Syria – a Challenge to the International Law of Human Rights

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It is for me a great honour and pleasure to have been invited to speak here in Belgrade in commemoration of Vojin Dimitrijevic, who left us all too early four years ago in 2012. He and I were for many years members of the Human Rights Committee, working together for the defence of human rights as established under the International Covenant on Civil and Political Rights. Yet we were more than professional colleagues. We become true friends notwithstanding all the differences which seemed to separate us. He had been nominated and promoted by a so-called "socialist" government, I had been nominated by a government from the "West". But Vojin could not be classified as a lawyer advocating "socialist" positions. He knew the socialist system perfectly well from his own personal experience, having become aware of its deficiencies and weaknesses – which was indeed not too difficult. On the other hand, he also nurtured no illusions about the inconsistencies of the "Western" policies, the gap which many times opens up between high-sounding proclamations of principles and actual practices that just follow opportunistic reasons. One of the thoughts he used to tell more than once was that socialist States had failed to fulfill their welfare promises while the West had many times betrayed its values by supporting the most brutal dictators when it fitted its strategic interests. Thus, moving on some kind of middle-ground, he could not be a "soldier" of the socialist ideology. Yet, in spite of his clear-sightedness he was no cynic. He was a true defender of human rights, believing especially in freedom of thought and freedom of expression. His voice was essential for the Human Rights Committee as a whole. When he spoke, people listened. They knew that what he said was relevant and consistently to the point of the problems we were discussing.

I chose the topic I am going to speak about tonday when the current armed conflict in Syria had not yet attained the degree of brutality it has reached these days when even a convoy designed to carry humanitarian aid to a traumatized civilian population was deliberately hit by aircraft throwing bombs and grenades without any regard for the victims, people discharging a humanitarian mission, and when the last hospital operating in the sector controlled by the rebel groups was destroyed with evil premeditation. No doubt that atrocious war crimes were committed following up on weeks and months of similar crimes. Can one still speak of human rights in a situation where any kind of respect for human life and dignity has been thrown overboard? One may evaluate the present constellation in two ways. Cynics will be inclined to say: those who under such circumstances dare to mention the lofty principles of human solidarity are just hopeless fools: let us turn away from any moral principles and accept that eventually everything boils down to Realpolitik: mankind does not progress; it remains stuck in primitive power games. Yet such resignation would be fatal. It would lead us further down a slippery road. Let us rather follow Sisyphos and try, against all odds, to stand up against the evil that threatens to overwhelm us. Paradise is lost. It will never come back. But we should never lose hope, relying on our strengths and stubbornness as human beings. A system for the protection of human rights was artfully constructed in the aftermath of World War II. Has it stood the test of time? The armed conflict in Syria puts it to a rough ride test day by day.

It is a matter of common knowledge that human rights were born as a discipline of international law after the horrors of the Nazi regime that unleashed World War II. All of us Europeans suffered during that crazy and criminal war, people in the former Yugoslavia being hit atrociously before the war machine, set into motion by Germany, came back and hit its authors with deadly force as well.

Those who conceived of the new world organization, the United Nations, after the, failure of the League of Nations, were eager to prevent the recurrence of such a bloody conflict at the base of which was lack of respect for the value and dignity of the human person. They wanted to make the world a better place. Therefore, they included in the purposes and principles of the UN, enunciated in Art. 1(3), the promotion and encouragement of "respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

This was an important step. It meant that the new UN institutions would be entitled to look into practices which until that time had been considered as a domestic *chasse gardée*, not to be touched from outside. Yet, the decision taken at San Francisco had no institutional backing. The Charter refrained from specifying by what means the lofty principles of human rights were to be ensured. An aura of vagueness surrounded the new concept. The only clear indication was Art. 68 of the Charter which provided that the Economic and Social Council was to establish, *inter alia*, a commission for the "promotion of human rights". On the opposite side, Art. 2(7) stated that the United Nations was not entitled to "intervene in matters which are essentially within the domestic jurisdiction of any State" – a provision that seemed to exclude any kind of dealing with human rights matters, which indeed were at that point in time almost unanimously classified as coming under exclusive domestic jurisdiction. How can you seriously conduct a policy intended to strengthen human rights if you are prevented from scrutinizing their real, concrete impact at the grass roots level? It was clear that sooner or later a clash – or a series of clashes – would occur. You all know that after some time – it took more than 20 years! – Art. 2(7) was knocked out. The adoption of the two International Covenants on Human Rights in 1966 marked the transition to a new stage where human rights became a common treasure of mankind. Eventually, in 2005, the

General Assembly proclaimed the famous "Responsibility to protect"[1] that clarified, once and for all, that human rights are more than abstract principles, that they must be transformed into a living reality on the ground under the supervision of the international community.

In the case of Syria, the antagonism between words and deeds, between high-sounding declarations and a reality that lags far behind, is particularly worrying and alarming. Syria was one of the first countries to ratify the International Covenant on Civil and Political Rights on 21 April 1969 (number five). And it presented immediately a candidate for the Human Rights Committee, an experienced diplomat[2] who later in his two years as a member of the Committee did not take the floor once. It then submitted quickly, but somewhat hastily its first report, consisting of just one page, where the Government affirmed proudly that everything was nice and fine in its country. Obviously, a lot of naiveté, we avoid the word "cover-up", underlay its first steps within the framework of the Covenant.

The current situation in Syria looks bleak. Through a merciless civil war, the country has been largely destroyed. Parts of Damascus and almost the entire city of Aleppo lie in ruins, not to speak of other towns and cities ravaged by the war. Three weeks ago, a temporary interruption of hostilities[3] seemed to bring some respite to the population that, deprived of food and water, finds itself at the brink of cruel starvation and total despair. Millions of persons have left the country as refugees. According to reliable sources, the numbers amount to almost 5 million people.[4] Half of the population has been internally displaced. Syria is on top of the agenda of all UN institutions but no end to the fighting is in sight. This is a serious test for the entire architecture of human rights mechanisms as they have grown over

[1] GA Res. 60/1, 16 September 2005, paras. 138, 139.
[2] Mr. Kelani.
[3] It was to begin on 12 September 2016.
[4] See figures provided by UNHCR, http://data.unhcr.org/syrianrefugees/regional.php.

the last decades. One can hardly imagine any greater suffering than what is described in the reports of the relevant UN bodies. Apparently, all the carefully designed mechanisms have failed. Syria finds itself in the grip of forces nobody seems to be able to control any longer. And the great magician able to heal all the wounds has not yet appeared on the stage. It is the responsibility of everyone seriously concerned with human rights to do the best to resolve the looming conflict.

This is not the lecture of a historian. Yet some basic facts must be recalled. For decades the political situation had been tense in particular because of frictions between the different religious groups. But the current stream of violence is generally traced back to February and March 2011. First, limited protests broke out concerning issues such as rural poverty, corruption, freedom of expression and the release of political prisoners. A subsequent highpoint was reached in the town of Dar'a when governmental forces shot, arrested and tortured children accused of painting anti-Government graffiti on public buildings.[5] Since that time, the violence has continued almost unabated, interrupted only by short periods of cessation of hostilities. Armed resistance groups emerged that soon established themselves in a considerable number of towns and cities in the north of the country, in particular in Aleppo. After a short while, the situation became even more complex by the influx of foreign fighters and the involvement of the so-called Islamic State[6] that rapidly brought large swaths of Syrian territory under its control. On the part of the Syrian Government, where President Assad seems to be the uncontested leader, the Russian Federation has assumed a supportive role. The Russian air force is engaged

[5] Report of the independent international Commission of inquiry on the Syrian Arab Republic, UN doc. A/HRC/S-17/2/Add. 1, 23 November 2011, para. 27.

[6] On its legal status see Christian Tomuschat, 'The Status of the 'Islamic State' under International Law', *Die Friedenswarte – Journal of International Peace and Organization* 90 (2015) 223-244.

in almost daily attacks against the rebels, not taking any account of the needs of the civilian population which has been the target of bombardments with a high blood toll for months. On the other hand, some of the rebels, the so-called "moderate" rebels, enjoy the assistance of the United States. It seems that there are no American soldiers on the ground. But the U.S. provides military logistics without which the hostilities would already have come to their end. The conflict has now been going on for five and a half years, almost as long as World War II. It has been and still is a challenge for the international community. If 400,000 deaths[7] and the numbers of refugees already mentioned had not attracted general attention and stimulated rescue efforts, humanity would have declared its moral bankruptcy.

Humanitarian assistance has indeed been provided from many sources. I only mention the UN High Commissioner for Refugees and the International Committee of the Red Cross.[8] Their actions testify to the sincerity of the will of the great majority of States to comply with their responsibilities also for people beyond their borders. However, we shall attempt to focus on the efforts of the relevant international institutions to tackle the core substance of the crisis. What have they done, what could they do to stop the daily massacre?

The first one of the UN institutions to respond was, correctly from an institutional viewpoint, the Human Rights Council. It convened a special session on Syria, adopting on 29 April 2011, i.e. just one month after the outbreak of the increased violence in the country, a resolution in which it strongly criticized the Syrian Government for numerous violations of its human rights obligations, essentially confining its emphasis to the application of lethal force against peaceful protests.[9] It seems worth mentioning that the resolution was adopted by 26 to 9

[7] Figures provided by Staffan de Mistura, UN Envoy, http://foreignpolicy.com/2016/04/22/u-n-envoy-revises-syria-death-toll-to-400000/.
[8] See https://www.icrc.org/en/where-we-work/middle-east/syria,
[9] Resolution S-16/1.

votes, 7 members of the Council abstaining. No mention was made in that first resolution of any other actor involved. The situation worsened so rapidly that the Security Council also felt prompted to intervene, complying with its mandate to ensure international peace and security in accordance with the General Assembly's determination that a life-threatening internal situation may come within the purview of that concept as well. In a Presidential Statement of 3 August 2011 it condemned "the widespread violations of human rights and the use of force against civilians by the Syrian authorities"[10] and stressed already that "[t]hose responsible for the violence should be held accountable"[11]. In this Statement, too, the focus was directed solely on the governmental authorities.

Finding that its appeal as well as the cautious admonition by the Security Council had remained fruitless, the Human Rights Council convened a new special session on Syria a few months later on 22 August 2011. In the ensuing resolution it used stronger language. It openly addressed the atrocious crimes committed by the security forces of the regime by stating:

> 1. *Strongly condemns* the continued grave and systematic human rights violations by the Syrian authorities, such as arbitrary executions, excessive use of force and the killing and persecution of protesters and human rights defenders, arbitrary detention, enforced disappearances, torture and ill-treatment of detainees, including of children.

It felt free to resort to such blunt and straightforward formulations without any diplomatic regards because in the meantime it had been able to take note of the report of a fact-finding mission dispatched by the Office of the United High Commissioner for Human Rights. This time, the number of opposing votes shrank to 4 (China, Cuba, Ecuador, Russian Federation), a hard core of States bound together not by a common concern to protect human rights but by a common

[10] UN doc. S/PRST/2011/16, 3 August 2011, para. 2.
[11] Ibid., para. 4.

political ideology anxious to provide support to an important ally of the Russian Federation. As before, however, the Human Rights Council still remained silent about any possible infringements of human rights committed by opponents of the regime.

In order to dispose of an unchallengeable factual basis for its activity, the Human Rights Council also established an auxiliary body entrusted with collecting evidence.[12] In more than ten reports, the Independent International Commission of Inquiry on the Syrian Arab Republic has assembled indeed a mass of materials that establish cogently the criminal conduct of the Syrian security forces.[13] Going much beyond simple violations of the relevant rules on permissible conduct in civil war, those materials demonstrate that continuously and consistently war crimes and crimes against humanity have been committed.

Western States attempted to use the potential of the Security Council as soon as possible, hoping to put an end to hostilities by an authoritative injunction of the highest organ of the world organization. They submitted to the Security Council a draft proposal[14] which, in a sober way, hinted that those responsible for the violence that had engulfed the Syrian people should not escape responsibility. In paragraph 3, the draft proposal stated:

> *Recalls* that those responsible for all violence and human rights violations should be held accountable.

[12] Resolution S-17/1, 22 August 2016.
[13] Fort he latest report see UN doc. A/HRC/33/55, 6 September 2016.
[14] UN doc. S/2011/612, 4 October 2011.

But the initiative, carried by France, Germany, Portugal and the UK, was quickly thrown out by a veto cast both by China and Russia.[15].

The next step was the examination, a few days later, of Syria's record within the framework of Universal Periodic Review. In its national report submitted for that purpose, dated 2 September 2011, the Syrian Government tried to rebut the criticisms raised by launching a counter-attack. Not shying away from strong words, it stated:

> In recent months, the Syrian Arab Republic has been subjected to a series of criminal attacks against the nation and the people by armed terrorist groups. These attacks, which continue to the present time, have been accompanied by an unprecedented media campaign of lies and allegations targeting national security, stability and unity. The campaign has been supported by certain Western States that are bent on discrediting and weakening the Syrian Arab Republic and getting it to change its political position on the challenges facing the region. The groups involved have committed offences against the Syrian people, and acts of theft, murder and vandalism. They have also exploited peaceful demonstrations in order to create anarchy, strike a blow at national unity and destroy the social fabric of the nation. These groups have deliberately caused mayhem and murder and destroyed public and private property. They have stirred up religious and inter-confessional strife and exploited legitimate, peaceful and orderly calls for reform emanating from members of the nation.[16]

In the ensuing discussion, which took place on 7 October 2011, Syria found backing for its position only by a small number of States, in particular: Cuba, Nicaragua, Russia, Bolivia, Ecuador, Venezuela, Democratic Republic of Korea. Significantly enough, it rejected recommendations destined to ensure minimum conditions for the reign of the rule of law, such as:

> 104.14. End its practice of arbitrarily detaining Syrians for participating in peaceful demonstrations and release all those held in detention (Australia);

[15] UN doc. S/PV.6627, 4 October 2011, 1.
[16] UN doc. A/HRC/WG.6/12/SYR/1, para. 1.

> 104.16. Allow the access of international observers to the places of detention (Switzerland);
> 104.17. Place all places of detention under effective judicial supervision and apply international standards for the treatment of detainees (Canada);
> 104.19. Allow full and unfettered access to the United Nations Human Rights Council's Commission of Inquiry established under Human Rights Council resolution S-17/1 (Australia);
> 104.20. Allow for a prompt, impartial and independent investigation into all human rights abuses and grant the OHCHR immediate access to conduct investigations (Sweden);
> 104.21. Prosecute all those responsible for the mass-scale criminal acts that have taken place in the past months, including members of security units, responsible commanders and politicians (Czech Republic**);**

Thus, the Government manifested openly that it wished to continue its own strategy of merciless and unfettered persecution of all of its adversaries. It was neither intrigued nor ashamed by the detailed description of the facts, and it acknowledged its lack of concern for the commitments it had undertaken by ratifying the International Covenant on Civil and Political Rights.

A decisive test for the veracity and credibility of the manifold allegations against the Syrian regime came about when finally the General Assembly, as the central body of the world organization with comprehensive competences in all fields of life, albeit without decision-making power, took up the matter during its 66th session in 2011, some eight months after the violence had made its impact felt on Syrian society. A group of sponsors had prepared a draft text more drastic than ever before. The General Assembly eventually stated in paragraph 1 of the operative part of Resolution 66/176:

> *Strongly condemns* the continued grave and systematic human rights violations by the Syrian authorities, such as arbitrary executions, excessive use of force and the persecution and killing of protesters and human rights defenders, arbitrary detention, enforced disappearances, torture and ill-treatment of detainees, including children.

This text was adopted by an overwhelming majority of 133 to 11 votes with 43 abstentions. Indeed, if a government is accused of practicing torture all alarm bells must ring. Syria found itself ostentatiously isolated in the international community, enjoying only the support of its political friends. It should be added that the resolution made no mention of the conduct of the armed groups fighting the Government. Fact-finding had not yet advanced so far as to ensure solid and unchallengeable bases of information in that regard.

The Security Council came back to the Syrian agenda in 2012, first of all with two Presidential Statements, a clear indication that within the body a lack of uniform evaluation of the situation could not be easily overcome. For the first time, in the Presidential Statement of 5 April 2012,[17] the opposition groups were mentioned inasmuch as without their consent a peaceful settlement of fighting had obviously no chance of success. In its following Resolutions 2042 and 2043 of 14 April 12 resp. 21 April 2012 (Preamble, para. 4) the Security Council went one step further by "condemning" not only the widespread violations of human rights by the Syrian authorities but also "any human rights abuses by armed groups".

Obviously, the Security Council could have gone much further by issuing binding orders to the litigant parties under Chapter VII of the Charter but the continuous increase in human suffering did not prevail over long-term considerations of a geo-political nature. More than a year of silence followed that could not be continued after reliable reports had confirmed that the Syrian armed forces had used chemical weapons in an attack on their enemies on 21 August 2013. Had the Security Council not expressed itself unambiguously about that massive infringement both of international human rights law and international humanitarian law, it would almost have forfeited its function as watchdog of international peace and security.

[17] UN doc. S/PRST/2012/10.

Thus, it stated in clear and unmistakable language in resolution 2118 (2013) of 27 September 2013:

> 1. *Determines* that the use of chemical weapons anywhere constitutes a threat to international peace and security;
> 2. *Condemns* in the strongest terms any use of chemical weapons in the Syrian Arab Republic, in particular the attack on 21 August 2013, in violation of international law.

Yet it refrained from imposing any sanctions. Chapter VII of the Charter was mentioned as the legal groundwork of the Resolution. But no other Member State was specifically addressed, which would have brought additional pressure to bear on Syria. The Security Council confined itself to addressing the Syrian Arab Republic, both the governmental authorities and the other fighting parties, by providing:

> 4. *Decides* that the Syrian Arab Republic shall not use, develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to other States or non-State actors;
> 5. *Underscores* that no party in Syria should use, develop, produce, acquire, stockpile, retain, or transfer chemical weapons.

A few days later the Security Council manifested once again its abhorrence vis-à-vis the level of brutal violence which the conflict had meanwhile attained. It used the form of a Presidential Statement[18] in order to be able to set out in greater detail than usually the relevant facts and emphasize their abominable character, bringing in almost an emotional tone that deviated from the normal business-like language used in its resolutions. It is clearly visible that the governmental representatives in the Security Council do not lack human empathy. One may assume that they persuaded their governments to be allowed to express those feelings in the hierarchically lower form of a Presidential Statement that would have been

[18] S/PRST/2013/15, 2 October 2013.

considered inconvenient as a genuine resolution.[19] In Resolution 2139 (2014) of 22 February 2014 the Security Council continued on that route, underlining with great emphasis the losses of civilian lives, the assaults on human dignity and the destructions suffered by the Syrian population, and stressing this time in particular the urgent need for humanitarian assistance. Here, all sides were addressed in harsh language. One may wonder why Russia accepted such a rude and undiplomatic tone vis-à-vis its ally. Our guess is that Russia started realizing that unconditional support for the barbaric acts of the Syrian security forces might at the same time inflict great damage to its already damaged reputation. It is significant, however, that Resolution 2139 (2014) was not based on Chapter VII. Furthermore, as already hinted, Russia has now, in September of this year, renounced any semblance of decency by supporting its Syrian ally with regard to the worst war crimes on the ground.

In the following years, the Security Council switched a couple of times to Chapter VII, each time however in such a way that no significant pressure on Syria arose therefrom. No sanctions were imposed on the Syrian government, no weapons embargo was imposed. Both super-powers involved in Syria, the Russian Federation as well as the United States, would have opposed such an embargo. If

[19] "The Security Council is appalled at the unacceptable and escalating level of violence and the death of more than 100,000 people in Syria as reported by the UN Secretary-General and the UN High Commissioner for Human Rights. It is gravely alarmed by the significant and rapid deterioration of the humanitarian situation in Syria. It notes with grave concern that several million Syrians, in particular internally displaced persons, nearly half of whom are children, are in need of immediate humanitarian assistance and that without urgent increased humanitarian action, their lives will be at risk."
"The Security Council condemns the widespread violations of human rights and international humanitarian law by the Syrian authorities, as well as any human rights abuses and violations of international humanitarian law by armed groups.
"The Security Council also condemns all violence committed in Syria, irrespective of where it comes from, including all acts of sexual and genderbased violence and abuse, and recalls that international law prohibits rape and other forms of sexual violence.
"The Security Council further condemns all grave violations and abuses committed against children in contravention of applicable international law, such as recruitment and use, killing and maiming, rape and all other forms of sexual violence, attacks on schools and hospitals as well as arbitrary arrest,
detention, torture, ill treatment and use as human shields.

the Security Council continues to refrain from such measures, it has arrived at the outer limits of its possibilities. The latest resolution on Syria, Resolution 2268 (2016) of 26 February 2016, reiterates essentially what had already been said before. Not even the most recent crimes committed by the fighting parties have redeemed the Security Council from its passiveness. It does watch – but it remains an idle observer, a watchdog that has teeth but does not use them.

What can other UN organs do in order to put a halt to the fighting with its lethal consequences for the population? From the very outset, it would seem that in particular the expert bodies have been reduced to an onlooker's role in accompanying the conflict. In fact, this is the case. Syria was a difficult client of the Human Rights Committee from the very outset. Its first report[20] had to be revised by bringing in at least some substantive elements whereas the first version had just consisted of the reproduction of some of the key articles of the Constitution.[21] Concerning its second periodic report, the Syrian Government waited for no less than 23 years until 2000. In its concluding observations[22] the HRCee noted that the death penalty had an excessive scope of application, that it had been apprised of numerous extrajudicial executions and disappearances, of torture and mistreatment of inmates in prisons and that the judiciary did not seem to enjoy any real independence. Apparently, those critical observations did not lead to any changes. When the HRCee had the opportunity to examine Syria's Third Periodic Report in 2005, the same observations were formulated. The members of the HRCee must have had the impression that the Syrian authorities had not bothered to take any measures with a view to overcoming the deficits that had been identified. The interesting fact is that since that time Syria has simply stopped

[20] UN doc. CCPR/C/1/Add.1, 9 March 1977.
[21] For the examination of that report see Yearbook of the Human Rights Committee 1977-1978, Vol. I, 95-100.
[22] CCPR/CO/71/SYR, 24 April 2001.

complying with its reporting obligations under the ICCPR. No new report has been received; the fourth periodic report was due in 2009, seven years ago. Syria just ignores the Human Rights Committee - without that attitude receiving any great attention in the international community.

A similar marginalization can be observed with regard to the Anti-Torture Committee under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984). Syria had ratified the CAT in 2004. It submitted its first report, which was due in 2005, in July 2009 only.[23] The CAT Committee considered that report on 3 and 4 May 2010, emphasizing in its concluding observation of 25 May 2010[24] in particular the many allegations of a widespread practice of torture, present especially in secret detention centres. One year later, after the tremendous increase in uncontrolled violence, the CAT Committee requested, by a letter of 23 November 2011, a special report on the deteriorating situation. The Syrian Government refused to provide such a report, arguing, against the letter of Article 19(1) CAT, that the Committee was not empowered to make such a request. Notwithstanding the absence of a report and the additional refusal of the Government to send a delegation for an oral exchange of views, the Committee examined the situation on the basis of the materials that in the meantime had been assembled by many other UN bodies. In its Concluding Observations,[25] it established a devastating balance sheet of the general pattern of heinous crimes committed by the Syrian authorities. However, this has been the end of the matter. The CAT Committee is powerless. It cannot take any more effective action.

The brief observations just stated show that the system developed within the UN for the protection of human rights is inherently defective. The expert bodies

[23] UN doc. CAT/C/SYR/1, 20 July 2009.
[24] UN doc. CAT//C/SYR/CO/1.
[25] UN doc. CAT/C/SYR/CO/1/Add.2, 29 June 2012.

designed to discharge the main burden of monitoring have only a limited arsenal of devices at their disposal. The concluding observations, which they address to a country after having examined its report, presuppose that the responsible governmental authorities are prepared to listen to criticisms and to introduce consequentially the requisite changes. The procedure is based on the persuasive force of dialogue where arguments are put forward by the relevant expert body, on the one hand, and where a Government as the addressee of ensuing recommendations carefully considers that evaluation of the human rights situation in its country. This system works generally well with countries where the rule of law has firm foundations and where civil society follows attentively the monitoring performed at international level. Normally, Western European countries take the observations addressed to them very seriously, complying scrupulously with them. This does not exclude controversies were issues of principle are at stake regarding the correct interpretation of the treaty instrument concerned. The concept of dialogue means that the States parties also have their word to say. They do not lose their right to propagate their specific interpretation of treaty clauses because an expert body suggests another understanding of any such clause. The expert bodies, on their part, must be prepared to learn from national experiences, possibly correcting their jurisprudence if they have become aware of their own failures or misguided opinions.[26] This is the great advantage of the flexible system of monitoring under the UN human rights treaties. The outcome of any examination, being carried out on a report or an individual communication, is never set in stone. It is carried exclusively by its inherent persuasiveness – so that it can be corrected much more easily than a judicial pronouncement. On the other hand, however, stubbornly to ignore an expert body's suggestions and recommendations in

[26] In particular, the Committee against Racial Discrimination has a couple of times engaged in sidelining freedom of opinion in its findings of alleged violations of the ban on racial discrimination by States; see, in particular, its views in the German case of *TBB – Turkish Union in Berlin/Brandenburg*, UN doc. CERD/C/82/D/48/2010, 26 February 2013.

opposition to clear-cut facts simply amounts to a violation of the obligations undertaken. If this is the case like in Syria, an expert body becomes absolutely helpless.

In fact, an expert body does not have many remedies at its disposal. What it can do essentially is: voice its concern, pronounce suggestions and recommendations. It may even request an additional report, which it does from time to time as did the CAT Committee regarding Syria. But it does not have the institutional power to appoint an expert for a fact-finding commission. Nor can it establish a special commission of inquiry. Where a State has refrained from submitting a report it may even decide to examine the domestic situation prevailing in that country in the absence of a report and in the absence of a delegation that acts as a responsible interlocutor. Yet it is institutionally prevented from taking active steps to intervene with a view to halting the conflict.

In that regard, as shown above, the Human Rights Council has much better opportunities. It may indeed carry out inquiries, engage in fact-finding and seek to establish personal contacts with the responsible government. All these are advantages which a committee of experts, entrusted with enforcing a given set of rules, lacks by virtue of its limited mandate.

The truth is that at the end of the day only two procedural avenues remain open. First of all, from a legal viewpoint, the Security Council is not prevented from taking, under Chapter VII of the Charter, any appropriate remedies, even fairly harsh measures. As has been shown above, the Security Council has been seized with the Syrian conflict at an early date already, making its first statement six months after the commission of the first acts of violent repression by the Syrian security forces. It is true that the Security Council is fully legitimated first of all to observe a critical situation before taking action under Chapter VII – which is never

easy since it is not enough just to adopt a resolution: any meaningful resolution must be enforced on the ground. But the members of the Security Council are not the masters of the UN Charter. They have an institutional responsibility. The international community has entrusted them with a mandate to ensure international peace and security in the interest of the entire international community. Obviously, the permanent members of the Council are burdened with a heightened responsibility. By reason of the veto power which they enjoy they can completely paralyze the Council. Are they entitled to make use of their veto power according to their individual preferences, according to their whims and fancies? The answer is clearly: no! They cannot get rid of their institutional responsibility by virtue of their own political choices. It is true, to say so once again, that no procedural remedies exist. There is no actor entitled to sue a permanent member of the Security Council for failure to discharge its responsibilities. Yet this lacuna in the arsenal of available legal devices does not take away the substantive link of responsibility that may even turn into criminal responsibility.

There are many situations where on the most diverse and justifiable grounds the Security Council may refrain from taking action. Many times, interference by means of armed force would have the effect of worsening the situation. On other occasions, the available means would not suffice to overcome a hostile regime. Lastly, many times it would be unclear against whom an international armed operation should be directed, all sides committing barbarous acts. In Syria, however, all limits of exculpatory defences have been exceeded. Since weeks and months, the civilian population, including schools and hospitals, has been bombarded to such an extent that it would be preposterous simply to speak of regrettable, collateral damages. These very days, the civilian population is threatened with death from starvation, the food reserves in the beleaguered city of Aleppo having been nearly exhausted and the water supply being stopped because

of the destruction of the main water tubes or pipes. Without water, every human being faces rapid death. This is no speculation, no conjecture, it is a simple truth. The Russian Federation has all the means at its disposal to bring to a sudden halt the armed conflict on the ground in Syria. If it stopped its air support for the armed forces of President Assad, the mass murder could be stopped from one day to the next. Obviously, the armed conflict would not be over. However, an agreement between the Russian Federation and the United States could provide a framework leading onto a path to a ceasefire and eventually peace.

To put it bluntly; we are facing openly planned war crimes that could be easily prevented and do not go away once the rebel forces are constrained to capitulate in view of the high number of civilian casualties. If the Russian Federation, in particular their political leaders who determine how the country's role in the Security Council is performed, and their military leaders, who direct and carry out the attacks on the civilian population, does not change its unlawful behavior vis-à-vis the encircled population,[27] they incur international responsibility in accordance with the general rules of public international law as they were enforced in Nürnberg 70 years ago by the victorious Alliance made up of France, the Soviet Union, the United Kingdom and the United States. Neither the Russian Federation nor the United States have ratified the Rome Statute of the International Criminal Court. As a consequence, the ICC has no jurisdiction over the persons that act on behalf of these two countries, given the fact that Syria, where the criminal acts in issue are being perpetrated, has on its part refrained from joining the Rome Statute. However, substantive criminal responsibility and actual prosecutability are not the same. Criminal responsibility does not evaporate just because under the

[27] On 8 October 2016, Russia vetoed a French draft proposal to ban all air flights over Aleppo, http://www.aljazeera.com/news/2016/10/syria-war-security-council-votes-aleppo-161008164635062.html.

current circumstances no forum is available that could hear the charges against the perpetrators.

Thus, almost at the end of the day, we come back to the International Criminal Court, the institution in whose functioning so many hopes were placed. Unhesitatingly, it must be stated at the present juncture that the ICC has not lived up to the expectations connected with its creation. During its first ten years of operation, it handed down just one final judgment.[28] Its record has improved slightly during the last four years since Prosecutor Fatou Bensouda from Gambia took over. But the overall number of final judgments is still disappointingly low, remaining under the benchmark of ten. The recent sentencing of the Malian national Al Kaqi Al Mahdi may have improved that record of the Court a little bit.[29] Yet it would be somewhat audacious to see this judgment as a real sign of hope come true. The trial against the perpetrator lasted only three days. He had made a confession. Thus, the case was more or less uncontroversial. In particular, it had the blessing of the African world, in particular of ECOWAS, the Economic Community of West African States.[30] The Court, which had been many times criticized on account of its alleged anti-African attitude, was redeemed of those charges all of a sudden by posing as a defender of African values.

To bring before the Court those responsible for the mass crimes committed in Syria will be a much greater challenge. As already noted, Syria is not a State party to the Rome Statute. On the other hand, any possible Russian responsibilities could only be entertained by the Court if Russia itself agreed to submit the situation in Syria to the ICC – which probably will never happen.

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[28] Critical comments by Christian Tomuschat, "The International Criminal Court at Age Ten", *Human Rights Law Journal* 32 (2012) 15-24.

[29] Judgment of 27 September 2016, ICC-01/12-01/15.

[30] On 7 July 2012 the ECOWAS Contact Group of Mali (composed of Benin, Burkina Faso, Côte d'Ivoire, Liberia, Niger, Nigeria and Togo) requested the ICC to "launch the necessary enquiries in order to identify the perpetrators of these war crimes and to initiate the necessary legal proceedings against them".

Therefore, is the prosecution of the crimes committed in Syria a matter to be left to domestic tribunals under the auspices of universal jurisdiction? In theory, this option exists for war crimes. Immunity is an obstacle that only high-ranking officials like presidents or ministers of foreign affairs can invoke to their benefit.[31] Generally, no statute of limitation exists for war crimes. All those acting in support of the war crimes and crimes against humanity currently being perpetrated in Syria should be aware of the fact that they can be held to account under general international law. Not even the wide room of discretion granted to governments in taking decisions in the framework of the Security Council can, in legal terms, protect them from personal accountability that one day may materialize as actual criminal responsibility. A first step of actual relevance could be the establishment of a documentation centre that collects the names at least of all those air pilots known to have carried out bombardments that amount to war crimes and crimes against humanity.

[31] See ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, p. 3, 22 para. 54.