights Watch*, 14 May 2012) <<https://www.hrw.org/news/2012/05/14/nato-investigate-civilian-deaths-libya>> accessed 10 March 2020.

²¹⁴⁷ Abrahams (n 2144) 13.

The findings of this report possess significant weight and its credibility is reinforced after a report on NATO's conduct published by the UN Commission of Inquiry on Libya (UNCIL) which was created by the UNHRC²¹⁴⁸, confirmed these occurrences three months prior to the HRW report in March 2012²¹⁴⁹, which documented 60 civilian deaths and 55 injuries at five sites.²¹⁵⁰

The report following its analysis on NATO's conduct, stated: 'The Commission confirmed civilian casualties and found targets that showed no evidence of military utility. The Commission was unable to draw conclusions in such instances on the basis of the information provided by NATO and recommends further investigations'.²¹⁵¹ The illegality of the NATO forces attacks is further exemplified as they were targeted toward residential homes and buildings.

6.3.1 The IHL Violations Committed by NATO Coalition Forces Throughout Operation Unified Protector

Before discussing the violations of IHL, it is important to determine the legal classification of the NATO's military intervention. IHL applies different rules depending on whether an armed conflict is international or internal in nature.²¹⁵² Initially, the conflict between the Gaddafi regime and revolutionary rebel groups was a NIAC.²¹⁵³

However, the military intervention in Libya, observed armed conflict between NATO, Gaddafi and Libyan forces rendering the conflict an International

²¹⁴⁸ UNHRC 'Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in Libyan Arab Jamahiriya' (1 June 2011) UN Doc A/HRC/17/44.

²¹⁴⁹ UNHRC 'Report of the International Commission of Inquiry on Libya' (8 March 2012) UN Doc A/HRC/19/68.

²¹⁵⁰ *ibid* para 86.

²¹⁵¹ *n* 2149 para 122.

²¹⁵² James G. Stewart, 'Towards A Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85 (850) *International Review of the Red Cross* 313, 313.

²¹⁵³ 1977 Additional Protocol II to the Geneva Conventions [1949] art 1 (2).

Armed Conflict (IAC), as the air operations were deemed to be legally separate to the NIAC between opposition forces and pro-Gaddafi forces.²¹⁵⁴

The UN Commission of Inquiry in Libya (UNCIL) confirmed this approach, stating that the conflicts in Libya were in fact 'co-existing international armed conflict'.²¹⁵⁵ Therefore, the NATO intervention falls within the meaning of an IAC, under article 2 of the Geneva Convention as an armed conflict between 'two or more of the High Contracting Parties'.²¹⁵⁶

The aforementioned reports published by the HRW and the UN Commission of Inquiry on Libya clearly demonstrate the NATO's failure to uphold its obligation to protect civilians as mandated in UNSC resolution 1973.

Chapters 3²¹⁵⁷, 4²¹⁵⁸ and 5²¹⁵⁹ of the thesis have identified the importance of protecting civilians in armed conflict²¹⁶⁰, which is a fundamental principle of IHL including the prohibition of civilians being the object of attack.²¹⁶¹

Subsequently, the principle of distinction places an obligation on states to distinguish between combatants and non-combatants: '[t]o ensure States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets'.²¹⁶²

As a consequence of the obligations created by IHL, NATO at all times were required to distinguish between civilians and combatants by ensuring attacks were only directed against combatants and not against civilians.²¹⁶³ Instead,

²¹⁵⁴ Claire Breen, 'The Arab Spring: A Testing Time for the Application of International Humanitarian Law' (2013) 11 *New Zealand Yearbook of International Law* 159, 166.

²¹⁵⁵ n 2148 para 56.

²¹⁵⁶ Geneva Convention IV: Relative to the Protection of Civilian Persons in Time of War [1949] art 2.

²¹⁵⁷ Section 3.1.2 to n 1001 in ch 3.

²¹⁵⁸ Section 4.3.1 to n 1454 in ch 4.

²¹⁵⁹ Section 5.2.2 to n 1817 in ch 5.

²¹⁶⁰ 1977 Additional Protocol I to the Geneva Conventions [1949] art 51 (1).

²¹⁶¹ 1977 Additional Protocol I to the Geneva Conventions [1949] art 51 (2).

²¹⁶² *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Rep 226, para 257.

²¹⁶³ Henckaerts and Beck (n 2101) 3.

the military campaign resulted in a blatant disregard for the principle of distinction following the attacks on civilians, which served no military advantage or purpose pursuant to a direct military objective as required under AP I.²¹⁶⁴

The meaning of civilian objects by virtue of this definition includes, 'a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used'.²¹⁶⁵ The bombardment of cities, towns villages and other areas where a concentration of civilians and civilian objects are prevalent is strictly prohibited.²¹⁶⁶

The HRW report established NATO airstrikes destroyed post offices, a communication tower, buildings and deliberately targeted farms, homes and apartment buildings within civilian residential areas using laser guided bombs, which the UNHRC concluded that the attacks carried out 'showed no evidence of military utility'.²¹⁶⁷ Additionally, this shows clear disregard for the IHL principle of 'Precaution' which provides:

[I]n the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.²¹⁶⁸

The above attacks carried out by NATO forces can be construed as being indiscriminate which is also prohibited under IHL.²¹⁶⁹

One of the attacks reported by HRW involved a genuine military target, a senior military official named as General Dyab, who was residing in his family home presenting no imminent threat. Yet, NATO forces carried out airstrikes

²¹⁶⁴ 1977 Additional Protocol I to the Geneva Conventions [1949] art 52 (2).

²¹⁶⁵ 1977 Additional Protocol I to the Geneva Conventions [1949] art 52 (3).

²¹⁶⁶ Henckaerts and Beck (n 2101) 43.

²¹⁶⁷ Abrahams (n 2144) 2.

²¹⁶⁸ Henckaerts and Beck (n 2101) 51.

²¹⁶⁹ Henckaerts and Beck (n 2101) 37.

on General Dyab's home, which resulted in his death and the death of all his family members.²¹⁷⁰

The NATO forces were required to assess the effects of civilian casualties before carrying out attacks to prevent incidental loss of civilian life, injury and damage to civilian objects in accordance with IHL and CIL.²¹⁷¹

The NATO were also required, to exercise control during the execution of the attacks by assessing the civilian casualties as a result of an airstrike. Arguably, this should have prompted suspension or cancellation of the attack entirely, if it was apparent an attack would have resulted in excessive loss of civilian life.²¹⁷² Target Selection is mandatory as a method of precaution when carrying out an attack as ICRC Rule 21 provides:

[W]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.²¹⁷³

Despite the UNCIL stating the NATO forces: 'conducted a highly precise campaign'²¹⁷⁴, this does not detract from the fact that NATO airstrikes deliberately targeted and caused the death of innocent civilians.

This argument is further strengthened as the NATO used laser guided bombs to carry out precise attacks on civilian targets. The use of such weapons upon civilian targets highlights the wilful intent to kill innocent civilians, which did not form as part of any legitimate military objective.

The ICC considers the NATO forces attacks against civilians who are not part of the hostilities²¹⁷⁵ and attacks on civilian objects²¹⁷⁶ as war crimes under the

²¹⁷⁰ Henckaerts and Beck (n 2101) 49-50.

²¹⁷¹ Henckaerts and Beck (n 2101) 58.

²¹⁷² Henckaerts and Beck (n 2101) 60.

²¹⁷³ Henckaerts and Beck (n 2101) 65.

²¹⁷⁴ n 2149 para 122.

²¹⁷⁵ Rome Statute of the International Criminal Court [1998] art 8 (2) (b) (i).

²¹⁷⁶ Rome Statute of the International Criminal Court [1998] art 8 (2) (b) (ii).

Rome Statute.²¹⁷⁷ This also renders the individuals who authorised²¹⁷⁸ and conducted²¹⁷⁹ the attacks against civilians criminally responsible for the offence of war crimes under the Rome Statute.²¹⁸⁰

The UN commission of Inquiry in Libya has specifically recommended 'further investigations'²¹⁸¹ to be conducted by NATO. To date, the NATO have been unwilling to investigate and take responsibility for the conduct in Libya.²¹⁸²

Further attempts have been made by Amnesty International requesting NATO to investigate the civilian deaths in Libya. However, the NGO was met with the following response from the NATO, stating it: 'has had no mandate to conduct any activities in Libya following Operation Unified Protector's termination on 31 October 2011'.²¹⁸³

It seems after UNSC resolution 2016 terminated the NATO's use of force in Libya²¹⁸⁴, this has served as an adequate excuse to avoid investigating the aforementioned cases in Libya, effectively eluding individual criminal responsibility and accountability for the civilian deaths for the international crimes committed in Libya.

6.4 R2P, The Failure of the UNSC and The Illegitimacy of The ICC following the 2011 Libyan conflict

As mentioned earlier in the thesis²¹⁸⁵, the doctrine of Responsibility to Protect (R2P) has been developed to address the circumstances when the

²¹⁷⁷ Rome Statute of the International Criminal Court [1998] art 8 (2) (b) (v).

²¹⁷⁸ Rome Statute of the International Criminal Court [1998] art 28.

²¹⁷⁹ Rome Statute of the International Criminal Court [1998] art 25.

²¹⁸⁰ Rome Statute of the International Criminal Court [1998] art 5.

²¹⁸¹ n 2149 para 122.

²¹⁸² 'NATO Urged to Investigate Civilian Deaths in Libya' (*BBC News*, 14 May 2012) <<https://www.bbc.com/news/world-africa-18053488>> accessed 10 March 2020.

²¹⁸³ 'Libya: The Forgotten Victims of NATO Strikes' (*Amnesty International*, 5 March 2012) 18 <<https://www.amnesty.org/download/Documents/24000/mde190032012en.pdf>> accessed 10 March 2020.

²¹⁸⁴ UNSC Res 2016 (27 October 2011) UN Doc S/RES/2016.

²¹⁸⁵ Section 2.1.1 to n 149 in ch 2.

international community has the right to interpose in another state to protect civilians.²¹⁸⁶

Thus, R2P has emerged as an approach to humanitarian crises, emphasising the responsibilities that international state actors have to protect human rights, which also includes a responsibility not to harm.²¹⁸⁷ However, a criticism of R2P has advanced that: 'one of the most striking aspects of this doctrine appears to be the gap between the promise and the reality'.²¹⁸⁸

Indeed, the NATO operation which was spearheaded by the P3²¹⁸⁹ in Libya has questioned the doctrine of R2P, especially in terms of the intervention's legality and legitimacy²¹⁹⁰ after the violations of IHL and CIL that had become prevalent throughout OUP.

This chapter has demonstrated that the NATO's conduct has not only breached the third pillar of R2P by failing to protect civilians, but undermined R2P and the norm of: 'collective international responsibility to protect, exercisable by the UNSC authorising military intervention as a last resort'.²¹⁹¹

The international reaction to NATO's military operation in Libya to overthrow the Gaddafi dictatorship has been deemed a success as many experts have considered Libya the ideal model for implementing R2P, however, a more rigorous assessment of the humanitarian impact of NATO's intervention in Libya is warranted.²¹⁹²

²¹⁸⁶ Erfaun Norooz, 'Responsibility to Protect and Its Applicability in Libya and Syria' (2015) 9 (3) *Vienna Journal of International Constitutional Law* 36, 36.

²¹⁸⁷ Conor Heaney, 'Fulfilling the Responsibility to Protect' (2015) 11 (1) *St Antony's International Review* 94, 94.

²¹⁸⁸ David Chandler, 'Unravelling the Paradox of the Responsibility to Protect' (2009) 20 (1) *Irish Studies in International Affairs* 27, 27.

²¹⁸⁹ Stelios Stavridis, 'EU Incoherence and Inconsistency Over Libya: Evidence to The Contrary' (2014) 89 *Cahiero De La Mediterranee* 1, 1.

²¹⁹⁰ Phil Orchard, 'Review Article: The Evolution of the Responsibility to Protect: At A Crossroads?' (2012) 88 (2) *International Affairs* 377, 377.

²¹⁹¹ Noel Dorr, 'The Responsibility to Protect - An Emerging Norm' (2008) 19 (1) *Irish Studies in International Affairs* 189, 189.

²¹⁹² Alan J. Kuperman, 'A Model Humanitarian Intervention? Reassessing NATO's Libya Campaign' (2013) 8 (1) *International Security* 105, 105.

NATO's intervention being deemed a success is perhaps attributed to the death of Colonel Gaddafi at the hands of rebel forces. However, Chollet and Fishman considered the 2011 intervention in Libya to be: 'an abject failure that set free Libya's vast conventional weapons stockpiles, gave rise to extremist groups and even exacerbated the conflict in Syria'.²¹⁹³

In support of this argument, UNCIL also investigated the humanitarian situation in post-Gaddafi Libya and have commented on the humanitarian situation and the effects of NATO's humanitarian operation, stating:

[T]he Commission has also concluded that war crimes and crimes against humanity were committed by the *thumar* and that breaches of international human rights law continue to occur in a climate of impunity. It found evidence of acts of extrajudicial executions, torture, enforced disappearance, indiscriminate attacks and pillage. No investigations have been carried out into any violations committed by the *thumar*.²¹⁹⁴

The Commission was unable to reach any conclusion in relation to the death of Muammar and Mutassim Qadhafi and recommends further investigation.²¹⁹⁵

The UNHRC have reported Libya's descent into chaos, stems from the indiscriminate and widespread violence by rebel brigade²¹⁹⁶, due to the deterioration of Libya's legislative framework.²¹⁹⁷ The UNSC in response to this established the United Nations Support Mission in Libya being tasked to restore order and reconstruct the Libyan state.²¹⁹⁸

Subsequently, the UNSC expressed deep concern regarding the illicit proliferation of missiles having the potential to disrupt regional and international peace and security.²¹⁹⁹ Ironically, the P3 that had spearheaded

²¹⁹³ Derek Chollet and Ben Fishman, 'Who Lost Libya? Obama's Intervention in Retrospect' (2015) 94 (3) *Foreign Affairs* 154, 154.

²¹⁹⁴ n 2149 para 120.

²¹⁹⁵ n 2149 para 121.

²¹⁹⁶ n 2149 para 79.

²¹⁹⁷ n 2149 para 124.

²¹⁹⁸ UNSC Res 2009 (16 September 2011) UN Doc S/RES/2009.

²¹⁹⁹ UNSC Res 2040 (12 March 2012) UN Doc S/RES/2040.

the NATO-led humanitarian campaign were mandated to prevent the humanitarian crisis, yet it appears it has only contributed to it.²²⁰⁰

Further criticisms extend so far as to claim that the humanitarian situation in Libya was 'exaggerated to encourage the intervention'²²⁰¹, as the sole purpose for NATO's military intervention in Libya was to execute a targeted assassination of Colonel Gaddafi and overthrow the regime, not to protect civilians.²²⁰²

This argument is credible, especially after the UNSC terminated NATO's mandate in Libya.²²⁰³ Since then, the humanitarian situation in post-Gaddafi Libya has only seen a surge in human rights violations and further descended the state in chaos as rebel forces and the NTC have also been responsible for civilian deaths, which has been described as a disaster.²²⁰⁴

This has since prompted critics commenting on the legitimacy and rationale which prompted NATO's intervention in Libya. It has been argued the campaign was dictated by self-interests and political gain, a sharp contrast to the victim and people centred principle of R2P²²⁰⁵, which was used as a tool for regime change by using the humanitarian crisis in Libya to transcend political differences.²²⁰⁶

OUP has been fiercely criticised for being engineered by the P3 to fulfil their own political motives by manipulating the doctrine of R2P which is a clear

²²⁰⁰ Seumas Milne, 'If the Libyan War Was About Saving Lives, It Was A Catastrophic Failure' *The Guardian* (London, 26 October 2011) <<https://www.theguardian.com/commentisfree/2011/oct/26/libya-war-saving-lives-catastrophic-failure>> accessed 10 March 2020.

²²⁰¹ Chilaka Francis Chigozie, Akor Ikechukwu and Ugwu Anthony, 'NATO's 2011 Intervention in Libya: Beyond Humanitarian Intervention (2013) 1 (1) *Net Journal of Social Sciences* 5,7.

²²⁰² Spencer Zifcak, 'The Responsibility to Protect After Libya And Syria' (2012) 13 (1) *Melbourne Journal of International Law* 59, 69-70.

²²⁰³ n 2198.

²²⁰⁴ Jon Western and Joshua S. Goldstein, 'Humanitarian Intervention Comes of Age: Lessons from Somalia to Libya' (2011) 90 (6) *Foreign Affairs* 48, 48.

²²⁰⁵ Jeffrey Bachman, 'R2P's 'Ulterior Motive Exemption' and the Failure to Protect in Libya' (2015) 3 (4) *Politics and Governance* 56, 56.

²²⁰⁶ Alexandru C Apetroe, 'The Responsibility to Protect. From Emerging Norm to A False Promise. A New Challenge to International Security Policy (2017) 62 (2) *Studia Universitatis Babeş-Bolyai Europaea* 71, 100

misalignment with the ideological principles of the R2P, thus constituting a failure of the norm in Libya.²²⁰⁷

6.4.1 Resolution 1973 and R2P: Criticisms Pertaining to the UNSC's Authorisation of NATO in Libya

The passing of resolution 1973 has become controversial following its passing. The aftermath of NATO's involvement in Libya, have raised particular concerns regarding the P3 for their political affluence and tactics used in the passing of resolution 1973.

Under the UN Charter, the UNSC is empowered to determine the existence of any threat/breach to peace and acts of aggression²²⁰⁸ and may take measures to implement the use of force²²⁰⁹ or not to implement the use of force under Chapter VII of the UN Charter.²²¹⁰

However, the discourse used in resolution 1973 for the P3 and NATO coalition forces to 'take all necessary measures'²²¹¹ to protect civilians in Libya, has been said to have 'marked a significant shift in the UNSC's practice to protect civilians in Libya from the threat of mass atrocities'.²²¹² This provision has been argued to limit:

[T]he scope of protection to situations where civilians and civilian populated areas, including Benghazi, are under threat of attack. The expression shows that the mandate not only includes actual attacks, it also covers situations when civilians or populated territories are exposed to a threat of attack'.²²¹³

²²⁰⁷ Caitlyn Duke, 'The Responsibility to Protect in the Libyan Intervention: Ultimate Success or International Failure?' (2016) 1 (2) Responsibility to Protect Student Journal <<http://r2pstudentjournal.leeds.ac.uk/issues/volume-1-issue-no-2/the-responsibility-to-protect-in-the-libyan-intervention-ultimate-success-or-international-failure/>> accessed 10 March 2020.

²²⁰⁸ Charter of the United Nations [1945] art 39.

²²⁰⁹ Charter of the United Nations [1945] art 42.

²²¹⁰ Charter of the United Nations [1945] art 41.

²²¹¹ n 2123 para 4.

²²¹² Luke Glanville, 'Intervention in Libya: From Sovereign Consent to Regional Consent' (2013) 14 (3) International Studies Perspectives 325, 325.

²²¹³ Geir Ulfstein and Hege Fosund Christiansen, 'The Legality of the NATO Bombing in Libya' (2013) 62 (1) ICLQ 159, 163.

As noted throughout this thesis²²¹⁴, article 2 (4) of the UN Charter prohibits states use of force, stating: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.²²¹⁵

The ICJ have clarified the word 'threat' within article 2 (4) UN charter²²¹⁶ and elaborated its meaning as a: 'declared readiness of a state to use force'.²²¹⁷ The discourse in resolution 1973 limited NATO's conduct to use force only in situations to protect civilians, not to make civilians the subject and object of attack.²²¹⁸

Thus, the excessive use of force by NATO has been highlighted throughout the chapter as they have carried out deliberate bombings of innocent civilian targets as well as providing significant air power to rebel forces.²²¹⁹

It appears the UNSC has contravened its own institutional mandate to administer peace and security in resolution 1973, instead it has catered to the self-interests of the P3 rather than enforcing R2P and protect Libyan civilians.

The P3 and the NATO forces in OUP have breached IHL, R2P and the UN Charter by exceeding the use of force mandated in resolution 1973.²²²⁰ Prior to the inception of resolution 1973 a closer examination of the politics surrounding the UNSC's decision also reveals considerably less than wholehearted support for the principle of R2P.²²²¹

²²¹⁴ Section 2.2.1 to n 164 in ch 2.

²²¹⁵ Charter of the United Nations [1945] art 2 (4).

²²¹⁶ *ibid.*

²²¹⁷ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, para 47.

²²¹⁸ Ulfstein and Christiansen (n 2213), 164.

²²¹⁹ Jason R Greenleaf, 'The Air War in Libya' (2013) 27 (2) *Air and Space Power Journal* 28, 46.

²²²⁰ Debora Valentina Malito, 'Morality as a Catalyst for Violence: Responsibility to Protect and Regime Change in Libya' (2019) 46 (1) *Politikon* 104, 105.

²²²¹ Tom Keating, 'The UN Security Council on Libya: Legitimacy or Dissimulation?' In Hehir A & Murray R (eds) *Libya, The Responsibility to Protect and the Future of Humanitarian Intervention* (2013) Palgrave Macmillan, London, 162.

Critics have further voiced their concerns surrounding the P3's involvement in the passing of resolution 1973 by using their permanent membership, influence and prowess in the UNSC to achieve their political objectives, instead of enforcing the doctrine of R2P.²²²²

Further critics have argued the P3 sought to economically exploit Libya, and the Arab Spring uprising which presented the ideal opportunity to overthrow the Gaddafi regime and lay claim to Libya's oil reserves.²²²³ Although, it has previously been revealed that diplomats from the P3 held advantages within the UNSC in response to the Libyan crisis, which dictated and aided the passing of resolution 1973.²²²⁴

In support of this argument, academics such as Adler-Nissen and Pouliot have provided a practice-based account of the P3's response to the Libyan spectacle. They have argued that the P3 heavily influenced the enactment, drafting and passing of Resolution 1970 and 1973 by using experienced lawyers and diplomats and their superior skills to identify the many legal technicalities which have often been used to bog down the council.²²²⁵

Adler-Nissen and Pouliot have further commented on the P3's influence further by suggesting:

[T]he British and the French were also very active in harnessing the framing power of the media to construct the intervention as a 'responsibility to protect civilians' — a kind of 'mélange of concepts: protection of civilians and the responsibility to protect,' which was aided by Gaddafi's inflammatory rhetoric.²²²⁶

²²²² Petra Perisic, 'Implications of the Conflicts in Libya and Syria for the Responsibility to Protect Doctrine' (2017) 67 (5) *Zbornik DFZ* 783, 794 – 795.

²²²³ Ronald Chipaika, 'The Libya Crisis: The Militarisation of the New Scramble and More' (2012) 2 (8) *International Journal of Humanities and Social Science* 43, 43.

²²²⁴ Jason Ralph and Jess Gifkins, 'The Purpose of United Nations Security Council Practice: Contesting Competence Claims in the Normative Context Created by The Responsibility to Protect' (2017) 23 (3) *European Journal of International Relations* 630, 636.

²²²⁵ Rebecca Adler-Nissen and Vincent Pouliot, 'Power in Practice: Negotiating the International Intervention in Libya' (2014) 20 (4) *European Journal of International Relations* 889, 898.

²²²⁶ *ibid* 899.

Moreover, the British and French representatives were able to manipulate the UNSC by manipulating UN Procedures to achieve their political aims, as Adler-Nissen and Pouliot comment:

[T]he most striking example, which diplomats said ‘contributed to the ability to pass Resolutions 1970 and 1973,’ is the defection of Libyan Deputy Permanent Representative Ibrahim Dabbashi on 21 February. Obtained through ‘lobbying,’ this event allowed the P3 ‘to say: “Clearly the Libyan people want this [intervention].’²²²⁷

It seems OUP conducted by NATO can only be deemed as a failure after the approval of resolution 1973, which was drafted by the P3, proving detrimental to the integrity and purpose of the UNSC. This chapter has highlighted the conduct of NATO forces using the doctrine of R2P as a subterfuge to achieve their political objectives by overthrowing the Gaddafi regime.²²²⁸

Thus, the P3 and the NATO forces have contravened their obligations under the UN Charter and violated IHL by deliberately targeting and killing civilians, which has still not prompted investigations to identify the individuals responsible for the international crimes that have been committed. By demonstrating NATO’s conduct in Libya, the chapter has also adduced, the P3 have been instrumental in drafting and passing both resolutions 1970 and 1973, behind closed doors.²²²⁹

This not only indicates the lack of transparency prevalent within the UNSC, but also the P3’s abuse of its permanent membership to manipulate states to pass resolution, displaying similar tendencies to justify the 2003 invasion of Iraq as discussed earlier in the thesis.²²³⁰

²²²⁷ Adler-Nissen and Pouliot (n 2225) 899.

²²²⁸ Arif Saba and Shahram Akbarzadeh, ‘The Responsibility to Protect and the Use of Force: An Assessment of the Just Cause and Last Resort Criteria in the case of Libya’ (2018) 25 (2) *International Peacekeeping* 242, 260.

²²²⁹ Daniel Moeckli and Rafael N Fasel, ‘A Duty to Give Reasons in the Security Council’ (2017) 14 (1) *International Organizations Law Review* 13, 15.

²²³⁰ Section 3.2.3 to n 1094 in ch 3.

This was achieved by using their extraordinary powers in ways that exceed its authority and serve its own narrow political interests rather than the mandate of ensuring peace and security within the international community.²²³¹

This anachronistic, institutionalisation of great power hierarchy which conflicts with modern norms of sovereign equality and democratic decision-making, has resulted in the UNSC to suffer from chronic legitimacy deficit.²²³² This in turn cumburs the UNSC's ability to effectively fulfil its mandated obligation to maintain international peace and security rendering the institution ineffective and in need of urgent reform.

6.5 The USA's Illegal Use of Force in Counter-Terrorism Operations in Post-Gaddafi Libya

Shortly after the deaths of Colonel Gaddafi and his son Mutassim Gaddafi²²³³, this resulted in the UNSC terminating NATO's mandate for use of force bringing an end to OUP.²²³⁴

The aftermath of NATO's military intervention in Libya is showcased by the continued intensification of hostilities which have continued unabated, drawing the international communities' attention on the problems presented in post-Gaddafi Libya.

Reports have emerged revealing the death toll in Libya. Between February 2011 to 2012 had reached a total of 21,490 persons being killed; 19,700 injured; and 435,000 being displaced.²²³⁵ These published figures have been

²²³¹ Joy Gordon, 'The United Nations Security Council and the Emerging Crisis of Legitimacy' (2014) 9 (1) *Yale J.Int'l L.* 40, 40.

²²³² Matthew D. Stephen, 'Legitimacy Deficits of International Organisations: Design, Drift and Decoupling at the UN Security Council' (2018) 31 (1) *Cambridge Review of International Affairs* 96, 97.

²²³³ Corten and Koutroulis (n 2138) 89.

²²³⁴ n 2198.

²²³⁵ Mohamed A Daw, Abdallah El-Bouzedi and Aghnaya A. Dau, 'Libyan Armed Conflict 2011: Mortality, Injury and Population Displacement' (2015) 5 (3) *African Journal of Emergency Medicine* 101, 103.

caused directly as a result of all parties involved including Gaddafi government forces, NATO allies, rebel forces, and the NTC.

The ensuing violence after the death of Colonel Gaddafi instead of bringing an end to the hostilities had only increased the intensity of the violence at the hands of armed groups, rebels, the NTC and terrorist groups resulting in more and more deaths and chaos both in Libya and regionally in Africa.²²³⁶

The ongoing violence in Libya has exhibited the power of radical Islamist militias²²³⁷ prompting further USA intervention in line with its continued GWOT, which was advanced by the Bush administrations post 9/11 pursuit to eliminate Al-Qaeda, and through the presidencies of both the Obama and Trump administration against ISIL with the aid of its regional military command situated in the continent of Africa²²³⁸ known as US Africa Command.²²³⁹

As discussed in the previous chapter²²⁴⁰, the alarmingly rapid expansion of ISIS/ISIL resulted in more than 35% of Syrian territory being captured.²²⁴¹ In the process of doing so, it assumed control over oil fields illicitly producing oil which was the main source of ISIL's income and revenue.²²⁴²

However, despite the threat presented by ISIL, the Syrian government did not consent to the USA intervening in Syria, it protested that the air strikes in Syrian territory were an unjustifiable violation of international law.²²⁴³

²²³⁶ Nicholas Idris Erameh and Enemaku Umar Idachaba, 'NATO Intervention in Libya and its consequences on Global Security' (2017) 17 (3) *Global Journal of Human-Social Science and Political Science* 1, 7.

²²³⁷ Dirk Vandewalle, 'After Qaddahfi: The Surprising Success of the New Libya' (2012) 91 (6) *Foreign Affairs* 8, 8.

²²³⁸ Daniel Volman, 'US to Create New Regional Military Command for Africa: AFRICOM' (2007) 34 (114) *Review of African Political Economy* 737, 737.

²²³⁹ Christopher Griffin, 'Trump and the Al Qaeda and ISIS Networks in Africa' (2018) 16 (2) *REVUE Lisa* <<https://journals.openedition.org/lisa/10157#quotation>> accessed 10 March 2020.

²²⁴⁰ Section 5.2.1 to n 1755 in ch 5.

²²⁴¹ Bo Wang and Bing Fan, 'Reflections on the Issue of ISIS' (2015) 9 (3) *Journal of Middle Eastern and Islamic Studies in Asia* 49, 53.

²²⁴² Quy-Toan Do et al, 'Terrorism, Geopolitics, and Oil Security: Using Remote Sensing to Estimate Oil Production of the Islamic State' (2018) 44 *Energy Research and Social Science* 411, 412-414.

²²⁴³ Michael P. Scharf, 'How the War Against ISIS Changed International Law' (2016) 48 (1) *Case W.Res.J.Int'l L.* 15, 16.

Since the emergence of ISIL in 2014, the groups spatial localisation has evolved due to the country's post-Gaddafi political dynamics demonstrating the groups pragmatic approach in achieving its proximal goal to prevent the consolidation of sovereign Libyan structures.²²⁴⁴

In addition, the increasing presence of ISIL in Libya and the fear that the terrorist organisation's might take control of Libya's important oil infrastructure and use Libya as a basis to spread its influence to other North African and Sub-Saharan countries have caused growing concern within the international community'.²²⁴⁵

The USA's involvement in post-Gaddafi Libya has remained focussed on counter-terrorism operations in Libya against ISIS/ISIL. However, its use of force has not always been deemed legal.

In 2015, a USA military airstrike killed a senior leader of ISIL in Derna, Libya. The target of the strike was named as Abu Nabil, aka Wissam Najm Abd Zayd Al-Zubaydi, an Iraqi national who was a long-time Al-Qaeda operative.²²⁴⁶ The USA provided no justification for carrying out the attack and acted without consent of the Libyan authorities.

This is not an isolated incident, the USA's pursuit for other senior members of terrorist organisations, have also observed its counter-terrorism mission to be illegal in Libya.

A notable example can be observed in 2013, where USA Special Forces, illegally seized and detained a senior Al-Qaeda member named Nazih Abdul-Hamed Al-Ruqai, known by his alias Abu Anas Al-Liby, wanted for the 1998

²²⁴⁴ Lachlan Wilson and Jason Pack, 'The Islamic States Revitalisation in Libya and Its Post 2016 War of Attrition' (2019) 12 (3) CTC: Sentinel 1, 22.

²²⁴⁵ Karine Bannelier-Christakis, 'Military Intervention Against ISIL in Iraq, Syria and Libya and the Legal Basis of Consent' (2016) 29 (3) LJIL 743, 756.

²²⁴⁶ Martin Pengelly and Chris Stephen, 'Islamic State Leader in Libya Killed in US Airstrike' *The Guardian* (London, 14 November 2015) <<https://www.theguardian.com/world/2015/nov/14/us-airstrike-isis-leader-libya>> accessed 10 March 2020.

bombings of the USA embassies in Kenya and Tanzania that killed more than 220 people.²²⁴⁷

The Libyan authorities responded by demanding an explanation from the USA for its actions and mentioned that Libyan citizens should be tried in their own state.²²⁴⁸

As discussed earlier in the thesis²²⁴⁹, It is widely accepted unless the acts of a non-state actor are attributable to the territorial state, the use of force against non-state actors is unlawful. If the state has effective control over a rebel or terrorist group then a state may invoke the right to self-defence, overriding the sovereignty of a state and overlook the responsibility to renunciate force.²²⁵⁰

The ICJ in the *Armed Activities*²²⁵¹ and the *Oil Platform Case*²²⁵² have both confirmed this approach. However, the USA has argued that since the 9/11 attacks, the use of force can be justified where a government is unable or unwilling to suppress the threat posed by non-state actors operating within its borders. An example of its illegal use of force can be observed in the counter-terrorism operations and airstrikes in Syria against ISIS²²⁵³ without consent from the Syrian government.²²⁵⁴

This has come to be known as the ‘unwilling or unable formula’ developed by the USA prior to the ISIS operations. The formula was developed as a suitable means to address the problem of terrorism forming an integral part of the USA’s ‘GWOT’ which gained prominence during the Afghanistan conflict as

²²⁴⁷ Chris Stephen and David Smith, ‘Libya Demands Explanation for US Kidnapping of Al-Qaida Leader Al-Liby’ *The Guardian* (London, 7 October 2013) <<https://www.theguardian.com/world/2013/oct/06/libya-kidnapping-citizen-us-forces-raid-somalia>> 10 March 2020.

²²⁴⁸ ‘Libya Demands Answers After US Raid Captures Prominent Al Qaeda Militant’ (*ABC News*, 7 October 2013) <<https://www.abc.net.au/news/2013-10-07/libya-demands-answers-from-us-after-secret-raid-capture-al-qaed/5001896>> accessed 10 March 2020.

²²⁴⁹ Section 3.1.1 to n 945 in ch 3.

²²⁵⁰ Scharf (n 2243) 36

²²⁵¹ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* [2005] ICJ Rep 169, paras 162-165.

²²⁵² *Oil Platforms (Iran v United States of America)* (Merits) [1986] ICJ Rep 14, paras 195-196.

²²⁵³ Section 5.3.1 to n 1927 in ch 5.

²²⁵⁴ Scharf (n 2243) 16-17.

the Taliban were regarded as the *de facto* government of Afghanistan and were held responsible for Al-Qaeda's activities²²⁵⁵ since they harboured them.²²⁵⁶

This rather flippant justification for breaching state sovereignty indicates subsequent to the events of 9/11, the USA can utilise pre-emptive self-defence as a justification to carry out counter-terrorism operations wherever it deems appropriate.

The GWOT and its synonymous 'unable or unwilling formula' cannot substitute the consent requirement from a state, nor prior authorisation from the UNSC. The USA by acting in such a way as highlighted in Afghanistan, Iraq, Syria and Libya is in clear violation of state sovereignty attracting the international crime of aggression under the Rome Statute.²²⁵⁷

6.5.1 The Bewildering Stance of The UNSC On the Use of Force in Response to Terrorism

The consensus amongst the international community has deplored the actions of ISIS/ISIL capturing state-run territory, using sustained and extreme violence in an attempt to establish a caliphate in western Iraq, eastern Syria and Libya by advocating and commissioning attacks worldwide by carrying out terrorist acts in Europe, South East Asia, Africa and North America which have presented an unprecedented and formidable threat.²²⁵⁸

The UNSC's initial response to the growing international communities concern of ISIS/ISIL and foreign terrorist groups saw the UNSC adopting resolution

²²⁵⁵ Section 3.1.1 to n 939 in ch 3.

²²⁵⁶ Paulina Starski, 'Right to Self-Defense, Attribution and the Non-State Actor – Birth of the Unbale or Unwilling Standard?' (2015) 75 Heidelberg Journal of International Law 455, 457.

²²⁵⁷ Rome Statute of the International Criminal Court [1998] art 8 *bis* (1).

²²⁵⁸ Coman Kenny, 'Prosecuting Crimes of International Concern: Islamic State at the ICC?' (2017) 33 (84) Utrecht Journal of International and European Law 120, 120.

2178²²⁵⁹ which was ironically drafted by the USA, after its illegal intervention in Libya in 2013.²²⁶⁰

Despite the virtues of resolution 2178 identifying the threat posed by ISIS, Al-Nusra and other terrorist groups, the resolution has attracted much criticism for the language used in its text. Kopitzke argues this resolution could be interpreted in a manner inconsistent with IL and IHRL by leaving 'room for undesirable interpretations'.²²⁶¹

Further concerns have been advanced regarding resolution 2178 and the potential consequences of its interpretation, after the passing of resolution 2249²²⁶² by the UNSC in response to growing threat of ISIS/ISIL and other terrorist groups has proven even more controversial following the language in the way states should engage and fight terrorist organisations. Specifically, Paragraph 5, calls upon:

[M]ember States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al Qaeda, and other terrorist groups.²²⁶³

²²⁵⁹ UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178.

²²⁶⁰ Cory Kopitzke, 'Security Council Resolution 2178 (2014): An Ineffective Response to the Foreign Terrorist Fighter Phenomenon' (2017) 24 (1) *Indiana Journal of Global Legal Studies* 309, 333.

²²⁶¹ *ibid* 321.

²²⁶² UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249.

²²⁶³ *ibid* para 5.

It seems the language adopted in resolution 2249 by the UNSC is bewildering, as the council uses the expression by 'all necessary means'²²⁶⁴ which according to some scholars is synonymous in implying the use of force.²²⁶⁵

However, in this case the UNSC does not 'authorise all necessary measures', nor does it 'decide' that they be taken, but rather 'calls upon' states to take such measures. This difference in language itself suggests that although the Council contemplates, and perhaps would even welcome the use of force by states, even though it does not explicitly authorise such action.²²⁶⁶

The significance, here is that the resolution is clearly designed to provide legitimacy for the measures being taken and to be taken against ISIS/ISIL, as phraseology expressed here suggests there is UNSC support for the use of force against ISIS.²²⁶⁷

Despite the UNSC not giving explicit authorisation to use of force in pursuit of ISIS/ISIL or any other terrorist group²²⁶⁸, the juxtaposition in the language used in resolution 2249 gives the P5 and other member states more of an incentive to use force in foreign states to conduct counter-terrorism operations by permitting and encouraging the crime of aggression.

The USA prior to the passing of resolution 2249 has used force without any UNSC authorisation in post-Gaddafi Libya. Instead, it has used the ideology derived from the post-9/11 bush doctrine to justify its continued GWOT, wherever it perceives and believes a terrorist threat exists.

²²⁶⁴ Olivia Gonzalez, 'The Pen and the Sword: Legal Justifications for the United States Engagement Against the Islamic State of Iraq and Syria' (2015) 39 (1) Fordham Int'l L.J.133, 142.

²²⁶⁵ Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution' (*EJIL: Talk*, 21 November 2015) <www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> accessed 10 March 2020.

²²⁶⁶ *ibid.*

²²⁶⁷ Akande and Milanovic (n 2265).

²²⁶⁸ Peter Hilpold, 'The Fight Against Terrorism and SC Resolution 2249 (2015): Towards A More Hobesian Or A More Kantian International Society' (2015) 55 (4) Indian Journal of International Law 535, 542.

The passing of resolution 2249 arguably complements the GWOT doctrine, as the language used in the resolution can be interpreted to justify continued use of force against international terrorist organisations and networks in a pre-emptive fashion.²²⁶⁹

Thereby encouraging counter-terrorism operations in foreign states, without any explicit authorisation by the UNSC or consent from a state government, a practice which has been demonstrated in the preceding chapters of the thesis in: Afghanistan, Iraq, Syria and Libya all of which have been found to contravene IL and have allowed the USA to continue this practice of aggression with impunity.

The discourse and rhetoric used in resolution 2249 serves as a catalyst for member states of the UNSC to use force, wherever a terrorist threat is perceived without the consent of a state government undermining the UN Charter.

This resolution undermines the UNSC's legitimacy and authority by making it redundant to 'authorise the use of force'²²⁷⁰ demonstrating the institutions' inability as 'a world organisation'²²⁷¹ to maintain and restore international peace security²²⁷² which is in need of desperate institutional reform.

6.6 The Role of the ICC After the 2011 Libyan Conflict

The UNSC is empowered to make referrals to the ICC.²²⁷³ Unlike referrals by state parties and the ICC prosecutor acting under his or her *proprio motu*

²²⁶⁹ Gina Heathcote, 'Feminist Reflections on the End of the War on Terror' (2010) 11 (2) Melbourne Journal of International Law 1, 2.

²²⁷⁰ Devon Whittle, 'The Limits of Legality and the United Nations Security Council: Applying Extra -Legal Measures Model to Chapter VII Action' (2015) 26 (3) EJIL 671, 673.

²²⁷¹ David Bosco, 'Uncertain Guardians: The UN Security Council's Past and Future' (2011) 66 (2) International Journal 439, 439.

²²⁷² Charter of the United Nations [1945] art 24.

²²⁷³ Charter of the United Nations [1945] art 39.

power (own accord)²²⁷⁴ both require jurisdiction to otherwise exist through a state's ratification of, or accession to the Rome Statute.²²⁷⁵

In light of the above, a UNSC referral is extremely significant because it also creates jurisdiction for the ICC²²⁷⁶ irrespective of whether a state is party to the Rome Statute. Under article 13 (b) of the Rome Statute.²²⁷⁷

In practice, referrals to the ICC have often proven to be difficult as the political interests of the P5 and the unwillingness to compromise²²⁷⁸ often result in draft resolutions being blocked by the P5, if they choose to invoke the veto privilege.

Thus, resolution 1970 was praised for being a 'unique achievement'²²⁷⁹ as this was the UNSC's first unanimous referral regarding the Libyan situation to the ICC²²⁸⁰, during the initial stages of the conflict which was co-sponsored by the USA without a P5 veto.²²⁸¹

On the 16th May 2011, the ICC prosecutor, Luis Moreno-Ocampo filed warrants for the arrest of members of the Gaddafi regime²²⁸² for crimes against humanity because of the systematic attacks against civilians.²²⁸³

²²⁷⁴ Jonathan Jeung-Meng Fork, 'Pro-Choice: Achieving the Goals of the International Criminal Court Through the Prosecutor's Proprio Motu Power' (2011) 34 (3) Boston College of International and Comparative Law Review 53, 54.

²²⁷⁵ Rome Statute of the International Criminal Court [1998].

²²⁷⁶ Jennifer Trahan, 'The Relationship Between the International Criminal Court and the UN Security Council: Parameters and Best Practices' (2013) 24 (4) Crim.L.F. 417, 419

²²⁷⁷ Rome Statute of the International Criminal Court [1998] art 13 (b).

²²⁷⁸ Tamas Lattmann, 'Situations Referred to the International Criminal Court by the United Nations Security Council – Ad Hoc Tribunalisation of the Court and Its Dangers' (2016) 2 Pecs Journal of International and European Law 68, 69.

²²⁷⁹ Saskia Postema, 'The Responsibility to Protect and Libya: Uncovering the Achilles' Heel of R2P-Based Intervention' (2015) 1 (1) Student Undergraduate Research E-Journal <<https://journals.open.tudelft.nl/index.php/sure/article/view/1078/1221>> accessed 10 March 2020.

²²⁸⁰ n 2122 para 4.

²²⁸¹ Karen L. Corrie, 'International Criminal Law' (2012) 46 (1) Int'l Law 145, 145.

²²⁸² John J. Liolos, 'Justice for Tyrants: International Criminal Court Warrants for Gaddafi Regime Crimes' (2012) 35 (2) B.C.Int'l & Comp.L.Rev. 589, 589.

²²⁸³ *Situation in the Libyan Arab Jamahiriya, Prosecutors Application Pursuant to Article 58 As to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Pre-Trial Chamber I) ICC-01/11 (16 May 2011), para 2.

Subsequently, on the 27th June 2011 arrest warrants were issued for Muammar Gaddafi²²⁸⁴ (which was later withdrawn following his death)²²⁸⁵, Saif Al-Islam Gaddafi²²⁸⁶ and Abdullah Al-Senussi.²²⁸⁷ Following the capture of Abdullah Senussi by Mauritanian authorities²²⁸⁸ and Saif Gaddafi being held in rebel custody in Zintan, Libya.²²⁸⁹

The role of the ICC has proven controversial as the institution's authority and inability to prosecute certain individuals has been undermined by the Libyan government by either failing or refusing to transfer Saif Gaddafi into ICC custody, due to the complementarity principle and the ICC's lack of enforcement capabilities as demonstrated throughout the remainder of the chapter.

6.6.1 The Principle of Complementarity and ICC's Inability to Prosecute Saif Al-Gaddafi

As discussed earlier in the thesis²²⁹⁰, the complementarity principle contained within the Rome Statute²²⁹¹ has presented many challenges in practice as Libya has remained unwilling to co-operate with the ICC as required by resolution 1970, supporting the view that the ICC places great value to state sovereignty.²²⁹²

²²⁸⁴ *Situation in Libyan Arab Jamahiriya, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi* (Pre-Trial Chamber I) ICC-01/11-13 (27 June 2011).

²²⁸⁵ *Prosecutor v Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Pre-Trial Chamber I) ICC-01/11-01/11 (22 November 2011).

²²⁸⁶ *Situation in Libyan Arab Jamahiriya, Warrant of Arrest for Saif Al-Islam Gaddafi* (Pre-Trial Chamber I) ICC-01/11-14 (27 June 2011).

²²⁸⁷ *Situation in Libyan Arab Jamahiriya, Warrant of Arrest for Abdullah-Al-Senussi* (Pre-Trial Chamber I) ICC-01/11-01/11-4 (27 June 2011).

²²⁸⁸ Ruth Sherlock, 'Libya: The Executioner Abdullah Al-Senussi Captured' *The Telegraph* (London, 20 November 2011) <<https://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8902861/Libya-the-executioner-Abdullah-al-Senussi-captured.html>> accessed 10 March 2020.

²²⁸⁹ Chris Stephen and David Batty, 'Saif Al-Islam Gaddafi Captured in Libya' *The Guardian* (London, 19 November 2011) <<https://www.theguardian.com/world/2011/nov/19/saif-al-islam-gaddafi-captured>> accessed 10 March 2020.

²²⁹⁰ Section 2.3.1 to n 658 in ch 2.

²²⁹¹ Rome Statute of the International Criminal Court [1998] art 1.

²²⁹² Frederica Gioia, 'State Sovereignty Jurisdiction and Modern International Law: The Principle of Complementarity in International Criminal Law' (2006) 19 (4) LJIL 1095, 1096.

After Libyan rebel forces overthrew the Gaddafi regime with the assistance of the NATO forces, the new Libyan government insisted that Libya would itself prosecute Saif Al-Islam Gaddafi and Abdullah Al-Senussi. However, litigation over the issue of complementarity at the ICC has since ensued.²²⁹³

In May 2012, the Libyan government sought to prosecute Gaddafi within Libyan court's by challenging the admissibility of the case being brought to the ICC, going so far as to contest Gaddafi's surrender request²²⁹⁴ under the Rome Statute²²⁹⁵ which was rejected by the ICC.²²⁹⁶

In April 2013, the Libyan government then proceeded to challenge the admissibility of the case against Al-Senussi before the ICC²²⁹⁷ to which the ICC responded and agreed that the Libyan authorities were competent to carry out investigations and proceedings against Al-Senussi²²⁹⁸ but the decision did not have any bearing on Gaddafi.²²⁹⁹

In July 2015, Tripoli's court of appeal sentenced Al-Senussi and Saif Al-Islam Gaddafi among others to be condemned to death. It was also reported that Gaddafi despite requests for his case to be admissible before the ICC²³⁰⁰, the sentence was delivered for Gaddafi in absentia due to the failure of his transfer from the custody of the Zintan rebels to the central authorities in Tripoli.²³⁰¹

²²⁹³ Samuel C Birnbaum, 'Predictive Due Process and the International Criminal Court' (2015) 48 (2) *Vanderbilt Journal of Transnational Law* 307, 312.

²²⁹⁴ *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (States Representatives Application) ICC-01/11-01/11 (3 May 2012), para 108.

²²⁹⁵ Rome Statute of the International Criminal Court [1998] art 94 (1).

²²⁹⁶ *Prosecutor v Saif Al-Islam Gaddafi & Abdullah Al-Senussi* (Appeals Chamber Decision) ICC-01/11-01/11 (May 31 2013), para 219.

²²⁹⁷ *Prosecutor v Saif Al-Islam Gaddafi & Abdullah Al-Senussi* (States Representatives Application) ICC-01/11-01/11-307-Red2 (2 April 2013).

²²⁹⁸ *Prosecutor v Saif Al-Islam Gaddafi* (Pre-Trial Chamber I Decision) ICC-01/11-01/11-466-Red (11 October 2013), para 311.

²²⁹⁹ 'ICC Pre-Trial Chamber I Decides that the Al-Senussi Case is to Proceed in Libya and is Inadmissible before the ICC' (*International Criminal Court*, 11 October 2013) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr953>> accessed 10 March 2020.

²³⁰⁰ *Prosecutor v Saif Al-Islam Gaddafi* (Appeals Chamber Decision) ICC-01/11-01/11-547-Red (21 May 2014).

²³⁰¹ Nidal Nabil Jurdi, 'The Complementarity Regime of the International Criminal Court in Practice: Is it Truly Serving the Purpose? Some Lessons from Libya?' (2017) 30 (1) *LJIL* 199, 211.

Despite the Libyan government insisting they could conduct a fair trial, many believe the trial was tainted by the political unrest in the country. The trial had no witnesses brought forward and no evidence was presented or debated in court.²³⁰²

This pessimism is well founded as the Libyan government deliberately shielded Gaddafi from being prosecuted, which has led Gaddafi's defence council previously claiming that the case was inadmissible before the ICC, under article 17 (1) (c) of the Rome Statute.²³⁰³

In June 2018, Gaddafi's defence council challenged the admissibility of the ICC claiming that he had already been tried in Libya for the same conduct as alleged by the prosecutor of the ICC in the present case and a second trial is not permitted pursuant to article 20 (3) of the Rome Statute.²³⁰⁴

In addition, Gaddafi's defence also argued the case was inadmissible before the ICC after Gaddafi's release from prison in Zintan, the Government of Libya pursuant to Law 6 of 2015²³⁰⁵ provided amnesty to Gaddafi, rendering any further criminal proceedings against him in Libya being dropped²³⁰⁶ on the condition the case could be re-opened and subject him to serve his full sentence, if any new offences occur²³⁰⁷ within a five-year period.²³⁰⁸

The Rome Statute clearly asserts if a state is found to shield an individual from criminal responsibility for crimes committed within the jurisdiction of the court or proceedings, which were not conducted independently or impartially with no intention to bring the accused to justice, then the person shall be tried by the ICC.²³⁰⁹

²³⁰² 'Profile: Abdullah Al-Senussi' (*BBC News*, 16 October 2015) <<https://www.bbc.com/news/world-middle-east-17414121>> accessed 10 March 2020.

²³⁰³ Rome Statute of the International Criminal Court [1998] art 17 (1) (c).

²³⁰⁴ *Prosecutor v Saif Al-Islam Gaddafi* (Defence Application) ICC-01/11-01/11-640 (5 June 2018), para 1.

²³⁰⁵ Law Number 6 on General Amnesty 2015 art 1.

²³⁰⁶ *ibid.*

²³⁰⁷ Law Number 6 on General Amnesty 2015 art 7.

²³⁰⁸ n 2304 paras 26 - 27.

²³⁰⁹ Rome Statute of the International Criminal Court [1998] art 20 (3) (a) & (b).

In April 2019, the ICC rejected Gaddafi's defence application and decided that the case was admissible before the court.²³¹⁰ It is clear from the above, the ICC's 'inherent weakness stems from the principle of complementarity as the institution is secondary to national jurisdictions, and in that sense is weaker than other international criminal court's such as the ICTY²³¹¹ and ICTR²³¹², which had jurisdiction and supremacy over national state courts'.²³¹³

The effect of this weakness is that the ICC wields less authority over the states, giving states the option of maintaining the upper hand as it is within the power of the states to go forward with investigations and prosecutions, pre-empting the court.²³¹⁴

The Libyan government has utilised the principle of complementarity as a tool to administer sham justice by sentencing Gaddafi in absentia and then introducing domestic legislation to shield Gaddafi from any further criminal proceedings, essentially, pardoning him from alleged international crimes committed in the 2011 Libyan crisis.

In this sense, the unwillingness to prosecute Gaddafi for crimes against humanity, within Libya's national courts have delegitimised the ICC by undermining its authority and its ability to take enforcement action against the Libyan government to take Gaddafi into ICC custody to be tried.

Further ridicule of the ICC is observed after Saif Al-Islam Gaddafi openly declared becoming a candidate for the presidential elections in Libya which was scheduled to be held towards the end of 2019, which gained the support of Russia.²³¹⁵

²³¹⁰ *Prosecutor v Saif Al-Islam Al-Gaddafi* (Pre-Trial Chamber I Decision) ICC-01/11-01/11 (5 April 2019), para 79.

²³¹¹ UNSC Res 827 (25 May 1993) UN Doc S/RES/827.

²³¹² UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

²³¹³ Lana Ljuboja, 'Justice in an Uncooperative World ICTY and ICTR Foreshadow ICC Ineffectiveness' (2010) 32 (3) *Hous.J.Int'l L.* 767, 772.

²³¹⁴ Linda E Carter, 'The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?' (2013) 12 (3) *Wash. U. Global Stud. L. Rev.* 451, 455.

²³¹⁵ Henry Meyer, 'Qaddafi Son Wants Libya Presidential Vote As Soon As Possible' (*Bloomberg*, 12 January 2019) <<https://www.bloomberg.com/news/articles/2019-01-12-qaddafi-son-wants-libya-presidential-vote-as-soon-as-possible>>

The ICC's lack of enforcement and inability to prosecute suspected criminals can also be observed in 2017, after the ICC issued an arrest warrant for the Libyan National Army (LNA) commander Mahmoud Mustafa Busayf Al-Werfalli²³¹⁶ in relation to allegations pertaining to the war crime of murder, alleged to have been committed in several incidents.²³¹⁷

Nearly five years have passed since the ICC warrant was issued, however the Libyan authorities have not convicted Werfalli, nor has the ICC been able to bring proceedings against him.

HRW reported in January 2018, unidentifiable armed groups detonated two car bombs in front of Baya'at Al-Radwan mosque in Benghazi, killing at least 34 people and wounding over 90. Video recordings appeared to identify LNA commander Mahmoud al-Werfalli and placed him at the time of the event.²³¹⁸

This gives weight to the criticism that for the best part of its existence, the ICC has haemorrhaged both the integrity and the legitimacy that are required of a judicial tribunal, whilst displaying amateurism in its failure to carry out reliable and independent investigations.²³¹⁹

Failures of the ICC's ability to conduct investigations are also prevalent after NATO's 2011 intervention in OUP, after Louis Moreno-Ocampo publicly stated NATO troops would be investigated alongside rebel soldiers and regime forces for alleged breaches of IHL during the battle to overthrow Colonel Muammar Gaddafi, following a series of complaints about the P3 and its allies including

12/qaddafi-son-wants-libya-presidential-vote-as-soon-as-possible> accessed 10 March 2020).

²³¹⁶ *Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli* (Pre-Trial Chamber I Decision) ICC-01/11-01/17 (15 August 2017).

²³¹⁷ *ibid* para 2.

²³¹⁸ 'World Report 2019: Libya Events of 2018' (*Human Rights Watch*) <<https://www.hrw.org/world-report/2019/country-chapters/libya>> accessed 10 March 2020.

²³¹⁹ Benedict Abrahamson Chigara, 'Towards Nemo Judex in Parte Sua Critique of the International Criminal Court' (2019) 19 (3) *International Criminal Law Review* 412, 419-420.

those in the NTC.²³²⁰ Yet, no indictments, trials or prosecutions have happened since then.

Despite the report compiled by HRW²³²¹ and the UNHRC²³²² clearly detailing and establishing NATO's illegal conduct in Libya by deliberately targeting innocent civilians', impunity has prevailed allowing individuals from the P3 to elude accountability for their crimes.

The fact that the ICC has not investigated NATO's conduct in the aftermath of OUP in Libya exemplifies the 'proximity between the UNSC, state interests, and international criminal justice which appears to be uncomfortably close, suggesting the ICC has become too closely associated with a western policy of regime change'.²³²³

In addition, Triponel and Williams have argued realpolitik-oriented policy makers, have expressed their discomfort with the ICC, as it has become intertwined with the political process, having a significant impact on the UNSC and its process for maintaining international peace and security.²³²⁴

While the ICC draws its potency from the normative demands of justice, in reality, justice is also subject to political interests, state power, and the political process, often resulting in the court exerting its own influence on political efforts to ensure peace and security, sometimes even contributing to an alteration of the balance of power. In this way, it inches ever closer to the realm of the realpolitik.²³²⁵

²³²⁰ Damien McElroy, 'Libya: NATO To Be Investigated by ICC For War Crimes' *The Telegraph* (London, 2 November 2011) <<https://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8866007/Libya-Nato-to-be-investigated-by-ICC-for-war-crimes.html>> accessed 10 March 2020.

²³²¹ Abrahams (n 2144).

²³²² n 2149.

²³²³ Leslie Vinjamuri, 'The International Criminal Court and The Paradox of Authority' (2016) 79 (1) LCP 275, 286.

²³²⁴ Anna F. Triponel and Paul R. Williams, 'The Clash of the Titans: Justice and Realpolitik in Libya' (2013) 28 (3) Am.U.Int'l L.Rev. 775, 779.

²³²⁵ *ibid* 780.

The concurs with this argument, as the current chapter has demonstrated the ICC being used as a political tool and the UNSC has served as a platform for manipulation catering to the self-interests of the P3 in Libya²³²⁶ and legitimising the illegitimate global 'GWOT' doctrine both of which are comparable to the USA and the UK's unlawful historic strategy which led to the 2001 and 2003 invasion of Afghanistan and Iraq.

This chapter has also demonstrated the ICC's failure to prosecute individuals from NATO in the aftermath of the 2011 after the UNSC authorised OUP and its inability to execute arrest warrants to prosecute Saif Al-Islam Gaddafi and other individuals²³²⁷, a decade after the court was granted jurisdiction in Libya by the UNSC.

The preceding chapters of the thesis and the current chapter have adduced both the UNSC and the ICC created to maintain international peace and security and administer international criminal justice respectively, have failed to fulfil their institutional purpose.

By analysing and critiquing the roles of both organisations in humanitarian and counter-terrorism operations in majority Muslim states, the thesis has demonstrated the current structural composition and architectural configuration of the UNSC and the ICC cannot adequately respond to humanitarian catastrophes, international terrorism or hold perpetrators of alleged international crimes accountable in accordance with international criminal law.

It is important to mention even though the case studies selected by the author were used for the purposes of answering the research question to assess the effectiveness of the UNSC and the ICC, the findings of this thesis are not

²³²⁶ Jeron Maklanron, 'South Africa's Disappointment with the International Criminal Court: The Unfair Treatment of African People Caused an End to Cooperation' (2016) 9 (7) *Journal of Pan African Studies* 82, 90.

²³²⁷ *Prosecutor v Al-Tuhany Mohamed Khaled* (Pre-Trial Chamber I) ICC-01/11-01/13 (18 April 2013).

merely confined to just Muslims majority states, its application is global and applicable to all states.

The transnational and global reach of terrorism and humanitarian situations which may arise as a result of armed conflicts in any state globally, suggests the substantial hindrances and shortcomings of both international organisations presented throughout the thesis specifically, the GWOT doctrine and the continued privileges afforded to the P5 (and also to the benefit of their allied states) can continue to breach the IL principles of state sovereignty, territorial integrity in addition to committing blatant violations of IHL, IHRL, CIL and *Jus Cogens* with impunity, thereby allowing individuals from these powerful states to evade criminal liability.

In addition, the ICC's shortcomings, specifically the court's inability to enforce arrest warrants, jurisdictional limitations and the complementarity principle as demonstrated in this chapter and the preceding chapters of the thesis also demonstrate that any state globally not just Muslim majority states can also refuse to co-operate with the court in prosecuting and convicting individuals nationally can thereby promote impunity.

The situation in Libya has increased 'speculation as to whether the ICC and the current criminal justice model can be enhanced to address the counter-productivity of the complementarity principle'.²³²⁸ The subsequent chapter to improve the current position of both the UNSC and the ICC will entrance the authors novel solution proposition for reforming of both international organisations entitled: The Justice, Equality, Peace and Security (JEPS) model.

²³²⁸ Patricia Hobbs, 'The Catalysing Effect of the Rome Statute in Africa: Positive Complementarity and Self-Referrals' (2020) 31 (3) Crim.L.F. 345, 369.

Chapter 7 – Thesis Proposals & Recommendations

7.1 Previous Proposal's and Recommendations by Academics for Reforming the UNSC and the ICC

The weaknesses identified throughout the thesis support the consensus of the international community that there is a need for the UNSC to be reformed.²³²⁹ Widespread reform proposals of the UNSC and amendment of the UN Charter²³³⁰ have been made in an attempt to help the organisation adjust to the challenges presented in humanitarian crises and the continued threat of international terrorism in the twenty-first century.²³³¹

Primarily, a proposal made by Joseph E. Schwartzberg in 2004 sought to reform the UNSC by abolishing the current permanent membership and veto, suggesting both should be replaced with the concept of 'weighted voting' by introducing the 'WV formula'²³³² stating:

$$\frac{WV = P + C + M}{3}$$

[W]V here represents a nation's weighted vote, the average of: P, its percentage share of the total population of all UN members, its financial contribution as a percentage of the total UN budget; and M, its share of the total UN membership (i.e., 1/191, or 0.524%). This formula embodies three fundamental principles: democratic/demographic, economic, and legal (the sovereign equality of nations).²³³³

Moreover, between 2005-2006, three proposals reforming the membership of the UNSC were proposed by the Centre of UN Reform Education (CURE), specifically by Professor Walter Hoffman entitled: Model C, Model X and Model Duo.²³³⁴ In 2005, Model C proposed:

²³²⁹ Niguse Mandefero Alene, 'Reforming the UN Security Council – Challenges & Prospects' (2015) 3 (4) *Journal of Social and Political Science* 65, 66.

²³³⁰ Norman J. Paddleford, 'The Use of the Veto' (1948) 2 (2) *Int'l Org.* 227, 227.

²³³¹ Yehuda Z. Blum, 'Proposals for UN Security Council Reform' (2005) 99 (3) *AJIL* 632, 632.

²³³² Joseph E. Schwartzberg, *Revitalizing the United Nations: Reform Through Weighted Voting* (Ethan Allen, 2004) 16.

²³³³ *ibid* 14.

²³³⁴ Adeleke Olumide Ogunnoiki, 'Reforming the United Nations In the 21st Century: A Discourse on the Enlargement, Democratisation and the Working Methods of the Council' (2018) 4 (6) *International Journal of Advanced Academic Research* 40, 56.

[D]ividing Asia and the Pacific group into two Pacific Rim and South Asia. Model C envisions the enlargement of the UNSC from 15 to 25. The model, for the permanent seat and non-permanent seat categories have a total of 5 and 10 seats respectively.²³³⁵

It would retain 'the original five permanent members but redistribute the ten two-year term seat members: three to Africa; two to Asia; one to Europe; two to the Pacific Rim; and two to Latin America and the Caribbean'.²³³⁶ The plan then creates:

[O]ne four-year renewable seat and one eight-year renewable seat for each region. The eight-year seats would be dual-seated, meaning two nations would occupy the seat on a two-year rotation. The four-year seats are reward seats. Each region selects the constituent nation that has contributed most to peacekeeping and other UN operations and met its financial obligations.²³³⁷

In 2006, Model X proposed, 'the plan sacrifices some equitable representation in favour of a smaller, more efficient UNSC of no more than twenty. However, the developing world is not neglected. Regional disputes are side-lined by proposing no new permanent seats'.²³³⁸ Model X proposed:

[t]o add five four-year renewable term seats; two four-year renewable seats for Africa, two for Asia, and one for the Americas and the Pacific. Each region would itself control whether a member was renewed or re-elected. Europe is denied a new seat, which somewhat redresses their over-representation among the permanent members which currently stands at two permanent members.²³³⁹

Model Duo was also proposed in 2006, which the sought the expansion of the UNSC from 15 to 21 seats. In this model, two separate non-contiguous six-year terms would be assigned to the electoral regions. Hence, the UNSC

²³³⁵ *ibid.*

²³³⁶ Brian Cox, 'United Nations Security Council Reform: Collected Proposals and Possible Consequences' (2009) 6 (1) *South Carolina Journal of International Law and Relations* 89, 112-113

²³³⁷ *ibid.*

²³³⁸ Cox (n 2336) 113-114.

²³³⁹ *ibid.*

becomes more representative which would increase the participation in its decision-making process.²³⁴⁰

In 2015, a proposal made by Enrico Milano sought to restrict the use of veto powers without effectuating any substantial reform of the UN Charter by relying on the obligatory abstention rule, in accordance with Chapter VI.²³⁴¹

The P5 would be encouraged to abstain from voting, which was developed in the 1945 San Francisco conference under the principle '*nemo iudex in re sua*' (fairness) to limit the duty to abstain to non-binding, conciliatory measures adopted mainly under Chapter VI of the UN Charter.²³⁴²

The 'obligatory abstention rule' has been frequently overlooked, especially, by Russia and its use of the veto throughout the Cold War.²³⁴³ Higgins has explained the reasons for the P5's unwillingness to observe the rule, arguing this is due to the fact that:

[I]t has become increasingly difficult to identify 'the parties' to a dispute. In an increasingly interdependent world, states find it hard to stand aside from the disputes of others. Even if they are not involved directly as the major protagonists in the controversy, they may well be involved indirectly, in the sense that they have interests at stake.²³⁴⁴

In 2014, the revitalisation of the rule was proposed by international law specialist Stephen Smith making a recommendation that New Zealand should take the lead in reviving the rule by reminding P5 states to observe the rule, following the commencement of its seat in the UNSC between 2015-2016.²³⁴⁵

²³⁴⁰ Cox (n 2336) 57.

²³⁴¹ Charter of the United Nations [1945] art 27 (3).

²³⁴² Enrico Milano, 'Russia's Veto in the Security Council: Whither the Duty to Abstain under Art.27 (3) of the UN Charter' (2015) 75 Heidelberg Journal of International Law 215, 217.

²³⁴³ Aglaya Snetkov and Marc Lanteigne, 'The Loud Dissenter and its Cautious-Russia China, Global Governance and Humanitarian Intervention' (2015) 15 (1) International Relations of the Asia-Pacific 113, 137.

²³⁴⁴ Rosalyn Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council' (1970) 64 (1) AJIL 1, 2.

²³⁴⁵ Stephen Eliot Smith, 'Reviving the Obligatory Abstention Rule in the UN Security Council: Reform from the Inside Out' (2014) 12 New Zealand Yearbook of International Law 15, 26.

In 2017, legal academics Daniel Moeckli and Raffael Fasel argued the lack of transparency, justification and accountability provided by the P5 when a veto of a draft resolution has been cast and proposed to reform the UNSC by placing obligations on member states including the P5 by implementing *de lege ferenda* (a duty to give reasons).²³⁴⁶

The proposal endeavoured to restore and enhance accountability, transparency and legal certainty in public UNSC meetings by providing explanations for votes cast in UNSC meetings even if council members have negotiated in informal settings.²³⁴⁷

The most recent proposal to reform the UNSC was forwarded by legal academics Ville Lattila and Alekski Ylönen in 2019, introducing the ‘two layered regional model’.²³⁴⁸

The reform proposal sought to eliminate four dysfunctional flaws the author identified namely: inequality, exclusiveness, rotating seats, and representation in an attempt to make the UNSC fairer and more democratic.²³⁴⁹ The author then highlights the practicality and advantages of the ‘two layered regional model’ in the voting process of draft resolutions.

Depending on the region of concern, states within that region would primarily vote on a resolution and then the rest of the UNSC would vote in favour or against that resolution. Thus, in order for a resolution to be successful a draft resolution must gain 60% of the votes. However, for interstate conflicts a single vote by the UNSC is only required.²³⁵⁰

The above reform proposals suggested by academics possess many advantages and virtues to improve the current state of the UNSC and its ability

²³⁴⁶ Daniel Moeckli and Rafael N Fasel, ‘A Duty to Give Reasons in the Security Council’ (2017) 14 (1) *International Organizations Law Review* 13, 57.

²³⁴⁷ *ibid* 85.

²³⁴⁸ Ville Lattila and Alekski Ylönen, ‘United Nations Security Council Reform Revisited: A Proposal’ (2019) 30 (1) *Diplomacy and Statecraft* 164, 164.

²³⁴⁹ Ville Lattila, ‘A New Proposal for UN Security Council Reform’ (*Oxford Research Group*, 28 May 2019) <<https://www.oxfordresearchgroup.org.uk/blog/a-new-proposal-for-un-security-council-reform>> accessed 8 February 2020.

²³⁵⁰ *ibid*.

to maintain international peace and security, although no reform proposal mentioned above has been adopted or implemented to date.

7.1.1 Proposals and Recommendations by the UNGA and Member States for Reforming the UNSC

Since the early 1990's the consensus amongst states, regional organisations and the UNGA to reform the UNSC have remained consistent.

Proposals have also been made for the UNSC to be expanded to remove the 'deadlock'²³⁵¹, 'increase membership of both permanent and non-permanent seats in an attempt to democratise the council through equal representation particularly of developing states'²³⁵², and to reflect the current geopolitical reality and ongoing threats to international peace and restore its waning legitimacy.²³⁵³

In 1992, the UNGA sought to reform the UNSC by calling for proposals from member states of the UN following the passing of resolution 47/62²³⁵⁴. In 1993, the UNGA passed resolution 48/26²³⁵⁵ introducing the 'Open Ended Working Group' (OEWG), which sought to explore and suggest possible ways in which the UNSC can be reformed.²³⁵⁶

The broad formulation of the OEWG is of general view that the issue of increasing the membership of the UNSC (which at present stands at a total of 15 members) cannot be looked at in isolation.²³⁵⁷

²³⁵¹ Nadia Sarwar, 'Expansion of the United Nations Security Council' (2011) 31 (3) *Strategic Studies* 257, 257.

²³⁵² Dumisani S Kumalo, 'The Question of Equitable Representation on, and Increase in, the Membership of the Security Council and Related Matters' (2009) 8 (1) *South African Journal of International Affairs* 135, 135.

²³⁵³ UNGA Res 47/62 (11 December 1992) UN Doc A/RES/47/62.

²³⁵⁴ *ibid.*

²³⁵⁵ UNGA Res 48/26 (29 November 1993) UN Doc A/RES/48/26.

²³⁵⁶ *ibid.*

²³⁵⁷ Bardo Fassbender, 'All Illusions Shattered? Looking Back on a Decade of Failed Attempts to Reform the UN Security Council' (2003) 7 (1) *Max Planck Yearbook of United Nations Law* 183, 190.

However, similar to academic proposals urging reform of the UNSC, political figures, organisations and member states have also proposed various reform proposals, yet none have been implemented.

The first major UNSC proposal was made in 1997 by the former President of the UNGA and Chairman of the OEWG, Ismail Razali, by introducing a three-stage reform plan.²³⁵⁸ The first stage required:

[t]he enlargement of the UNSC to include five new permanent members (two from industrialised and three from developing countries with one each from Africa, Asia, and Latin America and the Caribbean) and four non-permanent members (one each from Africa, Asia, Eastern Europe, and Latin America and the Caribbean) which required the UNGA to pass a resolution to initiate the reform by September 1997.²³⁵⁹

The second stage involved increasing permanent membership of the UNSC by adding five new seats by electing specific candidate states. The five new members would not be granted veto powers but the non-permanent members would be encouraged to limit its use, which would be effectuated through a UNGA resolution which would need to be passed by the 28th February 1998, by a two-third majority vote.²³⁶⁰

The third stage required the UNGA to impose a one-week deadline to designate states to be elected as new UNSC members as well as another vote amending the UN Charter to accommodate the two changes proposed in the first and second stage of the plan, which also required a two-third majority.²³⁶¹

In 2000, the UN Millennium Declaration expressed the need for comprehensive reform of the UNSC²³⁶² leading to the next major reform proposal being introduced in 2004 by the 'High Level Panel on Threats, Challenges and Change' created by UN Secretary-General Kofi Annan.²³⁶³

²³⁵⁸ Matthew Gould and Matthew D Rablen, 'Reform of The United Nations Security Council: Equity and Efficiency' (2017) 173 (1-2) *Public Choice* 145, 153.

²³⁵⁹ Dimitris Bourantonis and Konstantinos Magliveras, 'The Enlargement of the UN Security Council: Reflections from the Current Debate' (2002) 22 (1) *Politics Journal* 24, 25.

²³⁶⁰ *ibid.*

²³⁶¹ Bourantonis and Magliveras (n 2359).

²³⁶² UNGA Res 55/2 (8 September 2000) UN Doc A/RES/55/2, para 30.

²³⁶³ Gwyn Prins, 'Lord Castlereagh's Return: The Significance of Kofi Annan's High-Level Plan on Threats Challenges and Change' (2005) 81 (2) *International Affairs* 373, 373.

The UNGA report involved the participation of 16 member states²³⁶⁴, introducing a new document entitled: 'A More Secure World: Our Shared Responsibility' providing a new framework for the work and action of the UN.²³⁶⁵ The proposal contained 101 recommendations concerning a wide range of global security issues including present collective security.²³⁶⁶

In 2005, a report entitled: 'In Larger Freedom: Toward Development, Security and Human Rights for all', was based on the recommendations of the 2004 report, which contained two optional proposals.²³⁶⁷ The first was:

Model A' which proposed six new permanent seats – Africa (2), Asia and the Pacific (2), Europe (1) and, the Americas (1) without veto power, with the addition of 13 two-year seats (non-renewable) quantified and distributed as follows: 'Africa (4), Asia and the Pacific (3), Europe (2) and the Americas (4) which would bring the Council to a total of 24 members.²³⁶⁸

The second proposal entitled 'Model B' contained a slight variation to increase UNSC membership, stating:

11 two-year seats (non-renewable) – 4 for Africa, 3 for Asia and the Pacific, 1 for Europe and 3 for the Americas. This model introduced a third tier, a semi-permanent seat category which they called four-year seats (renewable). In this new category, there are 8 seats to be filled by two countries each from Asia, Africa, Europe and the Americas without veto power and can be renewed every four years. Like Model A, Model B enlarged the Council from 15 to 24 seats.²³⁶⁹

In addition, the Group of Four (G4) states comprising of: Brazil, Germany, India and Japan also presented a proposal for reform of the UNSC.²³⁷⁰

²³⁶⁴ UNGA Res 59/565 (2 December 2004) UN Doc A/59/565.

²³⁶⁵ Marco Odello, 'Commentary on the United Nations' High-Level Panel on Threats, Challenges and Change' (2005) 10 (2) *Journal of Conflict and Security Law* 231, 231.

²³⁶⁶ J. Peter Burgess and Robert Piper, 'Special Section: Report of the High-Level Panel on Threats, Challenges and Change' (2005) 36 (3) *Security Dialogue* 361, 361.

²³⁶⁷ Ogunnoiki (n 2334) 54.

²³⁶⁸ *ibid.*

²³⁶⁹ *ibid.*

²³⁷⁰ Nanna Charlotte Lord-Mallam, 'The Politics of the United Nations Reform in the Security Council and Other Organs' (2016) 21 (2) *IOSR Journal of Humanities and Social Science* 44, 53.

In 2005, its proposal to the UNGA²³⁷¹ sought to expand the UNSC membership from 15 to 24, with six new permanent members to be elected according to a geographic regional distribution with four permanent seats being allocated to Brazil, Germany, India and Japan and the remaining two seats being allocated to African states with veto powers being granted to the new permanent members after 15 years.²³⁷²

The G4 proposal sought to create four new non-permanent seats, allocating one seat to Africa, Asia, Eastern Europe and Latin America and the Caribbean.²³⁷³ The G4 justified its proposal:

[b]ased on their capacity to contribute to the maintenance of international peace and security globally, regardless of whether fellow neighbours endorsed them or not. They hold that any member state, in principle, could present itself as a 'legitimate candidate', without the obligation (or even expectation) to represent a region or geographic area.²³⁷⁴

However, this proposal has been opposed by the Uniting for Consensus group (UFC). The UFC consisted of a number of states including: Argentina, Canada, Colombia, Costa Rica, Italy, Malta, Mexico, Pakistan, Republic of Korea, San Marino, Spain and Turkey.²³⁷⁵ The UFC's proposal sought to add only non-permanent seats and preferably abolish the veto or at least restrict its use.²³⁷⁶

The Assembly of the African Union (AAU) has remained determined to the enlargement of the UNSC by increasing Africa's membership. The AAU's initial proposal in 1997 known as the 'Harare Declaration' sought to reform the

²³⁷¹ UNGA Draft Res 59/L.64 (6 July 2005) UN Doc A/59/L.64.

²³⁷² Benjamin MacQueen, 'Muslim States and Reform of the United Nations Security Council' (2010) 4 (3) *Journal of Middle Eastern and Islamic Studies* 47, 55-56.

²³⁷³ *ibid.*

²³⁷⁴ Eugenio V. Garcia and Natalia B.R. Coelho, 'A Seat at the Top? A Historical Appraisal of Brazil's Case for the UN Security Council' (2018) July-September Sage Open Research Paper 1, 9 <<https://journals.sagepub.com/doi/full/10.1177/2158244018801098>> accessed 02 October 2020.

²³⁷⁵ UNGA Draft Res 59/L.68 (21 July 2005) UN Doc A/59/L.68.

²³⁷⁶ Gould and Rablen (n 2358).

UNSC by introducing two permanent and five non-permanent seats for the African Region.²³⁷⁷

The 'Ezulwini Consensus' proposal in 2005, which was introduced in the AAU's 7th extraordinary session maintained its position calling for two permanent seats with a right to veto and five non-permanent seats.²³⁷⁸

The proposal also states that Africa is opposed to the principle of veto, however, so long as it exists then the right should be extended to all members²³⁷⁹ which has also been reflected previously in its draft resolution to the UNGA.²³⁸⁰

The L.69, a group consisting of 42 developing countries including: Brazil and India²³⁸¹ have also adopted a similar approach regarding the expansion of the UNSC by increasing the number of permanent and non-permanent seats in its 2007 proposal.²³⁸²

Although, other regional groups have advanced proposals which have sought to raise awareness encouraging P5 members to refrain using their veto privilege where international crimes have occurred.

In 2015, a declaration made by France and Mexico at the 70th meeting of the UNGA called for a suspension of veto powers in cases of mass atrocity following Russia's continued use of the veto preventing UNSC intervention in the Syrian crisis.²³⁸³

Moreover, the Accountability, Coherence and Transparency (ACT) group consisting of 25 members including: Saudi Arabia, Switzerland, Sweden,

²³⁷⁷ Joachim W. Muller, *Reforming the United Nations: The Quiet Revolution* (Kluwer Law International 2001) 526.

²³⁷⁸ Assembly of the African Union, 'Executive Council: 7th Extraordinary Session 7-8 March' (2005) AAU Doc Ext/EX.CL/2 (VII).

²³⁷⁹ *ibid* 9.

²³⁸⁰ UNGA Draft Res 59/L.67 (14 July 2005) UN Doc A/59/L.67.

²³⁸¹ Rajeesh Kumar, 'Waiting for Godot: India and United Nations Security Council Reform' (2017) 41 (6) *Strategic Analysis* 546, 547.

²³⁸² UNGA Draft Res 61/L.69 (11 September 2007) UN Doc A/61/L.69.

²³⁸³ Graham Melling and Anne Dennett, 'The Security Council Veto and Syria: Responding to Mass Atrocities Through the Uniting for Peace Resolution' (2017) 57 (3-4) *Indian Journal of International Law* 285, 295.

Finland, Denmark and Lichtenstein, have been dedicated to improving the workings of the council.²³⁸⁴

In 2015, the ACT group developed and proposed a ‘Security Council Code of Conduct’²³⁸⁵ open to all Member States as current, or potential future members of the UNSC. The code of conduct is a pledge to support UNSC action in cases of genocide, crimes against humanity and war crimes, not to vote against any credible draft resolutions to prevent or end such situations.²³⁸⁶

Despite the proposals made by academics, political figures, member states, regional groups and organisations all striving to improve the fairness, authority and efficiency²³⁸⁷ of the UNSC’s voting process to ensure democratic and equal representation, this has still not effectuated any reform or substantial change of the UNSC.

7.1.2 Previous Proposals and Recommendations for Reforming the ICC

Since the end of the Cold War, the international community has created a variety of legal institutions designed to step in where justice systems have failed to prosecute war crimes, genocide, aggression and crimes against humanity.²³⁸⁸

Examples of such institutions have been detailed in the second chapter of the thesis which include the ICTY²³⁸⁹ and ICTR²³⁹⁰ tribunals which were the result

²³⁸⁴ ‘The Veto and the UN Security Council’ (*Center for UN Reform Education*, 28 October 2019) <<https://centerforunreform.org/2019/10/28/the-veto-and-the-un-security-council/>> accessed 8 March 2020.

²³⁸⁵ ‘Explanatory Note: On a Code of Conduct Regarding the Security Council Action Against Genocide, Crimes Against Humanity or War Crimes’ (*Center for UN Reform Education*, 1 September 2015) <<https://centerforunreform.org/wp-content/uploads/2015/09/Final-2015-09-01-SC-Code-of-Conduct-Atrocity.pdf>> accessed 8 March 2020.

²³⁸⁶ *ibid.*

²³⁸⁷ Charles Vigouroux, ‘Legitimacy, Representation and Effectiveness: Three Goals for A Security Council Reform’ (2009) 5 *Glendon Journal of International Studies* 16, 17.

²³⁸⁸ Alexandra Huneus, ‘International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Court (2013) 107 (1) *AJIL* 1,1.

²³⁸⁹ UNSC Res 827 (25 May 1993) UN Doc S/RES/827.

²³⁹⁰ UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

of the UNSC's failure to interpose and obviate the humanitarian crises which ensued in both the Srebrenica and Rwanda genocide.²³⁹¹

The most prominent of these institutions being the ICC. However, over the course of nearly two decades, the court has been unable to step in where serious international crimes have been committed by individuals during armed conflicts, which has been demonstrated throughout the thesis.

Whilst, the ICC has been successful and commended for increasingly encountering managerial practices, which have been designed to improve organisational efficiency and cost-effectiveness of the court by reorganising the registry of the ICC²³⁹² through its most comprehensive reform known as Project ReVision²³⁹³, the central issues highlighted throughout the thesis which cumber the court's ability to administer international criminal justice have not led to any major reform.

Prior to the court's inception, it has been previously stated: 'the idea of having a single and permanent International Criminal Court acting as a dominant source of international law enforcement was impalatable to states'.²³⁹⁴ This argument holds significance considering, the USA, Russia and China are currently not party to the Rome Statute.²³⁹⁵

Jimenez argues the impact the ICC has had in its ability to try cases suggesting, 'the way the court can achieve legitimacy and global justice is through a 'cosmopolitan model', by gaining the support of emerging states and becoming wholly independent from the UNSC'.²³⁹⁶

²³⁹¹ Section 2.2.2 to n 316 in ch 2.

²³⁹² 'Comprehensive Report on the Reorganisation of the Registry of the International Criminal Court' (*International Criminal Court*, 9 August 2016) <<https://www.icc-cpi.int/itemsDocuments/ICC-Registry-CR.pdf>> accessed 8 March 2020.

²³⁹³ Richard Clements, 'ReVisiting the ICC Registry's ReVision Project' (2019) 17 (2) JICJ 259, 259.

²³⁹⁴ Rowland J.V. Cole, 'Africa's Relationship with the International Criminal Court: More Practical Than Legal' (2013) 14 (2) Melbourne Journal of International Law 1, 28.

²³⁹⁵ Rome Statute of the International Criminal Court [1998].

²³⁹⁶ Ezequiel Jimenez, 'Seeking Global Reform: The United Nations Security Council, the International Criminal Court and Emerging Nations' (2012) 30 (1) Macalester International 84, 94.

Further proposals have also been made to address the unwillingness of state parties to the Rome Statute to enforce ICC arrest warrants, which is often attributed to the court's lack of supremacy over cases when the complementarity principle is invoked.²³⁹⁷

The international criminal law (ICL) principle of *nemo iudex in parte sua*, states:

[N]o one should be judged in his own case, a widely known principle which captures one of the two pillars of natural justice. Much of the confidence in the judicial as well as the arbitral process rests upon this maxim, which strives to assure impartiality in the decision-making process.²³⁹⁸

The integration processes between legal systems both national and international are considered pillars of global law. However, national systems are not always able to ensure the 'objectivity' and 'impartiality' required for the implementation of ICL.²³⁹⁹

An example of this is provided in the second chapter of the thesis, where Sudanese and various African state authorities refused to enforce ICC arrest warrants against the former president Omar Hassan Al-Bashir.²⁴⁰⁰

The sixth chapter of the thesis has also demonstrated Libyan authorities granting Saif Al-Islam Gaddafi amnesty for alleged international crimes which occurred during the 2011 Arab Spring uprisings, by supervening the judicial decisions by the Libyan court to prosecute.²⁴⁰¹

This effectively overlooked any potential criminal liability Gaddafi may have been responsible for, which is not considered to be 'part and parcel of

²³⁹⁷ Marina Aksenova, 'Human Rights at the International Criminal Court: Testing the Limits of Judicial Discretion' (2017) 86 (1) *Nordic Journal of International Law* 68, 78.

²³⁹⁸ Robert Uwe Hess, 'Nemo Iudex In Sua Causa and the Challenge Procedure Under the UNCITRAL Model Law' (2018) 50 (4) *International Law and Politics* 1431, 1431-1432.

²³⁹⁹ Anna Oriolo, 'Revisiting the Interaction Between the ICC and National Jurisdictions as a New Gateway to Strengthening the Effectiveness of International Criminal Justice' (2012) 83 (1-2) *Dans Revue Internationale De Droit Penal* <<https://www.cairn.info/revue-internationale-de-droit-penal-2012-1-page-195.htm#>> accessed 24 February 2020.

²⁴⁰⁰ Section 2.3.1 to n 671 in ch 2.

²⁴⁰¹ Section 6.6.1 to n 2305 in ch 6.

transitional justice'²⁴⁰² but instead promotes impunity. Despite the obvious benefits of 'lower expenses and cost efficiency'²⁴⁰³, states have been unwilling to comply with the demands of the ICC to enforce arrest warrants.

Thus, Professor of international law Chigara has argued that the *nemo iudex in parte sua* may be applicable where state parties are unable or unwilling to enforce arrest warrants and overcome the complementarity principle where states fail to indict and conduct proceedings against individuals.²⁴⁰⁴

However, each chapter of the thesis has demonstrated the ICC does not have its own police or enforcement measures to compel states to comply with either enforcing arrest warrants or conduct trials, nor does the court have the ability to be able to use political or legal means to compel states to comply.

In a theoretical sense the current model has its benefits, the most obvious being states having supremacy and primacy over the ICC to bring proceedings nationally within states against alleged perpetrators.

Although, the second²⁴⁰⁵, third²⁴⁰⁶, fourth²⁴⁰⁷, and sixth²⁴⁰⁸ chapters of the thesis have all adduced African states, the P5 and their allied states have consistently remained unwilling to comply with the ICC's demands to cooperate in investigating and prosecuting citizens where alleged crimes have occurred.

This unfair practice and non-compliance with the court has exhibited the limitations and shortcomings of the ICC to administer international criminal justice.

This is partly due to the fact that certain P5 states are not party to the ICC (specifically the USA, China and Russia) but the predominant cause and

²⁴⁰² Drazan Dukic, 'Transitional Justice and the International Criminal Court – In the interests of Justice?' (2007) 89 (867) *International Review of the Red Cross* 691, 693.

²⁴⁰³ Yuval Shany, 'How Can International Criminal Court's Have A Greater Impact on National Criminal Proceedings? Lessons from the First Two Decades of International Criminal Justice in Operation' (2013) 46 (3) *Israel Law Review* 431, 431.

²⁴⁰⁴ Benedict Abrahamson Chigara, 'Towards Nemo Iudex in Parte Sua Critique of the International Criminal Court' (2019) 19 (3) *International Criminal Law Review* 412, 414.

²⁴⁰⁵ Section 2.3.2 to n 703 in ch 2.

²⁴⁰⁶ Section 3.4 to n 1314 in ch 3.

²⁴⁰⁷ Section 4.9.1 to n 1670 in ch 4.

²⁴⁰⁸ Section 6.6.1 to n 2297 in ch 6.

fundamental reason preventing the ICC from being able to prosecute individuals is consequent to the veto privilege attached to permanent membership.

The remainder of the thesis will introduce a novel solution to overcome the ineffectiveness of both the UNSC and the ICC, whilst assessing the prospects of whether such proposal can be effectuated to improve the current position of both institutions.

7.2 The Authors Novel Proposal for Reforming the UNSC and the ICC Entitled: 'The Justice, Equality, Peace and Security (JEPS) Model' or Alternatively 'The Sarwar Model'.

The Justice, Equality, Peace and Security (JEPS) model seeks to eliminate the issues which have been highlighted throughout this chapter and the thesis which have rendered both institutions futile. The JEPS model comprises of four major proposals for reform to improve the effectiveness of both institutions. The novel model proposes to:

1. **Abolish the veto privilege:** given to P5 members and replacing it with a Three Fifth majority voting system.
2. **Equal State Representation:** by increasing non-permanent membership in the UNSC from 15 to 25 members in line with the current system of serving two-year terms, with no changes to the permanent membership in the council.
3. **Restructure the UN and the ICC:** this part of the proposal seeks to amend and repeal certain provisions of the UN Charter and the Rome Statute, moving the ICC from being an independent court to being another judicial organ of the UN separate to the ICJ dealing exclusively in matters relating to the most serious international crimes.

4. **Update International Crimes:** by adding the crimes of terrorism and ecocide alongside war crimes, genocide, crimes against humanity and aggression contained within the Rome Statute.²⁴⁰⁹

Although certain elements of the JEPS model may resemble similarities to previous proposals made by academics, states and organisations as mentioned throughout the chapter (particularly points one, two and four).

The most substantial and authentic contribution by the authors proposed reform model remains within point three, whilst providing a variation to existing proposals asserting an increase in non-permanent seats within the UNSC in point two.

However, the novelty of the authors proposal is contingent on points one, three and four of thesis combined with point three (restructuring of the UN and ICC). These must be executed together in its entirety, in order for the proposal to serve as an effective solution to overcome the challenges both organisations have succumbed to in fulfilling their respective mandates, which will be justified throughout the remainder of the chapter.

7.2.1 Abolishing the Veto Privileges Granted to the P5

The UN system in general has been considered egalitarian through its one-state-one-vote system, enjoyed by member states in the UNGA and various other decision-making bodies with the infamous exception of the UNSC.²⁴¹⁰

The thesis throughout has adduced the adverse effects of the veto privilege, which has fundamentally rendered the UNSC ineffective, thwarting its ability to respond to humanitarian crises.²⁴¹¹ This has been prevalent in armed conflicts and counter-terrorism operations, disallowing accountability, transparency and individual responsibility to prevail.

²⁴⁰⁹ Rome Statute of the International Criminal Court [1998] art 5.

²⁴¹⁰ Steven J. Hoffman, 'Mitigating Inequalities of Influence Among States in Global Decision Making' (2012) 3 (4) Global Policy 421, 429.

²⁴¹¹ Chelsea Koester, 'Looking Beyond R2P for an Answer to Inaction in the Security Council' (2015) 27 (3) Florida International Law Journal 377, 378.

In this sense, the veto privilege can be observed as an extension of the P5's hegemony, which is exerted through its permanent membership of the UNSC. This unequal balance of power and authority within the UNSC has been described as the 'international hierarchy of influence'²⁴¹² or 'prestige',²⁴¹³

The thesis has demonstrated that the veto privilege is an instrument where the P5 states exercise absolute power to decide on critical matters and use this as a means to elude and relinquish individual criminal responsibility of their own nationals and those of allied states for international law (IL), international humanitarian law (IHL), International Human Rights Law (IHRL), customary international law (CIL) and *Jus Cogens* violations, which occur flagrantly in armed conflicts or in circumstances where military occupation is present.

By abolishing the veto privilege, this would not only end impunity, but at the very least limit the possibility of nationals from P5 states and their allies evade accountability and investigations for violations of IHL, including heads of state and senior military personnel.

This would effectively counteract the effects of the 'global war on terror' doctrine as the P5 and their allies have often violated state sovereignty, conducted unauthorised military occupations and used disproportionate and often excessive force at the expense of substantial losses of civilian life, which is also prevalent during humanitarian intervention through Responsibility to Protect.

In addition, removing this obstacle would allow the UNSC to effectively maintain international peace and security, in circumstances where humanitarian peace-keeping operations are required.

Therefore, in order to make the UNSC more democratic, this requires removing the veto privilege and replacing this with the 'double majority' proposal forwarded previously by Sellen²⁴¹⁴, which would require a three fifth

²⁴¹² Patrick A. McCarthy, 'Positionality, Tension and Instability in the UN Security Council' (1997) 3 (2) *Global Governance* 147, 147.

²⁴¹³ Robert Gilpin, 'The Theory of Hegemonic War' (1988) 18 (4) *Journal of Interdisciplinary History* 591, 601.

²⁴¹⁴ Keith L Sellen, 'The United Nations Security Council Veto in the New World Order' (1992) 138 *Mil.L.Rev.* 187, 192.

majority of permanent members and a two third majority vote of non-permanent members to pass a draft resolution. This would require amending article 27 UN Charter²⁴¹⁵ to:

1. [E]ach member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by a two third majority of non-permanent members vote in addition to a three fifth majority vote by permanent members.
3. Decisions of the Security Council on all other matters shall be made by a two third majority vote by non-permanent members in addition to a three fifth majority vote by permanent members, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

The advantage of implementing a 'double majority' voting system increases the prospects of passing a resolution rather than an outright veto which could halt the UNSC from acting altogether, essentially creating a deadlock in the UNSC as demonstrated in Syria²⁴¹⁶ and Palestine.²⁴¹⁷

In addition, the original P5 would still retain a level of authority to ultimately decide on whether a resolution would be adopted as a three fifth majority would be required or else a draft resolution would fail to be adopted.

This is similar to the 'qualified majority'²⁴¹⁸ (also referred to as double majority) voting procedure adopted by regional organisations such as the European Union, particularly, the Council of Europe where proposals have been forwarded by the European Commission or the High Representative of the Union for Foreign Affairs and Security Policy.²⁴¹⁹

For a proposal to take effect, voting by 'qualified majority' requires the following conditions need to be met: 1) 55% of member states vote in favour - in practice this means 15 out of 27 and 2) the proposal is supported by member states

²⁴¹⁵ *ibid.*

²⁴¹⁶ Section 5.3.2 to n 1936 in ch 5.

²⁴¹⁷ Section 4.7.2 to n 1592 in ch 4.

²⁴¹⁸ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 236.

²⁴¹⁹ 'Qualified Majority' (*European Council, Council of the European Union*, 23 March 2020) <<https://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/>> accessed 10 April 2020.

representing at least 65% of the total EU population.²⁴²⁰ This reform seems to be a reasonable compromise and could suffice as a practical way to respond to threats of peace and humanitarian crises.

Although despite the proposal's virtues, a realistic assessment of a 'double majority' voting system without veto powers presents an obvious disadvantage, notably, this could promote a culture within the UNSC of states creating majorities within the UNSC through alliances and factions with common and shared interests.

This could effectively takeover the UNSC's management and decision-making process. However, the author anticipates and promulgates the 'double majority' voting procedure would be a significant improvement to the current veto system as it would improve the UNSC's efficiency and ability to respond expediently where humanitarian crises and/or states and individuals therewith would be held accountable for violations which occur during armed conflicts.

In addition to the veto privilege being abolished, the powers conferred to the P5 under article 106 of the UN Charter must also be abolished. This provision states:

[P]ending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, 30 October 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.²⁴²¹

This provision does not contain any special voting procedure, thus, a majority decision of the UNSC is not sufficient or required²⁴²² as this provision is 'self-

²⁴²⁰ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 238 (3) (a).

²⁴²¹ Charter of the United Nations [1945] art 106.

²⁴²² H. Karsten Schmidt, 'The Charter of the United Nations: An Instrument to Re-Establish International Peace and Security?' (1958) 33 (2) *Indiana Law Journal* 322, 326.

authorising'²⁴²³ it effectively allows the P5 to use force without any prior authorisation of the UNSC.

This provision would allow a state and its nationals to elude'²⁴²⁴ any accountability or scrutiny, irrespective of the veto privilege being abolished. This provision can be seen as undemocratic and possesses the ability to undermine the UNSC contravening the rationale and objective of the JEPS model, thus article 106²⁴²⁵ must be abolished in order for the JEPS model to succeed.

7.2.2 Equal Representation

In an attempt to diversify representation in the UNSC, the JEPS model proposes an additional 15 new non-permanent seats, each serving two-year terms. This would increase the non-permanent membership of the council from ten to a total of twenty-five seats and the permanent seats would be made up of the original P5 members of the UNSC.

The rationale for this change is based on the presumption that the P5 would be perhaps more welcoming of increasing non-permanent seats instead of increasing the number of permanent seats.

This could potentially curb the claims of the UNSC being undemocratic²⁴²⁶ by allowing more representation by region including Africa, Western and Eastern Europe, Asia and the Pacific, the Middle East, the Caribbean Islands and Latin America. This composition would require amendment of article 23 of the UN Charter²⁴²⁷ to:

1.[T]he Security Council shall consist of thirty Members of the United Nations. The Republic of China, France, Russia, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The

²⁴²³ Gabor Sulyok, 'The Legality of Unilateral Humanitarian Intervention Re-Examined' (2003) 44 (3-4) *Acta Jur Hung* 199, 220.

²⁴²⁴ Theodore M. Cooperstein, 'Article 106 of the UN Charter' (2007) 11 (2) *Texas Review of Law and Politics* 353, 353.

²⁴²⁵ n 2421.

²⁴²⁶ Martin Binder and Monika Heupel, 'The Legitimacy of the UN Security Council: Evidence from Recent General Assembly Debates' (2015) 59 (2) *International Studies Quarterly* 238, 242.

²⁴²⁷ Charter of the United Nations [1945] art 23.

General Assembly shall elect twenty-five other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.

2. The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members after the increase of the membership of the Security Council from fifteen to twenty-five. A retiring member shall not be eligible for immediate re-election.

3. Each member of the Security Council shall have one representative.

This change coupled with removing the veto privilege and replacing it with the 'double majority' voting system will promote democracy, diversity and equality amongst states by re-distributing power and representation in the UNSC.

In addition, increased non-permanent membership in the council would encourage active participation, which would also increase morale amongst member states and bestow a sense of inclusivity and a shared 'hands on' responsibility to maintain international peace and security in line with the UN Charter.²⁴²⁸

This proposal seems possible as the only time in the UN's history where reform has been successful was in the UNGA's decision following a vote in 1963 to increase non-membership from six to fifteen members which came into effect in 1965.²⁴²⁹

7.2.3 Restructuring the United Nations

At present, the ICC and the UNSC are separate entities in the international legal system. This separation has hindered the performance of both institutions, even being branded an imperialist institution often being criticised as being futile in fulfilling their institutional purpose.

²⁴²⁸ Charter of the United Nations [1945] art 43.

²⁴²⁹ UNGA Res 1991 A (XVIII) (17 December 1963).

The JEPS model will improve the current position by shifting the ICC from being an independent institution and making the court a judicial organ of the UN, parallel to the International Court of Justice (ICJ) dealing exclusively with serious international crimes.

Interestingly, the ICJ's predecessor institution the Permanent Court of International Justice was created by the UN's predecessor institution the League of Nations as an independent court not as one of its institutional organs, until it was later added when the UN was established.²⁴³⁰

The JEPS model achieves this by creating an international system representing a similar regional structure proposed by the AAU as an alternative institution to the ICC to investigate and prosecute international crimes in its previous proposal entitled: 'Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights' (ACJHPR)²⁴³¹ more commonly referred to as the 'Malabo Protocol'²⁴³² to replace the African Court on Human and Peoples Rights (ACHPR).

As mentioned in the second chapter of the thesis²⁴³³, the Malabo protocol provides a structure for a new court which sought to divide the ACJHPR into three sections which will comprise of; a general matters section, a human rights and peoples section and an international criminal section.²⁴³⁴

In comparison, the JEPS model seeks to divide the UN into three sections also comprising of a judicial advisory section where disputes arise between states (ICJ), the political, security and policymaking section (the UNSC and the UNGA) and finally an international criminal section (the ICC).

By restructuring the ICC in this way, this addresses the current issues which prevent the court from effectively administering international criminal justice

²⁴³⁰ Robert Kolb, *The Elgar Companion to the International Court of Justice* (Edward Elgar Publishing 2014) 33-34.

²⁴³¹ Eki Yemisi Omorogbe, 'The Crisis of International Criminal Law in Africa: A Regional Regime in Response?' (2019) 66 (2) NILR 287, 293.

²⁴³² Assembly on the African Union (23rd Ordinary Session) 'Decision on The Draft Legal Instruments' (2014) AAU Doc. Assembly/AU/8 (XXIII) para 2 (e).

²⁴³³ Section 2.3.2 to n 728 in ch 2.

²⁴³⁴ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights [2014] annex art 16.

fairly and would serve as an incentive to retain African state membership, confidence and dispel claims of imperialism, exceptionalism, racism and bias.

This restructuring of the UN and adding the court as an organ in conjunction with the proposed 'double majority' voting system in the UNSC and increased non-permanent membership eliminates all the issues which have been presented throughout the thesis.

This would make the referral process to the ICC easier and more likely to occur, allowing the prosecutor to have jurisdiction over all 193 states to conduct preliminary examinations, investigations, indictments and proceedings against individuals including nationals of the P5 without the veto privilege preventing a draft resolution from passing through the council. This would require amending article 92 UN Charter²⁴³⁵ in line with the JEPS model to:

[T]he International Court of Justice and the International Criminal Court shall be the principal judicial organs of the United Nations. It shall function in accordance with the annexed Statutes, which is based upon the Statute of the Permanent Court of International Justice and the Rome Statute of the International Criminal Court which forms an integral part of the present Charter.

In addition, this would require amending article 93 UN Charter²⁴³⁶ in line with the JEPS model to:

1. [A]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice and the Rome Statute of the International Criminal Court.
2. A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice and the Rome Statute of the International Criminal Court on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

²⁴³⁵ Charter of the United Nations [1945] art 92.

²⁴³⁶ Charter of the United Nations [1945] art 93.

This amendment of the charter would allow the prosecutor of the ICC to have jurisdiction²⁴³⁷ over 193 states of the UNSC making it easier to exercise his/her *proprio motu* powers²⁴³⁸ (meaning one's own accord).²⁴³⁹ In addition, this would also require amending article 94 UN Charter²⁴⁴⁰ in line with the JEPS model to:

1. [E]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice and the International Criminal Court in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by either Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

In addition, amendments to article 2 of the Rome Statute²⁴⁴¹ would also need to be made to reflect the change in relationship between the UNSC and the ICC, as the court would become another judicial organ of the UN. The requirement for Assembly of State Parties (ASP) would no longer be required as the UNGA would replace this as all 193 member states of the UN would fall within the jurisdiction of the court and would be represented.

By implementing this change articles 121²⁴⁴², 122²⁴⁴³ and 123 the Rome Statute²⁴⁴⁴ regarding amendments to the statute and institutional changes would need to be repealed to reflect the restructure of both institutions.

Secondly, amendments to the UN Charter will allow the ICC jurisdiction over all members of the UN and make the UNSC more expedient to act upon recommendations that have been made by states and UNHRC reports which require urgent referral of nationals of the P5, their allies and/or any state where

²⁴³⁷ Quadri Kafayat, 'The Proprio Motu Power of the ICC Prosecutor: The Reason Some States Have Refused to Ratify the Rome Statute' (2014) 2 (1) International Journal of Humanities and Management Sciences 11, 11.

²⁴³⁸ Rome Statute of the International Criminal Court [1998] art 15 (1).

²⁴³⁹ Jonathan Jeung-Meng Fork, 'Pro-Choice: Achieving the Goals of the International Criminal Court Through the Prosecutor's Proprio Motu Power' (2011) 34 (3) B.C.Int'l & Comp.L.Rev. 53, 54.

²⁴⁴⁰ Charter of the United Nations [1945] art 94.

²⁴⁴¹ Rome Statute of the International Criminal Court [1998] art 2.

²⁴⁴² Rome Statute of the International Criminal Court [1998] art 121.

²⁴⁴³ Rome Statute of the International Criminal Court [1998] art 122.

²⁴⁴⁴ Rome Statute of the International Criminal Court [1998] art 123.

severe violations of IL, IHL and CIL have occurred in humanitarian and counter-terrorism operations.

In addition, as part of the proposal the complementarity principle would still remain active despite the thesis demonstrating the court's lack of supremacy over cases, which has contributed to the current culture of impunity and continued disproportionate focus of nationals in African states.

This is particularly important as the proposal would allow states to have primary jurisdiction in the first instance to arrest, prosecute and convict alleged perpetrators of international crimes within national jurisdictions, thereby respecting the sovereignty of states to exercise their jurisdiction over all persons within their territories as discussed earlier in the thesis.²⁴⁴⁵

However, in cases where non-compliance on behalf of a state becomes apparent and/or issued arrest warrants have not been actioned and/or criminal proceedings have not taken place then the court would retain secondary jurisdiction over cases.

Thirdly, this would improve relations between member states, particularly African states and regional organisations such as the AAU²⁴⁴⁶ as the restructuring of both institutions would restore the credibility and state confidence in the ICC as it would no longer be barred from investigating individuals from more economically powerful states such as the P5 and their allies.

This would dispel the current criticisms of the ICC being an 'anti-African, pro-West, re-colonization tool'²⁴⁴⁷ and claims that the court is a racist and imperialist institution which has led certain African states to adopt the ICC withdrawal strategy'²⁴⁴⁸ such as South Africa previously giving notice to

²⁴⁴⁵ Section 2.1.1 to n 131 in ch 2

²⁴⁴⁶ Christa-Gaye Kerr, 'Sovereign Immunity, the AU, and the ICC: Legitimacy Undermined' (2020) 41 (1) *Mich.J.Int'l L.* 195, 196.

²⁴⁴⁷ W.Chadwick Austin and Michael Thieme, 'Is the International Criminal Court Anti-African' (2016) 28 (3) *Peace Review* 342, 347.

²⁴⁴⁸ Konstantinos D. Magliveras, 'The Withdrawal of African States from the ICC: Good, Bad or Irrelevant?' (2019) 66 (3) *NILR* 419, 420.

withdraw²⁴⁴⁹ from the Rome Statute in addition to further criticisms highlighted in the second chapter of the thesis.²⁴⁵⁰

With the above reforms, this would improve confidence and compliance with the ICC and states would be more willing to bring proceedings against nationals if an international crime has been committed. To ensure compliance, this would also require amending article 96 UN Charter²⁴⁵¹ in line with the JEPS model is provided as follows:

- a. [T]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
- b. The General Assembly or the Security Council may refer matters to the International Criminal Court to allow the prosecutor of the court to conduct preliminary investigations where an individual belonging to a member state has been alleged to have committed a serious international crime prescribed under the Rome Statute of the International Criminal Court.
- c. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

This amendment serves as a contingency in circumstances where a state continues to refuse the enforcement of an arrest warrant and comply with the ICC, the prosecutor by implementing the *nemo iudex in parte sua* principle, can then report back to the UNSC to vote on another draft resolution to implement measures concerning a particular states non-compliance. For example: sanctions being imposed to compel states to comply with the demands of the ICC by transferring the individual into ICC custody.

²⁴⁴⁹ Gerhard Kemp, 'South Africa's Possible Withdrawal from the ICC and the Future of the Criminalization and Prosecution of Crimes Against Humanity, War Crimes and Genocide Under Domestic Law: A Submission Informed by Historical Normative and Policy Considerations (2017) 16 (3) Wash. U. Global Stud. L. Rev. 411, 414.

²⁴⁵⁰ Section 2.3.2 to n 720 in ch 2.

²⁴⁵¹ Charter of the United Nations [1945] art 96.

7.2.4 Updating International Crimes

The JEPS model requires the amendment to article 5 of the Rome Statute²⁴⁵² in the context of armed conflicts to include two new international crimes of terrorism and ecocide.

Previously, the crime of terrorism was initially excluded from the court's jurisdiction in absence of an internationally codified definition of terrorism which is the requirement of the *nullum crimen sine lege* (no crime without law) principle and attacks not amounting to the seriousness threshold.²⁴⁵³

However, the Al-Qaeda attacks of 9/11 and the emergence of Hamas, Hezbollah and ISIS/ISIL and the transnational nature of terrorism as demonstrated throughout the thesis in Afghanistan, Iraq, Palestine, Syria and Libya have all been portrayed to have committed significant levels of violence by deliberately attacking civilians, targeting civilian populations and residences contributing to the mass atrocities and dire humanitarian conditions within these states which arguably meets the ICC's threshold to be considered serious.

Whilst a precise definition of terrorism has proven difficult in practice, experts have long agreed that terrorism means 'a weapon'. In this sense, terrorism is not a political movement in and of itself, but a tool used by various movements.²⁴⁵⁴

Legal academics such as Cohen have argued that an accepted and widespread definition of terrorism currently exists and found within the

²⁴⁵² Rome Statute of the International Criminal Court [1998] art 5.

²⁴⁵³ Robert Cryer, 'Terrorism and the International Criminal Court' (2003) 82 Australian Law Reform Commission-Reform Journal <<http://classic.austlii.edu.au/au/journals/ALRCRefJl/2003/4.html>> accessed 27 February 2020.

²⁴⁵⁴ Nicholas Rostow, 'Before and After: The Changed UN Response to Terrorism Since September 11th' (2002) 35 (3) Cornell Int'l L.J. 475, 476.

Convention on the Suppression of the Financing of Terrorism.²⁴⁵⁵ Article 2 (1)

(b) of the convention defines terrorism as:

[A]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.²⁴⁵⁶

This definition addresses the '*Actus Reus*' (physical act) of a terrorist act, namely the infliction of physical harm. The targets are civilians or persons not taking direct part in hostilities. It also addresses the special '*Mens Rea*' (Intent) which signifies terrorist acts from mere criminal conduct, but instead the purpose is to bring about a political change or to intimidate a population.²⁴⁵⁷

Moreover, this definition is widely accepted considering 189 member states of the UN are party to the convention²⁴⁵⁸ which is sufficient to include as an international crime listed within the Rome Statute.²⁴⁵⁹

In support of this argument, the Special Tribunal for Lebanon was created by the UNSC²⁴⁶⁰ in response to the assassination of the former Prime Minister of Lebanon Rafik Hariri²⁴⁶¹ to try individuals responsible for the attack and prosecute them with the crime of terrorism.²⁴⁶²

The most recent decision rendered by the tribunal in *Prosecutor v Ayyash, Merhi, Oneissi and Sabra*²⁴⁶³ found Salim Ayyash guilty on all counts for terrorist acts including the intentional homicide of Mr. Rafik Hariri with pre-meditation by using explosives.²⁴⁶⁴

²⁴⁵⁵ Aviv Cohen, 'Prosecuting Terrorists at the International Criminal Court: Re-Evaluating an Unused Legal Tool to Combat Terrorism' (2012) 20 (2) Michigan State International Law Review 219, 221.

²⁴⁵⁶ International Convention for the Suppression of the Financing of Terrorism [1999] art 2 (1) (b).

²⁴⁵⁷ Cohen (n 2455) 234.

²⁴⁵⁸ *ibid.*

²⁴⁵⁹ n 2452.

²⁴⁶⁰ UNSC Res 1757 (30 May 2007) UN Doc S/RES/1757.

²⁴⁶¹ *ibid* art 1.

²⁴⁶² n 2460 art 2.

²⁴⁶³ *Prosecutor v Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi and Assad Hassan Sabra* (Trial Chamber Judgment) STL-11-01/T/TC (18 August 2020).

²⁴⁶⁴ *ibid* paras 6769 – 6841.

The successful outcome of this decision is a sufficient example supporting the inclusion of terrorism as an international crime within the Rome Statute²⁴⁶⁵ as it provides an international judicial response to the ever-increasing seriousness of individuals committing consequential and violent acts of terrorism.

The protection and respect of the natural environment by states²⁴⁶⁶ has also been stressed in various arbitral²⁴⁶⁷, judicial proceedings²⁴⁶⁸ including the ICJ²⁴⁶⁹ and codified in the Stockholm²⁴⁷⁰ and Rio declarations.²⁴⁷¹

In this respect, the crime of ecocide is important and necessary to hold individuals criminally responsible for deliberately damaging the natural environment in armed conflict through the use of destructive, chemical, biological, gaseous and incendiary weapons in armed conflict. The use of weaponised mustard gas, sarin gas and chlorine have been found:

[t]o be public health concerns causing increased population burden of respiratory, dermatological, ophthalmic and neurological problems, as well as congenital malformations and cancers. Such weapons have also been found to disrupt natural ecosystems destroying plants, animals contaminating vital resources such as water, food and livestock.²⁴⁷²

The thesis has demonstrated that the P5 and/or their allies within Muslims States as highlighted in the fourth and fifth chapter of the thesis have deliberately caused damage to the natural environment as a collateral and effective strategy of war by using such weapons, as 'military planners consider the destruction of ecology indispensable to eliminate hiding insurgents and

²⁴⁶⁵ n 2452.

²⁴⁶⁶ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 29.

²⁴⁶⁷ *Trail Smelter Arbitration (United States v Canada)* (1938-41) 3 RIAA 1905.

²⁴⁶⁸ *Lac Lenoux Arbitration (France v Spain)* (1957) 12 RIAA 281.

²⁴⁶⁹ *Gabcikovo-Nagymaros Project (Hungary/ Slovakia)* (Judgment) [1997] ICJ Rep 7, para 141.

²⁴⁷⁰ United Nations Conference on the Human Environment, UNGA Res A/RES/2994 (XXVII) (15 December 1972) (adopted by 112 votes to none; 10 abstentions), principle 21.

²⁴⁷¹ Rio Declaration on Environment and Development [1992], principle 2.

²⁴⁷² Abdulkarim Ekyazez et al, 'Chemical Weapons and Public Health: Assessing Impact and Responses' (2020) 42 (3) *Journal of Public Health* 334, 339.

enemies'²⁴⁷³, which has proven to be disastrous and injurious to civilian life and the natural environment.²⁴⁷⁴

Despite ecocide posing a threat to international security²⁴⁷⁵ and the 'link between environmental degradation, peace and security being established'²⁴⁷⁶ the current international law framework:

[I]acks an environmental crime to punish mass environmental damage that results in harm to human beings and destruction of ecosystems. Efforts to develop a norm of liability to recognise ecocide as a crime within Rome Statute have in fact remained unchanged.²⁴⁷⁷

A sufficient definition of ecocide was proposed previously by academics such as Higgins defining the crime as: 'The extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished'.²⁴⁷⁸

Similarly, the use of illegal chemical and biological weapons by individuals from P5 states and their allies in armed conflict is of extreme importance, considering the long-lasting adverse effects to civilian health and the natural environment. The destructive capabilities of such weapons fulfill the threshold to be considered international crimes.

Thus, all of the above proposals advanced under the JEPS model, accommodate the amendment of the Rome Statute, along with the removal of

²⁴⁷³ A. Thanikodi and P. Kanagaraj, 'Military Technologies and Environmental Rights: A Study of Deleterious Consequences and Remedial Measures' (2009) 70 (2) *Indian Journal of Political Science* 351, 351.

²⁴⁷⁴ K. Ganesan, S.K. Raza and R. Vijayaraghavan, 'Chemical Warfare Agents' (2010) 2 (3) *Journal of Pharmacy and Bio-allied Sciences* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3148621/>> accessed 27 February 2020.

²⁴⁷⁵ A More Secure World: Our Shared Responsibility – Report of the Secretary-General's High-Level Panel on Threats, challenges and Change, UN GAOR, 59TH Session, Agenda Item 55 UN Doc A/59/565 (2 December 2004) para 12.

²⁴⁷⁶ Bronwyn Lay et al, 'Timely and Necessary: Ecocide Law as Urgent and Emerging' (2015) 28 *Journal of Jurisprudence* 431, 431-432.

²⁴⁷⁷ Rosemary Mwanza, 'Enhancing Accountability for Environmental Damage Under International Law: Ecocide as A Legal Fulfilment of Ecological Integrity' (2018) 19 (2) *Melbourne Journal of International Law* 1, 2.

²⁴⁷⁸ Polly Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Planet* (Shepherd-Walwyn, 2010) 63.

veto powers, promoting equal representation, restructuring the court to end impunity, which would potentially make the process seamless for the prosecutor to investigate the crimes of terrorism and ecocide in addition to the existing international crimes either by referral from the UNSC²⁴⁷⁹, a referral made by a state party²⁴⁸⁰ or the prosecutor exercising his/her *impromptu moto* by automatically having jurisdiction over 193 states.²⁴⁸¹

The aforementioned amendments under the JEPS model provide obvious advantages which endeavour to mitigate the adverse effects of realpolitik, where the P5 have often pursued self-interests in accordance with their foreign policies as mentioned in the second²⁴⁸², third²⁴⁸³, fourth²⁴⁸⁴, fifth²⁴⁸⁵ and sixth chapters of the thesis.²⁴⁸⁶

The authors proposals would also serve as a deterrent for states using disproportionate force and illegal weapons in armed conflict, although if individuals from states (including the P5) breach IHL and commit such crimes during humanitarian and counter-terrorism operations, they would be susceptible to criminal liability.

7.2.5 Hypothetical Scenario of the JEPS Models Application in Practice Using the Syria Case Study

Hypothetically, if the proposals in the JEPS model were to have been applied for example in the Syrian conflict, this would have had substantial advantages in improving both the UNSC and ICC's effectiveness as international organisations to interpose, prevent and mitigate the effects of the devastating conflict by responding expediently to the humanitarian situation and holding individuals of the P5 and their allied states accountable.

²⁴⁷⁹ Rome Statute of the International Criminal Court [1998] art 13 (b).

²⁴⁸⁰ Rome Statute of the International Criminal Court [1998] art 13 (a)

²⁴⁸¹ Rome Statute of the International Criminal Court [1998] art 15.

²⁴⁸² Section 2.2.3 to n 466 in ch 2.

²⁴⁸³ Section 3.4 to n 1346 in ch 3.

²⁴⁸⁴ Section 4.9.1 to n 1685 in ch 4.

²⁴⁸⁵ Section 5.3.2 to n 1975 in ch 5.

²⁴⁸⁶ Section 6.6.1n to n 2324 in ch 6.

As mentioned in the preceding chapter concerning Syria, the author noted a total of 20 draft resolutions being vetoed in total by China, Russia and the USA since the inception of the conflict in 2011.²⁴⁸⁷

The author in analysing the situation in Syria exemplified and substantiated credible reports of illegal weapons of a chemical nature being used by the Russian and Syrian forces throughout the conflict on civilian populations causing environmental damage.²⁴⁸⁸ the USA has frequently committed the international crime of aggression by violating the sovereignty of Syria in pursuit of the its GWOT to destroy ISIS.²⁴⁸⁹

In addition, IHL and IHRL violations have also been committed by terrorist groups such as ISIS²⁴⁹⁰ with no referrals throughout the decade long conflict being made by the UNSC to grant jurisdiction to the ICC to investigate and hold individuals from the P5 and allied states accountable for alleged international crimes which have occurred.²⁴⁹¹

Primarily, if the JEPS model were to have been implemented at the inception of the Syrian conflict, the first and second proposal of abolishing the veto and replacing it with the 'double majority' voting system and increasing non-permanent membership arguably would have possessed had a higher probability of passing a resolution in the UNSC to take sufficient measures to authorise perhaps peacekeeping measures, through the Responsibility to Protect (R2P) doctrine to maintain peace and security.²⁴⁹²

The presence of UN peacekeepers and/or state militaries presence from various states of the international community may very well have ended or mitigated the adverse humanitarian situation within the first five years of the conflict.

In addition, UNSC sanctioned military presence within Syria may have served as a deterrent for terrorist groups such as ISIS from emerging in 2014 and

²⁴⁸⁷ Section 5.3.2 to n 1936 in ch 5.

²⁴⁸⁸ Section 5.2.3 to n 1881 in ch 5.

²⁴⁸⁹ Section 5.3.1 to n 1922 in ch 5.

²⁴⁹⁰ Section 5.2.2 to n 1798 in ch 5.

²⁴⁹¹ Section 5.3 to n 1906 in ch 5.

²⁴⁹² Section 5.3 to n 1907 in ch 5.

successfully establishing a stronghold by rapidly expanding their presence and control over swathes of Syrian territory and perhaps even avoided the Russian and Syrian forces aggressive military tactics in recapturing lost territory to ISIS which resulted in significant loss of civilian life.

In addition, the violations of IL, IHL, IHRL and CIL violations committed by individuals from Russian, Syrian and allied forces in using chemical weapons, disproportionate means, methods and military strategies to combat ISIS would have been held accountable by the ICC as the court would have had automatic jurisdiction over these states by virtue of the third proposal in the JEPS model.

This also includes individuals from the USA and coalition forces that have committed the international crime of aggression by breaching the IL principle of state sovereignty.

Moreover, the crimes committed by individuals belonging to terrorist groups operating in the territory, would have also succumbed to the jurisdiction of the ICC automatically and liable for the international crime of terrorism under the fourth proposal of the JEPS model.

This means the chief prosecutor of the ICC could have become involved much earlier in the conflict, thereby allowing states in the first instance to have primary jurisdiction giving them the chance to initiate investigations, enforce warrants, try and convict individuals by virtue of the complementarity principle and if this was not possible, in turn this would have prompted secondary jurisdiction of the ICC.

The significance here is that no veto would have outright blocked any prospect for ICC intervention through the UNSC, which has arguably allowed the conflict to continue for over a decade resulting in substantial death tolls and unnecessary loss of life.²⁴⁹³

Potentially, this could have relinquished any possibility for impunity to prevail with alleged perpetrators of these states being likely of being charged with war crimes, crimes against humanity, genocide and aggression.

²⁴⁹³ Section 5.2 to n 1736 in ch 5.

in addition, individuals in the Russian-Syrian militaries would have been charged with the additional international crime of ecocide under the fourth proposal of the JEPS model for the extensive damage caused to the environment as a result of chemical weapons being used against civilians within the state.

Even though this is a hypothetical scenario of the JEPS model in practice, the author reiterates both international organisations, would have been more effective in maintaining peace, security and justice.

The use of the JEPS model could have improved the expediency of both the UNSC and the ICC to act in Syria and potentially limit and mitigate the substantial civilian deaths, damage to civilian infrastructures and the states' economy.

In addition, the JEPS model in operation perhaps may have potentially served as a deterrent for states considering using force outside the authority such as the USA and coalition allies in pursuit of their GWOT.

Potentially, this could have also limited the level of force used by Russian and Syrian forces as the authors model would have possessed a higher probability of holding these states and their individuals accountable for the illegal conduct in the absence of any veto privileges, which has currently served as a shield from any criminal liability for all P5 states involved.

7.3 Obstacles to Reform

The JEPS model mentioned above provides an adequate legal solution to resolve the problems presented in practice, which have rendered both the UNSC and the ICC futile and ineffective to interpose where violations have occurred in humanitarian and counter-terrorism operations.

Despite the virtues of the JEPS proposal, the author contends that it remains unlikely that such measures would be implemented, considering the myriad of reform proposals that have been advanced previously by member states,

organisations, politicians and academics alike, which to this present date have remained a 'dead letter'.²⁴⁹⁴

The reforms proposed under the JEPS model to take effect are contingent on the approval of the UNGA, the P5 members of the UNSC and also the ICC Assembly of States Parties (ASP) to be in full agreement and vote for such a substantial change.

On this premise, the first stage of the process would require a two third majority vote by member states of the UNGA and vote of the P5 without a single veto to make changes to the UN Charter.

Subsequently, the second stage would then require a state party to the Rome Statute i.e. the UK, to submit an amendment proposal to the UN Secretary General to circulate the reform proposal to amend provisions of the Rome Statute²⁴⁹⁵ at the annual ICC Assembly of States Parties (ASP) or the ICC review conference providing a consensus is reached amongst states to adopt the amendment.²⁴⁹⁶

If no such consensus is reached, a two third majority vote by State Parties is required to adopt an amendment.²⁴⁹⁷

Subject to this approval, If an amendment of article 5 is adopted, this would take effect in the year after the deposit of their instruments of ratification have been accepted.²⁴⁹⁸ This is also the same year time frame for any other proposed amendment, after instruments of ratification or acceptance have been deposited with the Secretary-General of the UN by a majority seven-eighth approval vote by member states.²⁴⁹⁹

Whilst the first stage is more likely and probable to garner the support and majority vote by state parties required to adopt the amendments of the JEPS model, the second stage remains highly unlikely, improbable and even

²⁴⁹⁴ Daniele Archibugi, 'The Reform of the UN and Cosmopolitan Democracy: A Critical Review' (1993) 3 (3) *Journal of Peace Research* 301, 301.

²⁴⁹⁵ Rome Statute of the International Criminal Court [1998] art 121 (1).

²⁴⁹⁶ Rome Statute of the International Criminal Court [1998] art 121 (2).

²⁴⁹⁷ Rome Statute of the International Criminal Court [1998] art 121 (3).

²⁴⁹⁸ Rome Statute of the International Criminal Court [1998] art 121 (5).

²⁴⁹⁹ Rome Statute of the International Criminal Court [1998] art 121 (4).

impossible to gain the support of all the P5 members²⁵⁰⁰ due to the stringent voting criteria to initiate an amendment prescribed under article 108 of the UN Charter.²⁵⁰¹

This assumption is based on the JEPS model's proposal to abolish the veto, however, P5 members have expressed a reluctance to relinquish their veto privileges²⁵⁰² as agreeing to do so would remove and shift power within the UNSC and be re-distributed equally amongst council members giving each vote equal weight.

Hypothetically, if the veto privilege were to be abolished, this could place the P5 and their allies in a vulnerable position as adopting such amendments would be self-detrimental, contravening their interests and the interests of their allies. This is unlikely as preserving and pursuing self-interests of the P5 has remained a consistent practice within the UNSC since its inception.²⁵⁰³

In this regard, it seems an unlikely outcome that the P5 would relinquish their veto privileges conferred to them as the protection of the veto would no longer be available to shield themselves and their allies from individual criminal responsibility and accountability.

The effects of article 108²⁵⁰⁴ have also been criticised for impeding any reform the UNSC, as this was unexpected and 'no one foresaw that this formula would 'lock in' the UNSC and limit the possibilities for change'.²⁵⁰⁵

This provision coupled with the veto privilege has allocated complete power to the P5 of the UNSC that continue to smother any efforts of restructuring the

²⁵⁰⁰ Shava V Gasimova, 'The Security Council's Endless Enlargement Debate' (2012) 6 (3) Central European Journal of International Security Studies 269, 284

²⁵⁰¹ Charter of the United Nations [1945] art 108.

²⁵⁰² Michelle Nicholls and Louis Charbonneau, 'Britain Vows to Remain Diplomatic Power Keep UN Veto' (*Reuters*, 24 June 2016) < <https://www.reuters.com/article/britain-eu-un/britain-vows-to-remain-diplomatic-power-keep-u-n-veto-idINKCN0ZA2FI>> accessed 8 March 2020.

²⁵⁰³ Brian Frederking and Christopher Patane, 'Legitimacy and the UN Security Council Agenda' (2017) 50 (2) Political Science and Politics 347, 348.

²⁵⁰⁴ n 2501.

²⁵⁰⁵ Mariana Pimenta and Oliveira Baccarini, 'Informal Reform of the United Nations Security Council' (2018) 40 (1) Contexto Internacional 97, 97.

council²⁵⁰⁶ rendering the reform procedure a slave to the organisations original and current architecture.²⁵⁰⁷

This segment of the thesis provided the authors novel contribution to the existing knowledge by introducing a new organisational structure of the UNSC and the ICC from its original architecture in order to reform and improve the effectiveness of both organisations by providing solutions to the central issues identified throughout the thesis which have prevented both institutions in the past from fulfilling their respective purpose and mandates.

The 'JEPS Model' has extrapolated the potential of the UNSC and the ICC to become highly efficient, versatile, democratic, equitable and fair to counteract the ineffectiveness of both organisations to hold nationals of the P5 and allied states accountable for perpetrating international crimes in humanitarian peace-keeping and counter-terrorism operations.

The author contends the 'JEPS Model' contains the solutions necessary to reverse the decades long downward trend criticism adopted by spectators that both organisations are 'unable and a poor response to the indispensable threats and challenges of the twenty first century'.²⁵⁰⁸

Specifically, the proposal sought to improve the UNSC's ability to interpose in humanitarian crises and prevent the P5 and their allied states from violating principles of IL, IHL, IHRL, CIL and *Jus Cogens* in counter-terrorism and humanitarian operations and increase transparency, accountability and end impunity by empowering the ICC.

The chapter has identified the key provisions to initiate the reform process and provided amendments to certain articles contained within the UN Charter and the Rome Statute to accommodate the changes required to effectuate the proposals set forth in the 'JEPS Model'.

²⁵⁰⁶ Michael J. Kelly, 'U.N. Security Council Permanent Membership: A New Proposal for a Twenty-First Century Council' (2001) 31 (2) *Seton Hall L.Rev.* 319, 338

²⁵⁰⁷ Jorge Luis Silva Gonzalez et al, 'Theoretical Legal Assumptions for the United Nations Security Council Reform' (2020) 4 (1) *Technium Social Sciences Journal* 73, 80.

²⁵⁰⁸ Nancy Soderberg, 'Time to Bring the United Nations Security Council Into the 21st Century' (2015) 16 (2) *Georgetown Journal of International Affairs* 39, 39.

However, the chapter alongside its novel reform proposal, has also identified certain articles which pose as an obstacle for reform. Thus, the 'JEPS Model' like so many previous reform proposals before it, have given weight to the argument 'to put it bluntly, the UN is not profoundly reformable; nor would such a reform be at all useful'.²⁵⁰⁹

7.4 Alternative Solutions to improve the UNSC and the ICC

The United for Peace (U4P) resolution alternatively referred to as the 'Acheson Plan'²⁵¹⁰ was adopted by the UNGA through resolution 377 (V) A²⁵¹¹, to overcome the veto privilege preventing the UNSC from maintaining international peace and security. This can be requested whilst the UNGA is in session or an emergency special session can be requested by state members within twenty-four hours.²⁵¹²

In general, the UNGA normally cannot involve itself in disputes or situations dealt with by the UNSC.²⁵¹³ However, resolution 377 (V) A places the UNGA alongside of, or possibly superior to, the UNSC as the executive body of the UN in preserving and restoring peace, by permitting the UNGA to do much of what the UNSC is authorised to do under Chapter VII of the UN Charter.²⁵¹⁴

This includes making recommendations and taking measures including the authorisation of non-armed²⁵¹⁵ armed force²⁵¹⁶ where acts of aggression, threats and breaches of peace have been determined²⁵¹⁷, which has led the resolution to be deemed the 'most momentous action ever taken by the UNGA'.²⁵¹⁸

²⁵⁰⁹ Dapo Akande et al, 'Old Questions and New Challenges for the UN Security System: The Role of the Security Council in Light of the Charters Reform' (2007) 5 (1) *Journal of International Law and Policy* 42, 45.

²⁵¹⁰ Keith S. Peterson, 'The Agendas of the United Nations General Assembly: A Content Analysis' (1958) 39 (3) *Southwestern Social Science Quarterly* 232, 233-234.

²⁵¹¹ UNGA Res 377 (3 November 1950) UN Doc A/RES/377 (V) (A).

²⁵¹² *ibid* annex 1.

²⁵¹³ Charter of the United Nations [1945] art 12 (1).

²⁵¹⁴ L.H. Woolsey, 'The Uniting for Peace Resolution of the United Nations' (1951) 45 (1) *AJIL* 129, 129.

²⁵¹⁵ Charter of the United Nations [1945] art 41.

²⁵¹⁶ Charter of the United Nations [1945] art 42.

²⁵¹⁷ Charter of the United Nations [1945] art 39.

²⁵¹⁸ Woolsey (n 2514).

The rationale and objective of the resolution was to improve the UNSC's ability to preserve peace. As procedural matters are not subject to veto²⁵¹⁹ any subsequent matter referred to the UNGA can be discussed.²⁵²⁰ This in turn allows organising the possibilities of collective action by UN members through the medium of the UNGA in case the UNSC fails to exercise its responsibilities.²⁵²¹

This expansion of the UNGA's powers in 1950, was developed after the USSR's persistent use of the veto as a strategy preventing the UNSC from taking measures²⁵²² in order to respond and protect²⁵²³ the Republic of Korea against the aggression launched against it by military forces from North Korea.²⁵²⁴

In practice, the U4P resolution in response to the situation in Korea²⁵²⁵ has historically been invoked a further eleven times after its creation to remedy the veto stalemate of draft resolutions in the UNSC cast by the UK/France²⁵²⁶, the USSR²⁵²⁷ and the USA.²⁵²⁸

²⁵¹⁹ Charter of the United Nations [1945] art 27 (2).

²⁵²⁰ Charter of the United Nations [1945] art 11.

²⁵²¹ Juraj Andrassy, 'Uniting for Peace' (1956) 50 (3) AJIL 563, 563.

²⁵²² UNSC Draft Res S/1653 (06 July 1950) UN Doc S/1653, UNSC Draft Res S/1752 (12 September 1950) UN Doc S/1752, UNSC Draft Res S/1894 (30 November 1950) UN Doc S/1894.

²⁵²³ UNSC Res A/1618 (4 December 1950) UN Doc A/1618.

²⁵²⁴ Christian Tomuschat, 'Uniting for Peace' (*United Nations Audio Visual Library*) <<https://legal.un.org/avl/ha/ufp/ufp.html>> accessed 8 March 2020.

²⁵²⁵ UNGA Res 498 (V) (1 February 1951) UN Doc A/RES/498 (V).

²⁵²⁶ UNSC Draft Res S/3710 (30 October 1956) UN Doc S/3710, UNSC Draft Res S/3713 (30 October 1956) UN Doc S/3713/Rev.1, UNSC Draft Res S/14459 (30 April 1981) UN Doc S/14459, UNSC Draft Res S/14460/Rev.1 (30 April 1981) UN Doc S/14660/Rev.1, UNSC Draft Res S/14461 (30 April 1981) UN Doc S/14461, UNSC Draft Res S/14462 (30 April 1981) UN Doc S/14462.

²⁵²⁷ UNSC Draft Res S/3730/Rev.1 (4 November 1956) UN Doc S/3730/Rev.1, UNSC Draft Res S/4050/Rev.1 (18 July 1958) UN Doc S/4050/Rev.1, UNSC Draft Res S/4055/Rev.1 (22 July 1958) UN Doc S/4055/Rev.1, UNSC Draft Res S/4523 (17 September 1960) UN Doc S/4523, UNSC Draft Res S/10416 (4 December 1971) UN Doc S/10416, UNSC Draft Res S/10423 (5 December 1971) UN Doc S/10423, UNSC Draft Res S/13729 (7 January 1980) UN Doc S/13729.

²⁵²⁸ UNSC Draft Res S/14832 (20 January 1982) UN Doc S/14832, UNSC Draft Res S/13911 (30 April 1980) UN Doc S/13911, UNSC Draft Res S/1997/199 (7 March 1997) UN Doc S/1997/199, UNSC Draft Res S/1997/241 (21 March 1997) UN Doc S/1997/241.

Seven resolutions have been passed by procedural votes in UNSC to the UNGA to invoke U4P²⁵²⁹ and a further four instances where states have requested an emergency session in the UNGA to invoke U4P.²⁵³⁰

The outcome after requesting emergency sessions in almost all of these instances have led to the UNGA responding humanitarian situations through U4P resolutions in Egypt²⁵³¹, Hungary²⁵³², Jordan/Lebanon²⁵³³, Congo²⁵³⁴, Afghanistan²⁵³⁵, Middle East²⁵³⁶, Namibia²⁵³⁷ and Palestine.²⁵³⁸

Thus, scholars have taken the view that the U4P resolution could 'serve to fill the lacuna caused by the UNSC deadlock and potentially reinforce and legitimise the R2P concept'.²⁵³⁹

The International Commission on Intervention and State Sovereignty (ICISS), which is the organisation responsible for developing R2P in their 2001 report have specifically mentioned that UNSC authorisation should be sought in the first instance, to use military force for the purposes of intervening in humanitarian situations which may arise in another state.²⁵⁴⁰ The report also

²⁵²⁹ UNSC Res 119 (31 October 1956) UN Doc S/RES/119, UNSC Res 120 (4 November 1956) UN Doc S/RES/120, UNSC Res 129 (7 August 1958) UN Doc S/RES/129, UNSC Res 157 (17 September 1960) UN Doc S/RES/157, UNSC Res 303 (6 December 1971) UN Doc S/RES/303, UNSC Res 462 (9 January 1980) UN Doc S/RES/462, UNSC Res 500 (28 January 1982) UN Doc S/RES/500.

²⁵³⁰ UNGA 'Request for the Summoning of an Emergency Special Session of the General Assembly' (1967) UN Doc A/6717, UNGA 'Seventh Emergency Special Session' (1980) UN Doc A/ES-7/1, UNGA 'Eighth Emergency Special Session' (1981) UN Doc A/ES-8/1, UNGA 'Tenth Emergency Special Session' (1997) UN Doc A/ES-10/1.

²⁵³¹ UNGA Res 1000 (ES-I) (5 November 1956) UN Doc A/RES/1000 (ES-I).

²⁵³² UNGA Res 1004 (ES-II) (4 November 1956) UN Doc A/RES/1004 (ES-II).

²⁵³³ UNGA Res 1237 (ES-III) (21 August 1958) UN Doc A/RES/1237 (ES-III).

²⁵³⁴ UNGA Res 1474 (ES-IV) (20 September 1960) UN Doc A/RES/1474 (ES-IV).

²⁵³⁵ UNGA Res ES-6/2 (14 January 1980) UN Doc A/RES/ES-6/2.

²⁵³⁶ UNGA Res 2253 (ES-V) (4 July 1967) UN Doc A/RES/2254 (ES-V), UNGA Res 2254 (ES-V) (14 July 1967) UN Doc A/RES/2254 (ES-V), UNGA Res ES-7/2 (29 July 1980) UN Doc A/RES/ES-7/2, UNGA Res ES-7/9 (24 September 1982) UN Doc A/RES/ES-7/9.

²⁵³⁷ UNGA Res ES-8/2 (14 September 1981) UN Doc A/RES/ES-8/2.

²⁵³⁸ UNGA Res ES-9/1 (5 February 1982) UN Doc A/RES/ES-9/1.

²⁵³⁹ Coman Kenny, 'Responsibility to Recommend: The Role of the UN General Assembly in the Maintenance of International Peace and Security' (2016) 3 (1) *Journal on the Use of Force and International Law* 3, 3.

²⁵⁴⁰ Gareth Evans et al, 'The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty' (ICISS, 1 December 2001) XII <<https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf?sequence=6&isAllowed=y>> accessed 6 July 2021.

encouraged the P5 not to invoke their veto privileges in such circumstances.²⁵⁴¹

Although specific instructions have been given by the ICISS that in any circumstance where the UNSC has failed to respond to a humanitarian crisis within a reasonable time period, then states should refer the matter to be considered by the UNGA in an Emergency Special Session under the U4P procedure to invoke intervention through R2P.²⁵⁴²

However, member states over the past two decades have been reluctant to invoke resolution 377 (V) A, to allow the UNGA to authorise collective action to respond to dire humanitarian situations, nor has any referral ever been made to the ICC even in the midst of mass atrocities.

An example of this can be observed in the ongoing Syrian civil war²⁵⁴³ presented in chapter five²⁵⁴⁴, where the decade long conflict has led to the mass displacement of civilians and regarded as the 'worst mass refugee crisis experience within the Middle East in recent decades'²⁵⁴⁵ having far reaching effects globally but mainly in Europe.²⁵⁴⁶

Yet this has not been sufficient to warrant a response under the U4P resolution, despite the UNSC clearly failing to respond since 2011, because of Russia and China's consistent use of the veto power throughout the conflict.²⁵⁴⁷

Interestingly, the UK and the USA's justification to pursue the North Atlantic Treaty Organisation (NATO) led to military intervention in response to the humanitarian situation in the Kosovo war, which was based on the political risk

²⁵⁴¹ *ibid*, XIII

²⁵⁴² n 2540, XIII.

²⁵⁴³ Alexandros Paraskevas, Maureen Brookes and Levent Altinay, 'Global Refugee Crisis and the Service Industries' (2019) 39 (9-10) *Service Industries Journal* 663, 663.

²⁵⁴⁴ Section 5.2 to n 1626 in ch 5.

²⁵⁴⁵ Eyal Zisser, 'The Syrian Refugees – Left to Their Fate' (2019) 46 (2) *British Journal of Middle Eastern Studies* 293, 293.

²⁵⁴⁶ Gerasimos Tsourapas, 'The Syrian Refugee Crisis and Foreign Policy Decision-Making in Jordan, Lebanon and Turkey' (2019) 4 (4) *Journal of Global Security Studies* 464, 465-466.

²⁵⁴⁷ Graham Melling and Anne Dennett, 'The Security Council Veto and Syria: Responding to Mass Atrocities Through Uniting for Peace Resolution' (2017) 57 (3-4) *Indian Journal of International Law* 285, 286-287.

that invoking the U4P resolution through the UNGA may ultimately fail. Subsequently, this led NATO without any prior UNSC or UNGA approval to maintain the intervention's putative legitimacy, despite its questionable legality.²⁵⁴⁸

The rationale and the objective of the U4P resolution may suffice as the only solution which could potentially override any deadlock caused by a P5 veto preventing the UNSC from maintaining international peace and security.

The U4P possesses the ability to eliminate the 'double standard which has permeated UNSC decision making'²⁵⁴⁹ by empowering the ICC with jurisdiction to investigate individuals suspected of perpetrating international crimes²⁵⁵⁰ preventing impunity²⁵⁵¹ and allow international criminal law and justice to prevail.

Although, in practice member states have been reluctant to invoke U4P and bypass the UNSC even in the face of mass atrocities.²⁵⁵² Nonetheless, the U4P resolution appears to be the only available solution next to any substantially drastic reform of the UNSC and the ICC to improve the effectiveness of these organisations. By this measure, despite the U4P resolution not being invoked frequently in practice, it still retains a higher probability of being invoked than any substantial reform being implemented.

²⁵⁴⁸ Michael Ramsden, 'Uniting for Peace and Humanitarian Intervention: The Authorising Function of the U.N. General Assembly' (2016) 25 (2) Washington International Journal 267, 277.

²⁵⁴⁹ Michael Ramsden, 'Uniting Against Impunity: The UN General Assembly as A Catalyst for Action at the ICC' (2017) 66 (4) ICLQ 893, 893.

²⁵⁵⁰ Rome Statute of the International Criminal Court [1998] art 5.

²⁵⁵¹ Michael Ramsden, 'Uniting for Peace in the Age of International Justice' (2016) 42 Yale J.I 1, 23.

²⁵⁵² Larry D. Johnson, 'Uniting for Peace: Does It Still Serve Any Useful Purpose?' (2014) 108 AJIL 106, 114.

Chapter 8 - Thesis Conclusion

Throughout the 19th and 20th century, substantial developments and efforts have been made collectively by the international community fastidiously to abrogate and mitigate the devastating and catastrophic results of armed conflicts and war to preserve human life and dignity.

This has been achieved through the development of International Law (IL), International Humanitarian Law (IHL), International Human Rights Law (IHRL), Customary International Law (CIL) and the peremptory norm of *Jus Cogens*.

The thesis has demonstrated the purpose of the United Nations (UN) was created as a result of the mass atrocities which ensued in World War II (WWII)²⁵⁵³ on the premise of complementing, upholding and maintaining these principles derived from various bodies of IL, promoting fairness and 'sovereign equality of all its members'²⁵⁵⁴ by 'standing for the cause of the free, and its flag marking the symbol of liberation, if, in spite of its efforts, a world war should still break out'.²⁵⁵⁵

The United Nations (UN) is a successor to its predecessor the League of Nations (LON).²⁵⁵⁶ The UN represented a fresh approach to the world problems of peace and security, effectively writing off the LON for being a failure.²⁵⁵⁷

The new era brought new credibility and rising expectations that the United Nations Security Council (UNSC) created as one of the six organs of the

²⁵⁵³ Thomas G. Weiss, 'The United Nations: Before, During and After 1945' (2015) 91 (6) *International Affairs* 1221, 1221.

²⁵⁵⁴ Geoffrey Goodwin, 'The Role of the United Nations in World Affairs' (1958) 34 (1) *International Affairs* 25, 25.

²⁵⁵⁵ Gladwyn Jebb, 'The Role of the United Nations' (1952) 6 (4) *Int'l Org.* 509, 509.

²⁵⁵⁶ Nigel D. White, 'The Legacy of the League of Nations' (2019) 71 (2) *Revista Espanola De Derecho Internacional* 277, 277.

²⁵⁵⁷ Leland M. Goodrich, 'From League of Nations to United Nations' (1947) 1 (1) *Int'l Org.* 3, 3.

UN²⁵⁵⁸ would take on larger responsibilities and a greater role in overcoming pervasive and interrelated obstacles to peace and development.²⁵⁵⁹

The thesis in substantiating this and the equal importance of the International Criminal Court's (ICC) creation, was initially welcomed as: 'An institution intended to pierce the state centric veil behind which errant state and non-state actors have often been able to hide in the traditional human rights framework'.²⁵⁶⁰

However, despite the development of these various bodies of IL and the establishment of the UNSC and the ICC, the thesis has demonstrated the inadequateness of both institutions in fulfilling their respective institutional mandates and purpose.

The thesis in its analysis and critique of the P5 and their allied states conduct within the third, fourth, fifth and sixth chapters has identified the flaws which both organisations possess preventing them from fulfilling their respective purpose.

The thesis has demonstrated that there has been a clear division amongst member states within the UNSC preventing them from taking collective action in approving draft resolutions, which is largely attributed to the unrestricted use of veto privileges extended to the P5²⁵⁶¹ placing a barrier withholding the UNSC from acting expeditiously to implement humanitarian intervention and R2P.²⁵⁶²

This is the main cause of the 'ill-functioning collective security system by blocking draft resolutions in such a manner demonstrates an evident risk of

²⁵⁵⁸ Ekpotuatin Charles Ariye, 'The United Nations and its Peace Purpose: An Assessment' (2014) 5 (1) *Journal of Conflictology* 24, 24.

²⁵⁵⁹ Boutros Boutros-Ghali, 'Empowering the United Nations' (1992) 71 (5) *Foreign Affairs* 89, 89.

²⁵⁶⁰ Pam Spees, 'Womens Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power' (2003) 28 (4) *Signs* 1233, 1233.

²⁵⁶¹ Yaroslav Shiryayev, 'The Right of Armed Self-Defense in International Law and Self-Defence Arguments Used in the Second Lebanon War' (2008) 3 (1) *Acta Societatis Martensis* 80, 87.

²⁵⁶² James Pattison, 'Humanitarian Intervention and International Law: The Moral Importance of An Intervener's Legal Status' (2007) 10 (3) *Critical Review of International Social and Political Philosophy* 301, 319.

abuse'²⁵⁶³ which is responsible for creating a culture within the UNSC of 'perpetual naysaying'.²⁵⁶⁴

It can be argued that this has contributed to an unfair and undemocratic UNSC, where the P5 retain the power to ultimately decide whether or not a draft resolution is approved or fails depending on whether the objective of the draft resolution in any way contravenes their own national interests and the interest of their allies.²⁵⁶⁵

Although, where violations have been prevalent in humanitarian and counter-terrorism operations, the P5 have used this power as a shield preventing the ICC from acquiring jurisdiction to scrutinise the actions of their nationals, despite the international communities continued pressure for accountability.²⁵⁶⁶

The third chapter demonstrated that whilst the USA had a right in self-defence against the terrorist group Al-Qaeda after the 9/11 attack, the Bush administrations creation of the 'global war on terror' (GWOT) doctrine did not legally justify military occupation of Afghanistan for almost two decades, nor could it justify effectuating political regime change which resulted in staggering deaths of innocent civilians in the process.

The UNSC has been unable to prevent the USA occupation of Afghanistan, nor has the ICC prosecutor been able to investigate or prosecute any individuals in relation to the invasion of Afghanistan despite the ICC appeals chambers decision in 2020 to overturn²⁵⁶⁷ the pre-trial chamber's 2019

²⁵⁶³ Tarcisio Gazzini, 'The Use of Force in the Common Interest of the United Nations' (2007) 5 (1) *Journal of International Law and Policy* 19, 22

²⁵⁶⁴ Naoko Matsumura and Atsushi Tago, 'Negative Surprise in UN Security Council Authorization: Do the UK and French Vetoes Influence the General Public's Support of US Military Action?' (2019) 56 (3) *Journal of Peace Research* 395, 397.

²⁵⁶⁵ Richard Butler, 'Reform of the United Nations Security Council' (2012) 1 (1) *Penn State Journal of Law and International Affairs* 23, 31.

²⁵⁶⁶ Zheng Chen, 'China & The Responsibility to Protect' (2016) 25 (101) *Journal of Contemporary China* 686, 688.

²⁵⁶⁷ *Situation in the Islamic Republic of Afghanistan* (Appeals Chamber Decision) ICC-02/17-138 (5 March 2020).

decision, which initially refused to investigate war crimes and crimes against humanity in Afghanistan committed by individuals in the USA military.²⁵⁶⁸

Thus, it remains highly unlikely that the ICC will ever be able to prosecute any individual from the USA or Afghanistan as they have openly refused to cooperate with the court.

The third chapter also demonstrated the UK's justification to use force in Iraq and overthrow the former regime of Saddam Hussein, which was also found to be legally unjustified considering no development or proliferation of nuclear weapons were found, nor established by UN weapons inspectors.

This was also evidenced by the findings of the Chilcott report which found that the UK's decision to take military action was based on a previous resolution which had no effect in relation to the 2003 invasion.

The third chapter also imparted the UK and USA intelligence agencies' rebarbative tactics to coerce other UNSC members to vote in favour of a draft resolution to authorise use of force to serve their own self-interests subverted the UNSC.

The thesis by analysing the rendition programs and torture practices as part of the continued GWOT carried out predominantly by the USA and UK intelligence agencies with the support of various state governments,

The blatant human rights abuses which have taken place against detained terrorists, have also been adduced in various judicial decisions reached by the European Court of Human Rights, yet nationals of the UK and the USA have benefitted from impunity.

The fourth chapter analysed the historic and continued conflict between Palestine and Israel, which has resulted in substantial violations of IL, IHL, CIL and *Jus Cogens* by the Israeli Defense Force (IDF) during its three counter-terrorism operations which were Operation Cast Lead, Operation Pillar of Defense and Operation Protective Edge between 2009-2014.

²⁵⁶⁸ *Situation in the Islamic Republic of Afghanistan* (Pre-Trial Chamber II Decision) ICC-02/17 (12 April 2019).

The chapter demonstrated during these military operations the IDF had been responsible for mass civilian deaths and casualties by deliberately attacking civilians (through the use of chemical and incendiary weapons) by using excessive, indiscriminate and unlimited force directed towards residential homes to eliminate the terrorist organisations; Hamas and Hezbollah.

The fourth chapter exhibited its findings with reference to United Nations Human Rights Council and non-governmental reports confirming the IDF's illegal conduct during the three military operations, yet the UNSC has been unable to interpose and obviate civilian deaths, owing to the USA's abuse of the veto privilege preventing any accountability or collective military intervention.

The chapter also found the ICC's inability to interpose due to the complementarity principle, and its limited jurisdictional authority, which rendered it ineffective when Israeli authorities were unwilling to prosecute their own nationals, which was further adduced following its blatant refusal to cooperate with the ICC appeals chambers decision in 2020 to investigate war crimes and crimes against humanity committed by the IDF.

The fifth chapter also demonstrated the blatant violations of IHL carried out by the Russian and Syrian forces during military and counter-terrorism operations, which focussed on recapturing territories from and eliminating the terrorist organisation ISIS.

This chapter highlighted the UNSC's inability to interpose or obviate the mass civilian deaths or hold Russia and the Assad regime accountable for the use of chemical weapons on the civilian population due to the veto privilege being frequently invoked by Russia and China preventing the UNSC from fulfilling its main primary function.

Moreover, the USA has also committed the international crime of aggression as part of its GWOT strategy by infringing the sovereignty of Syria without the permission of the Assad regime or the prior authorisation from the UNSC, yet individuals from both Russia and the USA have not been held accountable for

their blatant violations of IL, IHL and CIL, nor does it seem likely that they ever will be.

This has not only demonstrated the futility of the UNSC in fulfilling its mandate but also the limitations of the ICC restricting the prosecutor to conduct preliminary investigations let alone indict and prosecute individuals from these states.

The sixth chapter initially demonstrated the violations committed by the USA, UK, France and coalition forces in Operation Unified Protector in response to the Gaddafi regimes violent response to the 2011 Arab Spring protests in Libya, leading to the demise of Colonel Muammar Gaddafi, which also evidenced violations of IHL by deliberately targeting and directing attacks against civilians, residences and infrastructures.

The chapter also highlighted the USA's continued GWOT efforts in post-Gaddafi Libya have led to state committing the international crime of aggression by infringing the IL principle of state sovereignty of in pursuit of Al-Qaeda and ISIS/ISIL targets, presenting similarities to the USA's unauthorised presence in Syria in pursuit of its counter-terrorism objectives.

This chapter similar to the findings of the fifth chapter found that despite the blatant violations of IL which have been committed by the P5, it remains dubious that such states will be held accountable for their actions.

The sixth chapter has also demonstrated not only the impossibility of the ICC prosecuting individuals, senior military, political figures including heads of state of the P5, but the detrimental effect of the complementarity principle in circumstances where an arrest warrant has been issued for an individual.

The thesis has further corroborated this by demonstrating the case against Saif-Al-Gaddafi a former high ranking political figure and son of the late Colonel Gaddafi, resulted in a sham trial and Libyan authorities granting him amnesty, effectively pardoning his alleged crimes during the 2011 Arab Spring protests, whilst refusing the prosecutor's request to transfer him to ICC custody to be tried.

The thesis by choosing these Muslim majority states as case studies has adduced the consistent failures of the UNSC to maintain international peace and security. The thesis has also vindicated that the institution has 'mutated'²⁵⁶⁹ and become an 'inter-governmental organisation, reflecting the overlapping interests of the P5'.²⁵⁷⁰

Thus, it can be argued that the UNSC has shifted from its original position of upholding the highest standards of equality and fairness to becoming subjugated by the P5, 'not wanting global politics to be directed toward building and keeping peace among states and people'²⁵⁷¹, which is attributed to the veto privilege or in certain instances the mere threat of it.

In addition, the thesis has also highlighted over the course of nearly two decades, the initial enthusiasm and expectations of the ICC, 'detering war criminals and bringing nearer the day when no ruler, no state, no junta and no army anywhere will be able to abuse human rights with impunity'²⁵⁷², has proven to be unrealistic, paradoxical and futile.

The idea of aggressively prosecuting grave international crimes initially gained tremendous support²⁵⁷³, however in practice, the ICC has endured many challenges and marred with difficulties which has led to the court's inability and oft failure to investigate and prosecute perpetrators from the P5 due to its jurisdictional and enforcement limitations.²⁵⁷⁴

This gives weight to the criticisms forwarded previously by the AAU that the ICC is an imperialist and hegemonic institution which can only gain legitimacy

²⁵⁶⁹ Erik Jensen, 'The Evolution of the United Nations' (1986) 2 (2) *Irish Studies in International Affairs* 1, 1.

²⁵⁷⁰ Bruce Cronin, 'The Two Faces of the United Nations: The Tension Between Intergovernmentalism and Transnationalism' (2002) 8 (1) *Global Governance* 53, 53.

²⁵⁷¹ Roger A. Coate and Donald J. Puchala, 'Global Politics and the United Nations: System: A Current Assessment' (1990) 27 (2) *Journal of Peace Research* 127, 127.

²⁵⁷² Jack Goldsmith, 'The Self-Defeating International Criminal Court' (2003) 70 (1) *U.Chi.L.Rev.* 89, 89.

²⁵⁷³ Jonathan I. Charney, 'Progress in International Criminal Law?' (1999) 93 (2) *AJIL* 452, 452.

²⁵⁷⁴ Melissa K. Marler, 'The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute' (1999) 49 (3) *Duke L.J.* 825, 825.

by improving its operations as an impartial court not subjected to the superpowers within the UNSC.²⁵⁷⁵

In response to these criticisms pertaining to the ineffectiveness and weaknesses presented in the preceding chapters of the thesis, the seventh chapter has provided multitudinous reform proposals previously proffered by academics, organisations, political figures and member states.

This also included the introduction of the authors novel solution entitled: the 'Justice, Equality, Peace and Security (JEPS) model' which sought to improve and enhance 'the effectiveness and efficiency²⁵⁷⁶ of the UNSC and the ICC.

The 'JEPS model' sought to eliminate the fundamental hindrances as presented throughout the thesis, which have continued to prevent both organisations' ability to fulfil its mandate and founding purpose.

Under the new model the proposal sought to abolish the veto and replace it with a 'double majority' which would implement a three fifth majority voting system for the permanent members and a two third majority voting system for non-permanent members, thereby redistributing power within the council giving each vote equal authority, whilst proposing an increase of non-permanent membership from 10 to 25 with no change to the current permanent membership allowing equal regional representation within the UNSC.

The authors proposal's for reforming the ICC sought to restructure the current organisational framework moving the ICC from being an independent court to being another judicial organ of the UN, operating separately but simultaneously alongside the International Court of Justice, dealing exclusively in matters relating to the most serious international crimes and adding two additional crimes of terrorism and ecocide.

This part of the proposal sought to overcome the jurisdictional challenges, referral challenges and the challenges of complementarity often resulting in

²⁵⁷⁵ Andre Mbata Mangu, 'The International Criminal Court, Justice, Peace and the Fight Against Impunity in Africa: An Overview' (2015) 40 (2) Africa Development 7, 7.

²⁵⁷⁶ John Gerard Ruggie, 'The United States and the United Nations: Towards A New Realism' (1985) 39 (2) Int'l Org. 343, 356.

non-compliance of states in holding genuine proceedings against their own nationals for alleged international crimes and issues pertaining to enforcing arrest warrants.

The 'JEPS model's' proposal to restructure both organisations, hypothetically would bring 193 member states of the UNSC including the P5 automatically within the jurisdiction of the ICC. This reform of the UNSC would in turn make the referral proposal to the ICC seamless in the event of a state not willing to hold genuine proceedings or comply with arrest warrants.

Should a further refusal to comply with the ICC's demands occur, this could potentially subject a state to repercussions such as sanctions being imposed, which would be contingent upon the approval of the UNSC passing a resolution.

The seventh chapter has also proffered the author's pessimism. Despite emphasising the virtues of the JEPS model, the author has assessed the probability of such a reform proposal being unlikely to be actuated, like so many proposals and recommendations that have preceded have has no difference in overcoming the core problems that have crippled the UNSC²⁵⁷⁷ because of the required unanimity of all the P5 to vote in favour of such a proposal.²⁵⁷⁸

Overall, the thesis has demonstrated and proven the ineffectiveness of the UNSC, not just exclusively in the chosen Muslim majority states as case studies, but also in its ability to maintain peace and security globally, further supporting the view that it has become an imperial institution used by the P5 as an instrument imposing hegemonic IL.²⁵⁷⁹ Its failure has been described as an:

[H]uman appendix, an atrophied organ with no useful function to perform or whether the present condition is not one that can and should

²⁵⁷⁷ M.H. Faridi, 'United Nations Reforms in International Perspectives' (2011) 72 (2) *Indian Journal of Political Science* 597, 597.

²⁵⁷⁸ W.A. Riddell, 'Reviewed Work: Charter of the United Nations: Commentary and Documents by Leland M. Goodrich and Edward Hambro' (1950) 16 (2) *Canadian Journal of Economics and Political Science* 280, 280.

²⁵⁷⁹ Ian Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit' (2008) 102 (2) *AJIL* 275, 275.

be remedied or that perhaps will be changed in any case by an improvement in the state of international relations.²⁵⁸⁰

The current ICC prosecutor Fatou Bensouda has by her own admission advanced political support is required to ensure the guidance, support and success of the *raison d'être* (purpose) of the Rome Statute, arguing: 'There is no greater perversion of virtue than to politicise the instruments aimed at preventing human suffering and carnage'.²⁵⁸¹

The author by demonstrating the shortcomings and ineffectiveness of both the UNSC and the ICC throughout the thesis concurs with the following statement:

[I]n the present state of world society, international criminal law does not exist there are some powers who are not only in fact immune to the application of collective enforcement measures but, who, in law, too, are in a privileged position. If and when, the swords of war are taken away from their present guardians, then, and only then, will the international community be strong enough to wield the sword of universal criminal justice.²⁵⁸²

Conclusively, the preceding chapters of the thesis have highlighted the hindrances which currently exist for both the UNSC and the ICC.

Whilst the thesis has demonstrated the virtues of both of these organisations, this has been outweighed by their obvious disadvantages, which is mainly attributed to the veto privilege, the ICC's lack of authority, jurisdiction and enforcement over the P5 and their allied states exemplifying the urgent need to reform these organisations to make them more inclusive, fair and effective.

The thesis by evidencing this consistently throughout its preceding chapters, has accomplished and achieved the authors initial expectations and objectives of the research by recommending and entrancing a novel proposal to improve the effectiveness of the both international organisations.

²⁵⁸⁰ Leland M. Goodrich, 'The UN Security Council' (1958) 12 (3) Int'l Org. 273, 273.

²⁵⁸¹ Fatou Bensouda, 'The Progress and Convergence of the ICC and R2P Norms in a Rules-Based Global Order' (2020) 12 (4) Global Responsibility to Protect 372, 375.

²⁵⁸² Christopher Stephen, 'International Criminal Law: Wielding the Sword of Universal Criminal Justice?' (2012) 61 (1) ICLQ 55, 55.

Based on the findings of this thesis, in order for the UNSC to become effective in maintaining international peace and security and the ICC to administer international and universal criminal justice, this can only be achieved through reform of both organisations based on a design to ensure fairness and equality amongst member states as proposed by the 'JEPS model'.

This would entail repealing and amending various provisions of the UN Charter²⁵⁸³ and the Rome Statute²⁵⁸⁴ to 'strengthen and uphold the rule of law, by ensuring executive and legislative authority of the UNSC is unbiased and undertaken with due representation, deliberation and the judicial authority of the ICC to be truly free of any political taint'.²⁵⁸⁵

It would seem, the only viable solution to reform the unequal distribution of powers within the UNSC and the ICC is through diplomatic and political means.²⁵⁸⁶ Reform progress relies on member state's abilities to transcend the current ideological constraints of realism and instead adopt idealism²⁵⁸⁷ as no legal solution alone can actuate such a prodigiously gargantuan change.

This bequeaths any prospect of reforming these organisations at the complete discretion of the P5, which the thesis has adduced, seeking a consecutive unanimous vote by all five permanent members of the UNSC without a single veto to effectuate such a comprehensive, revolutionary and tendentious reform is insurmountable to secure, irrefutably quixotic and quite simply impossible.

²⁵⁸³ Charter of the United Nations [1945].

²⁵⁸⁴ Rome Statute of the International Criminal Court [1998].

²⁵⁸⁵ Miriam Cullen, 'Separation of Powers in the United Nations System?' (2020) 17 (3) *International Organizations Law Review* 492, 493.

²⁵⁸⁶ Martin Binder and Monika Heupal, 'Rising Powers, UN Security Council Reform and the Failure of Rhetorical Coercion' (2020) 11 (S3) *Global Policy* 93, 98.

²⁵⁸⁷ Bjarcke Zinck Winther and Laura Bang Lindegaard, 'In the Name of Democracy: UNSC Reform at the Intersection of Discourse and Governmentality' (2021) 32 (2) *Discourse and Society* 231, 248.

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