Imagining justice for Syria : water always finds its way
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IMAGINING JUSTICE FOR SYRIA: WATER ALWAYS FINDS ITS WAY

Elizabeth Maria Van Schaack

Imagining Justice for Syria: Water Always Finds Its Way

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in 1968

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To The People of Syria

and

To Those Who Tried To Do More

“When I am Overcome By Weakness”

I bandage my heart with the determination of that boy they hit with an electric stick on his only kidney until he urinated blood. Yet he returned and walked in the next demonstration.

I bandage it with the steadiness of a child’s steps in the snow of a refugee camp, a child wearing a small black shoe on one foot and a large blue sandal on the other, wandering off and singing to butterflies flying in the sunny skies, butterflies and skies seen only by his eyes. …

I bandage it with the outcry: “Death and not humiliation.”

NAJAT ABDUL SAMAD, WHEN I AM OVERCOME BY WEAKNESS (Ghada Alatrash trans.), quoted in Leigh Cuen, *A ‘New Poetry’ Emerges from Syria’s Civil War*, AL JAZEERA, Sept. 8, 2013.

“Death and not humiliation” was a frequent utterance of Syrian protesters.

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My beloved family provides endless sources of support and inspiration. I am ever grateful for their patience while I completed this PhD.

Preface

This project emerged from my years of work in the field of international justice—as a prosecutor, defense counsel, plaintiffs' counsel, diplomat, and professor. Having served in the U.S. State Department as Deputy to the previous Ambassador-at-Large for War Crimes Issues, the indomitable Stephen J. Rapp, for the early days of the Syrian conflict, I worked extensively to advance options for justice along a number of different fronts both within the U.S. interagency process and with partners in multilateral fora. Other states were actively involved, both working to advance (France, Switzerland, and Liechtenstein come immediately to mind) and impede justice. There were dozens of options explored, some more feasible than others, but none came to fruition. This PhD was inspired by my ambition to capture these various models and proposals in one place and explore what commends them and the geopolitical, legal, and practical challenges to implementing them. At first glance, the crisis in Syria suggests that the international community's experiment with international justice is essentially a failure. I hope in these pages to show that it was not entirely so, and that the conflict generated many creative ideas around justice, advanced the practice of international criminal law documentation and investigation, and empowered different actors to operate in this field. This manuscript will be published in 2020 by Oxford University Press as part of the United States Military Academy at West Point's innovative Lieber Series. Given this background and my own nationality, much of this text focuses on U.S. policy toward justice and accountability in Syria. Needless-to-say, the views expressed herein (and all errors) are entirely my own and do not reflect the position of the U.S. State Department or government writ large (although at times I wish they did).

Stanford, CA, USA
August 2019

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Acronyms & Abbreviations

ASP	Assembly of States Parties
AU	African Union
CAR	Central African Republic
CIJA	Commission for International Justice & Accountability
COI	Commission of Inquiry
CWC	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
EU	European Union
FFM	Fact-Finding Mission
FSA	Free Syrian Army
FOSP	Friends of the Syrian People
HRC	U.N. Human Rights Council
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally-Displaced Person
IHL	International Humanitarian Law
IIIM	International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes

under International Law Committed in the Syrian Arab Republic since March 2011

ISIL	Islamic State in Iraq and the Levant
ISSG	International Syria Support Group
JIM	Joint Investigative Mechanism
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NPWJ	No Peace Without Justice
OHCHR	Office of the High Commissioner for Human Rights
OIR	Combined Joint Task Force—Operation Inherent Resolve
OPCW	Organization for the Prohibition of Chemical Weapons
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
P-5	The permanent five members of the Security Council
R2P	Responsibility to Protect
SCSL	Special Court for Sierra Leone
SDG	Sustainable Development Goals
SJAC	Syria Justice & Accountability Centre
STL	Special Tribunal for Lebanon
TDA	The Day After
TRC	Truth & Reconciliation Commission
UNGA	United Nations General Assembly
UNHCR	United Nations High Commission for Refugees
UNSMIS	United Nations Supervision Mission in Syria
USIP	United States Institute of Peace
YPG	Kurdish People's Protection Units

Introduction

Syria's Challenge to the Promise of International Justice

Behind much of the savagery of modern history lies impunity.[1]

I. Introduction

The situation in Syria poses an acute—some might say existential—challenge to the international community's commitment to justice and accountability. It also marks the abject failure of the international system of peace and security erected in the post-World War II period. The Security Council has been almost entirely incapacitated by the propensity of Russia to veto nearly every coercive measure of any consequence that might be imposed on the regime of Syrian President Bashar Al-Assad, including legal accountability. As a result, other actors, within and without the United Nations, have endeavored to find inventive ways around this geopolitical impasse. This forced creativity has generated a number of innovative institutions, legal arguments, and investigative techniques aimed at advancing justice and accountability for Syria wherever possible. This dissertation catalogues the many obstacles to this pursuit of justice for Syria and analyzes ways today's justice entrepreneurs have worked to find ways around them. The subtitle of this dissertation—*Water Always Finds Its Way*—reflects this idea that the quest for justice is inexorable. Just as water eventually finds its way through cracks and around obstacles, even if at a trickle, so too will justice.

A. Introduction to the Research

Virtually every international crime that forms part of the international penal code—a *mélange* of customary international law and treaty provisions—has been committed in and around Syria. The Syrian people have witnessed and been subjected to deliberate, indiscriminate, and disproportionate attacks; the misuse of conventional, unconventional, and improvised weapon systems;[2] industrial-grade custodial abuses in a vast network of formal and informal prisons;[3] unrelenting siege warfare; the denial of humanitarian aid and what appears to be the deliberate use of starvation as a weapon of war; sexual violence, including the sexual enslavement of Yezidi women and girls trafficked from Iraq and the sexual torture of detained men and boys;[4] and the intentional destruction of irreplaceable cultural property.[5] Thousands of Syrians are missing, many

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[1] Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFF. 150 (Sept./Oct. 2001), https://www.foreignaffairs.com/articles/2001-09-01/case-universal-jurisdiction.
[2] *See* Beth Van Schaack, *Mapping War Crimes in Syria*, 92 INT'L L. STUD. 282 (2016).
[3] *See* INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC, OUT OF SIGHT, OUT OF MIND: DEATHS IN DETENTION IN THE SYRIAN ARAB REPUBLIC, U.N. Doc. A/HRC/31/CRP.1 (Feb. 3, 2016), https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-CRP1_en.pdf.
[4] *See, e.g.*, Special Report of the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, *Submission to the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning ISIL (Da'esh), Al Qaida and Associated Individuals, Groups, Undertakings and Entities*, U.N. Doc. S/2016/1090 (Dec. 2016).
[5] *See* Emma Cunliffe, Nibal Muhesen & Marina Lostal, *The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations*, 23 INT'L J. CULTURAL PROPERTY 1 (2016).

of them victims of enforced disappearances.[6] The long-standing taboo against the use of chemical weapons has been repeatedly flouted, and the sectarian nature of the violence has raised the specter of genocide against ethno-religious minorities.[7] All told, violence in the region has contributed to the biggest exodus of refugees since World War II.[8]

The Syrian battlespace is a crowded one. As the revolution unfurled, the regime of President Bashar al-Assad stood accused as the main culprit. As one observer put it, "since 2011, not a minute has passed in which the Syrian government has not been committing multiple, simultaneous, widespread war crimes and crimes against humanity."[9] One set of regime adversaries emerged from detached village defense forces and eventually evolved into a revolutionary army full of defectors and newly-armed civilians. As in the case of many Arab Spring uprisings, the opposition captured the West's imagination. Anti-government armed actors, however, have not escaped censure and have also been faulted for committing their own breaches of humanitarian law,[10] notwithstanding receiving multiple trainings in the law of armed conflict[11] and the issuance of a righteous Proclamation of Principles.[12] That said, any allegation of equivalency between the regime's deprivations and the war crimes of the Syrian opposition is an artifice. The emergence of the Islamic State of Iraq and the Levant/Da'esh (ISIL) on the scene introduced a new set of ruthless perpetrators who have brought the violence to an even more alarming level of brutality. ISIL has also served as a bridge between the wars in Syria and Iraq given the high degree of conflict spillover. Finally, the involvement of Western powers on opposite sides of the conflict—at once allies and adversaries—has complicated events on the ground and generated new risks to civilians. The conflict has been so destructive, the crime base so massive, and the pool of potential defendants so voluminous that existing institutions cannot adequately respond.

Although the political resolve within the international community around how to bring this fractured conflict to an end has not materialized, there have been consistent expressions of the need for future accountability and unprecedented investment in documentation efforts. Indeed, the Syrian conflict has become the most well-documented international crime base in human history. Under the auspices of the U.N. Human Rights Council, the Independent International Commission of Inquiry on the Syrian Arab Republic (COI) has been working to investigate all violations of international law since the commencement of the conflict in March 2011 and, where possible, identify those who are responsible. Alongside the COI, several fact-finding missions and investigative bodies are tracking the use of chemical weapons and apportioning responsibility.

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[6] *See* INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC, WITHOUT A TRACE: ENFORCED DISAPPEARANCE IN SYRIA (Dec. 19, 2013), https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/ThematicPaperEDInSyria.pdf.

[7] GENOCIDE WATCH, GENOCIDE AND MASS ATROCITIES ALERT: SYRIA (Apr. 26, 2013), http://www.genocidewatch.org/syria.html.

[8] UNHCR, SYRIA CONFLICT AT 5 YEARS: THE BIGGEST REFUGEE AND DISPLACEMENT CRISIS OF OUR TIME DEMANDS A HUGE SURGE IN SOLIDARITY (Mar. 15, 2016).

[9] Ben Taub, *Does Anyone in Syria Fear International Law?*, THE NEW YORKER, Aug. 31, 2016, *available at* https://www.newyorker.com/news/news-desk/does-anyone-in-syria-fear-international-law

[10] AMNESTY INTERNATIONAL, SYRIA: "TORTURE WAS MY PUNISHMENT": ABDUCTIONS, TORTURE AND SUMMARY KILLINGS UNDER ARMED GROUP RULE IN ALEPPO AND IDLEB, SYRIA (July 5, 2016).

[11] CENTER FOR CIVILIANS IN ARMED CONFLICT, CIVILIAN PROTECTION IN SYRIA (Dec. 2012).

[12] FSA PLATFORM, THE FREE SYRIAN ARMY'S PROCLAMATION OF PRINCIPLES PUBLISHED WITH THE ESTABLISHMENT OF THE FSA IN 2012, http://fsaplatform.org/fsa-principles.

Most innovative on the multilateral level is the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM), the result of the General Assembly flexing its muscles in the face of Security Council debility.[13] In the non-governmental realm, multiple organizations—Syrian and international—are adding to the massive cache of potential evidence.

A new documentation model has emerged in the form of the Commission for International Justice and Accountability (CIJA), a privatized investigative team preparing proto-indictments of potential perpetrators and analytical briefs even in the absence of a ready forum in which to admit such evidence or a clear path to justice.[14] From the grassroots, citizen journalists have uploaded millions of digital images and thousands of hours of footage of the carnage. Because the Syrian revolution has played out on social media, new technological tools have been developed and deployed to capture, authenticate, and deduplicate the millions of digital images now available on the internet. These documentarians are securing these collections in digital vaults, churning out a steady stream of fact-finding reports, conducting statistical data analysis, and even compiling detailed dossiers on potential defendants for future prosecutions.

The assumption has been that all this information would lay the groundwork for a whole range of transitional justice mechanisms—in the event that there is ever a transition in Syria—including criminal trials against those deemed responsible. So far, however, documentation has emerged as a substitute for justice, and it is unclear whether, when, or where the information gathered will be systematically transformed into hard evidence in a court of law. Since the conflict in Syria broke out, elements of the international community, including key organs of the United Nations, have deployed robust messaging that justice and accountability must be an integral component of Syria's transition.[15] For one, almost every Security Council resolution devoted to Syria mentions the imperative of accountability. Individual states are in accord. From the perspective of the United States, Secretary Hillary Rodham Clinton announced at an early meeting of the Friends of the Syrian People that accountability constituted a central pillar of the United States' Syria policy.[16] The U.S. House of Representatives overwhelmingly passed a resolution calling for the Security Council to establish a tribunal dedicated to the crimes committed, on all sides, in Syria (although it did not account for the fact that Russia was unlikely to support any such

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[13] G.A. Res. 71/248, U.N. Doc. A/RES/71/248 (Dec. 21, 2016).

[14] Mark Kersten, *What Counts as Evidence of Syria's War Crimes*, WASH. POST., Oct. 28, 2014, https://www.washingtonpost.com/news/monkey-cage/wp/2014/10/28/what-counts-as-evidence-of-syrias-war-crimes/?utm_term=.aa56fcbe5dff.

[15] *See, e.g.*, U.N. Doc. A/PRST/2011/16, at pmbl (Aug. 3, 2011) ("those responsible for the violence should be held accountable."); U.N. Doc. G.A. Res. 66/253, ¶ 8, U.N Doc. A/RES/66/253 (Feb. 12, 2012) ("Stresses again the importance of ensuring accountability and the need to end impunity and hold to account those responsible for human rights violations, including those violations that may amount to crimes against humanity."); *Annan, in Syria, calls for Accountability*, CNN (May 28, 2012), *available at* http://www.cnn.com/2012/05/28/world/meast/syria-unrest/ (noting remarks by then U.N./Arab League envoy after the massacre in El-Houla that left 49 children dead).

[16] *Secretary Clinton Delivers Remarks at the Conference of the Group of Friends of the Syrian People*, YOUTUBE (Apr. 2, 2012), https://www.youtube.com/watch?v=AHuTGxdmxr4 (noting measures to be taken to "ratchet up" pressure on the regime, including additional sanctions, "a new accountability clearinghouse to train Syrian citizens to document atrocities and abuses and to identify perpetrators" (a proposal that was to become the SJAC), and support to the civilian opposition).

initiative).[17] Allied states followed suit with similar demands.[18] And yet, despite these articulated intentions, legal accountability has been elusive because these statements have not been matched by the actions necessary to actually achieve accountability. In the absence of a tangible threat of actual prosecutions, such messaging has exerted a limited rhetorical effect.

Many factors have contributed to this entrenched impunity. For one, an impenetrable Russian veto has prevented a referral of the situation in Syria to the International Criminal Court (ICC).[19] That said, there are novel theories for how the ICC could proceed against some actors within the conflict—notably foreign fighters who hail from ICC member states and individuals accused of committing cross-border crimes that cause harm on the territories of ICC member states—even if it cannot exercise the full reach of its jurisdiction in Syria. Although the failure of the ICC referral effort marks a disappointment for many human rights advocates, it is not clear that the ICC is best positioned to administer justice for Syria. Given the scale and nature of the harm, a dedicated *ad hoc* tribunal with subject matter jurisdiction over the entire catalogue of war crimes committed in non-international armed conflicts (in addition to crimes against humanity and genocide) in many respects offers a better alternative.[20] Even though the ICC was supposed to obviate the need to produce new justice mechanisms, there remain situations like Syria where an *ad hoc* tribunal is called for. New theories for how to accomplish this, drawn from the Nuremberg precedent and more recent past practice, have emerged that do not depend on a consensus within the Security Council or Assad's consent.

Not all of the inaction in the multilateral sphere can be blamed on Russia's exercise of its veto prerogative, although this was a decisive factor in the Security Council chamber. For one, many states remained fixated on calling for the Security Council to undertake an ICC referral, despite the obvious and unyielding obstacles to such an endeavor.[21] This singular focus on the ICC eclipsed other worthy avenues for accountability that might have been pursued. The international community's reticence was also due to persistent ambivalence about the potential for vigorous criminal accountability to complicate the hoped-for peace negotiations and future processes of reconciliation. Furthermore, there were concerns that any accountability regime might sweep in personnel from third states that were gradually ramping up their involvement in the Syrian conflict. Finally, states have been palpably wary of creating a tribunal outside of the Council or without Syrian consent—a precedent that might be deployed against powerful states by other multilateral

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[17] *See* H.Con.Res.121, https://www.congress.gov/bill/114th-congress/house-concurrent-resolution/00121 (asking the President to direct his Ambassador to the United Nations to promote the establishment of a war crimes tribunal in the Security Council).
[18] *Syria/International Criminal Court—Joint statement by France, Australia, the United Kingdom, the Republic of Korea and Luxembourg* (Jan. 18, 2013), https://uk.ambafrance.org/France-calls-for-Syria-to-be-taken ("we felt that we must speak out on the absolute need for accountability and to send a clear message that the international community is not turning a blind eye to the atrocities being committed in Syria. Without accountability, there will be no sustainable peace.").
[19] *See* U.N. Doc. S/2014/348 (May 22, 2014) (draft resolution referring the situation in Syria to the ICC vetoed by Russia and China).
[20] Van Schaack, *supra* note 2 (noting that the ICC cannot prosecute many of the war crimes relevant to Syria, as a non-international armed conflict).
[21] *See id*. ("We fully support the Swiss initiative [for the Council to refer the situation in Syria to the ICC] and will remain at the forefront of the international community in calling for the situation in Syria to be referred to the ICC and in ensuring that, without exception, all perpetrators of the most serious international crimes in Syria are held to account. We hope other countries will join this initiative.").

configurations. For all these reasons, the establishment of a hybrid or *ad hoc* tribunal has failed to garner the necessary diplomatic support.

Although the establishment of international judicial institutions has been entirely foreclosed when it comes to Syria, glimmers of justice are apparent. For one, domestic courts are filling the accountability gap by invoking the entire array of domestic jurisdictional principles—not always to their full reach, but more than they ever have before. Indeed, the conflict in Syria has helped to re-enliven the principle of universal jurisdiction, which had been in retreat in recent years following a concerted backlash launched by powerful states. The exercise of various species of extraterritorial domestic jurisdiction has been facilitated by robust regimes of mutual legal assistance, greater cooperation between dedicated national war crimes units, the formation of joint investigative units between nation-states, and the inexorable integration of European criminal justice systems. In addition, a new-found interoperability is apparent between non-governmental organizations, multilateral criminal investigative mechanisms, and domestic prosecutorial authorities. This new architecture, bridging the public and the private, is contributing to a more robust and coordinated *system* of international justice.

All of these developments are playing out in venues not governed by the veto. Indeed, in what might be viewed as another silver lining, the paralysis in the Council has created space for advocates, policymakers, diplomats, and investigators to innovate elsewhere. These developments signal the diversification of actors, a new institutional heterogeneity, and a burgeoning creativity around the imperative of justice. With the opening of each new situs of activity, the Security Council becomes increasingly marginalized, suggesting a shift in the balance of powers among the U.N. organs and on the international stage. The IIIM and CIJA—one a multilateral innovation and the other a determined non-state actor—are both carrying out normally statist functions, revealing that sovereign states no longer enjoy a monopoly on criminal law processes. Further, these developments evince a striking willingness on the part of states to outsource aspects of their prosecutorial process and work in partnership with non-governmental and multilateral institutions in the quest for justice.

In many respects, this proliferation of investigative innovations is a good news story. However, a less sanguine trend is also apparent: it cannot be gainsaid that these new multilateral justice mechanisms are decidedly weaker than those developed in response to historical tragedies involving mass violence. Indeed, since the renaissance of international criminal law, the genealogy of international justice institutions reveals that each new generation has emerged weaker than the last. Starting in the 1990s, the Security Council imposed the two international tribunals upon the states in question during (in Yugoslavia) and immediately after (in Rwanda) a period of mass atrocities. Whereas these original *ad hoc* tribunals enjoyed a Chapter VII provenance, dependable U.N. funding, and obligations of cooperation on the part of states (albeit not always fulfilled), the second generation of international justice institutions in Cambodia, Sierra Leone, and Lebanon were premised on state consent (allowing target states to exact contentious concessions) and dependent on voluntary funding and cooperation. The third generation of hybrid institutions and mixed chambers depend on the existence of a functioning, fair, and willing domestic judicial system that is not always available. Anything operating at present, or that might be established, will have to function without the power of the Security Council behind it or the consent of Syria. All told, the Syria situation exemplifies two countervailing trends: the development of robust investigative methods within the international community alongside the dearth of international judicial institutions to receive the information unearthed. If Syrian victims are to enjoy any

measure of accountability, the international community needs to better align these trajectories in the direction of justice.

B. Research Aims

Given these general themes, this dissertation seeks to respond to the following research question:

How has the conflict in Syria inspired institutional, methodological, and jurisdictional innovation within the system of international criminal justice?

This research query encapsulates the following sub-questions:

1. How effective is our system of collective security in dealing with the imperative of justice following the commission of mass atrocities, particularly when crimes are ongoing and there has been no regime change?
2. To what extent do we have the legal tools and judicial architecture necessary to administer justice in these circumstances or do we need to conceptualize new institutions and new pathways to accountability?
3. How have advocates for justice attempted to surmount blockages within the Security Council to advance accountability, including through new documentation techniques, theories of jurisdiction, and models of institutional design?
4. Despite the double veto exercised by Russia and China in response to France's attempt to refer the situation in Syria to the International Criminal Court (ICC), are there nonetheless theories for how the Court could exercise its jurisdiction over events in and connected to Syria, at least in part? How would such a "situation" be defined within the framework of the Rome Statute?
5. Given the impediments to activating the ICC's plenary jurisdiction and to the creation of an *ad hoc* international tribunal dedicated to Syria in the model of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, what other options exist to "internationalize" justice for Syria? What are the articulated practical and legal impediments to such proposals, and what political objections exist?
6. In light of the failure of the international community to avail itself of any of these options, to what extent are domestic prosecutorial authorities and courts stepping in to fill the accountability void that is Syria? What challenges exist in relying upon domestic courts to administer justice for a conflict as multi-faceted and destructive as the one in Syria?
7. If agents of the state—criminal investigators, prosecutors, and judges—fail to achieve justice when defendants are in reach is there nonetheless value in seeking civil justice, either against individual perpetrators, the state of Syria itself, and/or other states that are supporting the Assad regime?
8. How have documentation challenges, methods, and actors evolved to address contemporary conflicts like the one in Syria and the current information environment? How will these new documentation efforts support the various justice options discussed?

9. Given that the conflict remains ongoing, and the prospects of a genuine political transition are increasingly improbable, is there value within the international community in exploring transitional justice options without transition?

This dissertation responds to these questions and engages these broad themes by situating the war in Syria within the actual and imagined system of international criminal justice and discussing the range of measures that are available to the international community to respond to the crisis. It explores the legal impediments and diplomatic challenges that have led to the fatal trinity that is Syria: the massive commission of international crimes that are subject to detailed investigations and documentation but whose perpetrators have enjoyed virtually complete impunity with no end in sight. It also tracks a number of accountability solutions to this tragic state of affairs that are being explored within multilateral gatherings, by states, and by civil society actors, including innovations of institutional design; the re-activation of a range of domestic jurisdictional principles (including universal jurisdiction in Europe); the emergence of creative investigative and documentation techniques, technologies, and organizations; and the rejection of state consent as a precondition for the exercise of jurisdiction. The text engages both law and policy around international justice by exploring legal constraints and openings, and by offering a set of original institutional blueprints, within and without the International Criminal Court. In so doing, it attempts to capture results of the creative energy radiating from members of the international community intent on advancing the accountability norm in Syria even in the face of geo-political blockages within the U.N. Security Council.

C. Thesis Structure

The dissertation begins in chapter 1 with a short history of a long conflict, covering the arrival of the Arab Spring in Syria, the transformation of a long-overdue revolution into a full-scale armed conflict, and the evolution of the situation on the ground to date. This chapter prefaces the contemporary violence with a few historical events, surfacing atrocities committed in the 1980s that have never been the subject of any genuine accountability process (and that mirror contemporary intercommunal violence) and the rise of an authoritarian state under the House of Assad. This chapter also explores the involvement of major Western powers that are at once adversaries and allies—aligned with opposing sides in the internal armed conflict but also focused on ISIL as a common foe—as well as the impact of spillover conflicts in the sub-region involving Iraq, Turkey, and Israel. In compiling this necessarily abbreviated backgrounder, I rely upon open source research—including journalistic accounts, living timelines, and think tank white papers—as well as the memories and memoirs of survivors. Others will write the definitive history of this tragedy; my goal here is to touch upon key milestones as this conflict unfolded and eventually engulfed the country.

Chapter 2 engages the question of why the Security Council, which is charged under the U.N. Charter with maintaining international peace and security, has been so paralyzed when it comes to the situation in Syria and particularly the imperative of justice. Drawing upon a close read and thick description of original U.N. records, it revisits the history of the Syrian conflict from the perspective of events in the U.N. Security Council. This chapter thus surveys Security Council action, and inaction, around a number of key areas, including the denunciation of abuses, efforts to resolve the conflict and provide humanitarian assistance, the condemnation of foreign fighters and the use of chemical weapons, international sanctions, and the promotion of accountability. In so doing, it presents the evolving and piecemeal responses of the international

community to the metastasis of the conflict in Syria and tracks the obstruction wrought by the volley of Russian and Chinese vetoes. Given blockages in the Council wrought by the re-emergence of great power rivalries, this chapter touches upon other situses of action (including the U.N. Human Rights Council and the Organization for the Prohibition of Chemical Weapons (OPCW)) and foregrounds the emergence of the General Assembly as a force for accountability. In this way, the Council has been sidelined in a way that has opened space for other multilateral entities to operate. The failure of the Security Council to effectuate its Charter mandate vis-à-vis Syria has sharpened calls for Council reform, as discussed at the end of this chapter.

Given this paralysis in the Council, the next set of chapters asks what pathways to justice exist when it comes to the Syrian conflict? In response, these chapters consider the architecture of international justice with reference to the matrix of liability set forth below. This matrix is organized along two axes: the first (x) is premised on the distinction between criminal and civil liability; the second (y) compares the types of justice institutions and legal authorities that are available against individual perpetrators and Syria as a sovereign state. This section of the dissertation explores the different routes to accountability through this matrix and the various advantages presented by, and the challenges encumbering, justice options within each of these cells when it comes to the situation in Syria. It does this through traditional legal research as well as off-the-record conversations with diplomats, practitioners, and policymakers.

		Tribunal		
		International	Hybrid/Regional	Domestic
Respondent/Defendant	Individual Perpetrators	Ø	Ø	Alien Tort Statute, *partie civile* system
		International Criminal Court, *ad hoc* tribunals	Special Court for Sierra Leone, Extraordinary African Chambers	Domestic international crimes statutes (e.g., 18 U.S.C. § 2340, German Code of Crimes Against International Law (CCAIL))
	The Sovereign State	International Court of Justice, human rights treaty bodies (e.g., Committee Against Torture)	African Court of Human & People's Rights, European Court of Human Rights	U.S. Foreign Sovereign Immunities Act or equivalent
		Ø	Ø	Ø

Tort Liability (shaded cells)   Criminal Liability (unshaded cells)

Chapter 3 focuses on the ICC and asks whether it is indelibly foreclosed when it comes to Syria given the dual veto deployed by Russia and China and in light of its statute, the treaty's drafting history, and the Court's jurisprudence as to its own jurisdiction. It highlights areas of potential and residual ICC jurisdiction over crimes being committed in Syria, even absent a Security Council referral. While the full conflict, in all its criminal manifestations, is not within the ICC's jurisdiction at present, there are creative arguments being advanced that would bring certain acts and actors within the Court's reach. These include animating the ICC's nationality jurisdiction, focusing on continuing crimes that involve the imposition of human suffering on the territories of ICC states parties, and referring the ISIL "situation" to the Court, even though ISIL no longer controls territory or enjoys any attributes of statehood.

Chapter 4 asks: assuming that the prosecutor of the ICC declines to move forward with any of these theories of jurisdiction, what are the other potential modalities for establishing an international *ad hoc* tribunal for Syria? In response, this chapter surveys the structure and origins of other international and hybrid tribunals as well as live proposals involving Syria. It presents an array of other options for exercising international jurisdiction that do not involve the Council, including a number of innovative paradigms for creating an *ad hoc* tribunal. These encompass novel proposals premised on the potential for a subset of states to pool their respective jurisdictional competencies to create an *ad hoc* tribunal reminiscent of the Nuremberg Tribunal. Other available approaches explored in this chapter include additional action at the General Assembly; an international or hybrid tribunal created by way of an international agreement among interested states; trials before specialized chambers in liberated areas in Syria or within neighboring states with varying degrees of international involvement; a regional tribunal; or the building of a shell of a special chamber that could be eventually inserted into the Syrian judicial system post transition.[22] Any one of these proposals could have resulted in the establishment of a fully-functioning and stand-alone tribunal or a skeletal legal framework for an eventual tribunal of which Syrian constituencies could ultimately take ownership and in which they could play central roles. All of these models could incorporate various elements of hybridity, including when it comes to the substantive law to be applied, which could be international criminal law, domestic criminal law, or a combination of the two.

There are any number of diplomatic, operational, and technical activities that were, or could have been, undertaken mid-conflict by the international community to lay the groundwork for future criminal prosecutions of crimes committed by all sides during the Syrian conflict, even in the absence of an ICC referral, multilateral consensus within the Council, or Syrian consent. These include, but were not limited to, building multilateral and Syrian support for the various available models; identifying existing platforms and organizations that might host deliberations, drafting sessions, and the chosen institution itself in the pre-transition phase; establishing the necessary legal framework and drafting any constitutive documents; bolstering Syrian knowledge of accountability and transitional justice principles; and training future personnel and fielding an advance team.[23] Although a number of innovative proposals were floated, no tangible progress

[22] *See* S. 905, Syrian War Crimes Accountability Act of 2017, https://www.congress.gov/bill/115th-congress/senate-bill/905 (calling for the President to support efforts to ensure accountability for war crimes and for the completion of a feasibility study of potential transitional justice mechanisms for Syria (including a hybrid tribunal) to address crimes committed).

[23] For example, the Public International Law and Policy Group (PILPG) drafted a notional statute for a hybrid court. *See* The Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity

was made on the multilateral level until late 2016 when the General Assembly authorized the creation of the IIIM, which remains primarily an investigative body without prosecutorial powers.

In light of the lack of action at the international level, chapter 5 thus shifts attention to the potential for domestic courts to fill the accountability void. Based upon a review of domestic penal codes, comparative jurisprudential research, and conversations with practitioners, it asks to what extent are national courts exercising jurisdiction over events in Syria and under what theories of jurisdiction and legal frameworks? This chapter observes that principles of complementarity have contributed to more empowered and aggressive domestic courts when it comes to the prosecution of grave crimes of international concern. This chapter lays out the spectrum of jurisdictional bases that are being invoked in domestic courts around the globe. This includes a discussion of the utility of the re-invigorated concept of universal jurisdiction plus alternative theories of protective and effects jurisdiction that might be invoked by frontline states overwhelmed by the refugee crisis occasioned by the Syrian war. This chapter also acknowledges sources of resistance to the expansion of these forms of extraterritorial jurisdiction. After setting out these broad principles, this chapter tracks—in real time—criminal cases proceeding in domestic courts in France, Germany, Sweden, and elsewhere under these various jurisdictional principles. These legal proceedings are rendering small cracks in the wall of impunity around perpetrators in Syria. Although important, trials remain sporadic and largely dependent upon the serendipitous presence of a defendant within reach of a willing prosecutor.

Rounding out the matrix of accountability, chapter 6 queries whether there is utility to exploring the concept of state responsibility and tort liability to address the prevailing impunity in Syria. It presents several non-penal proceedings, including civil suits in domestic courts against responsible individuals and options for exercising jurisdiction over the sovereign state of Syria. Because there is no notion of state criminality under international law, only civil claims seeking money damages can be advanced against states. Although jurisdiction over Syria before the International Court of Justice (ICJ) exists under the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, proposals to invoke the Court have not borne fruit for lack of a state willing to step up and pronounce, *J'accuse!* And so, victims must bear this burden elsewhere. In this regard, some tort law options exist in domestic courts, especially in the United States with its suite of statutes giving its domestic courts jurisdiction over international law violations. Although civil remedies are not as robust as those available in criminal proceedings, civil liability offers victims certain benefits, such as the opportunity to control the litigation process and act where the public authorities may be unable or unwilling to do so. This chapter features a groundbreaking suit against Syria under the United States' Foreign Sovereign Immunity Act (FSIA), which resulted in a $300 million judgment for the surviving family members of Marie Colvin, the intrepid war correspondent assassinated by the Syrian regime.

The penultimate chapter discusses the imperative of international crimes documentation as well as institutional and technical innovations inspired by the Syrian conflict. It asks: to what extent have new documentation techniques and technologies emerged to democratize fact-gathering and lay the groundwork for future accountability efforts if the political will emerges? While documentation is not necessarily an accountability mechanism in its own right, almost any transitional justice response will benefit from, or be dependent on, the documentation of crime-

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Crimes, http://www.publicinternationallawandpolicygroup.org/wp-content/uploads/2014/01/Chautauqua-Blueprint-2014.pdf.

base and linkage information. The Syrian conflict coincided with the explosion of social media and the ubiquity of smart phones capable of capturing the commission of international crimes from multiple perspectives. The ability of ordinary people to contemporaneously record potential evidence on their personal devices has created both opportunities and challenges to accountability, particularly given the surfeit of unverified (and in some cases unverifiable) data. Organizations such as Benetech, Satellite Sentry, *Videre es Credere*, Hala Systems, and eyeWitness to Atrocities are developing applications and techniques of big data acquisition and analyses to render the terabytes of open source information useful for any number of accountability processes. Given that witnesses are the soft underbelly of the international justice system, there is hope that these new evidentiary tools will supplement, and potentially provide a substitute for, witness testimony. These documentation efforts have emerged as another bright spot in this conflict, as civil society actors have prepared for accountability by preserving potential evidence of atrocities and undergoing training in the whole range of transitional justice options.

The dissertation closes with a discussion of the prospects for a genuine transitional justice process in Syria. Chapter 8 thus asks the question of whether the field of transitional justice has anything to offer Syrian victims, even if a political transformation never materializes. Drawing upon academic research—including new empirical studies made possible by the creation of comprehensive transitional justice databases—the chapter begins with a discussion of the archetypal tools within the transitional justice toolkit—criminal accountability, truth commissions, reparations, conditional amnesties, lustration, and institutional reform—and the way in which transitional justice efforts have become increasingly internationalized. This reflects the belief—premised on historical case studies and emerging empirical research—that societies in transition must address the crimes of the past in some capacity or risk their repetition. This chapter discusses ways in which the international community has tried to prepare for a future transitional justice process even in the absence of a transfer of power, which seems increasingly unlikely as this thesis is finalized, and forms of transitional justice that might still be encouraged as the conflict winds down without a genuine transition in sight.

The Conclusion offers some final reflections as well as lessons learned from the tragedy that is Syria. These include over-arching observations about the weaknesses inherent to our systems of collective security and international justice that have been laid bare by the crisis. Notwithstanding these grounds for discouragement, the conclusion attempts to offer a few silver linings and rays of hope, most notably the greater sophistication of human rights documentation, the enlivening of domestic courts as engines of accountability, and the sheer volume of creative energy flowing through the international community as dedicated justice entrepreneurs attempt to advance the accountability norm and bring some measure of justice to Syria.

D. Methodology & Sources

In undertaking this thesis, I engaged in standard academic research with a range of legal and non-legal sources. For background and context on the war in Syria, I reviewed several firsthand accounts of the conflict written by journalists, members of the Syrian diaspora, and others who lived through these events, such as Alia Malek's THE HOME THAT WAS OUR COUNTRY: A MEMOIR OF SYRIA (2018) and Rania Abouzeid's NO TURNING BACK: LIFE, LOSS, AND HOPE IN WARTIME SYRIA (2018). Particularly poignant was WE CROSSED A BRIDGE AND IT TREMBLED: VOICES FROM SYRIA (2017) by Wendy Pearlman, which contains a series of interviews with ordinary Syrians recounting their country's tragic descent into war. Several NGOs and entities

have conducted population-based surveys of Syrians to glean their preferences around transitional justice, which informed my own thinking about the centrality of criminal accountability to any transitional justice response.[24] My affiliation with several human rights and international crimes documentation organizations, such as the Commission on International Justice & Accountability (CIJA), gave me direct access to caches of original documents collected from Syria. I also reviewed the 1000-page casefile of *Colvin v. Syrian Arab Republic*, Case 1:16-cv-01423-ABJ, a lawsuit filed in the United States under the Foreign Sovereign Immunity Act, which includes sworn affidavits by insiders and defectors as well as Syrian experts.

In considering the legal challenges of providing accountability for a massive crime base, I engaged in classic legal research, drawing upon the history and jurisprudence of the war crimes trials held before international, hybrid, and domestic courts following World War II and the revival of international criminal law in the mid-1990s. I also examined the *lex lata* of international criminal law with reference to relevant treaties, customary international law, general principles of law, and judicial decisions. To identify the latter, I surveyed legal databases of contemporary national jurisprudence to collect as many decisions and judgments as possible from domestic prosecutions involving events in Syria. In this regard, I was aided by several websites devoted to surveying international criminal justice efforts, such as TRIAL International,[25] the Case Matrix Network,[26] Legal Tools Database,[27] the International Crimes Database,[28] vLex,[29] Lexis-Nexis, and the Hague Justice Portal.[30] In addition to this caselaw, I reviewed the most recent scholarship, as well as classic works, devoted to explicating principles of international and domestic jurisdiction, institutional design, international criminal law, and atrocities prevention and response. For the chapter on Transitional Justice Without Transition, I also collected and reviewed the best empirical and interdisciplinary research on the impact of transitional justice mechanisms—trials, amnesties, truth commissions, and lustrations—on instantiating peace, achieving justice for victims, and promoting deterrence.

A major theme of this manuscript is that the law is not the problem; there is plenty of extant international criminal law and there are no legal impediments to the many options to bring justice to Syria. Instead, this is a problem of geopolitics. To accurately understand and convey the multilateral dynamics around Syria and accountability, I gave the relevant records of deliberations in the U.N. Security Council, the U.N. General Assembly, and the U.N. Human Rights Council a close read as well as other accounts of the policies of the United States, Russia, Iran, European Union member states, and Turkey towards Syria drawn from the disciplines of political science and international relations. To capture the nature and scope of the violence, I collated the many reports produced by the Independent International Commission of Inquiry on the Syrian Arab Republic,[31] human rights non-governmental organizations (NGOs) (notably Amnesty International and Human Rights Watch, whose reporting of atrocities has been comprehensive and

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[24] *See, e.g.*, Charney Research, https://syrianperspectives2013.syriaaccountability.org/chapter/post-conflict-accountability/.
[25] TRIAL International, https://trialinternational.org/.
[26] Center for Case Matrix Network, International Centre for Law Research & Policy, https://www.cilrap.org/purpose/.
[27] Legal Tools Database, https://www.legal-tools.org/.
[28] International Crimes Database, http://www.internationalcrimesdatabase.org.
[29] vLex, https://vlex.com/.
[30] The Hague Justice Portal, http://haguejusticeportal.net/.
[31] U.N. Human Rights Council, Independent International Commission of Inquiry on the Syrian Arab Republic, https://www.ohchr.org/en/hrbodies/hrc/iicisyria/pages/independentinternationalcommission.aspx.

damning), and media accounts. I also read many of the situation reports from the Institute for the Study of War, which has covered the conflict extensively since it began;[32] the Council on Foreign Relations' conflict tracker;[33] and the analyses generated by other reputable think tanks.

In addition to this desk research, I informally consulted key players who have been working to establish some form of accountability for the innumerable international crimes committed during the Syrian conflict. This includes the academics, diplomats, human rights advocates, U.N. personnel (including two former U.N. High Commissioners for Human Rights), and journalists identified in the Acknowledgements. Former and current members of the U.S. State Department and the diplomatic corps of other concerned states shared their accounts—on a non-attribution basis—of the increasingly acrimonious deliberations within the United Nations in New York and Geneva. In addition, the staff and principals of the International Independent Investigative Mechanism for Syria (IIIM) and the U.N. Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD) offered invaluable insights into the formation and operation of their respective investigative mechanisms as well as their understanding of the ways their work might eventually contribute to justice processes. Furthermore, I spoke with a number of lawyers (prosecutors, defense counsel, and victims' counsel) involved in the many cases proceeding in Europe and the United States to better understand the accountability landscape within domestic courts. The European Center for Constitutional and Human Rights (ECCHR) and their Syrian partners were particularly helpful in this regard.

Members of several human rights documentation groups devoted to Syria—including the Syrian Archives, the Syria Justice & Accountability Center (SJAC), the Center for Justice & Accountability (CJA), and CIJA—helped me to understand how new and traditional documentation techniques are preserving evidence for future accountability purposes. In this regard, I had conversations with a number of NGOs (e.g., Benetech, Witness, eyeWitness to Atrocities and *Videre est Credere*) and for-profit corporations (e.g., Twitter, Facebook, and Microsoft) devoted to developing new human rights, communications, data analysis, secure storage, and encryption tools more generally. These sources indirectly informed the research, were operating under Chatham House rules, or spoke with me on a not-for-attribution basis and so are not cited directly in the text.

This thesis draws upon some of my earlier scholarship, including the following articles and book chapters:

- *With All Deliberate Speed: Civil Human Rights Litigation As a Tool for Social Change*, 57 VANDERBILT L. REV. 2305 (2005).
- *Justice Without Borders: Civil Universal Jurisdiction*, 2005 ASIL PROCEEDINGS 120.
- *Finding the Tort of Terrorism in International Criminal Law*, 28 UNIV. OF TEXAS, REV. LITIG. 381 (2009).
- Beth Van Schaack, *State Cooperation & The International Criminal Court: A Role for the United States?*, *in* BEYOND KAMPALA: NEXT STEPS FOR U.S. PRINCIPLED ENGAGEMENT WITH THE INTERNATIONAL CRIMINAL COURT 3 (American Society of International Law 2010).

[32] Institute for the Study of War, http://iswresearch.blogspot.com/search/label/Syria.
[33] Global Conflict Tracker, Syria, https://www.cfr.org/interactives/global-conflict-tracker?cid=ppc-Google-grant-conflict_tracker-010715&gclid=CjwKEAjwh6SsBRCYrKHF7J3NjicSJACUxAh73kL4x8gPd8BMYy6aFxbXUyBqojitpCU3bBjO79FFzxoC-73w_wcB#!/conflict/civil-war-in-syria.

- *The Prevalence of "Present-In" Jurisdiction*, 107 ASIL PROCEEDINGS 237 (2013) (with Zarko Perovic).
- *Mapping War Crimes in Syria*, 92 INT'L L. STUD. 282 (2016).
- *The Building Blocks of Hybrid Justice*, 44 DENVER J. INT'L LAW & POLICY 169 (2016).
- CAMBODIA'S INVISIBLE SCARS: TRAUMA PSYCHOLOGY IN THE WAKE OF THE KHMER ROUGE (2011, 2016) (with Daryn Reicherter).
- *"More than a Domestic Mechanism": Options for Hybrid Justice in Sri Lanka*, *in* TRANSITIONAL JUSTICE IN SRI LANKA: MOVING BEYOND PROMISES 331 (Bhavani Fonseka ed., 2017).
- *Crimes Against Humanity: Repairing Title 18's Blind Spots*, *in* ARCS OF GLOBAL JUSTICE (Margaret M. deGuzman & Diane Marie Amann eds., 2018).

Some of this material also appeared in blog posts on the *Just Security* and *IntLawGrrls* blogs. Many of the chapters of this thesis were workshopped at academic gatherings, including at the University of Michigan and Stanford Law School. These chapters have undergone extensive peer review; many academics in the field commented on draft chapters, as indicated—with my appreciation—in the Acknowledgements.

II. Contribution to Knowledge

This thesis makes an original contribution to knowledge—and particularly the fields of public international law, international criminal law, transitional justice, human rights, and foreign policy—by capturing the state-of-the art when it comes to accountability for grave international crimes through the lens of the Syrian conflict. Using the matrix identified above, the thesis demonstrates ways in which the international community, civil society actors, victims' lawyers, and prosecutorial authorities could traverse, and have begun to traverse, the various pathways to accountability for the mass crimes being committed in Syria. These include novel theories of ICC jurisdiction that are only beginning to be explored in the academic literature.[34]

The thesis also identifies and evaluates a set of untried blueprints for a range of international, and quasi-international, tribunal models that could be constructed for the conflict in Syria.[35] Although there were a number of articles early in the conflict that mapped prior models, and advocated for the activation of existing accountability options,[36] none of the theories explored in this text has yet to receive careful or comparative analysis in the literature.[37] To be sure, there are discrete articles analyzing some components of this accountability landscape—such as new

[34] *See, e.g.*, Payam Akhavan, *The Radically Routine Rohingya Case: Territorial Jurisdiction and the Crime of Deportation under the ICC Statute*, 17 J. INT'L CRIM. JUST. 325 (2019). *See* chapter 3.
[35] *See* chapter 4.
[36] Annika Jones, *Seeking International Criminal Justice in Syria*, 89 INT'L L. STUD. 802 (2003); Jane Hunter, *Accountability or Continued Impunity? Syria and International Criminal Justice*, ACTION ON ARMED VIOLENCE (Mar. 28, 2014); Leila N. Sadat, *Genocide in Syria: International Legal Options, International Legal Limits, and the Serious Problem of Political Will*, 5 IMPUNITY WATCH L.J. 1 (2015).
[37] Kaleab A. Kassaye, *The Long Road Towards Justice in Syria: Challenges and Perspectives on War Crimes*, 7(1) J. CIVIL. & LEGAL SCI. (2018).

multilateral mechanisms[38] or the revival of universal jurisdiction in Europe[39]—as well as other international law issues implicated by the war in Syria,[40] such as the use of armed force and humanitarian intervention.[41] However, these works do not take the *tour d'horizon* approach of the present thesis.

While there is a rich scholarship devoted to the field of transitional justice generally,[42] with some attention to Syria specifically,[43] the thesis poses an overarching question that has not received sufficient scholarly attention: the utility of developing and pursuing the range of transitional justice mechanisms in the transitional justice toolkit absent a genuine political transition.[44] Furthermore, the chapter on documentation offers new insights into the role of civil society actors in compiling evidence for accountability purposes. This contribution is situated within an emergent literature exploring the implications of social media and the digital revolution on accountability and transitional justice, with some attention to Syria specifically.[45]

In terms of existing scholarship on the Syrian armed conflict, the tragedy has—not surprisingly—inspired a number of interdisciplinary academic works from the fields of history, political science, and international relations.[46] These join multiple moving memoirs from victims,

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[38] Alex Whiting, *An Investigative Mechanism for Syria: The General Assembly Steps into the Breach*, 15 J. INT'L CRIM. JUST. 231 (2017); Christian Wenaweser & James Cockayne, *Justice for Syria?: The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice*, 15 J. INT'L CRIM. JUST. 211 (2017); David Kaye, *Human Rights Prosecutors? The United Nations High Commissioner of Human Rights, International Justice, and the Example of Syria*, UC Irvine School of Law Research Paper No. 2013-83 (2013), available at SSRN: https://ssrn.com/abstract=2196550; David Mandel-Anthony, *Hardwiring Accountability for Mass Atrocities*, 11 DREXEL L. REV. 903 (2019).

[39] Hilly B. Moodrick-Even Khen, *Revisiting Universal Jurisdiction: The Application of the Complementarity Principle by National Courts and Implications for Ex-Post Justice in the Syrian Civil War*, 30 EMORY INT'L L. REV. 261 (2015).

[40] YASMINE NAHLAWI, THE RESPONSIBILITY TO PROTECT IN LIBYA AND SYRIA: MASS ATROCITIES, HUMAN PROTECTION, AND INTERNATIONAL LAW (2019); Cian C. Murphy, *Islamic State, the United Nations and the Fragility of the Rule of Law* (May 1, 2016), available at SSRN: https://ssrn.com/abstract=3211145.

[41] MICHAEL P. SCHARF ET AL., HOW THE SYRIA CONFLICT CHANGED INTERNATIONAL LAW (forthcoming Cambridge University Press 2020); Carsten Stahn, *Syria and the Semantics of Intervention, Aggression and Punishment: On 'Red Lines' and 'Blurred Lines'*, 11 J. INT'L CRIM. JUST. 955 (2013); Zachary Kaufman, *The United States, Syria, and the International Criminal Court: Implications of the Rome Statute's Aggression Amendment*, 55 HARV. INT'L L. J. ONLINE 35 (2013).

[42] *See, e.g.*, COLLEEN MURPHY, THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE (2017); JAMIE ROWEN, SEARCHING FOR TRUTH IN THE TRANSITIONAL JUSTICE MOVEMENT (2017); ZACHARY D. KAUFMAN, UNITED STATES LAW AND POLICY ON TRANSITIONAL JUSTICE: PRINCIPLES, POLITICS, AND PRAGMATICS (2016).

[43] Ammar Bajboi, *Transitional Justice and Victor's Justice in Syria*, (May 20, 2018), available at SSRN: https://ssrn.com/abstract=3182111; Espen Stokke & Eric Wiebelhaus-Brahm, *Syrian Diaspora Mobilization: Vertical Coordination, Patronage Relations, and the Challenges of Fragmentation in the Pursuit of Transitional Justice*, ETHNIC & RACIAL STUD. 1466 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3339913.

[44] *See* chapter 8.

[45] Paul J. Zwier, *Social Media and Conflict Mapping in Syria: Implications for Peacemaking, International Criminal Prosecutions and TRC Processes*, 30 EMORY INT'L L. REV. 169 (2015).

[46] *See, e.g.*, CHRISTOPHER PHILLIPS, THE BATTLE FOR SYRIA: INTERNATIONAL RIVALRY IN THE NEW MIDDLE EAST (2018); NIKOLOAS VAN DAM, DESTROYING A NATION: THE CIVIL WAR IN SYRIA (2017); SAM DAGHER, ASSAD OR WE BURN THE COUNTRY: HOW ONE FAMILY'S LUST FOR POWER DESTROYED SYRIA (2019).

survivors, witnesses, journalists, and members of the diaspora.[47] A number of political scientists and scholars of international relations have written about the causes and consequences of the war,[48] the convoluted alliances among the parties involved,[49] the (inadequate) response of the international community,[50] and the prospects for a negotiated peace.[51] None of these approaches is devoted exclusively, or even primarily, to promoting justice and accountability, however.

This thesis does not explore the Syrian crime base or the evidence collected to date in great depth, on the theory that these topics have been well-documented by the Human Rights Council's Commission of Inquiry,[52] human rights groups,[53] Syrian and international documentation centers,[54] and journalists.[55] Indeed, there are a number of contemporaneous works focusing on particular manifestations of the violence that remain under-theorized, such as the destruction of cultural property[56] or the use of chemical weapons.[57] The emergence, rise, and decline of ISIL has also inspired a whole literature[58] within the burgeoning field devoted to preventing and countering violent extremism and the foreign fighters phenomenon.[59] Many of these interdisciplinary texts are largely theoretical in nature, whereas I have tried to retain a certain pragmatism that will be useful for policymakers, diplomats, and practitioners in addition to being of interest to academics and scholars.

This study complements and builds on this universe of existing work by focusing on the imperative of justice and accountability with an eye towards capturing what is being done (in domestic courts and multilateral fora) and what could be done if only the political will existed. All told, there is no current scholarly work that covers this much ground while also providing a deep dive into the conflict in Syria and the international community's reaction thereto.[60]

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[47] *See, e.g.*, JANINE DI GIOVANNI, THE MORNING THEY CAME FOR US: DISPATCHES FROM SYRIA (2017); AEHAM AHMAD, THE PIANIST FROM SYRIA: A MEMOIR (2019).

[48] JOSEPH DAHER, SYRIA AFTER THE UPRISINGS: THE POLITICAL ECONOMY OF STATE RESILIENCE (2019).

[49] HARRIET ALLSOPP, THE KURDS OF SYRIA: POLITICAL PARTIES AND IDENTITY IN THE MIDDLE EAST (2015).

[50] *See, e.g.*, AMANDA GUIDERO & MAIA CARTER HALLWARD, GLOBAL RESPONSES TO CONFLICT AND CRISIS IN SYRIA AND YEMEN (2019).

[51] Paul R. Williams, et al., *The Peace vs. Justice Debate and the Syrian Crisis*, 24 ILSA J. INT'L & COMP. L. 417 (2018).

[52] U.N. Comm'n of Inquiry, *"I Lost My Dignity": Sexual and Gender-Based Violence in the Syrian Arab Republic*, U.N. Doc. A/HRC/37/CRP.3 (Mar. 8, 2018).

[53] *See, e.g.*, AMNESTY INTERNATIONAL, JUSTICE FOR SYRIA, https://www.amnesty.org/en/latest/campaigns/2017/03/justice-for-syria/.

[54] SYRIA JUSTICE & ACCOUNTABILITY CENTRE, WALLS HAVE EARS: AN ANALYSIS OF CLASSIFIED SYRIAN SECURITY SECTOR DOCUMENTS (May 2019).

[55] BRIDEY HEING, ETHNIC CLEANSING AND THE SYRIAN CIVIL WAR (2018); PATRICK COCKBURN ET AL., SYRIA: DESCENT INTO THE ABYSS: AN UNFORGETTABLE ANTHOLOGY OF CONTEMPORARY REPORTAGE (2011-2014).

[56] HELGA TURKU, THE DESTRUCTION OF CULTURAL PROPERTY AS A WEAPON OF WAR: ISIS IN SYRIA AND IRAQ (2018).

[57] MICHELLE BENTLEY, SYRIA AND THE CHEMICAL WEAPONS TABOO: EXPLOITING THE FORBIDDEN (2016).

[58] *See* MARIA GRAVANI, A THEORY OF ISIS: POLITICAL VIOLENCE AND THE TRANSFORMATION OF THE GLOBAL ORDER (2017); COLIN P. CLARKE, AFTER THE CALIPHATE: THE ISLAMIC STATE & THE FUTURE TERRORIST DIASPORA (2019); ABDEL BARI ATWAN, ISLAMIC STATE: THE DIGITAL CALIPHATE (2015).

[59] INMACULADA MARRERO ROCHA & HUMBERTO M. TRUJILLO MENDOZA, JIHADISM, FOREIGN FIGHTERS AND RADICALIZATION IN THE EU: LEGAL, FUNCTIONAL AND PSYCHOSOCIAL RESPONSES (2018).

[60] *See* WILLEM-JAN VAN DER WOLF & CLAUDIA TOFAN, LAW AND WAR IN SYRIA : A LEGAL ACCOUNT OF THE CURRENT CRISIS IN SYRIA (2013).

III. Conclusion

Syria emerged as a test of the system of international justice and the ability of the international community to deliver justice and accountability for the commission of international crimes on a massive scale and mid-conflict. It is never easy to shatter a culture of impunity for international crimes, and the situation in Syria has proven to be particularly intractable. In the words of one international judge, "The evolution of international criminal justice was never and will never be a linear progress."[61] Although the international community missed the opportunity up front to fully integrate a justice component into its response to the Syrian conflict, it now has a chance to use the reconstruction process to create a path to accountability by conditioning aid on Syria's cooperation with future transitional justice and accountability efforts, and with those already underway, including domestic prosecutions in Europe.[62] As the international community begins to absorb the inevitability of Assad remaining in power, it remains to be seen whether justice will be a priority at the back end of this horrific conflict.

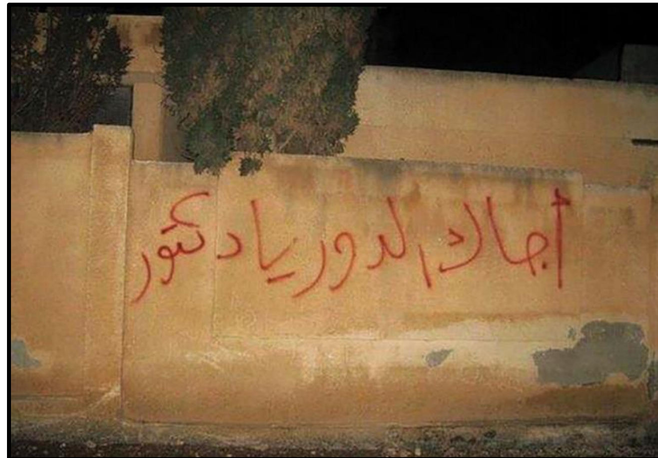
[61] Bertram Schmitt, *ICC Judge Schmitt Counsels Resilience to Preserve International Justice*, JUST SECURITY (Feb. 13, 2019).
[62] Melinda Rankin, *A Road Map for Germany: Negotiating a Path to Accountability with Assad*, PEACELAB BLOG (Dec. 18, 2018).

2

A Short History if a Long Conflict: From Revolution to Atrocity

If Hafez al-Assad was held accountable for the Hama, Aleppo, Al Shoghor Bridge, and Tadmur massacres, would his son dare to do what he has done? I do not think so.[1]

This is a conflict that began with—and has been characterized by—the torture of children.[2] Early in the revolution, some teenagers allegedly painted revolutionary slogans on a school wall in Dara'a: "It's your turn, Doctor," they wrote, referring to President Bashar al Assad, who trained as an ophthalmologist. The presumed culprits were rounded up and tortured.[3] Later, the mutilated corpse of another boy who had been arrested at a protest, thirteen-year-old Hamza Ali al-Khateeb, was returned to his parents a month after his arrest. In a postmortem video that depicted the extent of the child's abuse, a Syrian activist demanded, "Where are human rights? Where are the international tribunals?"[4] These are the very questions that animate this dissertation.



This chapter provides a short, and necessarily incomplete, history of the Syrian uprising and the conflict that followed, touching upon critical moments that have led to, and marked, this protracted, bloody, and ultimately crushed revolution.[5] Chapter 3 elaborates upon this history

[1] Craig Charney & Christine Quirk, *Post-Conflict Accountability: "Whoever Committed a Crime Should Be Accountable," in* Craig Charney & Christine Quirk, "He Who Did Wrong Should Be Accountable": Syrian Perspectives on Transitional Justice (2014) (quoting an anti-regime Sunni IDP in Raqqa).
[2] Lawyers & Doctors for Human Rights, No Silent Witnesses: Violations Against Children in Syrian Detention Centres (Dec. 2019).
[3] David Burke, *The Boy Whose Graffiti Changed the World*, Daily Mail, Mar. 14, 2017. The photograph above appeared in J. Michael Waller, *Weaponizing Ridicule*, Military L. Rev. 49, 52 (Sept.-Oct. 2017).
[4] Liam Stack, *Video of Tortured Boy's Corpse Deepens Anger in Syria*, N.Y. Times, May 30, 2011.
[5] Members of the media, think-tanks, and academics have produced a number of useful timelines and narrative accounts of this unfolding tragedy, but the definitive history of the conflict remains to be written. *See generally Syria Profile - Timeline*, BBC, Feb. 7, 2018; Ben Atherton, *Timeline: Syria and the Assads*, ABC, Mar. 8, 2012; *Syria, Timeline of the Civil War and US Response*, ABC, Feb. 22, 2018; Anup Kaphle, *Timeline: Unrest in Syria*, Wash. Post, Jan. 20, 2014; *Syrian Civil War Timeline: Tracking Five Years of Conflict,* Independent, Mar. 13,

through a close read of proceedings before the U.N. Security Council. Other key moments concerned with the promotion of accountability are discussed in greater detail elsewhere in this volume. All told, this is a story of unprecedented violence against civilians, great-power maneuverings reminiscent of the Cold War, the flouting of the once sacrosanct taboo against the use of chemical weapons, and the destruction of Aleppo, Palmyra, and other irreplaceable sites of an ancient mosaic culture. The conflict as a whole has placed key precepts of international law—including the global commitment to ensuring accountability for mass atrocities—under severe strain.

Post-Independence Syria & The Rise of the House of Assad

Syria's modern history is marked by instability, violence, and repression, and the Assad family has been at the center of Syrian politics for much of it.[6] In 1946, Syria won its independence after being carved out of the Ottoman Empire. The 1958 unification of Syria and Egypt into the fleeting United Arab Republic produced deep dissatisfaction within Syria, which eventually seceded and re-established the autonomous Syrian Arab Republic in 1961.[7] A state of emergency was declared in 1963, which gave the security forces broad powers to restrict citizens' rights. At the time, Bashar al-Assad's father, Hafez al-Assad—the descendent of a modest Alawite family—was a lieutenant in the Air Force and a ranking member of the Ba'ath Party, whose power and influence rendered Syria essentially a one-party state.[8] Hafez rose through the ranks of the Syrian military forces, being promoted to general in 1964, then commander-in-chief of the Air Force in 1965, and then Minister of Defense the next year.[9] He lived through an internal party coup in 1966 and the Israeli seizure of the Golan Heights during the 1967 Six-Day War. He then launched his own bloodless coup in 1970, overthrowing President Nur al-Din al-Atasi and much of the Ba'ath Party civilian leadership.[10]

Once in power, Assad was ruthless about consolidating his authority, suppressing internal dissent, and using patronage politics and manipulation of the welfare state to maintain power.[11] He rebuilt Syria's military by installing Alawites in leadership positions and established multiple—and competing—intelligence services (the *Mukhabarat)*, which surveilled each other as well as the Syrian populace. "Syrians had long ago internalized the *mukhabarat*, even in the diaspora. It was a fear rooted in the belief that they had unlimited reach."[12] The 1973 Constitution declared the Ba'ath Party to be the leading party of the State and society.[13] In the late 1970s, this constitutional hegemony provoked a series of uprisings that included terrorist acts attributed to the

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2016; *Syria Civil War Timeline: A Summary of Critical Events*, DW; *Uprising in Syria, 2011-*, ENCYCLOPEDIA BRITANNICA.

[6] *See* SAMI M. MOUBAYED, STEEL & SILK: MEN AND WOMEN WHO SHAPED SYRIA: 1900–2000 (2006).

[7] DEFENSE AND SECURITY: A COMPENDIUM OF NATIONAL ARMED FORCES AND SECURITY POLICIES 793 (Karl DeRouen, Jr. & Uk Heo eds., 2005).

[8] *Profile: Syria's Ruling Baath Party*, BBC, July 9, 2012.

[9] Neil MacFarquhar, *Hafez al-Assad, Who Turned Syria Into a Power in the Middle East, Dies at 69*, N.Y. TIMES, June 11, 2011.

[10] *The Ba'ath Party in Syria,* HARV. DIVINITY SCH., https://rlp.hds.harvard.edu/faq/baath-party-syria (last visited Feb. 11, 2018).

[11] *See generally* DAVID W. LESCH, SYRIA: THE FALL OF THE HOUSE OF ASSAD (2013).

[12] ALIA MALEK, THE HOME THAT WAS OUR COUNTRY: A MEMOIR OF SYRIA 189 (2017).

[13] Permanent Constitution of the Syrian Arab Republic art. 8, Mar. 13, 1973, http://www.servat.unibe.ch/icl/sy00000_.html.

Muslim Brotherhood and other Sunni Islamists.[14] This sectarian violence prompted a brutal response, particularly in January and February 1982, when Hafez crushed a Sunni uprising in Hama, leveling much of the Old City.[15] It is estimated that the army slaughtered upwards of 10,000 civilians—likely many more, but the final death toll remains unknown and unknowable.[16] These "events" (as they are called) have long stood as a warning to would-be dissidents. The massacre evoked little in the way of international reaction; the charitable explanation is that information was scarce and inexact.[17] Hama was followed by decades of repression characterized by gross human rights violations, including arbitrary arrests and detentions, systemic torture, forced disappearances, and summary executions as state policy.[18] After surviving several assassination and coup attempts (including one by his own brother),[19] Hafez died in 2000 of a heart attack.

Meanwhile, Hafez's second son, Bashar al-Assad, pursued a medical degree in ophthalmology and then studied abroad in the United Kingdom.[20] After Hafez's eldest son and heir-apparent was killed in a car accident in 1994, Assad *fils* returned to Syria and was eventually made a lieutenant colonel in the army. Upon his father's death, Assad was nominated to the Presidency by the Ba'ath Party, which necessitated a legislative amendment given his youth. After an election in which he ran unopposed, Assad became president of the Syrian Arab Republic in July 2000, continuing the Assad dynasty.[21] His inaugural speech hinted he might be willing to change course when it came to political freedoms and civil rights. Early moves—such as measures aimed at economic liberalization,[22] the release of political prisoners, and certain overtures to the West—suggested cautious reforms could replace his father's unbending authoritarianism.[23] This period of time—dubbed the "Damascus spring"—inspired a flourishing of civic discourse and opposition activism within civil society.[24] Nonetheless, renewed crackdowns on sources of dissent

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[14] Liad Porat, *The Syrian Muslim Brotherhood and the Asad Regime*, CROWN CTR. FOR MIDDLE EAST STUD. (Dec. 2010).

[15] Jason Rodrigues, *1982: Syria's President Hafez al-Assad Crushes Rebellion in Hama*, THE GUARDIAN, Aug. 1, 2011.

[16] Deborah Amos, *30 Years Later, Photos Emerge From Killings in Syria*, NPR, Feb. 2, 2012; Azmat Khan, *The Troubled History of Hama, Syria*, FRONTLINE, June 7, 2012 (citing estimates of 10,000 to 30,000 dead).

[17] *See Syria: Bloody Challenge to Assad*, TIME, Mar. 8, 1982 (a contemporaneous account suggesting only 1,000 dead); *Like Father, Like Son—Tyranny in Syria, A Massacre in Hama*, ASSOC. FOR DIPLOMATIC STUD. & TRAINING, https://adst.org/2015/06/like-father-like-son-tyranny-in-syria-a-massacre-in-hama/.

[18] *See generally* U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *1999 Country Reports on Human Rights Practices–Syria* (Feb. 23, 2000); *Human Rights Watch World Report 2000–Syria*, HUMAN RIGHTS WATCH (Dec. 1, 1999).

[19] Brian Whitaker, *Syrian Heir Disputed by Uncle in Exile*, THE GUARDIAN, June 12, 2000.

[20] *Profile: Bashar al-Assad*, AL JAZEERA, Oct. 25, 2011.

[21] Assad has been re-elected ever since in elections denounced as mere "farce." *John Kerry: Syrian President Election a "Farce,"* CBS NEWS, May 15, 2014 ("Assad's elections are a farce. They're an insult. They are a fraud on democracy, on the Syrian people and on the world.").

[22] Deborah Amos, *Syrian Official Pushes for Economic Reform*, NPR, Aug. 2, 2005; Deborah Amos, *Once-Socialist Damascus Displays New Wealth, Glitz*, NPR, Feb. 5, 2008.

[23] *See* U.N. SCOR, 66th Sess., 6524th mtg., U.N. Doc. S/PV.6524 (Apr. 27, 2011) (briefing by Lynn Pascoe, Under-Secretary for Political Affairs, on Assad's mix of reforms and repression).

[24] Carnegie Middle East Center, *The Damascus Spring*, DIWAN (Apr. 1, 2012).

and the withdrawal of minor reforms suggested more continuity than change.[25] "Like father, like son," as the saying goes.[26]

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The Arrival & Decline of the Arab Spring

Many thought that the Syrian police state would be immune to the Arab Spring, including Bashar al-Assad who believed that "a form of Syrian exceptionalism … would shield it from serious popular unrest."[27] Indeed, Syrians had felt the warmth of spring in the recent past, but it had proven to be illusory. Nonetheless, following uprisings in Tunisia, Egypt, and Libya, the winds of revolution arrived in Syria in March 2011.[28] Demonstrators held simultaneous Days of Dignity and of Rage in Damascus and Dara'a, respectively, to demand the release of political prisoners, greater press freedoms, and the end of the state of emergency, which had been in place for decades.[29] Although the protests were largely peaceful, the army over-reacted, particularly in Dara'a,[30] by deploying troops and tanks and by opening fire on civilians. Protesters quickly innovated, inventing the "airplane demonstration"—during which demonstrators would chant for several minutes and then take flight before the security services could arrive—or convene at an

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[25] *See* U.S. Dep't of State, Bureau of Democracy, H.R., and Lab., Country Reports on Human Rights Practices–Syria (offering annual assessments from 2000 onward, each year Bashar has led the country).

[26] U.N. SCOR, 67th sess., 6711th mtg., U.N. Doc. S/PV.6711 (Feb. 4, 2012), at 3 (statement of France) ("The father killed on a mass scale; the son has followed in his footsteps.").

[27] INTERNATIONAL CRISIS GROUP, POPULAR PROTEST IN NORTH AFRICA AND THE MIDDLE EAST (VI): THE SYRIAN PEOPLE'S SLOW-MOTION REVOLUTION, at i, July 6, 2011.

[28] *See generally* CARSTEN WIELAND, SYRIA, A DECADE OF LOST CHANCES: REPRESSION AND REVOLUTION FROM DAMASCUS SPRING TO ARAB SPRING (2012); Leila Fadel, *Assad Blames Protests on 'Vandalism,' 'Saboteurs*,' WASH. POST, June 20, 2011.

[29] *See* WILLEM VAN DER WOLF & CLAUDIA TOFAN, LAW AND WAR IN SYRIA: A LEGAL ACCOUNT OF THE CURRENT CRISIS IN SYRIA (2013).

[30] *See, e.g.*, HUMAN RIGHTS WATCH, "WE'VE NEVER SEEN SUCH HORROR": CRIMES AGAINST HUMANITY BY SYRIAN SECURITY FORCES (2011) (discussing violence in Dara'a Governorate).

agreed upon time and place wearing the same color to demonstrate the size of the opposition.[31] Assad's first speech to Parliament offered little in the way of concessions.[32] Over time, Assad announced some conciliatory measures, including the lifting of the odious state of emergency and the release of some prisoners. Although the latter move was billed as a concession, some members of the opposition insist that those released held the most extremist positions, which contributed to the radicalization of emergent armed groups. In any case, the uprisings spread, consuming suburbs of Damascus, Dara'a, Hama, and Homs—the latter of which became the epicenter of the revolution.[33] The memory of the 1982 Hama massacre remained fresh in the minds of the older generations; indeed, early in the revolution, someone tweeted: "Homs 2011 = Hama 1982, but slowly, slowly."[34]

As localized protests morphed into a nationwide uprising, the military and security forces continued to react with excessive force, a response that eventually devolved into "a scorched earth counterinsurgency" campaign.[35] Violence by paramilitaries and pro-government militia, the dreaded *shabiha*, gave the government deniability for some of the worst atrocities.[36] Many government personnel—including Prime Minister Riyad Farid Hijab in August 2011[37] alongside myriad members of the police and military—either secretly helped the demonstrators, defected to the opposition, or left the country to avoid complicity in abuses.[38] Others fled to escape mandatory conscription. Violence became increasingly sectarian, with many Alawites and other religious minorities becoming convinced their collective survival depended upon Assad remaining in power.[39] Against these escalating tensions, Assad launched a constitutional reform and referendum effort in February 2012, which resulted in a new Constitution that purported to allow some additional political parties, although it did not significantly curtail presidential powers.[40] Although these gestures came far too late, were too one-sided in execution, did not respond to other legitimate grievances, and were ultimately ineffective against the momentum of the demonstrations, they did mark some of the few peaceful efforts by the government to respond to the uprising. Ultimately, protesters' demands morphed into calls for Assad's removal, which constricted space for additional concessions.

Any hope that this conflict might be on a path towards resolution, or at the least remain a battle between armed actors, was shattered on May 25, 2012, when the news emerged of a massacre, committed by way of door-to-door executions, in the region known as El-Houla that resulted in the death of a hundred civilians, mainly from two extended families.[41] Many of the victims—including fifty children—were killed execution-style at point-blank range or in a play of

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[31] WENDY PEARLMAN, WE CROSSED A BRIDGE AND IT TREMBLED 78 (2017). For a discussion of how the Syrian revolution unfolded, see Wendy Pearlman, *Moral Identity and Protest Cascades*, 48 BRIT. J. POL. SCI. 877 (2018).
[32] Katherine Marsh, *Assad Blames Conspirators for Syrian Protests*, THE GUARDIAN, Mar. 30, 2011.
[33] Malek, *supra* note 12, at 193.
[34] Caitlin Fitz Gerald, *Syria: Is Homs 2011 Hama 1982 in Slow Motion?*, CNN, Nov. 29, 2011.
[35] SYRIA'S MUTATING CONFLICT, INTERNATIONAL CRISIS GROUP 6 (2012).
[36] *Syria Unrest: Who are the Shabiha?*, BBC, May 29, 2012.
[37] Damien Cave & Dalal Mawad, *Ex-Premier Says Syrian Government is Falling Apart*, N.Y. TIMES, Aug. 14, 2012.
[38] *Interactive: Tracking Syria's Defections*, AL JAZEERA, July 30, 2012.
[39] *See* Simon Adams, *The World's Next Genocide*, N.Y. TIMES, Nov. 15, 2012.
[40] THE CONSTITUTION OF THE REPUBLIC OF SYRIA (Feb. 26, 2012), https://www.refworld.org/docid/5100f02a2.html.
[41] *Houla: How a Massacre Unfolded*, BBC, June 8, 2012. For a summary of international responses, see Int'l Coal. For the Responsibility to Protect, *Crisis Update: Massacre in Syria renews calls for immediate action to halt violence* (May 30, 2012).

bullets in their homes.[42] The Security Council unanimously condemned the massacre,[43] and the U.N. Human Rights Council deployed its Commission of Inquiry (COI) to undertake a special investigation with an eye towards holding the perpetrators accountable.[44] These events also activated the U.N. human rights treaty bodies, with the U.N. Committee Against Torture and the U.N. Committee on the Rights of the Child both weighing in with their own condemnation of the events.[45] The massacre, which by many accounts was the work of the *shabiha*, also inspired some of the first calls to refer the situation in Syria to the International Criminal Court.[46] For its part, the Syrian government cynically convened an inquiry that blamed the incident on "terrorists."[47]

The Human Rights Council's COI initially presented three hypotheses as to who was responsible for El-Houla: the *shabiha* operating with the acquiescence, if not support, of government forces; opposition forces seeking to escalate the conflict or punish individuals who had withheld their support; or foreign elements with unknown affiliation.[48] The COI indicated—with what now appears to be misplaced optimism—its intention to save evidence for future accountability purposes.[49] It later concluded that there were "reasonable grounds to believe" that the government was responsible for the massacre and that no evidence supported Assad's version of events.[50] With the benefit of hindsight, this incident portended the level of brutality that this conflict would eventually achieve.

The Initial Response of the International Community

Relations between Syria and the West have long been fraught.[51] Syria has been on the United States' list of state sponsors of terrorism since 1979.[52] Its prolonged alignment with Iran and meddling in Lebanon earned it a place in the United States' sanctions program in 2004.[53] At first, the international community was relatively united in condemning Assad's reaction to the

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[42] Stephanie Nebehay, *Most Houla Victims Killed in Summary Executions: U.N.*, REUTERS, May 29, 2012.
[43] Security Council Press Statement on Attacks in Syria, U.N. Doc. SC/10658 (May 27, 2012); Rory Carrol & Matt Williams, *Syria Condemned by UN Security Council for Houla Massacre*, THE GUARDIAN, May 27, 2012.
[44] Human Rights Council, The Deteriorating Situation of Human Rights in the Syrian Arab Republic, and the Recent Killings in El-Houleh, U.N. Doc. A/HRC/RES/S-19/1, ¶ 8 (June 4, 2012).
[45] Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/20/CRP.1, ¶ 33 (June 26, 2012).
[46] Carrol & Williams, *supra* note 43.
[47] A/HRC/20/CRP.1, *supra* note 45, ¶¶ 26–30; *see also* Neil MacFarquhar, *Assad Condemns Houla Massacre, Blaming Terrorists*, N.Y. TIMES, June 3, 2012.
[48] A/HRC/20/CRP.1, *supra* note 45, ¶ 48.
[49] *Id*. ¶ 60.
[50] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/21/50, ¶¶ 44–50 (Aug. 15, 2012).
[51] *See* ANDREW TABLER, IN THE LION'S DEN: AN EYEWITNESS ACCOUNT OF WASHINGTON'S BATTLE WITH SYRIA (2011).
[52] *State Sponsors of Terrorism*, U.S. DEP'T OF STATE, https://www.state.gov/j/ct/list/c14151.htm (last visited Feb. 9, 2019).
[53] Exec. Order No. 13338, Blocking Property of Certain Persons and Prohibiting the Export of Certain Goods to Syria, 69 Fed. Reg. 26751 (May 13, 2004). Indeed, Syria had long interfered in Lebanon viewing it as an extension of its own territory. With a significant push from the U.N. Security Council, the Special Tribunal for Lebanon opened its doors in 2009 to prosecute the perpetrators of the assassination and related acts of terrorism. S.C. Res. 1757, ¶ 3, U.N. Doc. No. S/RES/1757 (May 20, 2007). Unable to gain custody over the accused, the Tribunal is proceeding *in absentia* against four defendants (a fifth was killed in battle in Syria where he allegedly commanded Hezbollah forces). *Hariri Assassination Suspects 'On the Run' as Lebanon Tribunal Nears End*, ALARABY, Sept. 9, 2018; *Hezbollah Commander Badreddine Killed in Syria*, BBC, May 13, 2016.

uprising.[54] Even Russia and China were critical of Assad's disproportionate response, although Russia's rhetoric regularly bestowed equal condemnation on terrorist elements and foreign interference.[55] The U.N. Human Rights Council began holding a series of special sessions devoted to Syria, resulting in the establishment of a Fact-Finding Mission (FFM)[56] and then a COI[57] to document the abuses and identify those responsible with an eye towards future accountability. Assad largely denied unfettered territorial access to these missions as well as to many humanitarian groups, exacerbating the crisis.[58] By September 2011, the FFM described the violence in Syria as rising to the level of crimes against humanity.[59] The COI followed suit and continues to issue harrowing reports. Hundreds of names of potential perpetrators have been compiled and remain under seal at the U.N. Office of the High Commissioner for Human Rights.[60]

The United States and the European Union (EU) initially reacted to the escalation of violence with waves of additional sanctions against Syrian officials and entities.[61] These sanctions were later expanded to include Assad and others within his inner circle through various executive orders and the Caesar Syrian Civilian Protection Act of 2019, which was integrated into the 2019 National Defense Authorization Act.[62] Syrian oil imports were banned on August 17, 2011.[63] In August 2011, President Barack Obama and other world leaders called upon Assad to step down.[64] It has been argued that this stance emboldened the opposition, made it more difficult to conceptualize inclusive options for resolving the conflict in which all sides have a stake in the outcome, encouraged the Gulf states to flood the opposition with resources, and created unrealistic expectations that NATO would commence airstrikes to forcibly remove a pariah leader, as it had done in Libya.[65] At the same time, the comment could be interpreted to be a call for a negotiated political process, although even then, it was difficult to imagine a return to normalcy with so much blood on Assad's hands.

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[54] *See* MARTY HARRIS, INTERNATIONAL RESPONSES TO THE SYRIAN UPRISING: MARCH 2011–JUNE 2012, PARLIAMENT OF AUSTRALIA (2012), https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/SyrianUprising#_ftnref27.

[55] *See* U.N. SCOR, 66th Sess., 6524th mtg., U.N. Doc. S/PV.6524, at 7 (Apr. 27, 2011) ("Like other members of the Security Council, the Russian Federation views with great concern the increasing tension and manifestations of confrontation in Syria, which are claiming victims and causing suffering among the demonstrators, law enforcement personnel and the army.") (statement of Russia).

[56] *See* U.N. Doc. A/HRC/RES/S-16/1 (Apr. 29, 2011).

[57] *See* U.N. Doc. A/HRC/RES/S-17/1 (Aug. 23, 2011).

[58] Kersten Knipp, *Assad Cannot Legally Deny Humanitarian Aid, Study Finds*, DEUTSCHE WELLE, May 7, 2014.

[59] *See* Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic, U.N. Doc. A/HRC/18/53, ¶ 69 (Sept. 15, 2011) (describing patterns of violence that may amount to crimes against humanity).

[60] Margaret Besheer, *UN Commission May Name Alleged War Criminals in Syria*, VOA, Feb. 20, 2015.

[61] *See, e.g.*, Exec. Order No. 13572, Blocking Property of Certain Persons With Respect to Human Rights Abuses in Syria, 76 Fed. Reg. 24787 (May 3, 2011) (targeting three Syrian officials—including Ali Mamluk, the director of the Syrian General Intelligence Directorate—the Intelligence Directorate itself, and the Iranian Islamic Revolutionary Guard Corps for providing material support to the Syrian government); Exec. Order No. 13573, Blocking Property of Senior Officials of the Government of Syria, 76 Fed. Reg. 29143 (May 20, 2011).

[62] Deborah Amos, *Congress Authorizes Sanctions on Syria, Iran and Russia*, NPR (Dec. 17, 2019); H.R. 31: Caesar Syria Civilian Protection Act of 2019, https://www.govtrack.us/congress/bills/116/hr31/text.

[63] Exec. Order No. 13582, Blocking Property of the Government of Syria and Prohibiting Certain Transactions with respect to Syria, 76 Fed. Reg. 52209 (Aug. 22, 2011).

[64] Jason Ukman & Liz Sly, *Obama: Syrian President Assad Must Step Down*, WASH. POST, Aug. 18, 2011.

[65] Javier Solana, *The Demise of Western Illusions in Syria*, JORDAN TIMES, Jan. 28, 2019.

The League of Arab States reacted in kind and, in a bold move, suspended Syria's membership in November 2011.[66] The League also imposed a travel ban and asset freeze on top Syrian officials[67] and launched an unprecedented, if short-lived, Observer Mission.[68] In February 2012, the United States shuttered its embassy in Damascus after Assad supporters managed to scale the walls.[69] Ambassador Robert S. Ford, who had left Syria briefly in October 2011 for security reasons, permanently returned to Washington, D.C., where he continued to work on Syrian issues until 2014, ultimately becoming the U.S. representative to the opposition.[70] After the El-Houla massacre in May 2012, the Obama Administration expelled the Syrian *chargé d'affaires*.[71] Secretary of State Hillary Rodham Clinton called upon states to join the Friends of the Syrian People (FOSP), an alliance dedicated to standing by the people, not the government. Clinton also pledged support for an accountability effort in April 2012, which became the Syria Justice and Accountability Center (SJAC). In July 2012, the U.S. Treasury Department authorized the Syrian Support Group to raise funds for the Free Syrian Army.[72]

The Opposition's Perpetual Rearrangements

Finding a reliable partner for multilateral engagement within the opposition emerged as a perennial challenge for the international community, particularly once the conflict metastasized; the opposition splintered and then oscillated among different alliances; and *jihadist* elements entered the mix. Although Syrian civil society had been significantly weakened under the Assads' rule, protesters did begin to organize as the revolution unfolded. Hundreds of Local Coordination Committees (LCCs) (*tansiqiyat*) cropped up to disseminate information, coordinate anti-regime protests, and distribute humanitarian relief.[73] Turkey played host to meetings of the Syrian National Council (SNC), a nascent opposition umbrella organization originally aligned with the LCCs. As the SNC devolved into in-fighting, lost credibility, and failed to unite the opposition,[74] the National Coalition for Syrian Revolutionary and Opposition Forces (or the Syrian Opposition Coalition (SOC) for short) emerged from a 2012 meeting in Doha, Qatar, as a rival, and more expansive, representative of the revolution, although there was considerable overlap between the two organizations.[75] Elements of the international community—including the United States, the United Kingdom, Turkey, France, and the Gulf States—eventually recognized the SOC as "the legitimate representative" of the Syrian people.[76] (A number of states—including the United

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[66] Neil MacFarquhar, *Arab League Votes to Suspend Syria Over Crackdown*, N.Y. TIMES, Nov. 12, 2011.
[67] *See* U.N. SCOR, 67th Sess., 6710th mtg., U.N. Doc. S/PV.6710 (Jan. 31, 2012) (recounting briefings by the Prime Minister of Qatar and the Secretary-General of the League of Arab States on the League's activities vis-à-vis Syria).
[68] LEAGUE OF ARAB STATES OBSERVER MISSION TO SYRIA, REPORT OF THE HEAD OF THE LEAGUE OF ARAB STATES OBSERVER MISSION TO SYRIA FOR THE PERIOD FROM 24 DECEMBER 2011 TO 18 JANUARY 2012 (2012); *see Arab League Suspends Syria Observer Mission*, VOA, Jan. 27, 2012.
[69] Anthony Shadid, *U.S. Embassy in Syria Closes as Violence Flares*, N.Y. TIMES, Feb. 6, 2012. The Czech Republic now serves as the United States' Protecting Power. Emily Tamkin, *Americans, Need Help in Syria? Call the Czechs*, FOREIGN POLICY, Aug. 4, 2017.
[70] Michael R. Gordon, *U.S. Representative to Syrian Opposition is Retiring*, N.Y. TIMES, Feb. 4, 2014.
[71] For a detailed discussion of U.S. policy in Syria, see CARLA E. HUMUD ET AL., CONG. RESEARCH SERV., RL33487, ARMED CONFLICT IN SYRIA: OVERVIEW AND U.S. RESPONSE 9 (Mar. 25, 2019) [hereinafter *CRS Report*].
[72] *How Safe Are Donations to Syrian Rebels?*, NPR, Aug. 9, 2012.
[73] Carnegie Middle East Center, *Local Coordination Committees of Syria*, DIWAN (Dec. 20, 2012).
[74] *See Guide to the Syrian Opposition*, BBC, Oct. 17, 2013.
[75] Carnegie Middle East Center, *National Coalition for Syrian Revolutionary and Opposition Forces*, DIWAN (Jan. 11, 2013). The SOC was also represented within the Arab League.
[76] Stefan Talmon, *Recognition of Opposition Groups as Legitimate Representative of a People*, 12 CHINESE J. INT'L L. 219 (2013) (discussing the international community's political recognition of the Coalition).

States—hedged at first, recognizing the group as "a" legitimate representative).[77] Recognition can be significant, because it legitimates the group's struggle against the *de jure* government, can enable certain forms of aid and assistance without running afoul of the principle of non-intervention, accord standing to the group within international organizations, and make frozen government assets available.[78]

Although members of the international community often bemoan the "divided opposition," others who have worked with the Syrian opposition insist that this observation is overblown and an excuse articulated by international actors to justify their inaction. According to one observer who has participated in peace negotiations, "[t]he opposition is a collection of individuals from various political, ideological, and sociological backgrounds with a common belief that the Syrian government should be more representative and accountable with a firmer grounding in human rights (and often in agreement that this cannot be achieved with Assad in power)—it is inevitable that there are disagreements between them about how to achieve this."[79]

Two hallmarks of the conflict's first few years deserve mention. First is the fact that the protests of ordinary Syrians remained peaceful, even as the violence and atrocities around them escalated. Surprising to many, demonstrations even continued in the early days after the Islamic State in Iraq and the Levant (ISIL) took Raqqa. This commitment to the peaceful exercise of Syrian's civil and human rights stands as a testament to the principles of justice, democracy, pluralism, and secularism underlying the revolution, particularly in the face of the government's use of disproportionate force and the emergence of groups driven by religious extremism.

Second is the role of women in the revolution. One of the first people to start documenting atrocities—and training others to do so—was Razan Zaitouneh, a human rights lawyer with the Violations Documentation Center.[80] Zaitouneh—deemed an "icon of the revolution"[81] and a recipient of the prestigious Sakharov Prize—was instrumental in standing up the LCCs and building a network of activists working against the regime and against extremism within the opposition. She was disappeared in December 2013 in Douma, and her whereabouts remain unknown.[82] It was hoped that her fate would be revealed once government forces retook Tawbeh Prison in Douma in 2018, which had been occupied by the so-called Army of Islam (*Jaish al-Islam*), a hardline opposition group long suspected in her kidnapping. Alas, it was not to be, and the complete circumstances of her disappearance remain a mystery.[83] This may yet change, however. In early 2020, France charged a member of the Army of Islam—Majdi Mustafa Nameh a.k.a. Islam Alloush—with torture, forced disappearances, and war crimes in connection with Zaitouneh's disappearance.[84] Although women have been the victims of war crimes and crimes

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[77] *Id*. at 221–23.
[78] Stefan Talmon, *Recognition of the Libyan National Transitional Council*, 16 ASIL INSIGHTS (June 16, 2011).
[79] Email from Betsy Popken, Special Counsel, Orrick, to author (Apr. 23, 2019) (on file with author).
[80] Razan Zaitouneh, VITAL VOICES, https://www.vitalvoices.org/people/razan-zaitouneh/; Razan Zaitouneh, FRONTLINE DEFENDERS, https://www.frontlinedefenders.org/en/profile/razan-zaitouneh.
[81] Nidal Bitari, Stanford University, February 20, 2019.
[82] Karam Nachar, *Who's Afraid of Razan Zaitouneh?*, AL-JUMHURIYA (Dec. 9, 2017).
[83] Bassem Mroue, *Clues but no Answers in one of Syria War's Biggest Mysteries*, FOX NEWS (Aug. 13, 2018).
[84] *France Arrests Syrian Islamist on War Crimes Charges*, FRANCE24, Jan. 31, 2020.

against humanity throughout the conflict—and they are often exclusively portrayed as such by the media—they have also been agents of the revolution since the beginning.[85]

The Warring Parties

The violence in Syria remained starkly asymmetrical until late spring 2011 when an organized armed opposition, made up of Syrian army defectors and rebels drawn from the civilian ranks, began to coalesce and engage government forces. The Free Syrian Army (FSA) announced itself in July 2011 with an intent to protect peaceful protesters and resist the security forces.[86] Following a meeting organized by the FOSP, the FSA created a Supreme Joint Military Command of the Syrian Revolution in December 2012 to coordinate the operations of various insurgent groups on the ground and to improve communications with the nascent political opposition.[87] Much of the FSA's leadership was billeted in Turkey or Jordan; it remains a loose and fluid conglomeration of armed groups, often without a unified command.[88] Opposition forces began to attack military targets, such as an army base outside of Damascus, signaling their growing strength. Syrian government forces responded by bombarding opposition strongholds. Homs was particularly hard hit.

In June 2012, elements within the opposition began to hold territory and stand up quasi-governmental entities. In July 2012, members of the opposition successfully bombed the National Security headquarters in the heart of Damascus, killing a number of Assad's top aides including the Minister of Defense.[89] By mid-2012, the International Committee of the Red Cross (ICRC)[90] and U.N. observers[91] began describing events as a full-scale "civil war" subject to the international humanitarian law (IHL) governing non-international armed conflicts.[92] After the opposition won some tactical victories and gained control of several key cities in 2013, its fortunes reversed course. This was due in part to ineffective governance and the emergence of rival Islamist groups, such as the Nusra Front, that were unaligned with prior opposition forces and did not necessarily espouse the secular and pluralist ideals of the original revolution. [93] Also consequential at this point: Iran and Lebanese Hezbollah had come to Assad's defense.

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[85] *See Women in the Syrian Revolution*, PEACEFARE.NET (Sept. 30, 2013), https://www.peacefare.net/2013/09/30/women-in-the-syrian-revolution/; Elizabeth Hagedon & Hussein Akoush, *Syrian Revolution Changed how Women are Viewed in the Workplace*, PRI, Aug. 30, 2018.
[86] *See generally* Charles Lister, *The Free Syrian Army: A Decentralized Insurgent Brand*, BROOKINGS (Nov. 2016) (discussing the FSA's formation).
[87] ELIZABETH O'BAGY, THE FREE SYRIAN ARMY (2013).
[88] *See* Lucas Winter, *A Modern History of the Free Syrian Army in Daraa*, FMSO Monographs (Nov. 1, 2013).
[89] Neil MacFarquhar, *Syrian Rebels Land Deadly Blow to Assad's Inner Circle*, N.Y. TIMES, July 18, 2012.
[90] *ICRC Declares Syrian Conflict a Civil War*, CHANNEL 4 NEWS, July 15, 2012; Rogier Bartels, *Follow-Up on the Organisational Requirement: ICRC Statements and Conflict Qualification*, ARMED GROUPS AND INTERNATIONAL LAW (Aug. 10, 2012). The ICRC generally communicates confidentially with the parties at first, with an eye toward ensuring their respect for international humanitarian law, before making its classification determinations public. *See Internal Conflicts or Other Situations of Violence—What Is the Difference for Victims?*, ICRC (Dec. 10, 2012) (interview with Kathleen Lawand).
[91] Louis Charbonneau, *Syria Conflict now a Civil War, UN Peacekeeping Chief Says*, REUTERS, June 12, 2012.
[92] *See* JOSEPH HOLLIDAY, THE ASSAD REGIME: FROM COUNTERINSURGENCY TO CIVIL WAR (2013).
[93] The Nusra Front—considered to be the branch of Al Qaida operating in Syria—has also been known as Jabhat Fateh Al-Sham and then Hay'at Tahrir al-Sham. *See* Counter Extremism Project, *Nusra Front (Jabhat Fateh Al-Sham)*, https://www.counterextremism.com/threat/nusra-front-jabhat-fateh-al-sham. Its rebranding has been described as an effort to distance itself from Al Qaida, although some observers are skeptical. *See* Colin P. Clarke, *Al Qaeda in Syria Can Change Its Name, But Not Its Stripes*, RAND CORP. (Mar. 23, 2017).

By 2015, components of the armed opposition—which encompassed upwards of 1,500 different armed groups that can be plotted along a continuum of secular to Islamist to "*jihadist*"—had formed a second alliance under the banner of the Syrian Democratic Forces (SDF), a loose association dominated by Kurdish fighters in the form of People's Protection Units (YPG).[94] The prominence of the latter, and their overt coordination with Western forces, endured as a source of vexation for Turkey. Indeed, Turkey, which views the Syrian Kurds as an extension of the Turkish Kurdish Workers' Party (PKK) militia that shares its irredentist aims, has unilaterally engaged YPG forces in Syria.[95] Opposition groups made some advances in 2015, which precipitated Russia's entrance into the conflict in September 2015.[96] As the war wore on, Assad either retook, or allowed opposition fighters to withdraw from, areas that had been under control of the ISIL or the opposition, such as Homs and Aleppo—all with Russian assistance.

The Islamic State

The emergence of ISIL in Syria in April 2013 triangulated the violence, adding a new and brutal set of perpetrators into the mix while complicating the conflict's geopolitics.[97] The presence of ISIL, and its exclusion from the various ceasefire attempts between the government and the opposition, has confounded efforts to bring a pause, no less an end, to the fighting to facilitate humanitarian aid and political dialogue.

ISIL traces its roots to Al Qaida in Iraq (AQI), originally founded by the late Abu Musab al-Zarqawi.[98] By February 2014, however, Al Qaida had officially cut ties with ISIL.[99] Eventually, AQI declined in significance in Iraq, but found new life in the Syria civil war. It rebranded itself multiple times: starting with the Islamic State of Iraq and al-Sham (ISIS), the Islamic State of Iraq and the Levant (ISIL), and finally the Islamic State to signal its global and sovereign aspirations.[100] Meanwhile, Syrians call the group *Da'esh*, a derogatory acronym derived from the group's name in Arabic. In contrast to Al Qaida's erstwhile affiliate in Syria, the Nusra Front, which has sometimes cooperated with rebel forces against the Assad government, ISIL has refused to align itself with groups it deems infidels, even if they share a common enemy.[101] ISIL's largely unchallenged recruitment efforts inspired upwards of forty thousand foreign fighters from over a hundred countries to flock to the region.[102] ISIL's ranks swelled with recruits whose reasons for joining the fight are as varied as they are astonishing: an ardent desire to help build the imagined

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[94] For a history of the SDF, see Dan Stigall, *The Syrian Detention Conundrum: International & Comparative Legal Complexities*, 11 HARV. NAT'L SEC. J. 54, 61-62 (2020).
[95] Terry D. Gill, *Classifying the Conflict in Syria*, 92 INT'L L. STUD. 353, 376 (2016). The PKK is a designated terrorist organization in the United States.
[96] Lister, *supra* note 86, at 9.
[97] *See* Cameron Glenn, *Timeline: The Rise, Spread and Fall of the Islamic State*, WILSON CTR. (July 5, 2016).
[98] Mary Anne Weaver, *The Short, Violent Life of Abu Musab al-Zarqawi*, THE ATLANTIC, July/Aug. 2006. *See generally* Ahmed S. Hashim, *The Islamic State: From Al-Qaeda Affiliate to Caliphate*, 21 MIDDLE EAST POL'Y COUNCIL J. 69 (2014).
[99] Liz Sly, *Al-Qaeda Disavows Any Ties with Radical Islamist ISIS Group in Syria, Iraq*, WASH. POST, Feb. 3, 2014. *See generally* Aaron Y. Zelin, *The War between ISIS and al-Qaeda for Supremacy of the Global Jihadist Movement*, WASH. INST. (June 2014).
[100] *See Mapping Militant Organizations, Syria*, Stanford University, http://web.stanford.edu/group/mappingmilitants/cgi-bin/maps/view/syria; Taylor Wofford, *ISIL, ISIS or IS? The Etymology of the Islamic State*, NEWSWEEK, Sept. 16, 2014.
[101] Lister, *supra* note 86, at 10.
[102] Robin Wright, *Are We Nearing the Endgame with ISIS?*, THE NEW YORKER (July 27, 2017) (interview with Brett McGurk, Special Presidential Envoy for the Global Coalition to Counter ISIS).

caliphate, the search for means or meaning, a quest to bring down Assad, an opportunity to test or attest to their faith, and love.[103]

ISIL declared a cross-border caliphate in June 2014, with Raqqa as its Syrian capital[104] and the late Abu Bakr al-Baghdadi—once imprisoned by U.S. troops in Iraq—as its leader.[105] At its peak, it was able to fly its ominous black flags over significant territory in Syria, holding roughly 25% of the country, exerting influence in 10 of the country's fourteen governorates, and subjecting over eight million people to its cruel regime.[106] This reach gave it access to oil fields and refineries, priceless antiquities, and banks—all of which enriched its coffers to the tune of millions of dollars per month.[107] As it expanded its operations, ISIL followed a bureaucratic, systematized process, establishing "intelligence operations, followed by military operations, *dawa* (missionary) activities, *hisba* activities (moral policing and consumer protection), and governance."[108] According to Aymenn al Tamimi, arguably the foremost translator and publisher of original ISIL documents:

> after the declaration of the Caliphate, documentary evidence shows the emergence of various so-called *Diwans*: institutions corresponding to government departments or ministries. The image of governance presented is accordingly much more comprehensive, pointing to local administrations of various realms of daily life that may also answer to higher central departments whose authority in the issuing of edicts should span the entirety of Islamic State territory.[109]

In September 2014, the United States announced an international coalition to defeat ISIL[110] and began rolling back ISIL's conquests in Iraq and then in Syria alongside Western, Syrian, SDF, and opposition forces, some of whom were simultaneously embattled with each other.[111] The SDF successfully attacked Raqqa in June 2017 with support from U.S. air strikes and special forces. By October 2017, ISIL's one-time capital had been largely liberated,[112] with ISIL fighters evacuating with the protection of forced civilian shields.[113] Although successful at routing ISIL, the operation came at great cost to the civilian infrastructure and population.[114] In November 2017, the Syrian

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[103] Vera Mironova & Sam Whitt, *A Glimpse into the Minds of Four Foreign Fighters in Syria*, COMBATING TERRORISM CTR. (June 2014).
[104] *See* Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *Rule of Terror: Living under ISIS in Syria*, U.N. Doc. A/HRC/27/CRP.3 (Nov. 14, 2014) at 13.
[105] Michael Pizzi, *In Declaring a Caliphate, Islamic State Draws a Line in the Sand*, AL JAZEERA, June 30, 2014.
[106] *See* CHARLES LISTER, AL QAEDA, THE ISLAMIC STATE AND THE EVOLUTION OF AN INSURGENCY 186 (2015).
[107] SETH G. JONES, ET AL., ROLLING BACK THE ISLAMIC STATE 20 (2017).
[108] Joby Warrick, et al., *The Rise of ISIS: 'Remaining and Expanding*,' WASH. INST., Nov. 12, 2015 (statement of Aaron Zelin).
[109] Aymenn al-Tamimi, *The Evolution in Islamic State Administration: The Documentary Evidence,* 9 PERSPECTIVES ON TERRORISM 123 (August 2015).
[110] U.S. Dep't of State, The Global Coalition to Defeat ISIS, https://www.state.gov/s/seci/ (last visited Feb. 11, 2019); Claire Mills and Louisa Brooke-Holland, *House of Commons Briefing Paper No. 06995, ISIS/Daesh: The Military Response in Iraq and Syria*, July 7, 2015.
[111] Josie Ensor, *ISIL Defeated in its Last Syrian Town as Jihadists Mount Final Stand*, THE TELEGRAPH, Dec. 14, 2018.
[112] Anne Barnard & Hwaida Saad, *Raqqa, ISIS 'Capital,' Is Captured, US-Backed Forces Say*, N.Y. TIMES, Oct. 17, 2017.
[113] *Syrian Islamic State Fighters Evacuate Raqqa City—SDF*, REUTERS, Oct. 14, 2017.
[114] Amnesty International, *Syria: US-led Coalition 'Deeply in Denial' about Civilian Casualties in Raqqa*, July 17, 2018.

government declared victory over ISIL in Deir al-Zour, the epicenter of Syria's oil industry.[115] It was not until March 2019 that the last territorial stronghold in the village of Baghouz was liberated by the SDF and friends.[116] Clean up operations were launched to identify remaining ISIL loyalists, which may number in the thousands even as the physical caliphate is no more.[117]

Hundreds of detainees from upwards of 40 countries found themselves in SDF custody, and the United States began seeking their repatriation for the purpose of prosecution or other disposition in their countries of origin.[118] Concerns that many of these detainees have escaped and are poised to regroup have mounted following President Trump's surprise, and controversial, order to U.S. forces to withdraw in late 2018.[119] What to do with the families of ISIL fighters remains a dilemma, many of whom are languishing in refugee camps. Kosovo and some Central Asian states (notably Kazakhstan[120]) have taken back their citizens with little protest. By contrast, Western European states have resisted, at times allowing the most vulnerable (e.g., orphans) to return but revoking the citizenship of adults who traveled to the region.[121] Such moves threaten to render these individuals stateless, potentially in violation of international law. The 1961 Convention on the Reduction of Statelessness, for example, generally disallows for such revocations except under certain enumerated grounds, such as if the individual's nationality was procured by fraud, if the individual has "conducted himself in a manner seriously prejudicial to the vital interests of the State," or if an individual "has taken an oath, or made a formal declaration, of allegiance to another State, or given definitive evidence of his determination to repudiate his allegiance to the Contracting State"—all scenarios that might cover someone joining ISIL.[122] Other human rights instruments also speak to the right to a nationality.[123]

War Crimes & Chemical Weapons

Amidst this ever-evolving conflict, evidence of war crimes mounted.[124] In January 2014, graphic images of industrial-grade torture and murder were smuggled out of the country by a forensic photographer code-named "Caesar."[125] U.S. intelligence later suggested that a crematorium was being used to dispose of the bodies.[126] Although torture in Syrian detention

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[115] *Syria Declares Victory over Islamic State in Deir al-Zor*, REUTERS, Nov. 3, 2017.
[116] Ben Wedeman & Lauren Said-Moorhouse, *ISIS has Lost its Final Stronghold in Syria, the Syrian Democratic Forces Says*, CNN, Mar. 23, 2019.
[117] Ellen Mitchel, *Experts Warn ISIS Still Has Up to 10,000 Loyalists in Syria, Iraq: Report*, THE HILL, Jan. 22, 2018.
[118] *Media Roundtable with General Joseph F. Dunford and Special Envoy Brett McGurk*, U.S. DEP'T OF DEF., Oct. 16, 2018.
[119] Daniel Byman, *Trump's Syria Pullout: A Quick Assessment*, LAWFARE (Dec. 20, 2018).
[120] *See* Stevan Weine, *Rehabilitating the Islamic State's Women and Children Returnees in Kazakhstan*, JUST SECURITY (Dec. 12, 2019).
[121] Letta Taylor, *Western Europe Must Repatriate its ISIS Fighters and Families*, HUMAN RIGHTS WATCH (June 21, 2019).
[122] U.N. Convention on the Reduction of Statelessness art. 8, Aug. 30, 1961, 989 U.N.T.S. 175. The Treaty is not well subscribed to, although many European states have acceded to it. *See* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&clang=_en#2 (last visited Mar. 5, 2020).
[123] *See generally* Shiva Jayaraman, *International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters*, 17 CHIC. J. INT'L L. 178, 191-193 (2016) (compiling human rights provisions).
[124] *See generally* Beth Van Schaack, *Mapping War Crimes in Syria*, 92 INT'L L. STUD. 282 (2016) (cataloguing war crimes being committed).
[125] HUMAN RIGHTS WATCH, SYRIA: STORIES BEHIND PHOTOS OF KILLED DETAINEES (2015).
[126] Kylie Atwood, *State Department Says Crematorium Installed at Syrian Prison*, CBS NEWS, May 15, 2017.

centers was by no means a new phenomenon,[127] these images offered stark evidence of the Assad regime's tried-and-true method for dealing with real or imagined dissent on an industrial scale. The government's depredations extended to the battlefield: government forces dropped barrel bombs from helicopters in civilian areas in breach of Security Council resolutions[128] and resorted to medieval-style siege warfare and the deliberate starvation of the civilian population.[129] Although the opposition began on the high road, and made deeds of commitment to adhere to IHL,[130] rebel elements have been associated with abuses[131]—although on a significantly lesser scale—including the kidnapping, torture, and summary execution of government forces[132] and the use of child soldiers.[133] ISIL significantly added to the mayhem; in addition to attacking civilians associated with the regime and the opposition, ISIL also established a transnational system of child soldiers and sexual slavery that included trafficking Yezidi women and children from Iraq into Syria.[134]

Given Syria's extensive pre-war stockpiles, the threat of chemical weapons use was ever-present as the conflict unfolded. It appears that chemical weapons were first used in December 2012 in Homs and then in March 2013 in the form of a sarin gas attack that killed twenty-six people in Khan al-Assal.[135] As these threats began to materialize, with rumors circulating there was activity at chemical weapons storage sites or even that the regime had begun mixing the precursors required to make sarin nerve gas, President Obama, in impromptu remarks, announced that the use of chemical weapons would cross a "red line" and change his calculus towards the conflict.[136] Specifically, he stated: "We have been very clear to the Assad regime—but also to other players on the ground—that a red line for us is we start seeing a whole bunch of chemical weapons moving around or being utilized. That would change my calculus; that would change my equation."[137] In August 2013, in Ghouta, a rebel-held suburb of Damascus, hundreds suffocated in another presumed attack, also involving sarin gas.[138] Following the emergence of graphic images of victims convulsing and foaming at the mouth, Obama began the process of seeking Congressional approval to respond militarily.[139] When it became clear from Congressional debates that this authority would not be forthcoming, Obama—not without controversy—withdrew this threat and backed a deal brokered by Russia.[140] Obama's decision to turn the decision over to

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[127] *See* AMNESTY INTERNATIONAL, SYRIA TORTURE BY THE SECURITY FORCES (1987).
[128] *See, e.g.*, S.C. Res. 2139, ¶ 3, U.N. Doc. S/RES/2139 (Feb. 22, 2014).
[129] *See* Beth Van Schaack, *Siege Warfare and the Starvation of Civilians as a Weapon of War and War Crime*, JUST SECURITY (Feb. 4, 2016).
[130] *See generally Syria: 4 brigades of the Free Syrian Army commit to prohibit sexual violence and the use of child soldiers*, GENEVA CALL (July 3, 2017).
[131] HUMAN RIGHTS WATCH, SYRIA: ARMED OPPOSITION GROUPS COMMITTING ABUSES (2012).
[132] Geneva Call, *supra* note 130.
[133] *See* Report of the Secretary-General, Children and Armed Conflict, U.N. Doc. A/72/865-S/2018/465 (May 16, 2018), at ¶¶ 184–87.
[134] HUMAN RIGHTS WATCH, IRAQ: WOMEN SUFFER UNDER ISIS (2016).
[135] *Timeline of Syrian Chemical Weapons Activity, 2012–2018*, Arms Control Association; *Timeline: Chemical Weapons Use in Syria's Civil War*, HAARETZ, Apr. 4, 2017.
[136] James Ball, *Obama Issues Syria a 'Red Line' Warning on Chemical Weapons*, WASH. POST, Aug. 20, 2012.
[137] *Obama: Chemical Weapons in Syria Are a "Red Line"*, CBS NEWS, Aug. 20, 2012; *Obama Warns Syria not to Cross "Red Line,"* CNN, Aug. 21, 2012.
[138] Ben Hubbard & Hwaida Saad, *Images of Death in Syria, but No Proof of Chemical Attack*, N.Y. TIMES, Aug. 21, 2013.
[139] Mark Landler and Jonathan Weisman, *Obama Delays Syria Strike to Focus on a Russian Plan*, N.Y. TIMES, Sept. 10, 2013.
[140] Mariam Karouny, *Destruction of Syrian Chemical Weapons Begins Mission*, REUTERS, Oct. 6, 2013.

Congress was heralded as one of the flaws of his presidency once it became clear that his red line had been interpreted as a green light by the Assad regime.[141] Others have argued that Obama's threat of force spurred a massive multilateral mobilization that ultimately led to the elimination of much of Assad's chemical weapon stockpiles and was an example of the effective use of coercive diplomacy.[142]

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As part of the Russia-brokered Framework Agreement for the Elimination of Syrian Chemical Weapons, Assad agreed to turn over the country's chemical weapons stockpiles for destruction[143] and ratify the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC).[144] Months later, the Organization for the Prohibition of Chemical Weapons (OPCW) ultimately certified that 1,300 metric tons of chemical weapons and their precursors had been destroyed, and the facilities for their replacement rendered inoperative. Nonetheless, the accuracy of the government's declaration of existing stocks, the thoroughness of this removal process, and the genuineness of Assad's commitment to renounce these weapons have been repeatedly called into question as chemical weapons attacks continued. Indeed, in August 2015 and several times thereafter, Assad reportedly

[141] Hisham Melhem, *How Obama's Syria Chemical Weapons Deal Fell Apart*, THE ATLANTIC, Apr. 10, 2017 (arguing that the failure of the chemical weapons deal is a tale of "Syrian deception, Russian duplicity and American dithering"). Senator John McCain tweeted that the failure to penalize earlier gas attacks had emboldened Assad. Dominic Evans and Khaled Yacoub Oweis, *Syria Gas 'Kills Hundreds,' Security Council Meets*, REUTERS, Aug. 21, 2013.

[142] Derek Chollet, *Obama's Red Line, Revisited*, POLITICO, July 19, 2016.

[143] Michael Gordon, *U.S. and Russia Reach Deal to Destroy Syria's Chemical Arms*, N.Y. TIMES, Sept. 14, 2013.

[144] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 317; Arms Control Association, *Chemical Weapons Convention Signatories and States-Parties* (June 2008), https://www.armscontrol.org/factsheets/cwcsig. In a letter to the U.N. Secretary-General, Syria indicated it would observe its CWC obligations immediately rather than wait 30 days from the date of accession, as provided for by the treaty. *Id*.

attacked civilians with chlorine gas, an agent that was not part of the OPCW's weapons elimination program though its use in combat is prohibited by the CWC.[145] ISIL also appeared to have either acquired mustard gas stockpiles that escaped elimination under the OPCW process or developed the capacity to weaponize these chemicals itself given confirmed use in 2015 near Aleppo (and also in Iraq in the vicinity of U.S. and Kurdish forces).[146] Investigations under the purview of the United Nations, the COI, and the OPCW have confirmed attacks and allocated responsibility, as discussed in chapter 8 on new modalities of documentation.

An airborne nerve gas attack in Khan Sheikhoun in April 2017 appeared to implicate Syria or Russia as the only states in the air at the time.[147] Newly-elected President Donald Trump responded soon after with air strikes on the Al Shayrat airbase where the attack was presumed to have originated, indicating in his 48-hour War Powers Act Report an intention to "degrade the Syrian military's ability to conduct further chemical weapons attacks."[148] Renewed strikes on what were identified as fundamental elements of Syria's chemical weapon infrastructure[149] followed an apparent chemical weapon attack in the suburb of Douma in April 2018.[150] At first, the U.S. government did not provide a domestic or international law justification for this response, other than to indicate the intent to "prevent and deter the spread and use of deadly chemical weapons."[151] In language sounding of reprisals, the Trump administration later asserted inherent domestic legal authority for such strikes under Article II of the U.S. Constitution to advance important national interests in "averting a worsening catastrophe in Syria, and specifically deterring the use and proliferation of chemical weapons."[152] In a briefing, Pentagon officials avoided the *jus ad bellum* issues and focused on the strikes' compliance with the *jus in bello*.[153] The Department of Justice's Office of Legal Counsel finally issued an official opinion on the legality of the airstrikes in May 2018, citing the convergence of domestic and international legal justifications for the use of force, including humanitarian concerns and the need to deter the proliferation of chemical weapons.[154] For its part, after starting with an individual and collective (on behalf of Iraq) self-defense

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[145] David Welna, *5 Questions About Syria and Chemical Weapons*, NPR, Apr. 9, 2018.
[146] Columb Strack, *The Evolution of the Islamic State's Chemical Weapons Efforts*, COUNTER TERRORISM CTR. (Oct. 2017).
[147] Anne Barnard and Michael Gordon, *Worst Chemical Attack in Years in Syria; U.S. Blames Assad*, N.Y. TIMES, Apr. 4, 2017; *OPCW Director-General Shares Incontrovertible Laboratory Results Concluding Exposure to Sarin*, ORG. FOR THE PROHIBITION OF CHEMICAL WEAPONS, Apr. 19, 2017.
[148] Michael Gordon, Helene Cooper & Michael D. Shear, *Dozens of U.S. Missiles Hit Air Base in Syria*, N.Y. TIMES. Apr. 6, 2017; Communication from the President of the United States, *Notification of Missile Strikes on the Shayrat Military Airfield in Syria* (Apr. 8, 2017).
[149] Department of Defense Press Briefing by Pentagon Chief Spokesperson Dana W. White and Joint Staff Director Lt. Gen. Kenneth F. McKenzie Jr. in the Pentagon Briefing Room, Apr. 14, 2018.
[150] *See* ORGANIZATION FOR THE PROHIBITION OF CHEMICAL WEAPONS, 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 (2019) (concluding that reactive chlorine was utilized in the attack).
[151] *Statement by President Trump on Syria*, THE WHITE HOUSE, Apr. 6, 2017.
[152] Department of Defense, Statement by Secretary James N. Mattis on Syria (Apr. 13, 2018); *see also* Communication from the President of the United States, *Statement on the April 13, 2018, Striking of Military Chemical Weapons-Related Facilities in Syria* (April 16, 2018).
[153] *Pentagon Briefing on Syria Airstrikes*, C-SPAN (Apr. 13, 2018), https://www.c-span.org/video/?444080-1/secretary-mattis-confident-syria-responsible-chemical-attack.
[154] Office of Legal Counsel, *Memorandum Opinion for the Counsel to the President, April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities*, May 31, 2018, https://www.justice.gov/olc/opinion/file/1067551/download.

argument in connection with 2015 drone strikes against two British foreign fighters in Raqqa,[155] the United Kingdom invoked the ancient doctrine of humanitarian intervention as its legal basis for acting in response to chemical weapons attacks.[156]

States' responses to these developments have been largely (but not exclusively) positive, or at least neutral, suggesting an increased acceptance of the use of force for ostensibly humanitarian reasons, at least in response to serious breaches of international law by a pariah state.[157] International law commentators are largely (but not exclusively) unconvinced.[158] Some of the states on record indicated that the strikes were legal; a broader geographic set communicated their general approval (indicating that the operations were justified, necessary, appropriate, and/or legitimate) without addressing the question of legality, *per se*. Others expressed vague concerns without fully condemning the United States' actions. Only a handful of states conveyed outright disapproval, with Russia calling the strikes an act of aggression.[159] Russia was not, however, able to garner any support for a Security Council resolution that would have condemned the attacks.[160] Notwithstanding these attempt at deterrence, the use of chemical weapons has continued.

A Humanitarian Catastrophe

The ceaseless violence has led to a humanitarian catastrophe—one of the worst ever faced by the United Nations.[161] As of 2020, almost 5.6 million Syrians had fled abroad and registered as refugees with the Office of the U.N. High Commissioner for Refugees (UNHCR)[162]—the largest refugee crisis since World War II.[163] Even more people remain internally displaced,[164] a number that expanded at a rate of 9,500 per day.[165] Indeed, many people have undergone serial displacement as a result of the competing constellations of power. Millions of people in Idlib Governorate, for example, are finding themselves displaced again now that the regime has

[155] Owen Bowcott & Nicholas Watt, *UK Envoy Makes New Legal Argument for Drone Killings in Syria*, THE GUARDIAN, Sept. 10, 2015.
[156] Prime Minister's Office, *Syria Action—UK Government Legal Position* (Apr. 14, 2018), https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position.
[157] *Syria War: World Reaction to US Missile Attack*, BBC, Apr. 7, 2017.
[158] *See* Ryan Goodman, *What do Top Legal Experts say about the Syria Strikes?*, JUST SECURITY (April 7, 2017).
[159] *See* Alonso Gurmendi Dunkelberg, Rebecca Ingber, Priya Pillai & Elvina Pothelet, *Mapping States' Reactions to the Syria Strikes of April 2018*, JUST SECURITY (Apr. 22, 2018).
[160] U.N. SCOR, 73rd sess., 8233rd mtg., U.N. Doc. S/PV.8233, at 22–23 (Apr. 14, 2018).
[161] Martin Chulov, *Half of Syrian Population 'Will Need Aid by End of Year,'* THE GUARDIAN, Apr. 19, 2013 (recounting comment by António Guterres when he headed UNHCR).
[162] *Syria Refugee Response*, UNHCR, https://data2.unhcr.org/en/situations/syria (last visited Feb. 24, 2020) (indicating close to 3.6 million of these refugees are in neighboring Turkey); *Turkey's Syrian Refugees: Defusing Metropolitan Tensions*, INT'L CRISIS GROUP (Jan. 29, 2018).
[163] Ibrahim al-Assil, et al., *The Return of Syrian Refugees*, CARNEGIE ENDOWMENT FOR INT'L PEACE (May 23, 2018).
[164] *Internally Displaced People*, UNHCR, https://www.unhcr.org/sy/internally-displaced-people (last visited Feb. 20, 2020).
[165] *See* Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons on his Mission to the Syrian Arab Republic, U.N. Doc. A/HRC/32/35/Add.2 (Apr. 5, 2016), at ¶ 10.

recovered control.[166] The crisis there—a final stronghold of opposition—resulted in close to a million people being displaced as 2020 unfolded.[167]

Hundreds of thousands of people have been killed over the course of the conflict. The United Nations stopped counting casualties in 2016 (when the number reached 400,000) because the data could not be verified.[168] By the end of 2018, the Syrian Observatory had put the count, which encompasses civilians and combatants, at over 500,000 (2% of Syria's pre-war population).[169] Of those who remain in the country, millions are food-insecure and need humanitarian assistance,[170] and 60% live in poverty according to the World Bank.[171] The United States alone has spent over $10 billion to alleviate the suffering within and outside Syria.[172]

The Assad regime has erected myriad obstacles to, and tried to micromanage, the provision of humanitarian assistance in an effort to retain power and squeeze opposition zones.[173] This includes barring U.N. personnel and aid workers coming from the West.[174] In 2014, the Council by way of Resolution 2165 established an unprecedented program to establish and monitor four humanitarian border crossings via Turkey, Iraq, and Jordan to bring aid to civilian areas,[175] overriding U.N. preferences for providing such assistance with the consent of the affected country (and on the basis of an appeal).[176] Although saddled by onerous inspection regimes, the ability of the United Nations and its implementing partners to cross conflict lines measurably improved the situation.[177] The multidimensional needs remained acute, however. They threatened to worsen once Russia vetoed a proposed extension of this cross-border aid corridor in December 2019 at the peak of the crisis in Idlib. Hours before the system for humanitarian aid delivery was set to expire, the Council approved a scaled back version, but only for six months and only involving two border crossings in Turkey.[178]

Foreign Intervention: Aid, Arms, and Airstrikes

The involvement of foreign militaries—all motivated by divergent interests—in Syria has complicated, and exacerbated, the conflict since its inception. The web of alliances is dizzying. Assad has received support from the Shi'ite Hezbollah militia in Lebanon, Iranian Revolutionary

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[166] *Quick Facts: What you Need to Know about the Syria Crisis*, MERCY CORPS, https://www.mercycorps.org/articles/iraq-jordan-lebanon-syria-turkey/quick-facts-what-you-need-know-about-syria-crisis.
[167] *UN High Commissioner for Refugees Appeals for Safety for Civilians Trapped in Idlib*, UNHCR USA (Feb. 20, 2020).
[168] Megan Specia, *How Syria's Death Toll is Lost in the Fog of War*, N.Y. TIMES, Apr. 13, 2018.
[169] *Syria: 560,000 Killed in Seven Years of War*, SYRIAN OBSERVATORY FOR HUMAN RIGHTS (Dec. 12, 2018), http://www.syriahr.com/en/?p=108829.
[170] *Syria Complex Emergency—Fact Sheet #4 FY20*, USAID (Feb. 7, 2020).
[171] WORLD BANK, THE TOLL OF WAR: THE ECONOMIC AND SOCIAL CONSEQUENCES OF THE CONFLICT IN SYRIA, at viii (2017).
[172] USAID, *supra* note 170.
[173] *See* Cedric Ryngaert, *Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective*, 5 AMSTERDAM L. FORUM 5 (Spring 2013).
[174] Stephanie Nebehay, *Syria Refusing Visas for Western Aid Workers*, REUTERS, July 16, 2012.
[175] S.C. Res. 2165, ¶¶ 2–3, U.N. Doc. S/RES/2165 (July 14, 2014); S.C. Res. 2449, ¶ 3, U.N.Doc. S/RES/2449 (Dec. 13, 2018) (renewing arrangement until 2020). Russia and China abstained on the renewal.
[176] G.A. Res. 46/182, Annex ¶ 3, U.N. Doc. A/RES/46/182 (Dec. 19, 1991).
[177] Aron Lund, *Aid Deliveries to Syria at Risk in UN Security Council Vote*, IRIN, Dec. 4, 2018.
[178] S.C. Res. 2504, ¶ 3, U.N. Doc. S/RES/2504 (Jan. 10, 2020).

Guards, and Russia.[179] Over the years, Russia's support for Assad ultimately broke through the war's deadly deadlock and will likely hand victory to the regime. The opposition has received lethal and nonlethal support from Europe, the United States, and many of the Gulf States.

In 2013, President Obama and Congress authorized the provision of non-lethal assistance to Leahy-vetted Syrian opposition groups,[180] notwithstanding the country sanctions in place.[181] Additional assistance was provided through covert action authorities, until President Trump ended the program.[182] These supply chains had to be temporarily suspended when ISIL seized a warehouse of U.S.-supplied aid.[183] In 2014, the U.S. Department of Defense committed more resources to lead a train-and-equip program aimed both at empowering the moderate opposition against the regime and at combating terrorist groups active in Syria (the United States favored the latter objective while the recipients remained focused on the former).[184] This project collapsed spectacularly when the Nusra Front routed U.S.-trained rebels,[185] and General Lloyd Austin, Commander of U.S. Central Command testified to Congress the hundreds of millions of dollars spent had resulted in "four or five" trained fighters.[186] Even as more details about these efforts have come to light, the number of successful trainees remains unknown.[187] Eventually, this aid was extended to lethal supplies on a smaller scale,[188] ending the longstanding legal and policy angst surrounding this issue.[189]

Other states, particularly in the Gulf, were not so reticent and flooded the conflict with all manner of lethal *matériel*.[190] For its part, the EU lifted the arms embargo on the opposition in May 2013.[191] The chaotic and decentralized support for various FSA factions, which have viewed themselves as both allies and rivals, ultimately undermined the organization's structural unity and led to the emergence of alternative nodes of leadership.[192]

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[179] *See* Gill, *supra* note 95, at 356.
[180] Any aid to armed groups from the United States must adhere to the "Leahy Act." *See* Foreign Assistance Act of 1961, 22 U.S.C. § 2378d ("No assistance shall be furnished under this chapter . . . to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights.").
[181] Louisa Loveluck, *What's Non-Lethal about the Aid to the Syrian Opposition?*, FOREIGN POLICY, Sept. 20, 2012.
[182] CARLA E. HUMUD, ET AL., ARMED CONFLICT IN SYRIA: OVERVIEW AND U.S. RESPONSES 37 (Jan. 2, 2019) (Congressional Research Service Report RL33487); Faysal Itani, *The End of American Support for Syrian Rebels Was Inevitable*, THE ATLANTIC (July 21, 2017).
[183] Michael R. Gordon et al., *U.S. Suspends Nonlethal Aid to Syrian Rebels*, N.Y. TIMES, Dec. 11, 2013.
[184] CRS Report, *supra* note 71, at 26.
[185] Liz Sly, *U.S.-Backed Syria Rebels Routed by Fighters Linked to Al-Qaeda*, WASH. POST, Nov. 2, 2014.
[186] Spencer Ackerman, *US Has Trained Only 'Four or Five' Syrian Fighters Against ISIS, Top General Testifies*, THE GUARDIAN, Sept. 16, 2015.
[187] Greg Miller, *CIA Ramping Up Covert Training Program for Moderate Syrian Rebels*, WASH. POST, Oct. 2, 2013.
[188] Greg Miller & Adam Entous, *Plans to Send Heavier Weapons to CIA-backed Rebels in Syria Stall Amid White House Skepticism*, WASH. POST, Oct. 23, 2016.
[189] *See also* Jonathan Masters, *What Should U.S. Policy Be in Syria?*, COUNCIL ON FOREIGN RELATIONS (Dec. 11, 2012); Doug Mataconis, *No, We Should Not Arm the Syrian Rebels*, OUTSIDE THE BELTWAY (Oct. 12, 2012) (recounting debates).
[190] Frank Gardner, *Gulf Arabs 'Stepping Up' Arms Supplies to Syrian Rebels*, BBC, Oct. 8, 2015.
[191] *Syria Crisis: EU Agrees to Lift Arms Embargo on Rebels*, BBC, May 28, 2013.
[192] Lister, *supra* note 86, at 8.

The United States and a coalition of Gulf States first launched air strikes in Syria in September 2014 against ISIL[193] (and the shadowy Al Qaida-linked Khorasan Group[194]) in areas under its occupation in and around Raqqa and Aleppo.[195] Although the Security Council declared ISIL to be "an unprecedented threat to international peace and security"[196] after it attacked soft targets in Europe, Lebanon, Tunisia, and elsewhere in 2015, the coalition acted without Security Council authorization or express Syrian consent (unlike in neighboring Iraq).[197] These operations were brought under the banner of Combined Joint Task Force-Operation Inherent Resolve (OIR), which consolidated anti-ISIL operations in Syria and Iraq (although not all member states participated in both halves of OIR).[198] When it comes to domestic law, the U.S. operations are ostensibly conducted pursuant to the 2001 Authorization for Use of Military Force (AUMF) passed in the wake of the September 11th attacks and the President's inherent authority.[199] From the perspective of international law, the United States at first cloaked its operations in the mantle of the inherent right of states to engage in collective self-defense,[200] and notified the Security Council accordingly.[201] The theory is that it is protecting itself and its ally Iraq from ISIL's safe havens and launching pads in Syria, which has proven itself to be unwilling or unable to suppress this threat even as it is actively embattled with the group.[202] The United Kingdom followed suit.[203]

For the most part, the OIR coalition assiduously avoided attacking Syrian government-held areas or assets, which would have unequivocally transformed the nature of the conflict, unless regime forces posed direct threats to U.S. personnel or partner forces.[204] In such circumstances, the United States has cited force protection as a rationale for engaging Syrian government

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[193] *See* Letter to Congressional Leaders Reporting on the Deployment of United States Armed Forces Personnel to Iraq and the Authorization of Military Operations in Syria September 23, 2014, DCPD201400697.
[194] Spencer Ackerman, *Khorasan Group Back in US Crosshairs as Air Strikes Hit Non-ISIS Targets in Syria*, THE GUARDIAN, Nov. 6, 2014. *See* Letter to Congressional Leaders Reporting on the Commencement of United States Military Operations in Syria September 23, 2014, DCPD201400698.
[195] *See* House of Commons Library, *ISIS/Daesh: The Military Response in Iraq and Syria, Research Paper 06995*, July 7, 2015.
[196] S.C. Res. 2249, pmbl., U.N. Doc. S/RES/2249 (Nov. 20, 2015).
[197] Somini Sengupta, *A Host of Possible Objections to Expanded Airstrikes in Syria*, N.Y. TIMES (Sept. 17, 2014).
[198] *See generally* Operation Inherent Resolve, http://www.inherentresolve.mil/ (last visited Feb. 11, 2019). The United Kingdom received Parliamentary authorization to participate. Steven Erlanger & Stephen Castle, *British Jets Hit ISIS in Syria After Parliament Authorizes Airstrikes*, N.Y. TIMES, Dec. 3, 2015.
[199] General Joseph F. Dunford, Chairman of the Joint Chiefs of Staff, Remarks at the National Press Club (June 19, 2017).
[200] REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (Dec. 2016).
[201] *See* Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/65 (Sept. 23, 3014).
[202] *See* Ashley S. Deeks, *Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483 (2012); Jens David Ohlin, *The Unwilling or Unable Doctrine Comes to Life*, OPINIO JURIS (Sept. 23, 2014).
[203] Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N.Doc. S/2015/688 (Sept. 8, 2015).
[204] David Botti, *First Came ISIS, Then Iran: How the Mission at a U.S. Base in Syria Kept Growing*, N.Y. TIMES, Feb. 9, 2019.

forces.[205] The Syrian regime has objected to the coalition's operations,[206] but has not consistently opposed coalition strikes on ISIL targets (no doubt because the group is a common foe), giving rise to theories of passive consent.[207] The Assad regime did, however, insist in advance that any strikes not coordinated with the Syrian government would be considered acts of aggression.[208] The United States has so far refused this invitation to engage in joint action.[209]

Russia began its own air strikes in August 2015, necessitating a de-confliction plan and air-safety protocols with the U.S. coalition.[210] Although Russia's sorties are ostensibly aimed at ISIL, it has been accused of targeting opposition areas in an effort to prop up Assad and of attacking civilians directly.[211] Israel has also conducted airstrikes, mostly to disrupt weapons convoys destined for Hezbollah[212] or target Iranian positions.[213] France joined the fray in 2015, after the ISIL attacks in Paris, citing self-defense as the legal justification for its actions.[214] President Trump also decided to arm the Kurdish People's Protection Units (YPG), drawing the ire of Turkey. For its part, Turkey began operations in northern Syria west of the Euphrates in August 2016 as part of Operation Euphrates Shield, and its clashes with Kurdish groups add another deadly dimension to the conflict,[215] particularly in the Afrin "security belt" in 2018.[216]

This involvement came to a head in 2019 when the U.S. pulled its troops out of Syria. Turkey wasted no time filling the vacuum in pursuit of its Kurdish nemesis, leading to new charges of war crimes, including forced displacements of civilians the execution of *hors de combat* fighters.[217] It also raised the specter that the Kurdish fighters would be forced to release the thousands of foreign fighters in their custody because they lacked the ability to respond to Turkish incursions while still guarding these fighters, particularly given the challenges around repatriation.[218] Marking a reconfiguration of the conflict involving Ankara, Damascus, and

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[205] Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Dec. 11, 2017).
[206] Identical Letters dated September 16, 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/718 (Sept. 17, 2015).
[207] Phil Stewart & Tom Perry, *U.S. and Arab Allies Launch First Strikes on Militants in Syria*, REUTERS (Sept. 22, 2014).
[208] Raphael Van Steenberghe, *From Passive Consent to Self-Defence after the Syrian Protest against the US-led Coalition*, EJIL: *TALK!* (Oct. 23, 2015).
[209] Claus Kreß, *The Fine Line between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force Against 'IS' in Syria*, JUST SECURITY (Feb. 17, 2015).
[210] *U.S. and Russia Sign Deal to Avoid Syria Air Incidents*, BBC, Oct. 20, 2015.
[211] Ruth Sherlock, *Why Civilians Are Being Targeted in Syria Airstrikes*, NPR, Feb. 7, 2018.
[212] *See, e.g.*, *Israel Said to Have Hit Hezbollah Convoys Dozens of Times*, TIMES OF ISRAEL, Aug. 17, 2017.
[213] *Syrian War: Israeli Jets Target Iranian Positions Around Damascus*, BBC, Jan. 21, 2019; Isabel Kershner, *Israel Confirms Attacks on Iranian Targets in Syria*, N.Y. TIMES, Jan. 20, 2019.
[214] Alissa J. Rubin & Anne Barnard, *France Strikes ISIS Targets in Syria in Retaliation for Attacks*, N.Y. TIMES, Nov. 15, 2015; *see* U.N. SCOR, 70th Sess., 7565th mtg. at 2, U.N. Doc. S/PV.7565 (Nov. 20, 2015) (statement of France).
[215] *Turkey to Launch Operation against U.S.-backed Kurds in Syria "In a Few Days,"* REUTERS, Dec. 12, 2018.
[216] Bulent Aliriza & Zeynep Yekeler, *Understanding Turkey's Afrin Operation*, CTR. FOR STRATEGIC STUD. (Jan. 25, 2018).
[217] Beth Van Schaack & Julia Brooks, *Turkey's Actions Trigger All States' Obligations to Prosecute War Crimes by Turkish Forces*, JUST SECURITY, Oct. 15, 2019.
[218] *See* Stigall, *supra* note 94, at 65-66.

Moscow, Turkish soldiers were killed in an airstrike in February 2020, spinning up NATO as this thesis is being finalized.

The United States first moved ground troops into Syria to assist in the mission against ISIL in 2015.[219] By late 2018, the initial 50 soldiers had grown to approximately 2,000 U.S. personnel.[220] Although, ISIL controlled large swaths of Syrian territory at one point, by October 2017, it had been driven from its *de facto* capital of Raqqa.[221] Iraq achieved similar victories against ISIL on its side of the border, shrinking the territory of the would-be caliphate. President Trump's December 2018 announcement that he would withdraw all U.S. troops from Syria[222] (a plan that was later walked back following criticism)[223] generated uncertainty about the sustainability of ISIL's downfall, as signaled by the resignations of U.S. Secretary of Defense James Mattis and Brett McGurk, the Special Presidential Envoy for the Global Coalition to Counter ISIL.[224] Then-National Security Advisor John Bolton also insisted that U.S. forces would remain in Syria until all Iranian-led forces withdraw; contemporaneous statements by then-Defense Secretary Mattis, however, suggest that the Department of Defense was not operating under such an extended mission.[225] Although ISIL was left controlling only a small swath of largely uninhabited territory, it retained thousands of fighters who—it was feared—would reconstitute themselves as an insurgency with the withdrawal of U.S. engagement.[226] At present, a few hundred U.S. troops remain in Syria. President Trump's announcement of their complete withdrawal in October 2019 threw U.S. policy into "turmoil."[227] It also triggered a new alliance between Kurdish forces and the Syrian government—poignantly described by the SDF commander-in-chief as the only alternative to genocide.[228]

Failed Peace Processes

Over the years, various elements within the international community have undertaken multiple attempts to broker a durable ceasefire and bring a lasting peace to the country, at times in parallel processes spearheaded by the United Nations in Geneva, Switzerland, and Russia and friends in Astana (now Nur-Sultan), Kazakhstan.[229] The Arab League initially put forward an ambitious Plan of Action, which was premised on dialogue with the opposition, the release of political prisoners, a military withdrawal, the holding of free and internationally supervised

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[219] Dan Roberts & Tom McCarthy, *Obama Orders U.S. Special Forces to 'Assist' Fight against ISIS in Syria*, THE GUARDIAN, Oct. 30, 2015.
[220] Mark Landler, Helene Cooper & Eric Schmitt, *Trump to Withdraw U.S. Forces from Syria, Declaring 'We Have Won Against ISIS,'* N.Y. TIMES, Dec. 19, 2018.
[221] Anne Barnard & Hwaida Saad, *Raqqa, ISIS 'Capital', is Captured, U.S.-Backed Forces Say*, N.Y. TIMES, Oct. 17, 2017.
[222] Donald Trump (@realDonaldTrump), "We have defeated ISIS in Syria, my only reason for being there during the Trump Presidency," (Dec. 19, 2018, 9:33 AM).
[223] Rick Noack, *Why Trump is Suddenly Going Back on His Promise to Withdraw All U.S. Troops from Syria, Explained in One Map*, WASH. POST (Feb. 22, 2019).
[224] Helene Cooper, *Jim Mattis, Defense Secretary, Resigns in Rebuke of Trump's Worldview*, N.Y. TIMES, Dec. 20, 2018.
[225] Paul Sonne & Missy Ryan, *Bolton: U.S. Forces Will Stay in Syria until Iran and Its Proxies Depart*, WASH. POST, Sept. 24, 2018
[226] DEPARTMENT OF DEFENSE, OFFICE OF INSPECTOR GENERAL, LEAD INSPECTOR GENERAL FOR OPERATION INHERENT RESOLVE, QUARTERLY REPORT TO THE U.S. CONGRESS (Jan. 1, 2019–Mar. 1, 2019).
[227] Peter Baker & Lara Jakes, *Trump Throws Middle East Policy Into Turmoil Over Syria*, N.Y. TIMES, Oct. 7, 2019.
[228] Mazloum Abdi, *If We Have to Choose Between Compromise and Genocide, We Will Choose Our People*, FOREIGN POLICY, Oct. 13, 2019.
[229] *Syria Diplomatic Talks: A Timeline*, AL JAZEERA, Sept. 15, 2017.

elections, and the formation of a unity government.[230] Assad at first accepted the Plan but later rejected it after his proposed amendments were not accepted.[231] Leading the international effort to promote a peaceful solution to the crisis has been a series of Joint Special Envoys of the United Nations and the League of Arab States—a post originally recommended by the U.N. General Assembly.[232] The first Special Envoy, Kofi Annan, generated a six-part peace plan on March 16, 2012. The plan, which continues to inspire peace efforts, contains the following elements:

1. The launch of an inclusive Syrian-led political process to address the legitimate aspirations and concerns of the Syrian people;
2. A cessation of violence to protect civilians and stabilize the country;
3. The timely provision of humanitarian aid to all areas affected by fighting, facilitated by a 2-hour daily humanitarian pause;
4. An intensification of the pace and scale of the release of arbitrarily detained persons;
5. Freedom of movement for journalists; and
6. The recognition of the freedom of association and the right to demonstrate as legally-protected rights.[233]

Although the Annan plan earned the endorsement of the U.N. Security Council,[234] and Assad's ostensible support,[235] it has yet to be implemented in full or even in part. After Annan resigned in frustration in August 2012, subsequent Special Envoys have continued to recommend his plan only to eventually resign in the absence of an effective international response. The League of Arab States promulgated its own peace plans in 2011 and 2012, which also called for the formation of a unity government and the convening of genuine elections, but Assad rejected these efforts.[236]

Formal peace talks have not yielded durable results. The Action Group for Syria—composed of the U.N. Secretary-General; the Arab League Secretary-General; the Foreign Ministers (or equivalent) of the P-5, Turkey, Iraq, Kuwait and Qatar (the latter three holding relevant chairs within the League of Arab States); and the High Representative for Foreign Affairs & Security Policy of the European Union—launched a series of conferences in Geneva beginning in June 2012. Geneva I resulted in the Geneva Communiqué, a roadmap to peace premised upon the establishment of a transitional governing body on the basis of "mutual consent" with full executive powers (which, it was envisaged, could include members of the present government), the promulgation of a new constitution, and the holding of democratic elections.[237] Later fully endorsed by the Security Council,[238] the Communiqué made clear references to accountability and transitional justice when it pronounced: "Accountability for acts committed during the present conflict must be addressed. There also needs to be a comprehensive package for transitional justice,

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[230] Liz Sly, *Arab League Announces Peace Plan for Syria*, WASH. POST, Nov. 2, 2011; Kareem Fahim, *Arab League Floats Ambitious New Peace Plan for Syria*, N.Y. TIMES, Jan. 22, 2012.
[231] Mark Hallam et al., *Syria Rejects Latest Arab League Plan*, DEUTSCHE WELLE, Jan. 23, 2013.
[232] G.A. Res. 66/253, ¶ 11, U.N. Doc. A/RES/66/253 (Feb. 16, 2012).
[233] Douglas Hamilton, *Text of Annan's Six-Point Peace Plan for Syria*, REUTERS, Apr. 4, 2012.
[234] Statement by the President of the Security Council, U.N. Doc. S/PRST/2012/6 (Mar. 21, 2012).
[235] *Syrian Government Accepts Anna Peace Plan*, BBC, Mar. 27, 2012.
[236] Neil MacFarquhar, *Arab League Votes to Suspend Syria Over Crackdown*, N.Y. TIMES, Nov. 12, 2011.
[237] Action Group for Syria, *Final Communiqué* (June 30, 2012), https://peacemaker.un.org/sites/peacemaker.un.org/files/SY_120630_Final%20Communique%20of%20the%20Action%20Group%20for%20Syria.pdf [hereinafter *Geneva Communiqué*].
[238] S.C. Res. 2118, ¶ 16, S/RES/2118 (Sept. 27, 2015).

including compensation or rehabilitation for victims of the present conflict, steps towards national reconciliation and forgiveness."[239] As it turns out, this marked the one and only time issues of accountability were publicly raised in the Syrian peace talks. In January 2013, Assad released his own plan—which envisioned a reconciliation conference and a new government—but it was rejected by the opposition.[240] Geneva II, held in early 2014, failed to reach a comprehensive agreement. Lakhdar Brahimi, who was Envoy at the time, did not extend his assignment after Geneva II when the regime failed to agree to negotiate about anything other than "terrorism."

Subsequent meetings in November 2015 in Vienna, Austria, reaffirmed the imperative of bringing the government and the opposition back together for peace talks under U.N. auspices in keeping with the Geneva Communiqué. States in Vienna formed the International Syria Support Group (ISSG), a working group co-chaired by the United States and Russia tasked with finding a diplomatic solution to the crisis that would be built upon a comprehensive and enduring cessation of hostilities.[241] This occurred at a time when terrorist activity was on the upswing, altering the political configurations, suggesting the emergence of two parallel conflicts, and enabling the Assad regime to carry the counterterrorism mantle. The ISSG had some success with the regime and opposition groups, but the plan did not encompass ISIL or the Nusra Front. This enabled Russia to continue airstrikes, ostensibly against terrorist groups. The ISSG largely collapsed, however, as compliance with its announced ceasefires waned. In December 2015, Saudi Arabia hosted groups aligned with the opposition to help form a High Negotiations Committee (HNC), later called the Syrian Negotiation Commission, which has become a key representative of the political opposition.[242] In their final statement, participants called for an all-inclusive, democratic, and civilian-led Syria.[243] Not to be outdone, Assad hosted a competing event in Damascus for the "patriotic opposition."[244]

Also in December 2015, the Security Council released its own plan for a comprehensive political settlement in the form of Resolution 2254, which incorporated elements of Annan's six-point plan and the Geneva Communiqué.[245] Geneva III was aborted in February 2016 when the government and opposition failed to reach agreement on humanitarian issues; Geneva IV met the same fate when the opposition walked out of talks in protest over the escalation of violence on the ground and the talks lost political momentum. (The efforts of Envoy Staffan de Mistura in 2016 and 2017 are also called the "Intra-Syrian Dialogue").

In 2017, Russia announced its own (arguably competing) efforts in Astana (the United States participated as an observer), where Russia, Iran, and Turkey agreed to establish de-escalation zones in order to piece together a nation-wide ceasefire. Astana II ended with further agreements on monitoring modalities and the exchange of prisoners and the dead. After these relative successes, the opposition refused to attend Astana III amidst allegations that the government was not adhering to the ceasefire and was endeavoring to recapture de-escalation

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[239] Geneva Communiqué, *supra* note 237, at 4.
[240] Anne Barnard, *Defiant Speech by Assad Is New Block to Peace in Syria*, N.Y. TIMES, Jan. 6, 2013.
[241] Andrew J. Tabler & Olivier Decottignies, *The Vienna Process: Transitioning Toward a Transition*, WASH. INST. (Dec. 17, 2015).
[242] *High Negotiations Committee (HNC)*, GLOBALSECURITY.ORG, https://www.globalsecurity.org/military/world/para/hnc.htm (last visited Feb. 10, 2019).
[243] *Riyadh Opposition meeting Calls for Inclusive Syria: Statement*, REUTERS, Dec. 10, 2015.
[244] Aron Lund, *Syria's Opposition Conferences: Results and Expectations*, CARNEGIE MIDDLE EAST CENTER, DIWAN (Dec. 11, 2015).
[245] S.C. Res. 2254, pmbl., S/RES/2254 (Dec. 18, 2015).

areas. Astana IV, which was to reinforce the four envisioned de-escalation zones, also ended with an opposition walkout in May 2017. Astana V (July 2017) and VI (September 2017) remained focused on establishing and policing the de-militarization of key areas with Russia, Turkey, and Iran as guarantors. The Assad government, however, ended up re-taking several of these locales under the guise of countering terrorist elements, which were again excluded from the terms of the professed ceasefire. By 2020, Western delegations were arguing that the Astana formula was no longer working and it was time for the United Nations to retake control of the negotiations.[246]

Meanwhile, participants within Geneva V (held in February 2017) attempted to advance negotiations on the implementation of Resolution 2254, but Geneva VI ended in May 2017 and Geneva VII in July 2017 with little progress.[247] Presidents Trump and Vladimir Putin agreed to a ceasefire later in July 2017; this proved to be short lived after Assad bombed the suburbs of Damascus. Russia also hosted a Syrian People's Congress in Sochi in January 2018, although many Syrian opposition groups boycotted the gathering or refused to leave the airport.[248] The last Geneva rounds, held in January 2018, were inconclusive as well, no doubt given the regime's "momentum" on the ground.[249] That said, a de-militarization or de-escalation agreement between Turkey and Russia agreed to in September 2018 in Idlib has held for a period of time, notwithstanding some regime breaches.

Under the leadership of the penultimate U.N. Special Envoy for Syria Staffan de Mistura, those in attendance at Sochi produced a Syrian Constitutional Committee proposal that has received some international support, although membership modalities remained contentious given the goal of equal governmental, non-governmental, and expert representation (the latter of whom were selected by the United Nations).[250] In September 2019, the current Special Envoy Geir O. Pedersen finally announced the formation of the Committee, which includes 50 government representatives, 50 opposition representations, and 50 members of civil society (but no representation from the Kurdish autonomous administration in the north), with a subset making up the drafting committee. Although some meetings progressed at the end of 2019, leaving some participants optimistic, the Committee reached an impasse by the end of the year, with parties even unable to agree on an agenda and Assad claiming that any outcome cannot bind Damascus.[251]

Conclusion

At this point in time, both the armed opposition and ISIL are a fraction of their former selves. Most armed opposition groups have been defeated, significantly weakened, geographically isolated, or infiltrated by terrorist elements. To the extent that the Kurdish-dominated SDF retained significant territory, it has now escheated to the Syrian government with the U.S. troop withdrawal. Assad seems destined to emerge triumphant. Although Assad will claim military victory, low-level

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[246] *Crisis in Syria Likely to Turn Catastrophic Unless Global Community Mobilizes to Conflict, Senior United Nations Officials Warn Security Council*, U.N. Doc. SC/14114 (Feb. 19, 2020).

[247] Not all observers continue to denominate these Geneva gatherings with roman numerals, but I have done so for clarity. *See* Lisa Roman & Alexander Bick, *It's Time for a New Syria Peace Process*, FOREIGN POLICY (Sept. 15, 2017).

[248] Patrick Wintour, *Russia's Syrian Peace Conference Teeters on Farce*, THE GUARDIAN, Jan. 30, 2018.

[249] DANIEL R. COATS, WORLDWIDE THREAT ASSESSMENT OF THE US INTELLIGENCE COMMUNITY 32 (2019).

[250] Nicholas Norberg, *A Primer on Syria's Constitutional Committee*, LAWFARE (Dec. 22, 2018); Sinan Hatahet, *The Prospective and Limitations of the Syrian Constitutional Committee*, GENEVA CENTRE FOR SECURITY POLICY (Feb. 2020).

[251] M. Hosam Hafez, *Syria New Constitutional Committee: Enlightened UN Diplomacy or Repositioning the Assad Regime?*, AL JAZEERA CENTRE FOR STUDIES (Oct. 31, 2019).

conflict is likely to continue in pockets around the country. Furthermore, it is unclear if Assad will be able to truly gain control of areas held by the political opposition or if the revolution has simply been forestalled for now. In any case, this putative victory will reduce any pressure to make concessions to the opposition and call into question whether any post-war accountability or transitional justice program will be launched within the country. What is clear is that the Syria of old has largely disintegrated: "Syria has ceased to exist as a unified state except in memories and on maps."[252] What remains is a country still beset by competing zones of influence, with most of the country back under government control (with support from Russia and Iran) with the exception of areas controlled by Syrian Kurds and aligned forces in the northeast and a few areas in the northwest occupied by opposition forces and militia newly-aligned with Turkey.[253]

It remains to be seen how the international community will adapt to an Assad victory. Although the United States no longer calls for Assad's removal,[254] President Trump has announced the United States will not contribute to reconstruction efforts unless the government commits to elements of the political solution outlined in Resolution 2254, passed unanimously in 2015.[255] This stance could be legislatively-mandated if something akin to the No Assistance for Assad Act is ever passed.[256] The European Union and Gulf Cooperation Council have made similar pledges, although relations are normalizing between Syria, the Gulf monarchies, and other Arab League members.[257] The bill for reconstruction will likely exceed $200 billion, according to U.N. and World Bank estimates.[258]

Throughout the conflict, many have seen the international community's inaction in the face of the atrocities as offering a green light to Assad. Indeed, early in the conflict the U.N. Special Advisers on the Prevention of Genocide and on the Responsibility to Protect released a joint statement in which they argued that:

> The lack of unified international condemnation and response to protect the Syrian population has encouraged the Government to continue its course of action. Reports suggest that the Government has intensified its attacks in the face of Security Council paralysis, leading to a sharp increase in the number of deaths, injuries and cases of abuse and torture over recent weeks and months.[259]

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[252] RANIA ABOUZEID, NO TURNING BACK: LIFE, LOSS, AND HOPE IN WARTIME SYRIA xi (2018).
[253] Brett McGurk, *Hard Truths in Syria*, FOREIGN AFFAIRS (May/June 2019).
[254] *See Special Representative for Syria Engagement Jeffrey in Interview with RIA Novosti & Kommersant*, U.S. MISSION RUSSIA (Nov. 23, 2018), https://ru.usembassy.gov/special-representative-for-syria-engagement-jeffrey-in-interview-with-ria-novosti-and-kommersant/ ("America will never have good relations with Bashar al-Asad—nonetheless, we are committed to a political process that is with and by the Syrian people. The Syrian people get to decide who will lead them and what kind of a government they will have. We are not committed to any kind of regime change. We are committed to a change in the behavior of that regime.").
[255] Richard Salame, *The Syrian War Is Still Raging, But the Battle Over Reconstruction Has Already Begun*, THE NATION, Sept. 5, 2018.
[256] No Assistance for Assad Act, H.R. 1706, 116th Congress (2019), https://www.govtrack.us/congress/bills/116/hr1706/text.
[257] Marc Daou, *Thaw in Relations between Arab Leaders and Syria's Assad*, FRANCE24 (Jan. 4, 2019).
[258] Omer Karasapan, *Rebuilding or Redefining Syria*, BROOKINGS (Feb. 13, 2017); Paul Cochrane, *After the War: Who's Going to Pay for Syria's Reconstruction?*, MIDDLE EAST EYE (Nov. 12, 2017).
[259] Statement of the Office of the Special Adviser on the Prevention of Genocide, INT'L COAL. FOR THE RESPONSIBILITY TO PROTECT (Mar. 15, 2012), http://responsibilitytoprotect.org/index.php/component/content/article/136-latest-news/4044-struggle-to-protect-civilians-in-syria-continues-commission-of-inquiry-on-libya-report-released-first-icc-verdict-issued.

Once the guns fall silent, the hard work of rebuilding Syria must begin, including the repatriation and reintegration of the internally and externally displaced, the reconstruction of the country, and the elimination of ISIL remnants. It remains to be seen whether any form of accountability or transitional justice will be pursued. As discussed elsewhere, there have been unprecedented efforts by ordinary Syrians and international advocates to document atrocities, but no multilateral steps have been taken towards actual accountability. As this volume reveals, there are plenty of blueprints to draw from—all that is necessary is the political will to begin.

3

The Security Council & Syria: A Study In Dysfunction

[T]hose on the Council who have been given a very special right called the right of veto … should exercise it only in the rarest type of case, and they should defer to the democratic majority of this Council, if there is such a majority.[1]

The Security Council occupies a dominant place in the United Nations' peace and security architecture. And the Council's five permanent members—China, France, Russia, the United Kingdom, and the United States (the P-5)—occupy a dominant place in the Council. As is well known, substantive decisions of the Council require an affirmative vote of nine Council members including the "concurring vote"—understood as either a "yes" vote or an abstention—of the P-5.[2] This perennially-controversial veto power—and the imperative of securing unanimity among the then-Great Powers—was the price paid to garner the victorious Allies' support for the establishment of the United Nations after World War II.[3] The theory was that any executive course of action to maintain international peace and security would inevitably involve the P-5, thus necessitating their concurrence.[4] Upon ratifying the U.N. Charter, all U.N. member states have agreed to carry out the decisions of the Council, which prevail over any competing international legal obligations, except perhaps when it comes to *jus cogens*—peremptory norms that brook no derogation.[5]

In the early days of the United Nations and during the Cold War period, the Union of Soviet Socialist Republics invoked its veto the most frequently, a pattern that dropped off precipitously once Russia succeeded to the Soviet Union's seat after the latter's dissolution in 1991.[6] The United States comes in second in exercising its veto prerogative, particularly when it comes to resolutions that appear to be aimed at Israel.[7] At the end of the Cold War, the Council went through a period of time in which the veto was used sparingly, heralding exultations about the rebirth of the Council.[8] During this revival, the P-5 endeavored to operate via consensus and avoid provoking any one among them to invoke its veto, attesting to the power of the so-called "pocket veto."[9] This

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[1] U.N. SCOR, 1st Sess., 46th mtg. at 356, U.N. Doc. S/PV.46 (June 17, 1946) (statement of Australia).
[2] U.N. Charter art. 27. The term "veto" is actually not employed in the Charter. Decisions on procedural matters require just nine votes, but the question of whether a matter is procedural or substantive is a substantive question.
[3] Francis O. Wilcox, *The Yalta Voting Formula*, 39 AM. POL. SCI. REV. 943, 944 (1945).
[4] Edward C. Luck, *A Council for All Seasons: The Creation of the Security Council and its Relevance Today*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, 61, 63 (Vaughan Lowe et al. eds., 2008).
[5] Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EUROP. J. INT'L L. 59 (2005).
[6] Yehuda Z. Blum, *Russia Takes over the Soviet Union's Seat at the United Nations*, 3 EUROP. J. INT'L L. 354 (1992).
[7] *See The 43 Times US has Used Veto Power against UN Resolutions on Israel*, MIDDLE EAST EYE, Dec. 18, 2017. A notable exception was President Obama's abstention on Resolution 2334 condemning and demanding a halt to Israeli settlements. S.C. Res. 2334, ¶¶ 1-2, U.N. Doc. S/RES/2334 (Dec. 23, 2016). The United States had vetoed a similar resolution in 2011, marking the only veto exercised by the Obama Administration.
[8] *See* Global Policy Forum, *Changing Patterns in the Use of the Veto in the Security Council* (Aug. 2012).
[9] Sahar Okhovat, *The United Nations Security Council: Its Veto and Its Reform*, CPACS Working Paper No. 15/1, at 15 (Dec. 2001).

mutual restraint can create space for useful dialogue, reflection, and compromise and can ensure the Council exercises self-discipline before moving forward with coercive action.[10] As a direct result of this more constructive dynamic, the number of resolutions passed by the Council increased substantially—from an average of 15 resolutions per year to more than 50 per year in the 1990s and 2000s.[11] As revealed by the situation in Syria and elsewhere, however, this trend proved to be no more permanent than the one that preceded it.

Once Syria descended into violence, relations within the Council chamber became increasingly acrimonious, with the two camps occupying very little common ground. Reading the Council's Syria-related records reveals the steady deterioration of relations between Russia (and its few erstwhile allies) and the P-3 (the United States, France and the United Kingdom), which generally enjoyed the support of the rest of the Council's elected members (except Venezuela, which aligned itself with Russia). The Security Council has only issued about two dozen formal resolutions, and half as many presidential statements, dedicated to the situation in Syria—a conflict now entering its ninth year.[12] Accountability for the crimes being committed in Syria has been a casualty of this dysfunction.

The Security Council discursive practices, pronouncements, operational initiatives, and vetoed resolutions offer a distinctive window into the history of the conflict and the international community's meager and ineffectual reaction to the atrocities underway. This chapter traces these malfunctions on a number of fronts alongside the few areas of progress. The areas of concern include condemnations of human rights violations and abuses; attempts to impose ceasefires and expand humanitarian access; the use of force and the Responsibility to Protect; inspiring the parties to pursue a political transition; countering terrorism and violent extremism; neutralizing Syria's chemical weapons; sanctions regimes; and—most relevant to this volume—promoting accountability. The most spectacular failure in the accountability realm is no doubt the French-led ICC referral effort, defeated by the tag-team of Russia and China.[13] Although numerous states, U.N. entities, and international personalities supported France's proposal, the draft resolution proved dead on arrival. The demise of a Joint Investigative Mechanism dedicated to attributing responsibility for chemical weapon use marked another low point, attesting to the fragility of multilateral arrangements subject to the veto. As a result of these outcomes, states and advocates have looked elsewhere to advance accountability.

As this dissertation demonstrates, the inability of the Council to operate has opened the way for individual states and other international institutions—multilateral and non-governmental—to innovate to advance the justice imperative as Syria devolved into total war. In the absence of resolute action by the Council, work to address the Syrian conflict occurred elsewhere, such as the office of the U.N. Secretary-General through serial Joint Special Envoys of the United Nations and the League of Arab States (Kofi Annan, Lakhdar Brahimi, Staffan de Mistura, and now Geir O. Pedersen) as well as in various multilateral assemblages, such as the

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[10] *See* Philippa Webb, *Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria*, J. CONFLICT & SECURITY L. 1, 2-3 (2014) (arguing that the veto may be used not only to "block the Council from fulfilling its role under the Charter," but also to "engender restraint by preventing the Council from engaging in 'excessive' maintenance of international peace and security").

[11] *See* Global Policy Forum, *Table on Number of Security Council Resolutions and Presidential Statements (1998-2009)*, https://www.globalpolicy.org/component/content/article/102/32802.html.

[12] All the Council's Syria pronouncements are compiled here: http://www.securitycouncilreport.org/un-documents/syria/.

[13] *See* Albania et al.: draft resolution, U.N. Doc. S/2014/348 (May 22, 2014).

League of Arab States, the Friends of the Syrian People (FOSP),[14] the Action Group for Syria,[15] and the International Syria Support Group (ISSG).[16] The General Assembly, U.N. Human Rights Council, and the Organisation for the Prohibition of Chemical Weapons (OPCW)—where Russian influence is negligible—also stepped up, at times with small and middling states in the lead. The Assembly has regularly adopted virtually the very text vetoed in the Council and, with exceptional candor, condemned the Council's inaction. To be sure, Russia and P-3 have occasionally been able to reach consensus outside the United Nations and away from the dominion of Chapter VII, but the seemingly inexorable vetoes have eclipsed the areas of agreement.

The existence and operation of the veto has always been controversial, all the more so when invoked in the face of atrocities.[17] Criticism of the Security Council's (in)action on Syria has galvanized a number of creative U.N. reform efforts that have found broad support within the General Assembly, but only limited endorsement among the P-5, whose assent will be necessary to achieve any meaningful amendments to the U.N. Charter or the working methods of the Council. The chapter closes with a discussion of the way in which these proposals have been further animated by the trenchant deadlock on Syria.

Security Council Turns to Syria

Given the dynamics dividing the P-3 and the P-2, the Security Council has largely failed in its peace and security mandate when it comes to the conflict in Syria. Although Russia presented itself as a reliable and responsible partner in the global counter-terrorism effort, there is no question it has abused its veto prerogative to shield and even prop up the Assad regime—fourteen times as this project comes to a close, often with China in tow.[18] As a result of this paralysis, coercive measures of any consequence against Assad or senior members of his regime have been foreclosed. Even the provision of basic food and medical aid within Syria became politically polarized as President Bashar Al-Assad flouted humanitarian principles and manipulated the provision of aid along sectarian lines.[19] To be sure, the Council has remained "actively seized" of the conflict and has performed decisively in some areas—most saliently on humanitarian initiatives, within the

[14] The FOSP was a coalition of states that coalesced as Russia began to veto resolutions devoted to Syria. It met several times during 2012-13 before petering out.

[15] The Action Group for Syria was composed of the ministers of foreign affairs (or the equivalent) for China, France, Russia, the United Kingdom, the United States, Turkey, Iraq, Kuwait, and Qatar. The European Union was represented through the High Representative for Foreign Affairs and Security Policy. The Secretaries General of the United Nations and the League of Arab State were also included.

[16] These various alliances are discussed in more detail in chapter 2. ISSG is a multilateral body established when no agreement was reached in the Geneva II conference held in January 2014. It is chaired by the United States and Russia. *See* The Syria Institute, *International Syria Support Group (ISSG)* (June 2016). Unlike the FOSP, all major players in Syria, including Iran, were members of ISSG.

[17] A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY: REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, U.N. Doc. A/59/565, at 64 (Dec. 2, 2004) ("The Charter of the United Nations provided the most powerful States with permanent membership on the Security Council and the veto. In exchange, they were expected to use their power for the common good and promote and obey international law.").

[18] For a compilation of all vetoes exercised in the Council, see Dag Hammarskjöld Library, *Security Council—Veto List*, http://research.un.org/en/docs/sc/quick. The first P-2 double veto cast came on a draft resolution dedicated to Myanmar in 2007. Zimbabwe (2008) and Venezuela (2019) were next. The rest all concern Syria.

[19] *See* U.N. Doc. S/PRST/2013/15 (Oct. 2, 2013) (invoking the 1991 U.N. Guiding Principles on Humanitarian Emergency Assistance (U.N. Doc. No. A/RES/46/182), which are premised on such assistance being delivered on the basis of need and devoid of any political prejudice).

counter-terrorism realm, and in response to the use of chemical weapons—but otherwise, it has disappointed.

In the negotiations, Russia laid down its own "Negroponte Doctrine",[20] generally rejecting draft resolutions that singled out the Assad regime too pointedly, that did not call for the armed opposition to dissociate from extremist groups, or that did not sufficiently condemn terrorism. On offense, Russia advanced language that suggested an equivalency of responsibility for abuses among the conflict's parties and insisted the Council address the scourge of terrorism. Russia also implicitly criticized Western support for members of the armed opposition. As Russia's intransigence set in, the P-3 dispensed with diplomatic decorum and rushed forth draft resolutions knowing full well they would fail. The P-3 then highlighted these predictable results to underscore Russia's complicity with the Syrian government—a pattern not lost on the Russian representative, who at one point noted, "[i]t is absolutely clear to us why adopting a draft resolution ahead of time has been proposed. … This has not been done out of good intentions; it is intended to embarrass Russia once again."[21] This willingness to isolate and attempt to shame Russia on Syria is also attributable to the Europeans' and the Americans' aggravation over Russia's actions in Ukraine. Equally unprecedented has been the frequency of the double veto, with China setting aside its prior practice of abstaining from resolutions doomed to fail or following the lead of the relevant regional organization. Instead, China has regularly thrown in its lot with Russia, at times in opposition to the League of Arab States.[22] Prior to this point, China exercised its veto sparingly, primarily where it has economic interests (as in Zimbabwe and Burma/Myanmar) or to punish states for their support for or recognition of Taiwan (as with Guatemala and Macedonia).

Adding to the noise, the Syrian Permanent Representative to the United Nations, who remained loyal to the regime, was often invited to participate in these gatherings because Syria's interests were "specially affected."[23] He used this prerogative to offer a series of confrontational, and at times delusional, soliloquys protesting any intrusion into Syria's internal affairs, proclaiming Syria's faithful adherence to international humanitarian law (IHL), and objecting to the provision of foreign support for terrorist elements in its midst. Given these battle lines, reading states' explanations-of-vote in the Council is like playing the "Exquisite Corpse" parlor game—delegates seem to be discussing entirely different conflicts in their Council interventions. All this has been to the regret of elected members attempting to create space for more genuine negotiations. As the Egyptian representative noted at a particularly contentious meeting of the Council: "the Council, which was created in the previous century to peaceably settle disputes, is gradually becoming a mere media platform. … [C]onsultations have amounted to no more than a repetition of traditional positions and dialogue that falls on deaf ears."[24]

It is impossible to fully understand the Security Council's collective approach to the arrival of the Arab Spring in Syria without recalling the situation in Libya. When protests broke out in

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[20] John Negroponte, the United States' Permanent Representative to the United Nations during the administration of George W. Bush, spelled out in this eponymous doctrine the elements that would have to be contained in any draft resolution involving Israel-Palestine to avoid a U.S. veto. Michael H. Jordan, *Symbolic Fight for Israel at the UN*, CHRISTIAN SCIENCE MONITOR, Dec. 8, 2003.

[21] *See, e.g.*, U.N. SCOR, 72nd sess., 8073rd mtg., at 2, U.N. Doc. S/PV.8073 (Oct. 24, 2017).

[22] *See* Minxin Pei, *Why Beijing Votes with Moscow*, N.Y. TIMES, Feb. 7, 2012 (noting that China has few strategic or economic interests in Syria but wants Russia's help to oppose Council action in countries where it does, such as in Myanmar and Zimbabwe).

[23] U.N. Security Council, Provisional Rules of Procedure art. 37.

[24] U.N. SCOR 71st sess., 7785th mtg., at 12, U.N. Doc. S/PV.7785 (Oct. 8, 2016) (statement by Egypt).

Syria in 2011, the Security Council was preoccupied with events in Northern Africa, where Muammar Qadhafi had launched his own violent crackdown against an explosive citizen uprising. In short order, the Council referred Libya to the ICC and imposed robust sanctions with Resolution 1970.[25] Soon after, in Resolution 1973, it established a no-fly zone and authorized states to "take all necessary measures" to protect civilians in Libya, language that opened the door to an armed intervention by NATO that ultimately led to the fall of the Qadhafi regime.[26] This robust response inspired hope among members of the nascent Syrian opposition that Assad might be similarly dispatched with.

Whether this outcome in Libya was contemplated at the time Resolution 1973 was adopted remains contested. Russia, which joined the first Libya resolution but abstained on the second, now claims that the Council's authorization to engage in atrocities prevention and response improperly evolved into an exercise in regime change.[27] It is insisted that this experience sowed seeds of distrust that now justify Russia's firm obstructionism in Syria.[28] More likely, the Libyan history gave Russia a set of arguments it could deploy to appeal to states concerned about Security Council overreach and distrustful of the Responsibility-to-Protect doctrine. In any case, even if taken at face value, the Libya comparison arguably enjoyed a hint of sincerity when first uttered in connection with Syria, but it sounded increasingly tactical and pretextual as time wore on. In an effort to alleviate Russia's Libya hangover, almost every resolution passed on Syria contained the standard language reaffirming the Council's "strong commitment to the sovereignty, independence and territorial integrity of the Syrian Arab Republic, and to the purposes and principles of the Charter of the United Nations."[29] These commitments, however, began to ring hollow as more and more states became indirectly, and then directly, embroiled in the conflict.[30]

The Denunciation of Escalating Human Rights Violations and Abuses

Turning to the specifics of the Security Council's resolutions on Syria, member states have regularly condemned, in the strongest available terms, the international crimes underway in Syria in the preambular and operative paragraphs of the resolutions that have passed. Each succeeding text announced mounting levels of violence and the death and displacement of ever more civilians, including increasing numbers of children. This language became boilerplate over the years, with additional elements being added as the warring parties discovered new ways to violate international law and jeopardize the civilian population.[31] In addition to a focus on the targeting of civilians, the Council also specifically condemned attacks on humanitarian workers, medical

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[25] S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

[26] S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011). Several states abstained on this vote, indicating concern with the course of action but also the influence of the League of Arab States, which largely supported the intervention. *See* Ranj Alaaldin, *Libya & the Arab League*, *in* POLITICAL RATIONALE AND INTERNATIONAL CONSEQUENCES OF THE WAR IN LIBYA 105 (Dag Henrikson & Ann Karin Larssen eds., 2016).

[27] *Russia has a Serious Stake in Libya's Uncertain Future*, THE CONVERSATION, June 20, 2017 (noting Russia's profound dissatisfaction with the way UNSCR 1973 was implemented).

[28] *But see* Erik Voeten, *How Libya Did and Did not Affect the Security Council Vote on Syria*, THE MONKEY CAGE, Feb. 7, 2012 (arguing that observers should not take Russia's arguments at face value).

[29] *See, e.g.*, S.C. Res. 2118, pmbl, U.N. Doc. S/RES/2118 (Sept. 27, 2013).

[30] Uri Friedman, *Syria's War Has Never Been More International*, THE ATLANTIC, Feb. 14, 2018.

[31] *See, e.g.*, Andorra et al.: draft resolution, S/2016/826 (Oct. 8, 2016) (noting grave distress at the "continued deterioration of the devastating humanitarian situation in Syria, and the fact that now more than 13.5 million people are in need of humanitarian assistance in Syria, and that about 6.1 million people are internally displaced (in addition to the half a million Palestinian refugees who had settled in Syria), [and that] several hundred thousands of people are suffering in besieged areas") (draft vetoed by Russia).

teams, U.N. personnel, and journalists.[32] The Council often observed with equivocation that "some of these violations may amount to war crimes and crimes against humanity."[33] Although early resolutions focused on the Assad regime, as the war wore on, a rhetorical equivalency gradually emerged between the regime and the increasingly fractured opposition forces. This was a key concession to Russia but also reflected the emergence of less moderate opposition groups as well as a general deterioration of opposition compliance with IHL. With the introduction of terrorist elements into the Syrian theater, the Council generally reserved its strongest accountability language for Al Qaida, the Islamic State in Iraq and the Levant (ISIL), and their affiliates. This section looks at these condemnations, and the rhetorical evolution of the Council's pronouncements, in more detail.

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The Council first turned its full attention to Syria in 2011.[34] At the time, Russia argued that the situation did not present a threat to international peace and security and blocked even a press statement from going forward.[35] Later, it invoked its pocket veto to block a European draft

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[32] *See, e.g.*, S.C. Res. 2393, pmbl, U.N. Doc. S/RES/2393 (Dec. 19, 2017). *See generally* Beth Van Schaack, *Attacks on Journalists a War Crime*, JUST SECURITY (Aug. 20, 2014) (discussing U.N., civil society, and other initiatives condemning the targeting of journalists).

[33] S/RES/2393, *supra* note 32, ¶ 1.

[34] *See, e.g.*, U.N. SCOR, 66th Sess., 6520th mtg., U.N. Doc. S/PV.6520 (Apr. 21, 2011) (containing expressions of concern by the United States, France, Germany about the crackdown on protests and calls for the government to address the legitimate demands of the Syrian people).

[35] U.N. SCOR, 66th Sess., 6524th mtg., U.N. Doc. S/PV.6524, at 7 (Apr. 27, 2011) ("The main thing, in our view, is that the current situation in Syria, despite increasing tension and confrontations, does not present a threat to international peace and security."); Neil MacFarquhar, *Push in UN for Criticism of Syria is Rejected*, N.Y. TIMES, Apr. 27, 2011.

resolution, effectively stalling any concrete action.[36] Upon the introduction of a revised text, Russia indicated the draft was still "excessive" and a presidential statement—an instrument that follows consultations and is based on unanimity, but is not put to a vote[37]—would be "satisfactory."[38] Accordingly, in August 2011, the Council merely issued a presidential statement condemning the violence, calling upon the Syrian regime to respect human rights, urging all parties to act with restraint, and recalling that those responsible for human rights violations should be held accountable.[39] It also welcomed promises of reform from the regime but regretted the lack of progress on implementation.[40] This statement would prove to be a highpoint of agreement within the Council.[41] In a bizarre turn of events, Lebanon—whose leadership was pro-Syria at the time—allowed the statement to go forward but then disassociated itself from it.[42]

In October 2011, several European Union members floated a new draft resolution that would have denounced the regime's violent response to the protests and demanded Syrian authorities allow the full exercise of human rights, including the rights of freedom of expression and assembly.[43] The draft also called for "an inclusive Syrian-led political process conducted in an environment free from violence, fear, intimidation, and extremism, and aimed at effectively addressing the legitimate aspirations and concerns of Syria's population." During the deliberations, all more coercive elements were removed from the original text in an effort to enable the Council to speak with a unified voice. So, instead of imposing an arms embargo or sanctions, as had been contemplated, the draft merely called on states to "exercise vigilance and restraint" over the supply of arms to Syria and indicated the Council's intention to consider measures under Article 41, the U.N. Charter provision that undergirds U.N. sanctions.[44]

Despite weeks of negotiations and concessions, this draft became the first resolution dedicated to Syria to be put to a vote with the knowledge that it would likely be vetoed by Russia. In its explanation of vote, Russia—which had been unsuccessful in its attempts to include explicit language barring military intervention—repeatedly invoked the specter of Libya and stressed the need to respect national sovereignty and the principle of non-intervention.[45] It warned that prior Chapter VII resolutions on Libya had been expansively interpreted to authorize more intrusive actions. It also decried the draft resolution's confrontational and "unilateral, accusatory bent" toward Damascus, the inclusion of ultimatums, and the failure to call upon the Syrian opposition to distance itself from extremist groups. In explaining its own veto, China emphasized its fealty to

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[36] The United Nations Security Council, *Under-Secretary-General for Political Affairs Briefs Security Council on Syria, Says 'Repression Is Not the Solution;' Inclusive Dialogue, Reforms Needed*, U.N. Doc. SC/10235 (Apr. 27, 2011). For a detailed treatment of early responses in the Council, see Saira Mohamed, *The U.N. Security Council and the Crisis in Syria*, 16(11) ASIL INSIGHTS (Mar. 26, 2012).

[37] *See* Marko Milanovic, *Can UNSC Presidential Statements be Legally Binding?*, EJIL TALK! (Apr. 15, 2009).

[38] Margaret Besheer, *UN Security Council Again Considers Syria Resolution*, VOA, Aug. 1, 2011.

[39] U.N. Doc. S/PRST/2011/16 (Aug. 3, 2011).

[40] *Id.*

[41] WILLEM VAN DER WOLF & CLAUDIA TOFAN, LAW AND WAR IN SYRIA: A LEGAL ACCOUNT OF THE CURRENT CRISIS IN SYRIA 18 (2013).

[42] *Security Council, in Statement, Condemns Syrian Authorities for 'Widespread Violations of Human Rights, Use of Force against Civilians*, U.N. Doc. SC/10352 (Aug. 3, 2011) (noting Lebanon's critique of the statement after it was read out).

[43] France, Germany, Portugal and United Kingdom of Great Britain and Northern Ireland: draft resolution, U.N. Doc. S/2011/612 (Oct. 4, 2011).

[44] *See generally* U.N. SCOR 69th sess., 7323rd mtg., U.N. Doc. S/PV.7323 (Nov. 25, 2014) (discussing agenda item "General Issues Relating to Sanctions").

[45] These debates are available here: U.N. SCOR, 66th sess., 6627th mtg., U.N. Doc. S/PV.6627 (Oct. 4, 2011).

the principle of noninterference and argued that sanctions would have further complicated, rather than ameliorated, the situation on the ground.

Four states abstained: Brazil, India, Lebanon, and South Africa. Brazil expressed the view that more time should have been given to negotiations within the Council in order to enable it to reach consensus. India explained its reticence on the grounds that the draft resolution did not do enough to place obligations on the Syrian opposition to "abjure violence" and submit their grievances to a "peaceful political process." South Africa observed that prior Security Council resolutions had been "abused" and opined that elements of the resolution "were designed as a prelude to further actions" and reflected a "hidden agenda aimed at once again instituting regime change, which has been an objective clearly stated by some." Ambassador Susan Rice, then the United States' Permanent Representative to the United Nations, dismissed these latter concerns as mere pretext, arguing the draft was "not about military intervention; this is not about Libya. That is a cheap ruse by those who would rather sell arms to the Syrian regime than stand with the Syrian people." In the meantime, the General Assembly, with the support of 133 member states, adopted a resolution containing much of the same language as the failed Council text, but without the command of Chapter VII behind it.[46]

In February 2012, coincidentally on the thirtieth anniversary of the 1982 Hama massacre, the P-2 vetoed an otherwise consensus resolution, initiated by Morocco and dedicated to encouraging a peaceful resolution of the conflict.[47] Although some states argued that this new resolution should include an arms embargo, a sanctions regime, and/or a commission of inquiry, the final text was more moderate. Indeed, after the vote, the United Kingdom's permanent representative noted, "There is nothing in this text that should have triggered a veto. We removed every possible excuse."[48] The draft, conceptualized under Chapter VI, would merely have welcomed the ambitious Plan of Action put forward by the League of Arab States and its offer to facilitate a dialogue between the government and the "whole spectrum of the Syrian opposition." The draft resolution would also have demanded that the Syrian government put an end to human rights violations, implement U.N. Human Rights Council resolutions, allow humanitarian aid, and cooperate with the Human Rights Council's Commission of Inquiry, established the previous August. In a show of even-handedness, it similarly called upon armed groups to cease attacks on state institutions.

In exercising its second veto vis-à-vis the Syrian conflict, Russia repeated its earlier paranoid prognostications that the supporters of the draft were laying the groundwork for regime change. Member states again attempted to counter this charge in their explanations of vote, to no avail. Russia further argued that the draft continued to send a "biased signal." For its part, China again lamented that the resolution was put to a vote prematurely, given there had been a request for continued consultations and the Council remained divided. Historically, China has often followed the lead of the pertinent regional organization, so its departure from the Arab League position was notable.[49] The resolution's supporters reacted with diplomatic ferocity. Ambassador

[46] *See* G.A. Res. 66/176, U.N. Doc. A/RES/66/176 (Dec. 19, 2011). The resolution garnered 11 nays and 43 abstentions (including Russia and China).

[47] Bahrain, Colombia, Egypt, France, Germany, Jordan, Kuwait, Libya, Morocco, Oman, Portugal, Qatar, Saudi Arabia, Togo, Tunisia, Turkey, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution, U.N. Doc. S/2012/77 (Feb. 4, 2012).

[48] These debates are available here: U.N. SCOR, 67th sess., 6711th mtg., U.N. Doc. S/PV.6711 (Feb. 4, 2012).

[49] Mohamed, *supra* note 36 (noting that China had distanced itself not only from the Arab League but also from members of the Non-Aligned Movement, which supported the resolution).

Rice, for example, expressed "disgust" at the outcome of the vote by a Council "held hostage" by at least one member delivering weapons to Assad. The vetoes inspired the convening of the so-called Friends of the Syrian People (FOSP), which met several times in 2012-13 with members of the Syrian opposition, then styled as the National Coalition for Syrian Revolutionary and Opposition Forces (SOC), which some elements of the international community eventually recognized as the legitimate representative of the Syrian people.[50]

In frustration, states turned to the General Assembly, which once more issued its own resolution. It condemned the widespread and systematic violations of human rights and fundamental freedoms by the Syrian authorities and violence by all parties, endorsed the Arab League's actions, stressed "the importance of ensuring accountability and the need to end impunity and hold to account those responsible for human rights violations, including those violations that may amount to crimes against humanity," and asked the Secretary-General to appoint a special envoy dedicated to the conflict.[51] The U.N. Human Rights Council also weighed in.[52] The U.N. Secretary-General and League of Arab States Secretary-General subsequently appointed former U.N. Secretary General Kofi Annan as the first Special Envoy for Syria.

These developments mark the emergence of the General Assembly as a force for action vis-à-vis Syria. Of note, the General Assembly has proceeded with little consideration of Article 12 of the U.N. Charter, which implies that the General Assembly should refrain from making recommendations with regard to situations simultaneously under consideration before the Council (which partially explains why the Council often ends its resolutions with its decision to "remain actively seized of the matter"). This is consistent with subsequent state practice and jurisprudence emanating from the International Court of Justice (ICJ), which has determined that there is ample state practice since the promulgation of the Charter allowing for the two U.N. organs to work in parallel.[53] Nor did the Assembly invoke the "Uniting for Peace" resolution, which was designed to circumvent the veto and purports to allow the General Assembly to "make recommendations concerning international peace and security—up to and including the use of force" in the face of deadlock in the Council.[54] Rather, states proceeded under an existing agenda item on the

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[50] *See generally* Stefan Talmon, *Recognition of Opposition Groups as Legitimate Representative of a People*, 12 CHINESE J. INT'L L. 219 (2013) (discussing the international community's political recognition practice in Syria).

[51] G.A. Res. 66/253A, U.N. Doc. A/RES/66/253A (Feb. 16, 2012). *See also* G.A. Res. 67/262, U.N. Doc. A/RES/67/262 (May 15, 2013) (further condemning abuses by the Syrian authorities, calling for the release of those arbitrarily detained and journalists covering the conflict, demanding that Syria give unfettered access to the COI, and calling for accountability).

[52] Human Rights Council, The Escalating Grave Human Rights Violations and Deteriorating Humanitarian Situation in the Syrian Arab Republic, U.N. Doc. A/HRC/RES/19/1 (Apr. 10, 2012). China, Cuba, and Russia voted against the resolution.

[53] *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, 2004 I.C.J. Rep. 136, 149–50 ("there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security. … The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12.").

[54] G.A. Res. 377 (V), § A, U.N. Doc. A/RES/5/377 (Nov. 3, 1950). For further discussion of the General Assembly's powers within Syria, see chapter 5. *See also* Andrew J. Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution*, 18(3) J. CONFLICT & SECURITY L. 453, 456 (2013) ("the Uniting for Peace resolution holds significant modern potential as a safety valve capable of temporarily shifting the responsibility for the maintenance of international peace and security from a blocked Council to the world's fully inclusive conference of states, the General Assembly").

prevention of armed conflict.[55] In an unprecedented follow-up resolution, the Assembly deplored the failure of the Council to take effective action in Syria or "to agree on measures to ensure the compliance of Syrian authorities with its decisions."[56]

The Council Condemns "All Parties"

With the emergence of other bad actors on the Syrian scene, the conflict further deteriorated both from the perspective of the levels of violence and the parties' compliance with IHL. The Council began to condemn all sides with equal vigor. For example, in Resolution 2139, which was focused on alleviating the suffering caused by siege warfare, the Council uniformly condemned the "widespread violations of human rights and international humanitarian law by the Syrian authorities, as well as human rights abuses and violations of international humanitarian law by armed groups," including:

> all forms of sexual and gender-based violence, as well as all grave violations and abuses committed against children in contravention of applicable international law, such as recruitment and use, killing and maiming, rape, attacks on schools and hospitals as well as arbitrary arrest, detention, torture, ill treatment and use as human shields.[57]

It demanded that "all parties" put an end to all forms of violence and "cease all attacks against civilians,"[58] particularly the indiscriminate use of weapons and the use of indiscriminate weapons (such as barrel bombs) in populated areas, as well as methods of warfare "which are of a nature to cause superfluous injury or unnecessary suffering."[59] The Resolution also stressed

> that some of these violations may amount to war crimes and crimes against humanity [and emphasized] the need to end impunity for violations of international humanitarian law and violations and abuses of human rights, and [reaffirmed] that those who have committed or are otherwise responsible for such violations and abuses in Syria must be brought to justice.[60]

As the parties continued to resort to siege tactics, the Council rebuked "the use of starvation of civilians as a method of combat, including by the besiegement of populated areas" and attacks on humanitarian convoys,[61] and indicated that sieges on the civilian population are counter to international law, marking an advancement from extant positive law.[62] In a subsequent resolution not tied to any particular conflict, the Council designated the use of starvation as a weapon of war as an international law violation and potential war crime.[63] The Council specifically decried the

[55] *See* Steven Mathias, *The United Nations and Syria: A Work in Progress?*, 106 ASIL PROCEEDINGS 220, 222 (2012).
[56] G.A. Res. 66/253B, pmbl, U.N. Doc. A/RES/66/253B (Aug. 7, 2012) (garnering 133 votes to 12 opposed with 31 abstentions).
[57] S.C. Res. 2139, ¶ 11, S/RES/2139 (Feb. 22, 2014).
[58] *Id.* ¶ 3.
[59] *Id.*
[60] *Id.* ¶ 2.
[61] S.C. Res. 2332, pmbl, U.N. Doc. S/RES/2332 (Dec. 21, 2016).
[62] S.C. Res. 2393, *supra* note 32, at pmbl.
[63] *See also* S.C. Res. 2417, pmbl & ¶ 5, U.N. Doc. S/RES/2417 (May 24, 2018). *But see* Ruwanthika Gunaratne, *Advocating for a Separate Designation Criterion on Starvation*, JUST SECURITY (June 6, 2018) (critiquing the resolution for allowing for sanctions only for the intentional imposition of conditions of starvation).

abduction, exploitation, trafficking, and abuse of women and children, including forced marriages committed by ISIL, the Nusra Front (ANF), and other entities associated with Al Qaida.[64]

Notwithstanding this appearance of equivalency and undifferentiated language in the Council's formal texts, resolutions regularly condemned acts that could only be, or were only being, committed by the regime given its control of the skies and superior weaponry. These include:

> the continuing indiscriminate attacks in populated areas, including an intensified campaign of aerial bombings and the use of barrel bombs in Aleppo and other areas, artillery, shelling and air strikes, and the widespread use of torture, ill-treatment, sexual and gender-based violence as well as all grave violations and abuses committed against children.[65]

Furthermore, in their individual interventions, many Council members singled out the regime for its actions. In connection with Resolution 2165, for example, France decried the regime's use of cluster bombs, ballistic missiles, chemical weapons, and barrel bombs against the civilian population.[66]

As ISIL and the Nusra Front became more active in Syria, the Council ratcheted up its accountability language. In Resolution 2170 (2014), for example, the Council recalled that

> widespread or systematic attacks directed against any civilian populations because of their ethnic or political background, religion or belief may constitute a crime against humanity, emphasize[d] the need to ensure that ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida are held accountable for abuses of human rights and violations of international humanitarian law, [and] urge[d] all parties to prevent such violations and abuses…[67]

The Council invoked earlier resolutions devoted to counter-terrorism and urged all states to "cooperate in efforts to find and bring to justice individuals, groups, undertakings and entities associated with Al-Qaida including ISIL and [the Nusra Front] who perpetrate, organize and sponsor terrorist acts and in this regard underlines the importance of regional cooperation."[68] By 2017, the list of international crimes regularly being condemned by the Council had expanded to include terrorist acts associated with ISIL affiliates. The list of international law breaches is now a long one:

> attacks against civilians and civilian objects, including those involving attacks on schools, medical facilities and the deliberate interruptions of water supply, the indiscriminate use of weapons, including artillery, barrel bombs and air strikes, indiscriminate shelling by mortars, car bombs, suicide attacks and tunnel bombs, as well as the use of starvation of civilians as a method of combat, including by the besiegement of populated areas, and the widespread use of torture, ill-treatment, arbitrary executions, extrajudicial killings, enforced disappearances, sexual and

[64] S.C. Res. 2199, pmbl, U.N. Doc. S/RES/2199 (Feb. 12, 2015).
[65] S.C. Res. 2165, pmbl, U.N. Doc. S/RES/2165 (July 14, 2014).
[66] U.N. SCOR, 69th sess., 7116th mtg., U.N. Doc. S/PV.7116 (Feb. 22, 2014), at 5.
[67] S.C. Res. 2170, ¶ 3, U.N. Doc. S/RES/2170 (Aug. 15, 2014).
[68] *Id*. ¶ 4.

gender-based violence, as well as all grave violations and abuses committed against children.[69]

The Council later issued a thematic resolution aimed at protecting cultural heritage worldwide that identified the involvement of non-state actors (including ISIL) in its destruction, looting, and pillage, and urged states to develop effective national measures to counter trafficking in cultural property.[70]

The conflict in Syria has featured siege warfare of medieval proportions. Although the government has been primarily responsible for this state of affairs, there have been government-controlled towns, such as Fuaa and Kefraya in Idlib Province, that have been besieged by the opposition. By 2016, the United Nations estimated that 400,000 people were under siege or in hard-to-reach areas (with the latter euphemism being employed at times to avoid the term "siege" with its war crimes implications).[71] The Council regularly recalled that "starvation of civilians as a method of combat is prohibited by international humanitarian law"[72] and that "sieges directed against civilian populations … are a violation of international humanitarian law,"[73] although it did not designate these tactics as war crimes *per se*. As the situation in locales under siege worsened, both U.N. Secretary-General Ban Ki-Moon and then-U.S. Secretary of State John Kerry publicly denounced the use of starvation as a weapon of war.[74]

The Absence of the Responsibility to Protect

The commission of grave international crimes in Syria offered an opportunity for the international community to operationalize the Responsibility-to-Protect doctrine (R2P).[75] And yet, R2P has not featured prominently in the Council's approach to the conflict, attesting to its erosion following controversial military operations in Iraq and Libya.[76] The R2P framework consists of three pillars: (1) states bear the primary responsibility to protect their population from genocide, war crimes, crimes against humanity, and ethnic cleansing; (2) the international community must assist states in fulfilling these protection obligations; and (3) when a state manifestly fails in its obligations (including when it is itself a perpetrator of these crimes), the international community has a responsibility to take appropriate collective action "in a timely and decisive manner" through the Security Council.[77]

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[69] S/RES/2393, *supra* note 32.
[70] S.C. Res. 2347, ¶ 3, U.N. Doc. S/RES/2347 (Mar. 24, 2017).
[71] U.N. Office for the Coordination of Humanitarian Affairs, *Joint Statement on Hard-to-Reach and Besieged Communities in Syria* (Jan. 7, 2016). The Syrian American Medical Society (SAMS) put the estimate at 600,000. SAMS, *Slow Death: Life and Death in Syrian Communities Under Siege* (Mar. 2015).
[72] S/RES/2165, *supra* note 65, ¶ 7.
[73] S/RES/2393, *supra* note 32, at pmbl.
[74] *See* Beth Van Schaack, *Siege Warfare and the Starvation of Civilians as a Weapon of War and War Crime*, JUST SECURITY (Feb. 4, 2016).
[75] G.A. Res. 60/1, 2005 World Summit Outcome Document, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).
[76] David Rieff, *R2P, R.I.P.*, N.Y. TIMES, Nov. 7, 2011; Tom Esslemont, *As Syrian Deaths Mount, World's 'Responsibility to Protect' Takes a Hit: Experts*, REUTERS, Oct. 24, 2016. R2P did make an appearance in neighboring Iraq when a massacre was threatened on Sinjar Mountain. *See* Beth Van Schaack, *ISIL = Genocide?*, JUST SECURITY (Aug. 29, 2014).
[77] Report of the Secretary General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/577 (Jan. 12, 2009), at 8-9.

At first, the Council was silent on R2P in its Syria pronouncements, even as it invoked the doctrine in resolutions addressed to other crises.[78] Over time, however, the Council began to make oblique references to at least the first pillar of R2P. For example, in Resolution 2165 on humanitarian access, it reaffirmed in preambular language "the primary responsibility of the Syrian authorities to protect the population in Syria."[79] Individual Council members also made reference the doctrine in their interventions. Rwanda, in its remarks around chemical weapons, noted that "the primary responsibility of this global body is the responsibility to protect."[80] Rwanda and Australia mentioned the Council's role in implementing R2P—with accountability as a form of protection—in connection with the failed ICC referral.[81] Notwithstanding these cameo appearances, R2P has not been particularly influential in the full Council in terms of its decision making or as a restraint on the veto.[82] Indeed, Russia used one of its explanations of vote to denounce the situation in Libya as a perversion of the concept by NATO. Specifically, the Russian permanent representative noted, "The international community is alarmed by statements that compliance with Security Council resolutions on Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect."[83]

Efforts to Resolve the Conflict & Facilitate Humanitarian Relief

The Council has undertaken a number of abortive efforts to de-escalate the conflict and alleviate the suffering caused by the Syrian crisis, including through the deployment of a U.N. supervision mission and attempts to establish *seriatim* ceasefires. It was hoped that the latter would lay the foundation for a permanent resolution of the conflict. Sadly, these pauses in the fighting have come and gone, providing the people of Syria with only the most fleeting of respites from the relentless warfare. Meanwhile, a number of proposals emerged to help resolve the conflict—including Annan's six-point plan, a Security Council roadmap, and efforts convened by Russia in Astana—but none proved viable as the conflict continued to rage. All the while, the humanitarian situation deteriorated, in part because Assad politicized the provision of aid.

The United Nations Supervision Mission in Syria

One of the Council's first responses to the unfolding conflict in Syria was a presidential statement that called for a sequential cessation of hostilities by the government on April 10, 2012, and then by the opposition 48 hours later.[84] In Resolution 2042, the Council also unanimously endorsed the six-point proposal put forth by Special Envoy Annan, and directed all parties to help

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[78] *See, e.g.,* S.C. Res. 1653, ¶ 10, U.N. Doc. S/RES/1653 (Jan. 27, 2006) (Great Lakes region); S.C. Res. 1996, ¶ 3, U.N. Doc. S/RES/1996 (July 8, 2011) (South Sudan); S.C. Res. 2014, pmbl, U.N. Doc. S/RES/2014 (Oct. 21, 2011) (Yemen); S.C. Res. 2016, ¶ 3, U.N. Doc. S/RES/2016 (Oct. 27, 2011) (Libya); and S.C. Res. 2085, ¶¶ 9, 17, U.N. Doc. S/RES/2085 (Mali).

[79] S/RES/2165, *supra* note 65, at pmbl. *See also* S.C. Res. 2254, pmbl, U.N. Doc. S/RES/2254 (Dec. 18, 2015); S/RES/2139, *supra* note 57, ¶ 9 (demanding that all parties take all appropriate steps to protect civilians, and stressing that "the primary responsibility to protect its population lies with the Syrian authorities").

[80] U.N. SCOR, 68th sess., 7038th mtg., U.N. Doc. S/PV.7038 (Sept. 27, 2013), at 14.

[81] U.N. SCOR, 69th sess., 7180th mtg., U.N. Doc. S/PV.7180 (May 22, 2014), at 6 (statement of Rwanda); *id.* at 9 (statement of Australia).

[82] *See generally* Aidan Hehir, *The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect*, 38 INT'L SECURITY 137 (2013).

[83] S/PV.6627, *supra* note 45, at 4.

[84] U.N. Doc. S/PRST/2012/10 (Apr. 5, 2012).

implement its provisions.[85] The proposal called on the warring parties to, *inter alia*, cease troop movements and the use of heavy weapons in population centers, allow humanitarian access and effectuate a two-hour daily humanitarian pause in the fighting, release arbitrarily detained persons, and initiate a comprehensive political transition. The Council also deployed an advance mission of unarmed military observers to lay the groundwork for a larger in-country supervision mission, assuming a sustained cessation of armed violence.[86] In the resolution's preamble, the Council condemned widespread human rights violations (by the regime) and abuses (by armed groups), and "recall[ed] that those responsible shall be held accountable,"[87] but did not otherwise address issues of justice and accountability.

The next week, Russia introduced the text of what became Resolution 2043 (2012), which established the United Nations Supervision Mission in Syria (UNSMIS).[88] While states praised the unity exhibited by the Council, many U.N. members were skeptical about the Mission's prospects absent a durable cessation of violence, particularly given the government's relentless shelling of opposition strongholds.[89] Ambassador Rice made plain that the United States would not extend the Mission without tangible progress toward implementing the Special Envoy's six-point plan. At the same time, many states warned this might be the last opportunity to change the course of events and avoid a full-scale civil war. As it turns out, the Mission had to temporarily suspend its operations in June 2012 following an intensification of the conflict.

The unanimity displayed by the Council in passing these twin UNSMIS resolutions proved to be short-lived as the P-3 tried to amplify pressure on the regime. The United Kingdom tabled a draft resolution[90] aimed at creating the permissive conditions necessary for a meaningful political process in keeping with Annan's plan and the Action Group for Syria's Geneva Communiqué.[91] This text included a demand that the regime remove heavy weapons and pull its troops back from population centers and that all parties cease armed violence in all its forms. The proposed text would also have extended UNSMIS and obliged Syria to ensure its effective operation. Non-compliance would have been met with immediate "measures under Article 41" (which typically implies sanctions). The draft condemned violence by all sides and also recalled that "those responsible for human rights violations and abuses, including acts of violence, must be held accountable." It specifically addressed the need for accountability for the perpetrators of attacks on U.N. personnel deployed with UNSMIS. In addition, the draft text would have required the Syrian government to cooperate with the Commission of Inquiry (COI) deployed by the U.N. Human Rights Council and provide its members with immediate entry and access to all areas of Syria.

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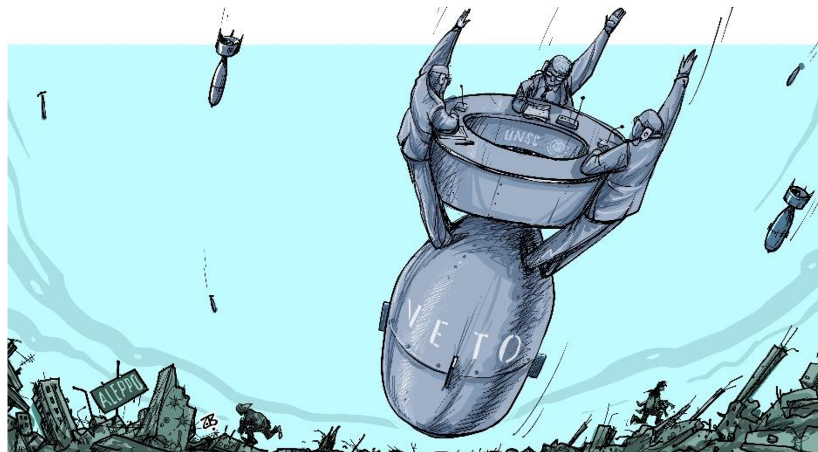
[85] S.C. Res. 2042, U.N. Doc. S/RES/2042 (Apr. 14, 2012). The text of the plan is annexed to this resolution. *See also* U.N. Doc. S/PRST/2012/6 (Mar. 21, 2012) (expressing full support for the Envoy's plan).
[86] *Id.* ¶¶ 5-7 (dispatching an advanced team to determine the feasibility of a wider supervision operation). The League of Arab Nations had put forward a proposal in 2011 aimed at stopping the fighting; although Syria signed the proposal, violence continued. The League had also deployed monitors but terminated the mission in early 2012. Ayman Samir & Erika Solomon, *Arab League Suspends Syria Mission as Violence Rages*, REUTERS, Jan. 27, 2012.
[87] S/RES/2042, *supra* note 85, at pmbl.
[88] S.C. Res. 2043, U.N. Doc. No. S/RES/2043 (Apr. 21, 2012) (establishing UNSMIS comprised of up to 300 unarmed military observers accompanied by a civilian component).
[89] These debates are available here: U.N. SCOR, 67th sess., 6756th mtg., U.N. Doc. S/PV.6756 (Apr. 21, 2012).
[90] France, Germany, Portugal, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution, U.N. Doc. S/2012/538 (July 19, 2012).
[91] *See* Final Communiqué of the Action Group for Syria, U.N. Doc A/66/865-S/2012/522, annex (July 6, 2012).

The draft resolution came to a vote at an awkward time: just after an audacious opposition attack targeted the Syrian leadership in Damascus and killed the Defence Minister and other top aides. The proposal failed upon Russian and Chinese vetoes (their third in tandem). The explanations of vote remained contentious and *ad hominem*. France blamed Russia for endeavoring to "win time for the Syrian regime to crush the opposition" and render the Council "a fig leaf for impunity."[92] Pakistan, which had abstained in the vote, lamented the divisive measures proposed under Chapter VII should have been set aside in favor of a more "constructive spirit of flexibility." Russia repeated its concerns about bias and the veiled threat of military intervention in justifying its veto. It accused the "Western members of the Council" of fanning "the flames of confrontation." China similarly decried the draft's sponsors for their "rigid and arrogant approach" and for linking the extension of the UNSMIS with one-sided coercive measures against Syria.

A day later, the Council issued a technical resolution, extending the Mission for a period of 30 days in light of the "dangerous security situation" prevailing in the country.[93] Russia had floated, but then withdrawn, a competing resolution that would have extended UNSMIS further and demanded that all parties facilitate its work, but that excluded any levers to ensure compliance.[94] In the end, UNSMIS met its demise August 19, 2012, after the Secretary-General reported its monitors could no longer implement their mandate safely or effectively.[95] The majority of the Council concluded that without coercive measures to ensure its ability to operate on the ground, the Mission had become untenable.



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Fleeting Ceasefires

Over the years, and barring a nationwide ceasefire, members of the Council and the international community regularly called for and urged the players to pursue piecemeal humanitarian pauses, freezes in hostilities, days of tranquility, regimes of calm, localized ceasefires, and de-escalation zones to give civilians around the country a break and allow for the

[92] These debates are here: U.N. SCOR, 67th sess., 6810th mtg., U.N. Doc. S/PV.6810 (July 19, 2012).
[93] S.C. Res. 2059, U.N. Doc. S/RES/2059 (July 20, 2012).
[94] Russian Federation: draft resolution, S/2012/547/Rev.2 (July 17, 2012).
[95] Letter dated 10 August 2012 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2012/618 (Aug. 10, 2012).

provision of humanitarian assistance.[96] The parties did occasionally implement localized truces, but a durable nationwide ceasefire remained elusive until late in the conflict.

In the fall of 2015, all the major belligerents in Syria formed the International Syria Support Group (ISSG). At this point, much subsequent work to effectuate more lasting ceasefires, and ultimately a political transition, happened outside the Security Council. Meeting in Vienna, Austria, the ISSG was able to make some progress towards a cessation of hostilities (meant as a precursor to a more comprehensive nationwide ceasefire) and the provision of humanitarian assistance to be supervised by the United Nations with the support of the P-5.[97] Although all 100 or so opposition factions within the High Negotiations Committee—the opposition's umbrella organization—were covered, the truce did not apply to offensive attacks against terrorist organizations designated as such by the Security Council, including ISIL, the Nusra Front, and its derivatives. In one of its Vienna Statements, the ISSG stressed that when taking action against these groups, combatants should avoid attacks on parties to the cessation as well as on civilians.[98]

These various efforts to bring about a cessation of hostilities have failed for multiple reasons.[99] For one, they have often contained the seeds of their own demise: ceasefire formulations have specifically excluded attacks on ISIL and other terrorist groups.[100] These gaps in coverage create a cavernous loophole for fighting to continue under the guise of counter-Nusra Front/ISIL operations and the Council's counter-terrorism agenda, and have offered the Assad regime and Russia a pretense for continuing to engage opposition forces. Because the international community was unwilling to pause these counter-terrorism operations, the ceasefires are inherently unstable.

A Comprehensive Resolution to the Conflict

Resolution 2254 of 2015 offered the first—and only—concrete roadmap for a political transition initiated by the Council. In it, members unanimously blessed the 2012 Geneva Communiqué and ISSG's "Vienna Statements," endorsed the work of the ISSG, and requested the Secretary-General and his Special Envoy to convene representatives of the Syrian government and the opposition to engage in formal negotiations to bring about a comprehensive and Syrian-owned political transition. It acknowledged the need for confidence-building measures to demonstrate the viability of a political process and a lasting ceasefire.

In terms of concrete steps, the text called for a new constitution to be approved within 18 months and for internationally-supervised elections.[101] The resolution was silent on the constitutional arrangements for the transition period, although the Preamble also called for "the establishment of an inclusive transitional governing body with full executive powers, which shall be formed on the basis of mutual consent while ensuring continuity of governmental institutions,"

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[96] *See, e.g.*, S/PRST/2012/6, *supra* note 85 (expressing support for the Envoy's proposal to "implement a daily two-hour humanitarian pause and to coordinate exact time and modalities of the daily pause through an efficient mechanism, including at the local level").
[97] ISSG, Statement of the International Syria Support Group Vienna (Nov. 14, 2015).
[98] ISSG, *Note to Correspondents: Statement of the International Syria Support Group* (May 17, 2016).
[99] Bassam Barabandi & Hassan Hassan, *Ceasefires in Syria: How Russia and Iran Can Help Broker Honest Deals*, FOREIGN AFF., Jan. 25, 2016.
[100] *See* S/RES/2254, *supra* note 79, ¶ 8 (calling on all states to prevent terrorist acts by ISIL, the Nusra Front, and Al Qaida and eradicate safe havens in Syria, and noting that any ceasefire would "not apply to offensive or defensive actions against these individuals, groups, undertakings and entities").
[101] *Id.* ¶ 4.

which could be interpreted in multiple ways.[102] Other than entreating the parties to pursue a political transition, the resolution did not address the ultimate fate of Assad except to imply that he would stay in power until U.N.-supervised elections could be held 18 months hence.[103] In their explanations of vote, however, several states indicated that Assad could not be a part of any solution to the crisis.[104] The United Kingdom, for example, insisted that "That process [of political transition] necessarily involves the departure of Bashar Al-Assad, not only for moral reasons, given the destruction that he has unleashed upon his own people, but also for practical reasons, because it will never be possible to bring peace and unity to Syria as long as he remains in office."[105] Likewise, while the resolution itself did not address accountability, several states raised the issue in their interventions.

Resolution 2254 made explicit the indelible link between a durable truce and a "credible, inclusive and non-sectarian" political solution. The Council also asserted that aid should be made available to "all people in need," language that was later reiterated when it became clear that humanitarian assistance was still not reaching opposition areas. With Resolution 2268, passed in 2016, and thereafter, the Council has consistently demanded the prompt implementation of Resolution 2254 and the acceleration of the delivery of humanitarian assistance.[106]

Humanitarian Assistance

In parallel with these ceasefire and conflict resolution efforts, the Security Council made marginal progress in responding to the spiraling deterioration of the humanitarian conditions in Syria, particularly with respect to civilians in besieged and hard-to-reach areas. It began with the issuance of a presidential statement that established the important doctrinal point that the arbitrary denial of humanitarian access "can constitute" a violation of IHL.[107] No guidance was offered on what constitutes an "arbitrary withholding," but the abject need coupled with willing providers would certainly be key factors.[108] This was followed by a unanimous Resolution 2139 in 2014, calling on all warring parties to lift their sieges on populated areas—such as in Homs, Aleppo, and Damascus (areas generally under besiegement by the government *vice* the opposition)—and to allow unhindered humanitarian access and the evacuation of civilians.[109] This demand was directed at "all parties," but "in particular the Syrian authorities." The Council also insisted all parties respect the principle of medical neutrality (including by demilitarizing medical facilities) and enable medical personnel to care for the wounded and sick in keeping with IHL.[110] As the

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[102] *Id*. pmbl. *See generally* THE CARTER CENTER, SYRIA'S TRANSITION GOVERNANCE & CONSTITUTIONAL OPTIONS UNDER U.N. SECURITY COUNCIL RESOLUTION 2254 (June 2016) (proposing constitutional arrangements for the 18-month transition period).
[103] *Id*. ¶ 4.
[104] *See, e.g.*, U.N. SCOR, 70th sess., 7588th mtg., U.N. Doc. S/PV.7588 (Dec. 18, 2015).
[105] *Id.* at 12.
[106] S.C. Res. 2268, ¶ 2, U.N. Doc. S/RES/2268 (Feb. 26, 2016).
[107] *See* S/PRST/2013/15, *supra* note 19 (condemning violence against civilians, terrorist attacks, the denial of humanitarian access and the prevailing impunity, and calling upon "all parties, in particular the Syrian authorities," to facilitate humanitarian efforts).
[108] *See* Dapo Akande & Emanuela-Chiara Gillard, *Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict* (Aug. 21, 2014), https://www.unocha.org/sites/unocha/files/dms/Documents/Arbitrary%20Withholding%20of%20Consent.pdf (setting forth framework for evaluating arbitrary withholding).
[109] S/RES/2139, *supra* note 57, ¶¶ 5-7. In adopting Resolution 2139, many states decried the fact that the prior presidential statement was never implemented. *See, e.g.*, S/PV.7116, *supra* note 66, at 13 (statement of Rwanda).
[110] *Id.* ¶¶ 8, 10. *See* Rule 25, International Committee of the Red Cross, Customary International Law Database.

resolution passed, Secretary-General Ban Ki-Moon protested that humanitarian assistance is "not something to be negotiated; it is something to be allowed by virtue of international law."[111]

In their explanations of votes, Council members welcomed the unanimity of Resolution 2139 and its long overdue focus on the acute humanitarian crises created by the conflict. Many states raised the issue of accountability and the need for an ICC referral as the impact on the civilian population worsened,[112] with Luxembourg insisting that "the starvation of civilians as a method of combat is prohibited under international humanitarian law" and Lithuania arguing that "[i]mpunity breeds violence and perpetuates conflict. ... The Council must use all the tools at its disposal, including referrals to the International Criminal Court." Russia, in turn, accused members of the Council of using the humanitarian situation in Syria to effectuate regime change and members of the opposition of plundering humanitarian convoys and targeting humanitarian workers. Russia painted a picture of humanitarian progress, claiming that aid was reaching many besieged areas through an air bridge and humanitarian terminals, as well as via polio vaccination campaigns. The United Kingdom—citing a recent briefing from Valerie Amos, the then-U.N. Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator—took issue with this rosy assessment, arguing the reality on the ground was much more dire. A group of international law experts took to the press and argued that there was no legal barrier to the United Nations providing aid without Syria's consent, in part because the United Nations would be operating with the consent of groups exercising effective control over territory.[113]

Despite these differing perspectives, in Resolution 2165 of 2014, the Council unanimously condemned the Syrian government's arbitrary withholding of consent to the activities of humanitarian actors, in violation of Resolution 2139, and—in an unprecedented and precedent-setting move—authorized the delivery of cross-border aid without Syria's express permission through certain identified border crossings (via Turkey, Iraq, and Jordan).[114] It established a monitoring mechanism to track the loading and dispatch of relief consignments by the United Nations and their implementing partners. The Council also called upon all parties to implement humanitarian pauses to enable the provision of assistance. In their interventions, states charged Syria with manipulating humanitarian aid to advance its military strategy, including by confiscating medical equipment intended for areas controlled by the opposition.[115] Russia drew attention to the resolution's recognition of increasing terrorist activity—a point also emphasized by Syria—as well as the fact that the resolution did not provide for an automatic authorization of enforcement measures.[116] Following the establishment of aid corridors, some areas saw improvement. Nonetheless, blockages, attacks on humanitarian convoys, and the looting of aid

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[111] S/PV.7116, *supra* note 66, at 2.

[112] *See, e.g.*, *id.* at 14.

[113] *There is no Legal Barrier to UN Cross-Border Operations in Syria*, THE GUARDIAN (Apr. 28, 2014)

[114] S/RES/2165, *supra* note 65. Undergirding the resolution was set of monthly reports by the U.N. Secretary-General on the lack of implementation of Resolution 2139 by the Syrian authorities. The new resolution was cheered by the National Coalition of Syrian Revolution and Opposition Forces. Statement on UNSC Resolution 2165, https://www.etilaf.us/unscr_2165 (noting that the resolution "sends a strong signal to the Syrian regime that its calculated policy of siege warfare will no longer be tolerated").

[115] U.N. SCOR, 69th sess., 7216th mtg., U.N. Doc. S/PV.7216 (July 14, 2014), at 3 (statement of Luxembourg); *id.* at 7 (statement of the United States).

[116] *Id.* at 13. Syria also called upon states to bring pressure on governments that it believes are financing, arming and training terrorist elements and facilitating their passage into Syria, namely Saudi Arabia, Qatar, and Turkey.

continued. Despite some grumbling from Russia, the previous arrangements were renewed several times.[117]

In Resolution 2258 of 2015, the Council commended the efforts of humanitarian actors in the field but condemned—in preambular language—their continued lack of access to the majority of people in need.[118] In particular, the resolution noted growing impediments to the delivery of assistance and the decline in approvals emanating from the Syrian authorities. Nonetheless, its directives to Syria were couched in rather anodyne terms, merely requesting the Syrian authorities "to expeditiously respond to all requests for cross-line deliveries … and to give such requests positive consideration."[119] The resolution ended with the toothless threat to "take further measures under the Charter" in the event of non-compliance with this and previous resolutions.[120] Such rhetorical tact was no doubt employed in order to win Moscow's support, induce Damascus's compliance, and avoid exacerbating an already tenuous humanitarian situation. The ISSG also pushed for better humanitarian access and indicated it would support air bridges and air drops by the World Food Program if the United Nations was denied access to certain besieged areas. It also insisted the provision of aid should not "benefit any particular group over any other" and must include all categories of assistance (food, medical, sanitation, etc.) in keeping with Resolution 2254.[121] The Council continued to raise concerns about the insufficient implementation of Resolution 2165 and its progeny, attacks on humanitarian convoys (without identifying the origins), breaches of the principle of medical neutrality, and the acute needs throughout the country.[122] It demanded that all parties allow safe, unimpeded, and sustained access for humanitarian assistance and threatened further action in the event of non-compliance.

Over the years, although the Security Council did not issue any legally binding decisions on refugees *per se*, it regularly commended states of the region for taking in Syrians fleeing the war. In Resolution 2165, for example, the Council

> [r]eiterat[ed] its appreciation for the significant and admirable efforts that have been made by the countries of the region, notably Lebanon, Jordan, Turkey, Iraq and Egypt, to accommodate the more than 2.8 million refugees who have fled Syria as a result of ongoing violence.[123]

It urged all U.N. member states to support states in the region as they tried to cope with the growing humanitarian crisis in keeping with burden-sharing principles. It also noted the need to build the conditions necessary to allow for the safe and voluntary return of refugees and internally-displaced persons (IDPs).[124] Controversially, Turkey later agreed to prevent migrants from passing through its territory into Europe in exchange for visa liberalization, aid, and a revitalized European Union

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[117] *See* S.C. Res. 2191, U.N. Doc. S/RES/2191 (Dec. 17, 2014); S.C. Res. 2258, U.N. Doc. S/RES/2258 (Dec. 22, 2015); S/RES/2332, *supra* note 61, ¶ 2; S/RES/2393, *supra* note 32, ¶ 2; S.C. Res. 2449, ¶ 3, U.N. Doc. S/RES/2449 (Dec. 13, 2018). *See generally* U.N. Office for the Coordination of Humanitarian Affairs (OCHA), United Nations Cross-border Operations from Jordan to Syria (in October 2017) (Nov. 9, 2017).
[118] S/RES/2258, *supra* note 117, at pmbl.
[119] *Id.* ¶ 3.
[120] *Id.* ¶ 6.
[121] ISSG, *Note to Correspondents: Statement of the International Syria Support Group* (May 17, 2016).
[122] S/RES/2449, *supra* note 117, at pmbl.
[123] S/RES/2165, *supra* note 65; *see also* S/RES/2139, *supra* note 57, at pmbl.
[124] S/RES/2254, *supra* note 79, at ¶ 14. *See also* S/RES/2258, *supra* note 117, at pmbl (expressing its appreciation to neighboring countries for accommodating Syrian refugees but noting with concern that the international response has fallen short of meeting the needs of host governments).

accession process.[125] Following an escalation of fighting in February 2020 with its troops increasingly drawn into battle, Turkey appeared to renege on this controversial agreement.[126]

The system established by Resolution 2165 came under threat at the end of 2019 when it was due to expire in the midst of the Idlib crisis.[127] Russia and China vetoed a Belgian, German and Kuwaiti proposal to extend and the effort,[128] arguing that it was obsolete because Syria had retaken most of the country and so it was time to "revert to established parameters for humanitarian assistance." In a tit-for-tat move, the P-3 rejected Russia's version of the resolution, which reduced the number of border crossings to two and only extended the system for only six months, with France arguing in its explanation of vote that Syria was "weaponizing" humanitarian assistance.[129] Frantic negotiations ensued, with OCHA and the World Health Organization insisting on the need for at least the three border crossings to ensure the provision of critical medical assistance, and particularly the corridor in the northeast at Al-Yarubiyah, Iraq, closest to where the opposition was concentrated. Eventually, as the arrangement was hours from expiring, the Council extended Resolution 2165, largely on the terms demanded by Russia.[130] But no one was happy.[131] Indeed, China, Russia, the United Kingdom and the United States all abstained. France, the only member of the P-5 to vote in favor of the resolution, accused Russia of "yielding to the demands of a criminal regime," and several states lamented the elimination of two crossings on political grounds, the abandonment of the four humanitarian principles (humanity, neutrality, impartiality and independence), and the wielding of ultimatums when people are dying.

The Crisis in Aleppo

Notwithstanding all these efforts, the situation on the ground continued to deteriorate. The crisis in Aleppo—Syria's "second city," economic capital, and a UNESCO World Heritage site—offers a microcosm of the war's most devastating effects and the Security Council's dysfunction. By way of background, the uprising spread to Aleppo in 2012.[132] When rebels took control of the east, the city was effectively split in two. ISIL gained a solid foothold in 2013, creating a three-way battleground. Circumstances in Aleppo were rendered even more fractured by in-fighting between rebel groups, more perilous by the government's introduction of barrel bombs, and more complicated by Russia's intervention in the conflict in 2015, ostensibly in pursuit of ISIL.[133] Localized ceasefires came and went; hospitals were destroyed by air attacks; and evidence emerged that suggested the government had launched a chemical attack in an attempt to definitively take the divided city.[134] The parties did manage to open corridors to allow civilians,

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[125] Elizabeth Collett, *The Paradox of the EU-Turkey Refugee Deal*, MIGRATION POLICY INSTITUTE (March 2016).
[126] Dominic Evans & Orhan Coskun, *Turkey Says it will let Refugees into Europe after Troops Killed in Syria*, REUTERS, Dec. 26, 2020.
[127] The debates are here: U.N. SCOR, 74th sess., 8697th mtg., U.N. Doc. S/PV.8697 (Dec. 20, 2019).
[128] Belgium, Germany and Kuwait: draft resolution, U.N. Doc. S/2019/961 (Dec. 20, 2019).
[129] Russia: draft resolution, U.N. Doc. S/2019/962 (Dec. 20, 2019).
[130] S.C. Res. 2504, ¶ 3, U.N. Doc. S/RES/2504 (Jan. 10, 2020).
[131] These debates are here: U.N. SCOR, 75th sess., 8700th mtg., U.N. Doc. S/PV.8700 (Jan. 10, 2020).
[132] *Aleppo Under Siege: A Timeline*, SKYNEWS, Dec. 14, 2016, https://news.sky.com/story/aleppo-under-siege-a-timeline-10613396. *See generally* Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N.Doc. A/HRC/34/64 (Feb. 2, 2017) (special report on Aleppo).
[133] Amnesty International, *'Death Everywhere'—War Crimes and Human Rights Abuses in Aleppo, Syria* (May 5, 2015).
[134] Human Rights Watch, *Syria: Coordinated Chemical Attacks on Aleppo* (Feb. 13, 2017) (recounting evidence of chlorine attacks in Aleppo at the end of 2016).

as well as militants willing to surrender, to flee the besieged city. Little Omran Daqneesh—dusty, bloodied, and dazed[135]—became a global symbol of this "complete meltdown of humanity."[136]

In response to the increasingly dire situation in eastern Aleppo, the United States and Russia negotiated a notional cease-fire agreement in September 2016 that would have had the parties recommit to the cessation of hostilities, allow the provision of verified humanitarian assistance (to be transported in containers that would be sealed at the Turkish border to protect against plunder and weapons smuggling), pull back all heavy weapons, and prevent the Nusra Front from advancing into the demilitarized zone. Securing Castello Road, which had earned the epithet "Death Road," featured prominently in the agreement as it provided the main route in and out of Eastern Aleppo.[137] The ceasefire was to lead the way to a joint U.S.-Russia air campaign against ISIL organized through a Joint Implementation Center (JIC). The truce did not hold, as government forces continued to bombard opposition areas in Aleppo. The United States suspended talks with Russia, alleging it had not held up its end of the deal to keep Assad in check.[138] It also argued that Russia shared responsibility for an attack on a U.N.-Syrian Red Crescent humanitarian convoy on September 19, 2016, likely committed by the Syrian regime.[139] Other sources suggested the JIC arrangement was scuttled because the Pentagon refused to coordinate intelligence and targeting decisions with the Russians.[140]

Shortly thereafter, France and Spain introduced a draft resolution that demanded an immediate end to "all aerial bombardments of and military flights over Aleppo city."[141] The text reiterated the obligations of parties to prevent material and financial support to terrorist groups, called for a resumption of the cessation of hostilities, underlined the need for enhanced monitoring, and urged states to facilitate the safe and unhindered provision of the "full spectrum" of humanitarian assistance. The latter concept euphemistically responded to repeated allegations that the Syrian government was blocking aid to certain opposition areas and removing medical supplies from aid convoys.[142] In the fifth exercise of its veto, Russia rejected the draft, portraying it as little more than an act of propaganda since it was doomed to failure. Russia was joined by the Bolivarian Republic of Venezuela, which accused members of the Council of providing weapons to "violent non-State actors who then became terrorist groups that are no longer under their control" and blamed the moderate opposition for not disassociating itself from the Nusra Front. Marking a departure from its previous practice, China abstained during the vote, reasoning that while the draft contained some important elements, it did not fully respect Syria's sovereignty or incorporate the "constructive views" of other Council members. The United States blamed Russia for claiming the mantle of counter-terrorism under the guise of assisting the Assad regime in re-taking Aleppo and

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[135] Euan McKirdy and Mohammed Tawfeeq, *Omran Daqneesh, Young Face of Aleppo Suffering, Seen on Syrian TV*, CNN, June 7, 2017.
[136] *Aleppo: 'A Complete Meltdown of Humanity,'* EURONEWS, Dec. 13, 2016 (quoting Jens Laerke, spokesperson for OCHA).
[137] Faith Karimi, *'Death Road' Stands in Way of Crucial Aid to Eastern Aleppo*, CNN, Sept. 16, 2016.
[138] Lesley Wroughton, *U.S. Suspends Syria Ceasefire Talks with Russia, Blames Moscow*, REUTERS, Oct. 3, 2016.
[139] *Syria Aid Convoy Attack: What We Know*, BBC, Oct. 5, 2016. The U.N. investigation is discussed in chapter 8 on documentation.
[140] Gareth Porter, *How the Pentagon Sank the US-Russia Deal in Syria—and the Ceasefire*, MIDDLE EAST EYE, Sept. 23, 2016.
[141] Andorra et al.: draft resolution, U.N. Doc. S/2016/846, ¶ 4 (Oct. 8, 2016). The resolution garnered three dozen U.N. member state co-sponsors.
[142] S/PV.7785, *supra* note 24, at 4 (statement by Spain). *See* Save the Children, *Some Aid Arrives in Eastern Ghouta, Convoys Stripped of Medical Supplies* (Mar. 5, 2018).

also for using the presence of a couple hundred Nusra Front fighters to justify an indiscriminate aerial bombardment campaign. In this regard, the United Kingdom representative concluded his statement with a terse entreaty to Russia: "Please stop now."

For its part, Russia floated a competing resolution in October 2016 focused on humanitarian access and urging parties to cease "conducting joint combat operations with terrorists."[143] The text advocated the separation of moderate opposition forces from the Nusra Front and called upon ISSG members to demand the parties stop fighting in collaboration with them. There was no mention of ceasing airstrikes in Aleppo, although the draft text did contain the boilerplate language urging the parties to abstain from targeting civilians. The draft garnered only three votes (China, Venezuela, and Egypt).[144] The United States characterized the resolution as an attempt to ratify "what Russia and the regime are doing in Aleppo."

By December 2016, the Assad regime—backed by Russian air power and regional Shi'ite militia—had surrounded the city, trapping rebels in an eastern enclave. Russia and the United States arranged to meet in Rome in an effort to resolve the situation and avoid further mass deaths. In the meantime, Egypt, New Zealand, and Spain tried again in the Council, floating text that called for an end to all violence in Aleppo for seven days to allow for humanitarian needs to be addressed, with an eye towards implementing further extensions on a recurring basis.[145] Once again, the coveted cessation would not have applied to military engagement with terrorist groups. The draft resolution featured a number of familiar elements: condemnations of violence, particularly against medical and humanitarian personnel, and a demand to implement the political process outlined in the long-neglected Resolution 2254. It also directed all parties to cease collaborating with terrorist groups and all ISSG members to seek to dissuade any party from doing so. As a new imperative, it contained a call to stem the flow of foreign terrorist fighters. The ISSG was also asked to coordinate efforts to monitor the ceasefire in Aleppo, facilitate humanitarian aid, and prevent terrorist acts. Finally, the draft would have given rebel forces 10 days to indicate whether they would remain a party to the cessation of hostilities.[146]

Russia (joined by China and Venezuela) rejected this effort (its sixth veto and the fifth draft text to earn the double veto). Russia was irritated that the draft appeared to give rebels time to replenish their ranks and supplies and did not require them to immediately evacuate the city and ensure the security of civilians.[147] Russia also cried procedural foul given the timing of the resolution (prior to the United States-Russia meeting and without the necessary notice) and accused the P-3 of having "shamelessly pressured" the "humanitarian troika" (Egypt et al.) to submit the "doomed draft." Russia further complained that the United States was an undependable negotiating party that did not speak with a consistent voice when it comes to agreements on a way forward in Syria. Venezuela painted a delusional picture in which Russia and Syria were engaged in a noble counter-terrorism effort, other states were actively supporting terrorist groups, and civilians were trying desperately to flee to government-controlled areas "where they find safety

[143] *See* Russian Federation: draft resolution, U.N. Doc. S/2016/847 (Oct. 8, 2016).
[144] S/PV.7785, *supra* note 24, at 12.
[145] Egypt, New Zealand and Spain: draft resolution, U.N. Doc. S/2016/1026 (Dec. 5, 2016).
[146] *Id.* ¶ 8 (demanding "that all parties to the cessation, within 10 days of the adoption of this resolution, indicate publicly, or to the Co-Chairs of the International Syria Support Group, their commitment to remain a party to the cessation of hostilities").
[147] U.N. SCOR, 71st sess., 7825th mtg., U.N. Doc. S/PV.7825 (Dec. 5, 2016), at 2 (statement of Russia).

and humanitarian assistance." It also blamed the United States and its "interventionalist policies in the Middle East" for the emergence of terrorism in the region.

Other states that had voted for the resolution bemoaned the Council's lack of progress on Aleppo to date, even on purely humanitarian issues. The sponsors in particular expressed disappointment that their weeks of work, which included making key concessions to Russia, had come to naught. The session ended with the delegations trading diplomatic jabs at each other and with the Syrian delegation insisting the United Nations had become a platform to "defend, protect and promote terrorism in Syria" with futile ceasefires offering little more than an opportunity for terrorists to rearm.[148] The United States' Permanent Representative at the time, Samantha Power, condemned the actions of Russia, Syria, and Iran in Aleppo, accusing them of placing a "noose" around the necks of civilians.[149] Once again, the General Assembly stepped in with a resolution demanding a cessation of hostilities, a range of civilian protection measures, and adherence to Security Council resolutions.[150]

By the end of 2016, the members of the Council finally put aside their differences and issued Resolution 2328, which articulated an agreement to evacuate civilians from Aleppo in accordance with humanitarian law.[151] The Council thus demanded

> complete, immediate, unconditional, safe and unhindered access for the United Nations and its implementing partners, in order to ensure that humanitarian assistance reaches people through the most direct route in order to meet basic needs, including the provision of medical care … for the whole of Syria.[152]

In many respects, this consensus reflected a *fait accompli*, as the Assad government had finally taken control of the city in December 2016. The Resolution did not contain many of the elements from the failed draft put forward several weeks prior by the troika. In particular, the text only "took note" of efforts to carry out evacuations of civilians and fighters from Aleppo and asked the United Nations and others to monitor such evacuations. States did not offer explanations of vote, so the dynamics in the Council leading to this moment of solidarity after the prior acrimony remain hazy.[153] The reference to the evacuation of "fighters" alongside civilians reflected the fact that it was assumed that any ceasefire could not take hold while members of ISIL or the Nusra Front remained billeted in Eastern Aleppo, so President Assad offered them an amnesty if they would leave the city voluntarily.[154] Assad hailed the evacuation of the once-divided city as a historic victory on par with the fall of the Soviet Union.[155] Hyperbole aside, there is no question the loss of Aleppo ended the hopes of many that a military victory against Assad might be possible.

Ghouta Becomes the New Aleppo

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[148] Syria also took this opportunity to accuse the United Kingdom of continuing to provide weapons to Saudi Arabia in its war in Yemen. *Id.* at 15-16.

[149] *'Are you capable of shame?' Samantha Power Critisizes Syria, Iran and Russia over Aleppo—Video*, REUTERS, Dec. 13, 2016.

[150] G.A. Res. 71/130, U.N. Doc. A/RES/71/130 (Dec. 9, 2016).

[151] S.C. Res. 2328, ¶ 2, U.N. Doc. S/RES/2328 (Dec. 19, 2016).

[152] *Id.* ¶ 5.

[153] *See* U.N. SCOR, 71st sess., 7841st mtg., U.N. Doc. S/PV.7841 (Dec. 19, 2016).

[154] Ellen Francis & Tom Miles, *Assad Offers Rebels Amnesty if They Surrender Aleppo*, REUTERS, Oct. 5, 2016.

[155] Kareem Shaheen, *Hundreds Leave Besieged East Aleppo on First Day of Evacuation*, THE GUARDIAN, Dec. 15, 2016.

With the situation in Aleppo "under control" (which is to say, under the government's control), the international community returned to the challenge of resolving the broader conflict. These efforts proved short-lived as Ghouta—the site of chemical weapons attacks that have book-ended this crisis—emerged as another city on the brink. Prior to the second chemical weapon attack, however, Russia and Turkey put forward a package of documents that contained a proposed nationwide ceasefire to go into effect on December 30, 2016, with Russia and Turkey as guarantors; a monitoring mechanism; a sanctions regime for ceasefire violators; and a negotiating blueprint for meetings contemplated for Astana, Kazakhstan, in January 2017.[156] The Council collectively expressed gratitude for Russia and Turkey's efforts to "jumpstart" a political process.[157] A series of de-escalation zones in May 2017 brought some respite; these held for some time but ultimately went the way of their predecessors. After President Donald J. Trump's bellicose response to the use of chemical weapons and the downing, in June 2017, of a Syrian warplane that was attacking U.S.-backed opposition groups, the United States changed tact and met with Russia on the margins of the G20 summit in July 2017 to announce an open-ended ceasefire.

In February 2018, as the conflict entered its eighth year, the government intensified strikes against rebel-held areas with assistance from Russian fighter jets. Ghouta, the last rebel redoubt near Damascus, came under intense fire. After Russia delayed a vote for several days, the Council unanimously passed Resolution 2041, establishing a 30-day nationwide ceasefire in order to allow for the sustained delivery of humanitarian assistance.[158] The resolution was introduced by Kuwait and Sweden, the humanitarian penholders at the time, in an effort to operationalize requests from the humanitarian community. Member states were called upon to "use their influence" with the parties to reinforce the cessation of hostilities and to build on existing arrangements to monitor events on the ground.[159] The resolution also envisioned weekly aid convoys and immediate medical evacuations. Russia justified its delay in joining consensus on the impossibility of implementing an immediate and extended ceasefire without concrete agreements between the parties. It also implied that horrific accounts from Ghouta and elsewhere were mere "propaganda" and expressed concern about public statements "by certain United States officials threatening aggression against Syria." Syria admitted its responsibilities towards its citizens but also emphasized its sovereign right to counter terrorism, acts of aggression, and a "United States occupying military presence."

Once again, the imposed ceasefire did not apply to military operations against ISIL or related groups.[160] Perhaps as a result, fighting and shelling continued, particularly in eastern Ghouta, where opposition fighters were entrenched. Convoys were unable to offload aid and no

[156] Letter dated 29 December 2016 from the Permanent Representative of the Russian Federation to the United Nations and the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2016/1133, annexes (Dec. 26, 2016).
[157] S.C. Res. 2336, ¶ 1, U.N. Doc. S/RES/2336 (Dec. 31, 2016).
[158] S.C. Res. 2401, ¶ 1, U.N. Doc. S/RES/2401 (Feb. 24, 2018) (demanding that all parties "cease hostilities without delay, and engage immediately to ensure full and comprehensive implementation of this demand by all parties, for a durable humanitarian pause for at least 30 consecutive days throughout Syria, to enable the safe, unimpeded and sustained delivery of humanitarian aid and services and medical evacuations of the critically sick and wounded, in accordance with applicable international law").
[159] *Id.* ¶ 3-4. In their explanations of vote, several states specifically identified the parties to a peace process that had been convened in Astana, Kazakhstan, to act as guarantors to ensure the Syrian regime ceases hostilities. *See, e.g.*, U.N. SCOR, 73rd sess., 8188th mtg., U.N. Doc. S/PV.8188 (Feb. 24, 2018), at 6 (statement of France).
[160] S/RES/2401, *supra* note 158, ¶ 2.

medical evacuations ensued because of the security situation. Russia eventually brokered an Aleppo-style deal whereby members of the opposition and their families were able to leave Eastern Ghouta for rebel-held Idlib. Members of the opposition who wished to stay were offered a pardon. It was another blow to the rebels, who had held Ghouta since 2012.

Idlib Becomes the New Ghouta

By the end of 2019, the conflict became centered on Idlib, where the remaining opposition and extremist groups had found safe haven amongst Syrian civilians who have been displaced "twice or thrice" before.[161] Government forces re-captured dozens of villages backed by Iranian-backed militias and Russian air power. The fighting displaced close to a million people from December onward alone. Germany, Belgium, and Kuwait—the humanitarian co-penholders—introduced a ceasefire proposal in September 2019 that did not specifically exclude counter-terrorism operations, as prior drafts had, although it did contain language encouraging member states to ensure that all measures taken to counter terrorism complied with international law.[162] Russia—which held the Presidency at the time—and China wasted no time deploying their vetoes, accusing the troika of having "hidden objectives" and attempting to "save the international terrorists who are entrenched in Idlib from their final defeat."[163] The pair table dropped a competing proposal, without undergoing prior negotiations, that contained the historical language.[164] This draft received only two votes in favor, with 4 abstentions. The United Kingdom argued that the latter text pretended "that the humanitarian situation in Idlib [was] caused solely by terrorists rather than by the indiscriminate aerial bombardment that is being carried out with scant regard for the principles of distinction and proportionality." Many states in their interventions lamented the lack of unity and polarization within the Council, even around humanitarian concerns. With the Council deadlocked, the P-3 and allies on the Council formally demarched Secretary-General António Guterres urging the United Nations to take action.[165]

Countering Terrorism

Russia and Syria began raising the scourge of terrorism early in their Security Council interventions;[166] eventually, the entire Council found common ground here.[167] With the emergence of the Nusra Front and ISIL on the scene, references to terrorism began to appear more frequently in the Security Council's pronouncements. In Resolution 2139 of 2014, for example, the Council lamented

> the increased terrorist attacks resulting in numerous casualties and destruction carried out by organizations and individuals associated with Al-Qaeda, its affiliates and other terrorist groups, and reiterate[ed] its call on all parties to commit to

[161] INTERNATIONAL CRISIS GROUP, THE ELEVENTH HOUR FOR IDLIB, SYRIA'S LAST REBEL BASTION 1 (Feb. 6, 2020).
[162] Belgium, Germany and Kuwait: draft resolution, U.N. Doc. S/2019/756 (Sept. 19, 2019).
[163] These debates are here: U.N. SCOR, 74th sess., 8623rd mtg., U.N. Doc. S/PV.8623 (Sept. 19, 2019).
[164] Russia and China: draft resolution, U.N. Doc. S/2019/757 (Sept. 19, 2019).
[165] Edith Lederer, *Western Nations Demand Immediate Cease-fire in Syria's Idlib*, AP (Feb. 27, 2020).
[166] For example, just after the attack on the Syrian leadership in July 2012, Russia floated and then withdrew a resolution that would have decried "the series of bombings that have made the situation more complex and deadly, some of which are indicative of the presence of well-organised terrorist groups." *See* Russian Federation: draft resolution, U.N. Doc. S/2012/547/Rev.2 (July 17, 2012), at pmbl. Likewise, when invited to offer its views, Syria regularly complained that the Council had failed to denounce terrorism. *See, e.g.*, S/PV.7116, *supra* note 66, at 15.
[167] That said, the United States blocked a statement condemning a car bomb attack in Damascus near the Russian embassy, arguing that the statement should have also censured the use of heavy weapons against civilians. *Russia-US Spat Dooms UN Statement on Damascus Bomb*, WASH. EXAMINER, Feb. 22, 2013.

> putting an end to terrorist acts perpetrated by such organizations and individuals, while reaffirming that terrorism in all its forms and manifestations constitutes one of the most serious threats to international peace and security, and that any acts of terrorism are criminal and unjustifiable, regardless of their motivation, wherever, whenever and by whomsoever committed.[168]

It then called upon both the Syrian authorities and opposition groups to combat and defeat organizations and individuals associated with Al Qaida and other terrorist groups.[169] In subsequent resolutions, Council members also expressed alarm at the spread of extremism, extremist groups, and the targeting of civilians based upon their ethnicity or confessional affiliations.[170] Council members insisted that "terrorism cannot and should not be associated with any religion, nationality, or civilization" and can only be defeated by "a sustained and comprehensive approach involving the active participation and collaboration of all States, and international and regional organizations to impede, impair, isolate and incapacitate the terrorist threat."[171] At the same time, the Council repeatedly cautioned that "Member States must ensure that any measures taken to combat terrorism … comply with all their obligations under international law, in particular international human rights, refugee and international humanitarian law" and underscored that "effective counter-terrorism measures and respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing, and are an essential part of a successful counter-terrorism effort."[172]

After the coordinated terrorist attacks in Paris in November 2015, the Council explicitly linked events in Syria with acts of terrorism attributed to ISIL in Europe and elsewhere.[173] The Council unanimously reaffirmed in Resolution 2249 that

> terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed…

The Council identified ISIL as "a global and unprecedented threat," with special mention of the Nusra Front and other entities associated with Al Qaida. Member states with the requisite capacity were called upon to "take all necessary measures"—code for the use of armed force—in compliance with international law to prevent and suppress terrorist acts committed by ISIL, the Nusra Front, and other terrorist groups. France had contributed to United States-led airstrikes underway in Iraq since September 2014, and to a lesser extent in Syria since September 2015 as part of *Opération Chammal*—named for a northwesterly wind that blows over the Persian Gulf· Following the Paris attacks, France launched more robust retaliatory strikes in Raqqa, one of the *de facto* "capitals" of the imagined caliphate. Resolution 2249's language bolstered states'

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[168] S/RES/2139, *supra* note 57, at pmbl; *see also id.* ¶ 14; U.N. Doc. S/PRST/2014/23 (Nov. 19, 2014) (omnibus presidential statement condemning various manifestations of modern terrorism).
[169] S/RES/2139, *supra* note 57, ¶ 14. Citing the G-8 declaration of June 2013, which committed members to seek to dismantle the global threat of terrorist networks, Russia reiterated its demands that "all Syrian sides … break with terrorists" and encouraged the opposition to work together with the government to overcome terrorism. *See* U.N. Doc. S/PV.7116, *supra* note 66, at 8.
[170] S/RES/2165, *supra* note 65, at pmbl.
[171] S/RES/2199, *supra* note 64, at pmbl.
[172] S/RES/2170, *supra* note 67, at pmbl.
[173] S.C. Res. 2249, ¶¶ 1-2, U.N. Doc. S/RES/2249 (Nov. 20, 2015) (condemning ISIL attacks in Tunisia, Turkey, Russia, Lebanon, and France).

arguments that their actions in Syria constituted legitimate self-defense, marking another area of common ground on the Council. The resolution also suggested the need to expand the list of designated terrorist groups, a research task ultimately undertaken by Jordan, and reaffirmed that "those responsible for committing or otherwise responsible for terrorist acts, violations of international humanitarian law or violations or abuses of human rights must be held accountable."

Notwithstanding U.S.-led airstrikes, ISIL had gained considerable ground in Syria by the start of 2015. This increased the number of people living under ISIL's ominous black banners and requiring public services previously provided by the Syrian government or emergent opposition bureaucrats. In 2016, the Security Council in Resolution 2332 took note of the "negative impact of their presence, violent extremist ideology and actions on stability in Syria and the region, including the devastating humanitarian impact on the civilian populations" in areas under ISIL control.[174] Reaching a common understanding of what conduct constitutes "terrorism" and which groups embattled within Syria were members of the moderate Syrian opposition in good standing versus those who should be considered terrorist groups *non grata* emerged as a perennial challenge within the Council. Russia repeatedly stressed the need for a united anti-terrorism front that would encompass the Assad regime, the "armed patriotic Syrian opposition," Kurdish volunteers, and other member states.[175] In Resolution 2254, the Council praised efforts by Jordan to reach a shared understanding within the ISSG of which individuals and groups were exempt from the ceasefire, i.e., which non-state actors remained targetable notwithstanding the cessation of hostilities.[176]

Blocking Foreign Fighters

Although by no means a new global phenomenon, the Syrian conflict brought laser-focused attention to the concept of foreign fighters, which the Council defined as:

> individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.[177]

The Council began to increasingly fixate on this element of the conflict in 2014. Most importantly, it passed Resolution 2178, an omnibus resolution devoted to preventing the international flow of foreign fighters worldwide that established global duties of prevention, information sharing, verification, and prosecution. The text condemned the recruitment of foreign terrorist fighters and demanded that all foreign fighters withdraw from the fight. It also expressed concern about the use of new information and communication technologies to recruit and incite terrorists and threatened to list such individuals under existing sanctions regimes devoted to Al Qaida. The resolution imposed far reaching new legal obligations on all member states to bring foreign fighters to justice, prevent the recruitment and movement of terrorists and terrorists groups through the implementation of effective border controls etc., and prohibit terrorist financing, including trade and other financial engagements that could constitute providing financial support to such groups.[178] Attesting to the magnitude of the significance accorded to this issue, the resolution was

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[174] S/RES/2332, *supra* note 61, at pmbl.
[175] S/PV.7588, *supra* note 104, ¶ 5.
[176] S/RES/2332, *supra* note 61, ¶ 9.
[177] S.C. Res. 2178, pmbl, U.N. Doc. S/RES/2178 (Sept. 24, 2014).
[178] *Id.* ¶¶ 12, 20. *See also* S/RES/2332, *supra* note 61, at pmbl; S/RES/2249, *supra* note 157, ¶ 6 (urging member states to intensify their efforts to stem the flow of foreign fighters).

passed by Security Council members' heads of state or government—only the sixth time in the United Nations' history.[179] In December 2017, the Council passed a follow up resolution, calling on all member states to respond to foreign fighters and their accompanying family members through appropriate border control, prosecutorial, rehabilitative, and reintegration measures in keeping with their obligations under international law.[180] Civil liberties advocates expressed concern that these measures, coupled with loose definitions of "terrorism" under international law, will be abused by oppressive regimes and gives insufficient attention to prevention.[181]

The Use of Force in Syria

Beyond the ambiguous authorization discussed above in connection with the Council's counter-terrorism agenda, the Council never authorized further uses of force in Syria, compelling states to articulate other legal justifications for their kinetic actions in Syria.[182] Russia called for an emergency session of the Council the day after the second major round of airstrikes in Syria by the United States, with the participation of France and the United Kingdom, following the Douma chemical weapons attack. Secretary-General Guterres opened the session with an admonition that any use of chemical weapons is "abhorrent," but in the same breath reminded all member states of their Charter obligations.[183] The Russian Permanent Representative introduced a draft resolution that would have condemned the operation as an act of aggression[184] and read a statement from President Putin to this effect.[185] The United States rejected this conclusion and explained that it had acted "to deter the future use of chemical weapons by holding the Syrian regime responsible for its crimes against humanity" in a way that was "justified, legitimate and proportionate." Ambassador Nikki Haley blamed Russia for defending Assad's use of "barbaric weapons." She also warned that the United States stood ready to act again if necessary: "When our President draws a red line, our President enforces the red line."

In addition to a deterrence rationale, the United Kingdom invoked the doctrine of humanitarian intervention: "Any State is permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering" so long as there is convincing evidence of extreme humanitarian distress, there is no practicable alternative, and the use of force is necessary and proportionate to the underlying humanitarian aim. France noted that the use of chemical weapons constitutes a war crime within the Rome Statute and, in an explanation sounding of reprisals, justified its participation as necessary to address the Syrian regime's repeated violations of international law. Poland overtly supported the action, whereas the Netherlands described the response as "understandable" and "measured." A number of states reiterated calls for the perpetrators of the chemical attacks to be held accountable, including via

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[179] Michael Plachta, *Security Council Adopts Resolution on Foreign Terrorist Fighters*, 30 INT'L ENFORCEMENT L. REP. 500 (2014).
[180] S.C. Res. 2396, U.N. Doc. S/RES/2396 (Dec. 21, 2017).
[181] Martin Scheinin, *Back to Post-9/11 Panic? Security Council resolution on Foreign Terrorist Fighters*, JUST SECURITY (Sept. 23, 2014); Bibi van Ginkel, *The New Security Council Resolution 2178 on Foreign Terrorist Fighters: A Missed Opportunity for a Holistic Approach*, International Centre for Counter-Terrorism (Nov. 4, 2014).
[182] *See* Ryan Goodman, *What Do Top Legal Experts Say About the Syria Strikes?*, JUST SECURITY, Apr. 7, 2017; Vito Todeschini, *Debate Map: Armed Conflict and Use of Force in Syria*, OXFORD PUBLIC INTERNATIONAL LAW (Apr. 30, 2017).
[183] These discussions are here: U.N. SCOR, 73rd sess., 8233rd mtg., U.N. Doc. S/PV.8233 (Apr. 14, 2018).
[184] Russian Federation: draft resolution, U.N. Doc. S/2018/355 (Apr. 14, 2018) (condemning "the aggression against the Syrian Arab Republic by the US and its allies in violation of international law and the UN Charter").
[185] S/PV.8233, *supra* note 183, at 4. China, Kazakhstan, and Equatorial Guinea were also critical of the strikes, but less provocatively so. *Id*. at 9-10, 17.

action outside the Security Council. Other members did not express their views on the strikes other than to counsel restraint, express their condemnation of the use of chemical weapons, and urge a political resolution to the conflict. Russia's proposed draft resolution gained the support of only three states: Bolivia, China, and Russia. Later, other members of the international community positioned themselves along this legality continuum.[186]

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Neutralizing Syria's Chemical Weapons

Another important, but fleeting, moment of consensus followed the use of chemical weapons in Ghouta on August 21, 2013. Prior to the war, Syria's arsenal of chemical weapons was reputed to be among the world's largest and most advanced—one of the many issues of concern within the international community as peaceful protests devolved into a full-scale civil war.[187] The Ghouta attack occurred at a time when a U.N. inspection team was on the ground to respond to earlier allegations of chemical weapon use.[188] The August assault—which resulted in hundreds of deaths and left 3,000 people suffering from neurotoxic symptoms[189]—marked the most significant use of chemical weapons since Saddam Hussein's attack on his Kurdish citizenry in Halabja, Iraq, in 1988. The Security Council convened an emergency session, but no resolution emerged, in part because Russia suggested the attack was a rebel "provocation" to discredit Assad.[190] The Secretary-General, invoking an earlier General Assembly authority, asked the U.N. Organisation

[186] *See* Alonso Gurmendi Dunkelberg et al., *Mapping States Reactions to the Syria Strikes of April 2018*, JUST SECURITY (Apr. 22, 2018).

[187] *See generally* Nuclear Threat Initiative, *Syria* (Apr. 2018) (discussing history of Syria's chemical weapons program).

[188] United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, *Final Report*, U.N. Doc. A/68/663-S/2013/735 (Dec. 13, 2013) (reporting on U.N. investigations confirming chemical weapon use in Ghouta and elsewhere).

[189] Médecins Sans Frontières, *Syria: Thousands Suffering Neurotoxic Symptoms Treated in Hospitals Supported by MSF* (Aug. 24, 2013).

[190] Dominic Evans and Khaled Yacoub Oweis, *Syria Gas 'Kills Hundreds,' Security Council Meets*, REUTERS, Aug. 21, 2013.

for the Prohibition of Chemical Weapons (OPCW) to deploy an investigative mission.[191] Both the United States and the United Kingdom released intelligence assessments purporting to confirm the attacks.[192]

In September 2013, Russia proposed and ultimately brokered a Framework for the Elimination of Syrian Chemical Weapons, which envisioned an international mission to inspect all potential chemical weapons sites within Syria and supervise the destruction of toxic material and equipment under the aegis of the OPCW.[193] This *deus ex machina*, coupled with lukewarm support from the U.S. Congress, decelerated President Barack Obama's drive toward deploying armed force in Syria.[194] In the Framework Agreement, the United States and Russia agreed to work towards the prompt adoption of a Security Council resolution to reinforce the scheme. Resolution 2118 ensued, which blessed a decision of the Executive Council of the OPCW establishing procedures for the expeditious inspection and destruction of Syria's chemical weapons program by a joint U.N.-OPCW mission to be funded in part by a trust fund of voluntary contributions.[195] Resolution 2118 stressed that those responsible for the use of chemical weapons—a "serious violation of international law" and a threat to international peace and security—"must be held accountable,"[196] a point echoed by then-U.S. Secretary of State John Kerry and other state representatives in their explanations of vote.[197] Indeed, Secretary Kerry also reiterated that the resolution established that *any* use of chemical weapons is a threat to international peace and security, regardless of the circumstances.[198]

The resolution also indicated the Council would take coercive action in the event of non-compliance by the Syrian regime and utilized the verb "decides" when it came to Syria's cooperation with the plan. This term usually indicates that the Council's action is a "decision" of the type that all U.N. members are legally obliged to accept and carry out under Article 25 of the

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[191] G.A. Res. 42/37C, ¶ 4, U.N. Doc. A/RES/42/37 C (Nov. 30, 1987) (requesting the Secretary-General to carry out investigations in response to reports concerning the possible use of chemical, bacteriological, or toxic weapons anywhere).

[192] *See* White House, *Government Assessment of the Syrian Government's Use of Chemical Weapons on August 21, 2013* (Aug. 30, 2013); U.K. Joint Intelligence Organization, *Syria: Reported Chemical Weapons Use* (Aug. 29, 2013) (memo from the Chair of the Joint Intelligence Committed to the Prime Minister). Despite this latter report, the British Parliament voted against supporting military action in Syria.

[193] Joint National Paper by the Russian Federation and the United States of America, *Framework for Elimination of Syrian Chemical Weapons*, EC-M-33/NAT.1 (Sept. 17, 2013).

[194] *See* S.J. Res. 21, Authorization for the Use of Military Force Against the Government of Syria to Respond to Use of Chemical Weapons, 113th Cong. (2013-14), https://www.congress.gov/bill/113th-congress/senate-joint-resolution/21/all-actions.

[195] The Executive Council Decision is appended as an Annex to Resolution 2118. *See* OPCW, Decision: Destruction of Syrian Chemical Weapons, EC-M-33/Dec. 1 (Sept. 27, 2013). For background see OPCW, Note by the Director-General, Progress in the Elimination of the Syrian Chemical Weapons Programme, EC-7/DG.1 (Feb. 23, 2018).

[196] S/RES/2118, *supra* note 29, at pmbl, ¶ 1. *See also id.* ¶ 15 (expressing the Council's "strong conviction that those individuals responsible for the use of chemical weapons in the Syrian Arab Republic should be held accountable").

[197] S/PV.7038, *supra* note 80, at 4-5 (Statement of the United States). Luxembourg indicated that the time had come to refer the situation in Syria to the ICC. *Id.* at 7. Argentina affirmed that the use chemical weapons is a war crime and a crime against humanity. *Id.* at 13.

[198] *Id*. at 4. France pointed out that this text allows the Council to act on this issue anytime in the future and to become a guarantor of chemical disarmament. *Id.* at 7.

U.N. Charter. Although the Resolution did not expressly invoke Chapter VII, many members nonetheless insisted it was legally binding.[199]

Although the resolution did not assign responsibility for the attack, many delegations blamed the Syrian government in their interventions.[200] Russia, by contrast, noted that implementation of the Framework Agreement would fall not just to the Syrian government but also required the cooperation of the Syrian opposition and other states to ensure that chemical weapons did not fall into the hands of "extremists." Importantly, the attack seemed to inspire the Council to endorse for the first time the Geneva Communiqué calling for transfer of power to a transitional governing body, conceived by many delegations as an important precursor towards convening the Geneva II conference.[201] Although delegates cheered the fact that the Security Council had overcome its internal divisions and set in motion a process to eliminate a significant chemical weapons program through non-military means, they also called attention to the need to resolve the conflict, respond to the humanitarian catastrophe in the region, and condemn equally attacks on civilians by conventional means. Indeed, Argentina noted that "the horror of chemical weapons … should not overshadow the fact that 99 per cent of the casualties in the conflict have been from conventional weapons."[202]

As part of this deal, Syria acceded with immediate effect to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC).[203] In the period that followed, Syria purported to submit detailed information about all chemical weapons agents and precursors in its stockpiles. Experts later neutralized 1,300 metric tons of weapons-grade chemicals via hydrolysis on a U.S. cargo vessel in international waters. However, subsequent chemical weapons use suggested that there were significant omissions in Syria's reporting or that its chemical weapons production capabilities were not entirely dismantled. As a result, the OPCW Director-General established a Declaration Assessment Team (DAT) to resolve inconsistencies, gaps, and discrepancies in the original Syrian declaration of its arsenal. In response to additional allegations of chemical weapon attacks, OPCW also created a fact-finding mission (FFM) in April 2014 under its authority to uphold the object

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[199] *Id.* at 5 (statement of Luxembourg). *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 162 (July 9) (finding that Israel had contravened several Security Council resolutions even though the texts did not expressly invoke Chapter VII); Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16(5) EUR. J. INT'L L. 879 (2005).

[200] S/PV.7038, *supra* note 80, at 6 (statement of France); *id*. at 15 ("Australia's assessment is that the evidence available shows that it was the Syrian authorities who were responsible for this crime, and this incident has confirmed what Australia has said for a long time—that the Council should refer the situation in Syria to the International Criminal Court.").

[201] S/RES/2118, *supra* note 29, ¶ 16. *See, e.g.*, S/PV.7038, *supra* note 80, at 10 (statement of China).

[202] *See, e.g.,* S/PV.7038, *supra* note 80, at 13; *id*. at 14 (statement by Rwanda).

[203] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. I, Jan. 13, 1993, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 317. The CWC enjoys almost universal ratification; only Egypt, Israel, North Korea and South Sudan have not ratified it. *See* Arms Control Association, *Chemical Weapons Signatories and States Parties*, https://www.armscontrol.org/factsheets/cwcsig. Syria had been a party to the 1925 Protocol for the Prohibition on the Use in War of Asphyxiating, Poisonous or Other Gases and Bacteriological Methods of Warfare (the 1925 Gas Protocol) since 1968. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65. It prohibits the use of chemical weapons, but not their production or stockpile.

and purpose of the CWC. The terms of reference were agreed upon through an exchange of letters with the Syrian government.

The Council re-engaged on this issue once evidence emerged of chlorine gas attacks in rebel strongholds in 2014—the first documented use of chemical weapons by a state party to the CWC.[204] Although chlorine was not technically a target agent in the OPCW removal process or subject to reporting by Syria (since it has many ordinary industrial and commercial uses), it can be weaponized in gas form. As such, its use in combat violates the treaty and Resolution 2118. These incidents provoked renewed condemnation from the Council, which in Resolution 2209 of 2015 threatened Chapter VII measures in the event of future non-compliance.[205] The Council called again for accountability, stressing that "those individuals responsible for any use of chemicals as weapons, including chlorine or any other toxic chemical, must be held accountable."

The FFM, which remains in operation, was originally mandated to establish facts surrounding allegations of the use of toxic chemicals for hostile purposes, but not to attribute responsibility to any party to the conflict.[206] In Resolution 2235 (2015), the Council created a new mechanism—an OPCW-UN Joint Investigative Mechanism (JIM)—to take this next step and "identify to the greatest extent feasible individuals, entities, groups, or governments who were perpetrators, organisers, sponsors or otherwise involved in the use of chemicals as weapons."[207] The JIM was, by and large, supposed to follow up on instances of chemical weapon use confirmed by the FFM. As a subsidiary body of the Council, it was also encouraged to examine additional information and evidence obtained from elsewhere, including with respect to the potential use of prohibited weapons by non-state actors and terrorist groups.[208] The JIM ultimately confirmed multiple instances of chemical weapon use by the regime (e.g., in several towns in Idlib Governorate) and the Islamic State (e.g., in Marea and Umm Hawsh).[209]

In February 2017, the P-3, with the support of a number of other states, circulated a new draft resolution on chemical weapons. The text would have taken note of the reports of the JIM, concluded that Resolution 2118 had been violated, condemned the use of chemical weapons by the Syrian Armed Forces and ISIL, and expressed particular concern about efforts by non-state actors to acquire and use chemical weapons.[210] An Annex identified a number of individuals, groups, and entities that would be immediately subject to sanctions, including asset freezes and a travel ban. It would also have imposed an embargo on listed chemicals, devices used to weaponize such chemicals, and helicopters used to disburse them. The list of sanctions designees named a number of senior officials within the Syrian Armed Forces, including individuals who would have

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[204] *See* Second Report of the OPCW Fact-Finding Mission in Syria: Key Findings, U.N. Doc. S/1212/2014 (Sept. 10, 2014). All the OPCW-FFM's reports are available here: https://www.opcw.org/special-sections/syria/fact-finding-mission-reports/.

[205] S.C. Res. 2209, ¶ 7, U.N. Doc. S/RES/2209 (Mar. 6, 2015).

[206] *See* OPCW, Note by Technical Secretariat: Future Activities of the OPCW Fact-Finding Mission in Syria, S/1255/2015 (Mar. 10, 2015).

[207] S.C. Res. 2235, pmbl, U.N. Doc. S/RES/2235 (Aug. 7, 2015). The Secretary General was tasked with presenting recommendations and terms of reference for this new entity in coordination with the OPCW Director-General. *Id.* ¶ 5.

[208] S.C. Res. 2319, U.N. Doc. S/RES/2319 (Nov. 17, 2016).

[209] *See* Third Report of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism, U.N. Doc. S/2016/38/Rev. 1 (Aug. 24, 2016); Seventh Report of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism, U.N. Doc. S/2017/904 (Oct. 26, 2017).

[210] Albania et al.: draft resolution, U.N. Doc. S/2017/172, ¶¶ 1-2 (Feb. 28, 2017).

been in the position to allow chemical weapons use in their areas of responsibility, and other personnel associated with the Syrian Scientific Studies and Research Center (SSRC), which undertakes the research and development of Syrian weapons technology.[211] All those listed were already subject to unilateral sanctions by the United States.[212] The draft also would have established a committee and a panel of experts to monitor implementation. Finally, the text reiterated the importance of accountability by expressing the Council's

> strong conviction that those individuals responsible for the use of chemical weapons in the Syrian Arab Republic should be thoroughly investigated, and prosecuted, as appropriate, before a competent tribunal which is both independent and impartial … [and its] intent to review additional options to ensure accountability for perpetrators, organizers, sponsors, or persons or entities otherwise involved in the use of chemical weapons in the Syrian Arab Republic.[213]

The draft's supporters insisted the source of the chemical weapon attacks had been identified by the JIM and so the time had come to sanction individual perpetrators, lest the Council appear to be promoting impunity or forsaking the venerable chemical weapon non-proliferation regime.[214] In support, the U.K. Permanent Representative reminded the states that in Resolution 2118 the Council agreed that any use of chemical weapons would lead to the imposition of Chapter VII measures. He concluded: "This is about taking a stand when children are poisoned."

As was expected, Russia—joined by China and Bolivia—rejected the draft, marking Russia' seventh veto and China's sixth.[215] In its explanation of vote, Russia took issue with the methodology employed and the determinations reached by the Mechanism, arguing that its conclusions were uncorroborated and could not support criminal charges. It noted in particular that the Mechanism had relied upon "questionable information" provided by the armed opposition and that its staff did not travel to many of the places where the crimes were alleged to have been committed. Rather, Russia alleged, the JIM's results were preprogrammed at the behest of the West. Russia also complained that two-thirds of the mission's expert team lacked geographic diversity. To this, the United Kingdom noted that in Resolution 2235 Russia agreed to the methodology that the JIM would apply, and so could not suddenly complain about the conclusions the Mechanism drew by applying this methodology impartially and independently. Syria amplified Russia's first point, criticizing the P-3 for putting to a vote "draft resolutions that draw from unprofessional reports that are unable to come to definitive conclusions and that draw on the false, fabricated eyewitness accounts of members of terrorist groups that are supported by those very same countries." In a bit of a non-sequitur, Syria also charged that the resolution was actually aimed at protecting Israel's nuclear, chemical, and biological stockpiles. In justifying its veto, China invoked the specter of Iraq and reminded members of the Council that "the purported existence of weapons of mass destruction was used in the past to unleash a war that has brought untold suffering to the people in the Middle East."[216] China emphasized the need to stabilize the

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[211] *See* Nuclear Threat Initiative, *Syrian Scientific Studies and Research Center* (Aug. 17, 2012).

[212] *See* Department of the Treasury, Syria Sanctions, https://www.treasury.gov/resource-center/sanctions/Programs/Pages/syria.aspx.

[213] S/2017/172, *supra* note 210, ¶¶ 4, 14.

[214] Debates around the proposed resolution are available here: U.N. SCOR, 72nd sess., 7893rd mtg., U.N. Doc. S/PV.7893 (Feb. 28, 2017).

[215] Egypt, Ethiopia, and Kazakhstan abstained, so the resolution received only nine positive votes, a point noted by several of its opponents. *See, e.g., id*. at 11 (statement of Bolivia).

[216] *Id.* at 9 (statement of China).

situation, preserve the current ceasefire, and ultimately find a political solution to the conflict, implying that imposing sanctions would run counter to these concerns. China also decried certain states' "[u]nprovoked and distorted attacks against the solemn position of other members" of the Council.[217]

The pre-designation of individuals and entities to be sanctioned also drew more broad-based criticism within the Council. Russia complained that the JIM's reports provided no basis for the imposition of targeted sanctions, which would only weaken the international counter-terrorism effort if implemented.[218] Egypt echoed a version of this point, noting that past practice was to establish a sanctions committee that would make designations into the sanctions program following a more individualized investigation. It insisted that it supported the notion of justice and accountability but opposed "the levelling of arbitrary accusations against specific individuals and entities on issues that could amount to being war crimes." Ethiopia agreed, concluding that the JIM's conclusions were not firm enough to individualize sanctions. Italy countered that simply "identifying which party is responsible is not enough; those who planned, ordered and executed the attacks must face justice." It insisted that the Council must uphold the work of the JIM and ensure meaningful follow-up in terms of holding responsible individuals and entities accountable.

On April 4, 2017, the town of Khan Sheikhoun in Idlib province experienced a devastating chemical attack—the deadliest since Ghouta—with a sarin-like substance. Days later, the Trump Administration unilaterally launched cruise missiles against Syria's Sahyrat airbase from which the attack was thought to have been unleashed. The Council called an emergency meeting at which time Russia vetoed (its eighth) a draft resolution initiated by the United States that would have condemned the April attack, called upon all parties to grant inspectors delay-free and full access to relevant sites, expressed the Council's determination that those responsible be held accountable, and obliged Syria to provide the FFM and JIM with flight plans and access to relevant personnel and airbases.[219] Bolivia joined Russia in rejecting the measure; China, Ethiopia and Kazakhstan abstained, with China emphasizing the importance of preserving unity within the Council and expressing regret that consensus could not be reached.[220] The language did not purport to assign responsibility for the attack, although it did place special cooperation obligations on the Assad regime.

Nonetheless, in its explanation of vote, Russia criticized a "distorted" draft, which "designated the guilty party prior to an independent and objective investigation." Russia linked its veto to the U.S strikes, insisting that voting in favor of the U.S. resolution would "have meant legitimizing those illegal actions." The United Kingdom indicted Russia for choosing to "protect the perpetrators of those attacks rather than work with the rest of the international community to condemn them." France expressed support for the United States' operation as a "legitimate response to a mass crime that could not go unpunished." Many other states repeated the call for accountability for the use of chemical weapons.

The JIM was extended twice, although these votes were delayed at times, which undermined the continuity of its work and led to staff departures. Even this effort eventually lost

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[217] *Id.* at 10.
[218] *Id.* at 7-8. Bolivia also took note of the fact that the OPCW did not play a role in generating the annexes to the draft resolution, which in its estimation violated the due process rights of the designees. *Id.* at 11.
[219] France, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution, U.N. Doc. S/2017/315 (Apr. 12, 2017).
[220] The debates are here: U.N. SCOR, 72nd sess., 7922nd mtg., U.N. Doc. S/PV.7922 (Apr. 12, 2017).

the support of Russia, demonstrating the fragility of multilateral arrangements that require a Council vote to continue their operations.[221] Russia used its next two vetoes to reject subsequent resolutions that would have extended the JIM's work for a third time, once on the theory that the extension was premature because the JIM's report on Khan Sheikhoun was imminent[222] and once because it objected to the Mechanism's working methods.[223] Russia had criticized both the OPCW FFM and the JIM for their failure to visit the sites of certain attacks, notably Khan al-Assal which was under the government's control at the time, and for accepting "dubious testimony from the opposition groups and even terrorists."[224] Russia raised the Iraq intervention in justifying its stance, accusing the United States of deliberately misleading international community to establish grounds for intervention in 2003. Bolivia, a non-permanent member, also voted against the measure the first time it was brought to a vote; China and Kazakhstan abstained. In their explanations of vote, some delegations issued a plea for greater unity within the Council and argued that the resolution should not have been tabled knowing it would garner Russia's veto. Other delegations expressed deep disappointment at the demise of the JIM, noting that there were still some 60 cases of alleged chemical weapons use being examined by the OPCW that could be referred to the JIM and that the failure to extend the mechanism would lead to further impunity.

Through some procedural machinations, Bolivia then submitted for a vote a Russian draft resolution to extend the JIM's mandate under different terms. It had not been subject to consultations and received a meager four votes in its favor.[225] This draft resolution implicitly criticized the FFM for operating in "remote mode," not pursuing "all possible leads and scenarios without exception," and not respecting the chain of custody. It also requested the JIM to take environmental samples at the Shayrat airbase, the target of President Trump's airstrikes, to verify allegations that sarin had been stored there, and to focus on chemical-related acts by non-state actors. Russia reiterated these criticisms of the JIM in its intervention in support of the resolution.[226] The United States suggested that the draft would allow Russia or even Syria to micromanage the JIM, thus undermining its independence. Ambassador Haley also warned that the United States would continue to defend the international taboo against chemical weapons use, as it did in April 2017. Russia deployed its eleventh veto in connection with a draft technical resolution by Japan, issued on the final day of the JIM's mandate, to extend the process for a mere 30 days.[227] This marked the definitive dissolution of the JIM. All told, the JIM issued seven reports allocating responsibility to Syrian forces and ISIL. Russia and friends continued to criticize the work of the JIM, focusing in particular on the methodology employed and the decision of the

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[221] S.C. Res. 2314, U.N. Doc. S/RES/2314 (Oct. 31, 2016); S/RES/2319, *supra* note 189.

[222] Albania et al.: draft resolution, U.N. Doc. S/2017/884 (Oct. 24, 2017) (proposal to renew the JIM for one year). Bolivia joined Russia in vetoing the draft. China and Kazakhstan abstained.

[223] France, Italy, Japan Sweden, Ukraine, United Kingdom of Great Britain and Northern Ireland, and the United States of America: draft resolution, U.N. Doc. S/2017/962 (Nov. 16, 2017). Bolivia also vetoed the measure. In this draft, the Security Council would have called for the FFM and JIM to collaborate closely so that the latter could quickly investigate any incident that the FFM determined involved the use of chemical weapons. It also called upon the Mechanism to conduct its investigations according to high methodological standards and evidentiary levels. U.N. Doc. S/2017/962, *supra*, ¶¶ 6-8. All parties would have been mandated to facilitate the unfettered access of both investigative processes. *Id.* ¶ 9.

[224] These debates are available here: U.N. SCOR, 72nd sess., 8105th mtg., U.N. Doc. S/PV.8105 (Nov. 16, 2017). Right as U.N. inspectors were slated to visit the Khan al-Assal governorate, the 2013 Ghouta attacks took place, preventing the visit.

[225] Plurinational State of Bolivia: draft resolution, U.N. Doc. S/2017/968 (Nov. 16, 2017).

[226] S/PV.8105, *supra* note 224, at 17.

[227] Japan: draft resolution, U.N. Doc. S/2017/970 (Nov. 17, 2017).

experts not to go to certain on-site visits for security reasons and because the attacks occurred too long in the past.[228] In particular, Russia criticized the conclusion of the "pseudo-investigation" that an unguided missile had been dropped from the air in Khan Sheikhoun.[229]

Apparent chemical weapons attacks in Syria continued throughout early 2018, notably in Douma—the last rebel-held town in Eastern Ghouta. Russia claimed to have conducted an investigation in Douma and found no evidence of chemical weapon use, although OPCW inspectors were initially blocked from the site, leading to speculation it had been scrubbed.[230] These events inspired an emergency meeting of the Security Council and a trifecta of failed resolutions.[231] With the first, the United States and allies attempted to launch a new "independent, impartial and transparent investigation" called the United Nations Independent Mechanism of Investigation (UNIMI), which could identify responsible parties and undertake site visits where security conditions allowed.[232] The draft also provided Security Council support for the OPCW FFM, which remained operational. Its backers argued the resolution responded to Russia's criticism of the JIM and was drafted in a spirit of unity.[233]

Nonetheless, this resolution was vetoed by Russia—its twelfth involving Syria and its sixth in connection with chemical weapon use. Russia justified its *nyet* by the fact that the draft was simply attempting to resurrect the discredited JIM, which in Russia's estimation had already proved itself to be a "puppet of anti-Damascus forces [that] covered itself with shame when it issued a guilty verdict for a sovereign State without credible evidence." China abstained, noting that while the draft contained "elements of consensus," it did not fully consider "some of the major concerns of certain Security Council members on improving the mechanism's working methods and ensuring an objective and impartial investigation." The rest of the Council except Bolivia voted in favor. Bolivia justified its "no" vote as a response to the threats to use force unilaterally in violation of the Charter that had been issued following the attack. Sure enough, the United States, the United Kingdom, and France later responded to the Douma attack with airstrikes on SSRC sites presumed to be part of Syria's chemical weapons program.[234] Syria later accused the P-3 of "staging" the chemical attacks to justify the airstrikes that followed.[235] Russia made similar allegations in the Security Council chamber, arguing that the rebels had evacuated Douma by the time of the attack so only they stood to benefit from the "provocation" in order to receive "support from the United States and other Western countries."[236] It also accused the JIM of tailoring conclusions to justify Western airstrikes on Al-Shayrat airbase.

[228] S/PV.8105, *supra* note 224, at 10 (statement of China).
[229] *Id*. at 17.
[230] *How We Created a Virtual Crime Scene to Investigate Syria's Chemical Attack*, N.Y. TIMES, Jun. 24, 2018; Richard Pérez-Peña & Rick Gladstone, *Chemical Arms Experts Blocked from Site of Syria Attack*, N.Y. TIMES, Apr. 16, 2018.
[231] *See* U.N. SCOR, 73rd sess., 8228th mtg., U.N. Doc. S/PV.8228 (Apr. 10, 2018).
[232] Albania et al.: draft resolution, U.N. Doc. S/2018/321 (Apr. 10, 2018). Vis-à-vis the FFM, the draft resolution would have demanded that all parties in Syria accord it "unhindered and safe access to any sites deemed relevant." *Id*. ¶ 5.
[233] S/PV.8228, *supra* note 231, at 2-3 (statement of France); 3, 9-10 (statements of the United States); 9 (statement of the United Kingdom).
[234] For a discussion of the legal theories undergirding the attacks, see Jennifer Trahan, *The Narrow Case for the Legality of Strikes in Syria and Russia's Illegitimate Veto*, OPINIO JURIS (Apr. 23, 2018).
[235] *Bashar al Assad: The UK and US are Prolonging Syria's Civil War*, SKYNEWS, June 10, 2018.
[236] S/PV.8228, *supra* note 231, at 13 (statement of Russia). Russia also claimed its specialists confirmed that no such incident took place in Douma. S/PV.8233, *supra* note 183, at 4.

A competing draft circulated by Russia also failed, with only six votes in favor (Bolivia, China, Equatorial Guinea, Ethiopia, Kazakhstan, and Russia).[237] This resolution was superficially similar to the United States' draft. It would have created a UNIMI and blessed the work of the OPCW FFM. It contained a number of provisions directing the UNIMI and the FFM to utilize rigorous investigative standards, including on-site visits, and to consider information provided by the Syrian Arab Republic pertaining to the activities of non-state actors. However, what proved fatal was that it limited UNIMI to identifying "beyond a reasonable doubt facts which may lead to the attribution *by the Security Council*" (emphasis added) of chemical weapon use.[238] Elsewhere, the draft would have invited

> the UNIMI to engage relevant regional States in pursuit of its mandate, including in order to identify beyond reasonable doubt facts which may lead to the attribution by the Security Council of the involvement of any individuals, entities or groups associated with ISIL (Da'esh) or ANF in the use of chemicals as weapons in the Syrian Arab Republic.[239]

The states that voted in favor of both resolutions expressed their support for the revival of an independent investigative mechanisms to establish accountability for chemical weapon use.[240] Russia's "beyond a reasonable doubt" standard drew criticism from other members of the Council. In this regard, the United Kingdom noted that the draft:

> moves the parameters on access and imparts a quasi-judicial standard—"beyond a reasonable doubt"—that is inappropriate for the type of investigation that the Council wishes to establish. If the Russians want a criminal investigation, they could always suggest that we refer the matter to the International Criminal Court.[241]

Russia was also accused of trying to exert control over who would staff the mechanism and what findings would be made public because its draft appeared to give veto power over these issues to the Council.

Russia quickly submitted a pared down version of the latter resolution,[242] which would have merely condemned the attacks, expressed support for the OPCW, and demanded that the FFM be given access to Syria. After quick consultations, the new draft also failed, this time with only five votes in favor (Equatorial Guinea abstained along with Côte d'Ivoire, Kuwait, the Netherlands, Peru, and Sweden). The P-3 and Poland rejected the draft, explaining that the work of the FFM needed to be enhanced by an investigative mechanism that could ascribe responsibility for attacks. The United Kingdom stated, "we are not able to support the text. It would be like watching a fire, identifying that there was a fire, and doing nothing to put it out."[243] The United States accused Russia of trying to micromanage the FFM and controlling its investigators. The Netherlands raised concerns that the resolution implied that the FFM needed Council approval to operate when in fact it already has the mandate for on-site visits. Ethiopia could not find fault with the "matter-of-fact and uncomplicated" draft and argued the FFM could have used the Council's

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[237] Russian Federation: draft resolution, U.N. Doc. S/2018/175 (Apr. 10, 2018).
[238] *Id.* ¶ 6.
[239] *Id.* ¶ 22.
[240] S/PV.8228, *supra* note 231, at 11 (statement of Ethiopia); *id.* at 12 (statement of Kazakhstan).
[241] *Id.* at 9 (statement of the United Kingdom).
[242] Russian Federation: draft resolution, U.N. Doc. S/2018/322 (Apr. 10, 2018).
[243] S/PV.8228, *supra* note 231, at 14-15 (statement of the United Kingdom).

support and that it would have been an achievement simply to confirm chemical weapon use in Douma, especially in light of Russia's denial.

With the expiration of the JIM, states parties to the OPCW voted overwhelmingly in June 2018 to empower the Secretariat to "put in place arrangements to identify the perpetrators of the use of chemical weapons" in Syria and elsewhere in the world.[244] The Secretariat established an Investigations & Identification Team to follow up on the work of the FFM and JIM. In addition, several less-robust mechanisms remain focused on chemical weapon use: the original OPCW FFM (which is not empowered to attribute responsibility); the OPCW Declaration Assessment Team, which is still examining—and finding fault with—the accuracy of Syria's original declarations; and the U.N. Commission of Inquiry, which looks at international crimes broadly but does not have specialized expertise when it comes to this set of weapons. The latter has examined a number of attacks and attempted to attribute responsibility based upon its operative standard of proof.[245] Russia continued to contest the conclusions of the FFM and the OPCW, staging an Arria-formula meeting in January 2020.[246]

Sanctions

As sanctions for Syria were under consideration in the Council, the United Nations had fifteen sanctions regimes in place—the highest number in history—which together cost only about $30 million per year to support.[247] Smart sanctions have proven themselves to be a useful tool against recalcitrant states. When in place, they can starve a regime of resources and isolate key personnel. On the flip side, sanctions relief also offers an effective lever during negotiations.

Notwithstanding the fact that sanctions had become a tool deployed repeatedly by the Council, efforts to establish comprehensive sanctions regimes in connection with the current Syrian crisis all failed,[248] either because they were negotiated out of the draft text[249] or subject to a double Russian/Chinese veto.[250] Although comprehensive sanctions devoted to Syria eluded the Council, it was able to get certain individuals associated with terrorist groups operating in Syria designated onto pre-existing Al Qaida sanctions programs, notwithstanding the operational and ideological independence between Al Qaida and ISIL.[251] It also extended the Al Qaida arms embargo to the situation in Syria, with particular concern expressed for man-portable air-defense

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[244] OPCW, Decision Addressing the Threat from Chemical Weapons Use, C-SS-4/DEC.3, ¶ 10 (June 27, 2018).

[245] *See* Chemical Weapons Attacks Documented by the Independent International Commission of Inquiry on the Syrian Arab Republic (Jan. 2018), https://www.ohchr.org/SiteCollectionImages/Bodies/HRCouncil/IICISyria/COISyria_ChemicalWeapons.jpg.

[246] *Arria-Formula Meeting on Syria Chemical Weapons*, WHAT'S IN BLUE (Jan. 20, 2020). Arria-formula meetings, named after the former Ambassador to Venezuela who first conceptualized the concept in 1992, are informal and do not require the support of a majority of the Council to proceed.

[247] *See* S/PV.7323, *supra* note 44, at 2.

[248] Syrian officials had been under earlier U.N. sanctions following the assassination of former Lebanese Prime Minister Rafik Hariri and the release of the report by the International Independent Investigation Commission (UNIIIC), established by the Security Council in 2005. *See* S.C. Res. 1636, U.N. Doc. S/RES/1636 (Oct. 31, 2005) (establishing sanctions regime for individuals mentioned in the UNIIIC's report).

[249] S/PV.7116, *supra* note 66, at 11 (statement of Nigeria expressing regret that there was no paragraph barring arms transfers) and 12-13 (statement of Rwanda expressing regret that amendments on the responsibility of states supplying weapons to the Syrian parties were not included in the final version of the resolution).

[250] *See* S/2017/172, *supra* note 210.

[251] S/RES/2170, *supra* note 67, ¶¶ 18-20, Annex. *See also* S.C. Res. 2161, U.N. Doc. S/RES/2161 (June 17, 2014) (updating Al Qaida asset freeze, travel ban, and arms embargo); S.C. Res. 2253, ¶ 1, U.N. Doc. S/RES/2253 (Dec. 17, 2015) (renaming the Al Qaida Sanctions List to include ISIL (Da'esh)).

missiles (ManPADs).[252] Sanctions were also aimed at disrupting the oil trade as a source of financing for ISIL, the Nusra Front, and other Al Qaida-affiliated terrorist groups.[253] In the same resolution, the Council called upon all member states to take appropriate measures to prevent the trade in Iraqi and Syrian cultural property[254] and refrain from paying ransoms for kidnappings or hostage-takings. All states were to ensure that any person who participates in the financing, preparation, or perpetration of terrorist acts is brought to justice under appropriate provisions of domestic law.

In the absence of multilateral U.N. sanctions, it has fallen to individual states and regional institutions to impose sanctions. The Arab League,[255] the European Union,[256] the United States,[257] Canada,[258] France,[259] and Turkey,[260] among others, have thus imposed a mix of economic and travel sanctions on Syrian individuals (including members of the Assad family) and entities. A month into the conflict, the Arab League suspended Syria's membership in the organization and, in a move without precedent, froze all Syrian assets in member countries.[261] The United States long ago designated Syria a "state sponsor of terrorism" in connection with Syria's historical support for terrorist groups, its occupation of Lebanon, and its pursuit of weapons of mass destruction, which severely limited bilateral interactions[262] and paved the way for the imposition of broad-based sanctions.[263] Additional sanctions have been levied since the current crisis, including on the energy sector.[264] Since 2012, a number of emergent armed groups (including the Nusra Front) have been designated "Foreign Terrorist Organizations" by the United States, which

[252] S/RES/2199, *supra* note 64, ¶¶ 24-27. In February 2018, during the battle for Aleppo, a Russian jet was shot down by a ManPAD. Elias Groll, *Russian Jet Shot Down Over Syria; Israeli Targeted Killings*, FOREIGN POLICY, Feb. 5, 2018.
[253] S/RES/2199, *supra* note 64, at pmbl, ¶¶ 1-14.
[254] *Id.* ¶¶ 15-17. This resolution effectively extended the ban on Iraqi cultural goods to Syria.
[255] Neil MacFarquhar & Nada Bakri, *Isolating Syria, Arab League Imposes Broad Sanctions*, N.Y. TIMES, Nov. 27, 2011.
[256] *See* Council Decision 2011/273/CFSP concerning restrictive measures against Syria [2011] OJ L 121; Council Decision 2013/255/CFSP concerning restrictive measures against Syria [2013] OJ L 147.
[257] *See* Caesar Syria Protection Act of 2019, H.R. 31, https://www.congress.gov/bill/116th-congress/house-bill/31 (bolstering U.S. sanctions regimes).
[258] Global Affairs Canada, Canadian Sanctions Related To Syria, http://www.international.gc.ca/sanctions/countries-pays/syria-syrie.aspx?lang=eng.
[259] Décrets, Arrêtés, Circulaires, Ministère de l'Économie et Des Finances, *Arrêté du 18 janvier 2018 portant application des articles L. 562-3 du code monétaire et financier*, Journal Officiel de la République Française (Jan. 23, 2018).
[260] *Turkey Imposes Economic Sanctions on Syria*, BBC, Nov. 30, 2011.
[261] *Syria Suspended from Arab League*, THE GUARDIAN, Nov. 12, 2011.
[262] *See* U.S. Department of State, State Sponsor of Terrorism, https://www.state.gov/j/ct/list/c14151.htm. The designation, which dates from December 1979, opens Syria up to suit under the Foreign Sovereign Immunity Act, 28 U.S.C. § 1605, an opportunity which the family of slain war correspondent Marie Colvin availed itself (see chapter 7).
[263] The 1977 International Emergency Economic Powers Act (IEEPA) allows the U.S. President to declare a national emergency with respect to a foreign threat to national security or foreign policy and impose sanctions to respond to that threat. 50 U.S.C. § 1701, et seq. Invoking this authority, President George W. Bush originally imposed sanctions on Syria (including an arms embargo). *See* Exec. Order No. 13338, 60 Fed. Reg. 93 (May 13, 2004).
[264] In serial Executive Orders President Obama, blocked the assets individuals associated with human rights abuses in Syria. *See* Exec. Order No. 13572, 76 Fed. Reg. 85 (Apr. 29, 2011); Exec. Order No. 13573, 76 Fed. Reg. 98 (May 18, 2011); Exec. Order No. 13,582, 76 Fed. Reg. 172 (Aug. 17, 2011); Exec. Order No. 13606, 77 Fed. Reg. 79 (Apr. 22, 2012); Exec. Order No 13608, 77 Fed. Reg. 86 (May 1, 2012).

brings them into pre-existing omnibus terrorism sanctions regimes.[265] The task of identifying groups and individuals to sanction is complicated by the constant merging, splitting, and rebranding of armed groups in the Syrian theater. The United States will expand upon its sanctions once the Caesar Syria Civilian Protection Act becomes law.[266]

In response to this sanctions blockage at the Council, France introduced a new initiative—the International Partnership Against Impunity for the Use of Chemical Weapons—that it anticipates will "supplement the international mechanisms to combat the proliferation of chemical weapons"[267] through coordinated and publicized sanctions regimes, evidence gathering, information sharing, and prosecutions. Russia did not attend the inaugural session. In addition to gathering information on chemical weapons use, the consortium will publish the names of individuals, entities, and governments that have been subject to sanctions. By coordinating sanctions programs, the new partnership is meant to replicate, or at least approach, what U.N. sanctions might have achieved through the Council. It remains to be seen whether France's new initiative will knit these various unilateral and regional efforts together into a comprehensive regime.

Promoting Accountability & The ICC

It is against this contentious backdrop that the Security Council considered options to promote justice in Syria. While the Security Council did occasionally speak with one voice in condemning the violence in Syria, its undifferentiated demands for accountability soon lost all meaning in the absence of concrete advancements towards justice. This is even though the Council acknowledged an express link between impunity and continued violence in Resolution 2191:

> Noting with grave concern that impunity in Syria contributes to widespread violations and abuses of human rights and violations of international humanitarian law, stressing the need to end impunity for these violations and abuses, and re-emphasizing in this regard the need that those who have committed or are otherwise responsible for such violations and abuses in Syria must be brought to justice.[268]

This nexus has been repeatedly emphasized by individual member states. Italy, for example, reasoned: "there is a need to fight impunity. So long as no one is held accountable and faces tangible consequences for war crimes and crimes against humanity, the incentive will remain to continue to commit them."[269] Nonetheless, and although it has promoted justice elsewhere to varying degrees, the Security Council has utterly failed when it comes to achieving even a measure of justice for the victims of international crimes committed in and around Syria. Most significant from the perspective of international justice is the double veto of a French draft resolution to refer the situation to the ICC. Furthermore, a number of other justice options were available to the Council, but these were not pursued.

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[265] U.S. State Department, Foreign Terrorist Organizations, https://www.state.gov/j/ct/rls/other/des/123085.htm.
[266] H.R. 1677, Caesar Syria Civilian Protection Act of 2018, https://www.congress.gov/bill/115th-congress/house-bill/1677 (declaring U.S. policy to use all diplomatic and economic means to compel Assad to end abuses and work toward a democratic government).
[267] Chemical Weapons No Impunity!, https://www.noimpunitychemicalweapons.org/-en-.html#participants (last visited Aug. 30, 2019).
[268] S/RES/2191, *supra* note 117; *see also* Resolution 2258, *supra* note 117, at pmbl.
[269] S/PV.7922, *supra* note 220, at 5.

Early in the conflict, it was clear that events in Syria would easily surpass the Court's gravity threshold. As Syria is not a party to the treaty establishing the ICC, the only way the full conflict can come before the Court at the moment is via a Security Council referral. Even before a concrete referral proposal emerged, many states began to express their support for an ICC referral in their Council interventions.[270] As such, the Council came under considerable pressure to refer the situation to the Court, particularly as detailed information about the commission of international crimes began to emerge from multiple authoritative sources.

Starting in Geneva, the Human Rights Council first created a Fact-Finding Mission (FFM) dedicated to Syria in 2011.[271] The FFM concluded there were patterns of human rights violations that may amount to crimes against humanity.[272] The violence was such that the armed conflict threshold had not yet been crossed, so war crimes were not at issue. This FFM was soon upgraded to a COI charged with documenting the full range of human rights abuses and international criminal law violations being committed in Syria.[273] Still in operation, its mandate, like the mandate of many prior COIs, is to identify crimes and lay the groundwork for accountability including through the identification of potentially responsible individuals. Neither institution enjoyed the backing or endorsement of the Security Council, which resulted in the Syrian government (and its allies) having no legal obligation to cooperate, even though the Council has created, and provided operational and rhetorical support to, such documentation exercises in the past.[274] In its *seriatim* reports, in addition to cataloging the range of international crimes in Syria, the COI repeatedly encouraged the Council to refer the situation in Syria to the ICC or to establish an *ad hoc* tribunal.[275]

Elsewhere in the United Nations system, the U.N. Secretary-General and the then-U.N. High Commissioner for Human Rights, South African Navanethem Pillay, concluded that both crimes against humanity and war crimes were being committed in Syria;[276] the latter also advocated for an ICC referral[277] whereas the former "welcome[d] the debate triggered by the call" for a referral.[278] Despite being called a "lunatic" by Syria's U.N. ambassador, Pillay kept up the call through the end of her tenure[279] when it was picked up by her successor, Prince Zeid Ra'ad Zeid al-Hussein of Jordan.[280] Indeed, as the Syrian crisis unfolded, the "High Commissioner has

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[270] *See, e.g.*, S/PV.7116, *supra* note 66, at 4 (statement of Australia) and 12 (Chile).
[271] Human Rights Council, The Current Human Rights Situation in the Syrian Arab Republic in the Context of Recent Events, U.N. Doc. A/HRC/S-16/1 (Apr. 29, 2011).
[272] Report of the Fact-Finding Mission on Syria Pursuant to Human Rights Council Resolution S-16/1, ¶ 72.
[273] Situation of Human Rights in the Syrian Arab Republic, U.N. Doc. Resolution S-17/1, ¶ 13 (Aug. 23, 2011).
[274] *See, e.g.*, S.C. Res. 2226 (2015), ¶ 17, U.N. Doc. S/RES/2226 (June 25, 2015) (instructing the U.N. mission in Côte d'Ivoire to coordinate with the Independent Expert working in country); S.C. Res. 1975, ¶ 8, U.N. Doc. S/RES/1975 (Mar. 30, 2011) (calling on all sides to cooperate with investigations in Côte d'Ivoire); S.C. Res. 2134, ¶ 19, U.N. Soc. S/RES/2143 (Jan. 28, 2014) (same for the Central African Republic).
[275] *See, e.g.*, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/31/68, ¶ 161 (Feb. 11, 2016).
[276] Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic, U.N. Doc. A/HRC/18/53, ¶ 69 (Sept. 15, 2011).
[277] *UN Human Rights Chief Renews Call on Security Council to Refer Syria to ICC*, UN NEWS, July 2, 2012.
[278] United Nations Secretary-General Ban Ki-moon, *Secretary-General's Remarks to Security Council Open Debate on the Protection of Civilians in Armed Conflict* (Feb. 12, 2013).
[279] Michelle Nichols, *U.N. Rights Chief says Syria Government Abuses 'Far Outweigh" Rebels*, REUTERS, Apr. 8, 2012.
[280] *'Syria must be Referred to the ICC'—UN Human Rights Commissioner*, AMN, Mar. 3, 2018.

taken on increasingly visible tasks as investigator, reporter, advocate, and voice of outrage."[281] NGOs echoed these sentiments.[282] Although the Human Rights Council was active in promoting accountability, its pronouncements fell just short of calling for the Security Council to effectuate a referral. Specifically, it

> Emphasize[d] the need to ensure that all those responsible for violations of international humanitarian law or violations and abuses of human rights law are held to account through appropriate fair and independent domestic or international criminal justice mechanisms, in accordance with the principle of complementarity, stresse[d] the need to pursue practical steps towards this goal, and for that reason encourage[d] the Security Council to take appropriate action to ensure accountability, noting the important role that the International Criminal Court can play in this regard.[283]

In January 2013, Switzerland began pushing formally for an ICC referral by circulating a letter with more than 50 sovereign signatories calling for the Council to refer the matter to the Court. The letter emphasized that although

> accountability is primarily a national responsibility and that the role of international criminal justice is complementary, … the Syrian Arab Republic has, so far, not reacted to repeated calls from the international community to ensure accountability through a national procedure that needs to be credible, fair and independent in order to bring all perpetrators of alleged crimes to justice. Without accountability … there will be no sustainable peace in Syria.[284]

Absent a referral, the Swiss suggested the Council could "at the very least" announce its intention to refer the situation to the Court unless an accountability process is established "in a timely manner." Russia responded with a statement criticizing the Swiss letter as "ill-timed and counterproductive."[285] The United States did not join the letter, but is not on record opposing the campaign either. Incidentally, later that year, the former Prosecutor of the ICC, Argentine Luis Moreno Ocampo, similarly suggested the Security Council should refer the Syrian situation to the ICC with jurisdiction to begin in 2014. His theory was that the Court could use the threat of prosecution as a "Sword of Damocles" that would incentivize the parties to bring their conduct into compliance with international law and buy some time for a negotiated settlement. Importantly, he stressed that any referral would have to be supported by a credible threat of robust arrest operations—a profound weakness of the ICC system.[286]

In August 2013, chemical weapons were used in Rif Damascus. France initiated a draft resolution that would have condemned the attack; obliged Syria to dismantle its chemical weapons

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[281] David A. Kaye, *Human Rights Prosecutors? The United Nations High Commissioner for Human Rights, International Justice, and the Example of Syria* 3 (U.C. Irvine School of Law Research Paper No. 2013-83), https://ssrn.com/abstract=2196550 (compiling statements coming from the OHCHR).
[282] *See* Amnesty International, *Dozens of Countries Call on UN to Refer Syria to International Criminal Court* (January 14, 2013) (noting Amnesty call in April 2011).
[283] Human Rights Council, Situation of Human Rights in the Syrian Arab Republic, U.N. Doc. A/RES/72/191, ¶ 35 (Jan. 23, 2018).
[284] *See* Letter to H.E. Mr. Mohammad Masood Khan, President of the Security Council for the month of January 2013, from the Permanent Mission of Switzerland to the United Nations (Jan. 14, 2013).
[285] *Russia Opposed Syria Crisis War Crimes Court Referral*, REUTERS, Jan. 15, 2013.
[286] Luis Moreno Ocampo, *The ICC as the Sword of Damocles,* JUST SECURITY (Sept. 23, 2013).

program under international supervision (a scheme containing many of the elements that would later appear in Russia's chemical weapons Framework Agreement); imposed a chemical, biological, and nuclear weapons embargo; and referred the situation to the ICC.[287] That draft did not move forward, and the international community instead embraced Russia's disarmament plan. In January 2014, the so-called Caesar photos, which documented the commission of industrial-grade torture in Syrian prisons (discussed more fully in chapter 8), came to light. In April 2014, members of the Security Council viewed the Caesar photos in an informal setting organized by France.[288] The horror depicted in those photos re-galvanized the ICC referral movement. France again grasped the pen. At the time its renewed resolution was being considered, the war in Syria was in its fourth year, and had devolved into a full-scale humanitarian catastrophe. France's initiative earned strong international support from many states and civil society actors.[289] The draft referral boasted 65 sovereign co-sponsors by the time it went to a vote—almost a third of U.N. membership.[290]

The United States originally demurred, taking note of the impulse to trigger the ICC and expressing sympathy for the objectives that animate such calls.[291] It urged accountability in vague language, but refrained from endorsing any referral proposals or foreclosing any options. The United States had also quietly floated ideas about various alternative frameworks for accountability, such as an *ad hoc* hybrid tribunal or dedicated war crimes chamber that could be stood up on the periphery of the conflict or in a liberated zone. Even as it advanced these measures, the United States emphasized that the Syrian people should have "a," but not necessarily "the," leading voice in any accountability exercise.

To a certain degree, U.S. reticence toward ICC action in Syria was a reflection of lingering ambivalence towards the institution that traced its roots to the Bush Administration's overt hostility to the Court. Ever present was the fear of an impending investigation into events in Afghanistan, an ICC member state, that would implicate U.S. personnel in custodial abuses. At the same time, some in the United States had more principled reasons for being cautious about an ICC referral. These concerns included the vexing questions of whether a mid-conflict referral would help restore international peace and security in the region and be in the best interests of the Syrian people and a hoped for new Syrian regime. Expressing this concern, Ambassador Power queried: "What could the International Criminal Court really do, even if Russia or China were to allow a referral? Would a drawn-out legal process really affect the immediate calculus of Assad and those who ordered chemical weapons attacks?"[292] Others noted that the ICC would be overwhelmed if the Syrian conflict were added to its docket. As one commentator has noted:

> Given the way the situation in Syria has developed, with atrocities being reported on various sides of the conflict, the fact that the situation has not been referred to the ICC is actually a blessing for the court as it means the Office of the Prosecutor (OTP) does not have to grapple with decisions under political pressure about whom

[287] French Draft Resolution on Chemical Weapons in Syria, *available at* https://docs.google.com/file/d/0ByLPNZ-eSjJdX29vd2Y3WlNxQWc/view.
[288] Louis Charbonneau & Michelle Nichols, *U.N. Security Council Members View Graphic Photos of Syria Dead*, REUTERS, Apr. 15, 2014.
[289] *See* HUMAN RIGHTS WATCH, SYRIA: GROUPS CALL FOR ICC REFERRAL (May 15, 2014) (listing NGO supporters).
[290] For a list of state co-sponsors see S/PV.7180, *supra* note 81, at 2.
[291] *See* Harold Hongju Koh, *International Criminal Justice 5.0*, 38 YALE J. INTL L. 525, 540 (2013).
[292] Max Fisher, *Samantha Power's Case for Striking Syria*, WASH. POST, Sept. 7, 2013.

to prosecute and whose reputations to leave unblemished to facilitate their involvement in later negotiations.[293]

Notwithstanding these and other hesitations related to its support for Israel,[294] the United States ultimately joined the co-sponsors of the French draft.[295]

As the Council considered the draft resolution, U.N. Deputy-Secretary-General Jan Eliasson spoke first on behalf of the Secretary-General to urge the Council to pass the resolution or risk more bloodshed and the erosion of the credibility of the Council and the United Nations as a whole.[296] Once the resolution was put to a vote, it garnered the support of 13 Council members. Dozens of other non-voting states requested to participate in the session without a vote. As luck would have it, nine of the ten elected members happened to be ICC members as well (all but Rwanda).[297] Russia explained the fourth exercise of its veto by invoking the ghost of Libya, arguing that the draft resolution was a thinly-veiled attempt to engage in another armed intervention. Russia also insisted that putting the resolution to a vote threatened to undermine P-5 unity, which was already at a new low.

China—in exercising its fourth double veto—also cried procedural foul. In its explanation of vote, China expressed its long-held reservations about referring situations to the Court and urged states to recommit to seeking a political solution to the crisis. It warned of the risk of undermining the peace process: "to [f]orcibly refer the situation in Syria to the Court in the current environment is not conducive either to building trust among all parties in Syria or to an early resumption of the negotiations in Geneva." Other delegates insisted there was no peace process underway to undermine. Syria was invited to speak and invoked the privilege of complementarity, arguing the government was adequately prosecuting war crimes domestically—a laughable claim as discussed in chapter 6 on domestic cases. The Syrian permanent representative also complained that the draft resolution was political, discriminatory, and interventionist and "contrasted starkly with the Council's repeated affirmations of its strong commitment to Syria's sovereignty, independence, unity and territorial integrity, as well as the call for a political solution."

Knowing that Russia would veto the resolution, as it had all prior texts imposing any real consequences on the Assad regime, no doubt made it easier for the United States to join the proposed referral. Additionally, the French draft contained a number of protections that the United States had insisted upon in the prior referral resolutions, so its equities were adequately protected. Although it proved to be a purely symbolic exercise, the draft ICC referral was not without import or impact. For one, Russia's inevitable exercise of the veto gave the United States and its allies another opportunity to shame Russia for its support for the Syrian regime—not that Russia appears

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[293] Kirsten Ainley, *The Responsibility to Protect and the International Criminal Court: Counteracting the Crisis*, 91(1) INT'L AFF. 37, 47 (2015).

[294] One sticking point involved the Golan Heights, occupied by Israel since the 1967 Six-Day War, which while generally quiet could easily have embroiled Israel in the war in neighboring Syria. *See* David Bosco, *Justice for Assad Can Wait*, FOREIGN POLICY, Feb. 22, 2012; Fionnuala Ní Aoláin, *Why the US Failure to Support an ICC Referral for Syria does not Protect Israel (or American Interests)*, JUST SECURITY (Oct. 13, 2013).

[295] Colum Lynch, *Exclusive: U.S. to Support ICC War Crimes Prosecution in Syria*, FOREIGN POLICY, May 7, 2014.

[296] The debates are captured here: S/PV.7180, *supra* note 81. For a rich description, see Carrie Booth Walling, *Syria and the Responsibility to Prosecute: Norm Promotion in the United Nations Security Council*, *in* ACCESSING AND IMPLEMENTING HUMAN RIGHTS AND JUSTICE (Kurt Mills & Melissa Labonte eds., 2018).

[297] These were: Argentina, Australia, Chad, Chile, France, Jordan, Lithuania, Luxembourg, Nigeria, Republic of Korea, Rwanda, United Kingdom, and the United States. *See* S/PV.7180, *supra* note 81.

at all ashamed by its conduct.[298] Given the Trump Administration's articulated hostility towards the Court, particularly following the revival of the Office of the Prosecutor's investigation into crimes in Afghanistan, it is unlikely that the United States would support this effort again.[299]

The General Assembly next issued its own resolution, regretting the failure of the French draft.[300] In particular, the Assembly emphasized:

> the need to ensure that all those responsible for violations of international humanitarian law or violations and abuses of human rights law are held to account through appropriate fair and independent, national or international, criminal justice mechanisms in accordance with the principle of complementarity, and stresse[d] the need to pursue practical steps towards this goal, and for this reason encourage[d] the Security Council to take appropriate action to ensure accountability, noting the important role that the International Criminal Court can play in this regard.[301]

Although clearly supportive of the ICC, the text fell a bit short of explicitly calling on the Council to effectuate a referral. The next year, the General Assembly went a bit farther with respect to North Korea by recommending the Council consider referring the situation to the Court.[302] The Council continued to debate propriety of a referral in subsequent sessions, but no formal resolution emerged.[303]

Implications for Security Council Reform

As the situation in Syria unfolded, many non-permanent Council members, other U.N. members, and NGOs expressed mounting frustration at the lack of action by the Council on Syria. Indeed, the Ghouta attacks occurred during Argentina's presidency of the Security Council in August 2013. President Cristina Fernandez appeared in the Council chamber in lieu of the country's permanent representative to argue that the veto, which she conceded had proven its utility in preventing a nuclear holocaust during the Cold War, had outlived its value and become an instrument of dysfunction.[304] Australia next took over the rotating presidency. Although Syria was on the Council's agenda, Australia's permanent representative Gary Quinlan indicated it was not productive to host formal discussions because they would lead nowhere. He expressed hope

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[298] *See* Saira Mohamed, *Shame at the Security Council*, 90 WASH. L. REV. 1191 (2013) (discussing efforts to shame permanent members into responding to world crises and the factors that impact the success or failure of such efforts).

[299] In a press statement, Secretary of State Pompeo described the Court as "an unaccountable political institution, masquerading as a legal body." Michael R. Pompeo, *ICC Decision on Afghanistan* (Mar. 5, 2020), https://www.state.gov/icc-decision-on-afghanistan/.

[300] G.A. Res. 69/189, pmbl, U.N. Doc. A/RES/69/189 (Dec. 18, 2014) ("noting the repeated encouragement by the High Commissioner for the Security Council to refer the situation to the International Criminal Court, and regretting that a draft resolution was not adopted despite broad support from Member States") (citations removed).

[301] *Id.* ¶ 22. The resolution enjoyed 127 votes in favor, 13 against, and 48 abstentions.

[302] G.A. Res. 70/172, ¶ 10, U.N. Doc. A/RES/70/172 (Dec. 17, 2015) ("Encourages the Security Council to continue its consideration of the relevant conclusions and recommendations of the commission of inquiry and take appropriate action to ensure accountability, including through consideration of referral of the situation in the Democratic People's Republic of Korea to the International Criminal Court"). This resolution garnered 119 votes in its favor.

[303] *See, e.g.*, U.N. SCOR, 70th sess., 7419th mtg., U.N. Doc. S/PV.7419 (Mar. 27, 2015) (debating the protection of minorities in the Middle East).

[304] *Security Council Veto Power Attacked*, AP (Aug. 6, 2013) (quoting Fernandez: "and we can't deal with the problems in this new world with old instruments and old methods").

that the upcoming G20 meetings in St. Petersburg would be more productive.[305] Also unprecedented was the rejection by Saudi Arabia of its elected seat on the Security Council in October 2013, ostensibly in protest of the Council's perceived blunders in the Middle East (citing Syria, Palestine, and the failure to free the Middle East of weapons of mass destruction). The Saudi Ministry of Foreign Affairs stated:

> The failure of the Security Council to make the Middle East a zone free of all weapons of mass destruction, whether because of its inability to subject the nuclear programmes of all countries in the region, without exception, to international control and inspection or to prevent any country in the region from possessing nuclear weapons, is additional irrefutable evidence and proof of its inability to carry out its duties and honour its responsibilities. Allowing the ruling regime in Syria to kill and burn its people with chemical weapons while the world stands idly by, without applying deterrent sanctions against the Damascus regime, is also irrefutable evidence and proof of the inability of the Security Council to carry out its duties and responsibilities.[306]

The Syria deadlock has helped galvanize the age-old U.N. reform movement, which has always contained a number of interlocking strands.[307] These include arguments that the P-5 no longer represent an exclusive nucleus of power in the global community, that the P-5 cannot be trusted to manage matters of international peace and security on an even-handed basis; and that the Council should be more geographically representative.[308] Germany, Japan, India, and Brazil (the Group of Four (G-4)) have led the expansion charge on the assumption that each would be accorded a permanent seat on the Council. Calling themselves "Uniting for Consensus," other states wary of granting any of the G-4 a veto, have advocated for the enlargement of the non-permanent members.[309] Finally, the Ezulwini Consensus seeks two permanent seats with veto power and additional rotating seats for states on the African continent.[310] The Council's inaction on Syria has contributed to the growing belief that the veto is outdated, incompatible with the Council's Charter-based duty to maintain international peace and security, and fundamentally inequitable and "undemocratic," because it allows any P-5 member to block an initiative irrespective of how much support it has among other U.N. members, even for purely self-interested reasons. These concerns have given rise to a number of gatherings devoted to considering the

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[305] Press Release, *Press Conference by Australia's Security Council President on Work Programme for September*, U.N. Information Centre Canberra (Sept. 5, 2013).

[306] *Statement of the Ministry of Foreign Affairs on Saudi Arabia's Apology for not Accepting Security Council Membership*, Annex to the letter dated 12 November 2013 from the Permanent Representative of Saudi Arabia to the United Nations addressed to the Secretary-General, U.N. Doc A/68/599 (Nov. 14, 2013). *See* Beth Van Schaack, *This One Goes to Eleven: The ICC and the Security Council*, JUST SECURITY (Dec. 9, 2013).

[307] *See generally* Kirsten Ainley, *The Responsibility to Protect and the International Criminal Court: Counteracting the Crisis*, 91 INT'L AFFAIRS 37 (2015) (discussing reform proposals).

[308] *See* Global Policy Forum, *Security Council Reform*, https://www.globalpolicy.org/un-reform/un-reform-topics/reform-of-the-security-council-9-16.html; Jakob Silas Lund, *Pros and Cons of Security Council Reform*, Center for UN Reform Education (Jan. 19, 2010) (outlining the "five key cluster areas" considered by many to be ripe for reform, including questions of membership, regional representation, the veto power, the working methods, and the relationship with the General Assembly).

[309] Press Release, *'Uniting For Consensus' Group of States Introduces Text on Security Council Reform to General Assembly*, U.N. Doc. GA/10371 (July 26, 2005), *available at* https://www.un.org/press/en/2005/ga10371.doc.htm.

[310] *See* The Common African Position on the Proposed Reform of the United Nations: "The Ezulwini Consensus", African Union Executive Council, Ext/EX.CL/2 (VII) (Mar. 7-8, 2005).

Council's "working methods" with an eye towards reform on a number of fronts, including with respect to the ICC.[311] Although each of the P-5 has at one point or another supported a proposal for expanding the Council, no tangible progress has been made on this or other reform measures that would require an amendment to the Charter. In any case, the window for formal reform is now closed given the current acrimony in the Council chamber.

Even prior to the Syria crisis, U.N. member states expressed support for reform measures aimed at preventing or discouraging permanent members of the Council from exercising their veto in the face of atrocity crimes or where the Responsibility to Protect is implicated.[312] This veto-restraint proposal found early expression in the report by the Secretary-General's High-Level Panel on Threats, Challenges, and Change issued on the eve of the 2005 World Summit in parallel with the emergence of the Responsibility-to-Protect doctrine. In particular, the report stated:

> [A]s a whole the institution of the veto has an anachronistic character that is unsuitable for the institution in an increasingly democratic age and we would urge that its use be limited to matters where vital interests are genuinely at stake. We also ask the permanent members, in their individual capacities, to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses.[313]

At that time, a group of states calling themselves the Small Five (S-5)—Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland—took up the cause and have similarly proposed that the P-5 should agree to refrain from using the veto in cases of genocide, crimes against humanity, and serious breaches of IHL,[314] perhaps through the enactment of a rule of procedure pursuant to Article 30 of the Charter.

Similar proposals have also been included as part of a new Security Council-reform initiative initiated by Switzerland in 2013 known as Accountability, Coherence, and Transparency (ACT). Among other proposals, the ACT group advocated for the adoption of a voluntary Code of Conduct whereby Security Council members—permanent and rotating—would voluntarily pledge not to obstruct draft resolutions that seek to address the commission of crimes against humanity, genocide, and war crimes.[315] Supportive states have also argued that any member state invoking its veto in response to an atrocity situation should be required to explain how its vote is consistent with the U.N. Charter and international law. Finally, states have proposed that the Council develop a non-veto "no" vote, enabling states to cast a negative vote that would not operate as a formal veto within the meaning of Article 27 of the Charter. Supportive states argue that the proposed restraint on the use of the veto is based on states' treaty commitments (such as to the four Geneva Conventions and their Protocols, which prohibit violations of IHL and mandate prosecutions, and the Genocide Convention, which contains an amorphous duty of prevention) as well as the

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[311] *See, e.g.*, U.N. SCOR, 69th sess., 7285th mtg., U.N. Doc. S/PV.7285 (Oct. 23, 2014).
[312] *See also* International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* 68 (Dec. 2001) (calling on the P-5 adopt a code of conduct that would oblige them to refrain from using their veto in R2P situations).
[313] A MORE SECURE WORLD, *supra* note 17, at 68.
[314] Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland, *Improving the Working Methods of the Security Council*, Agenda Item 115 (Mar. 20, 2012).
[315] Explanatory Note on a Code of Conduct regarding Security Council Action against Genocide, Crimes Against Humanity or War Crimes (Sept. 1, 2015).

commitments emerging from the 2016 World Humanitarian Summit.[316] Over 110 states[317] have signed the Code of Conduct, and a number of NGOs[318] have expressed support.[319] States have invoked these pledges in connection with the Syria crisis. For example, in its explanation of vote in connection with the failed sanctions resolution, Uruguay noted that "[a]s a signatory to the code of conduct regarding Security Council action against genocide, crimes against humanity and war crimes, Uruguay is committed to preventing and putting an end to such horrendous crimes. In that regard, we can only lament the use of the veto in the case of this draft resolution."[320]

France was the first P-5 member to openly support the initiative, including in connection with Syria.[321] Indeed, France and Mexico subsequently launched a similar proposal calling on the P-5 to pledge to suspend the veto in the case of mass atrocities. Under this scheme, the Secretary-General—acting within the spirit of Article 99 of the U.N. Charter—would determine the nature of the crimes in progress, which would trigger the applicability of the pledge in circumstances in which atrocity crimes were underway, unless the state could argue that "vital national interests" were in jeopardy. France explained its veto-restraint initiative as follows:

> Our suggestion is that the five permanent members of the Security Council—China, France, Russia, Britain and the United States—themselves could voluntarily regulate their right to exercise their veto. The Charter would not be amended and the change would be implemented through a mutual commitment from the permanent members. In concrete terms, if the Security Council were required to make a decision with regard to a mass crime, the permanent members would agree to suspend their right to veto. The criteria for implementation would be simple: at the request of at least 50 member states, the United Nations secretary general would be called upon to determine the nature of the crime. Once he had delivered his opinion, the code of conduct would immediately apply.[322]

France expressed confidence that such a pledge could be accomplished through a formal rule of procedure, a voluntary or informal code of conduct, or a statement of intent by the Council without the need to amend the Charter.[323] The Political Statement on Suspension of Veto Powers in Cases

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[316] *See generally* Outcome of the World Humanitarian Summit, U.N. Doc. A/71/353 (Aug. 23, 2016).
[317] Global Centre for the Responsibility to Protect, *UN Security Council Code of Conduct*, http://www.globalr2p.org/our_work/un_security_council_code_of_conduct (last visited Sept. 7, 2019).
[318] A group of NGOs expressed their support for the proposal after the ICC referral failed. *See* Joint NGO Statement on the Use of the Veto, *available at* http://www.globalr2p.org/media/files/ joint-ngo-statement-on-the-use-of-the-veto.pdf4.
[319] Supportive comments on veto restraint are compiled here: Global Center for the Responsibility to Protect, *References on the Need for Veto Restraint by the UN Security Council in Mass Atrocity Situations*, http://www.globalr2p.org/media/files/veto-restraint-references-4.pdf.
[320] *See* S/PV.7893, *supra* note 214, at 9. Kuwait made similar expressions of support in connection with the trifecta of failed resolutions following the Douma chemical weapon attack.
[321] S/PV.7922, *supra* note 220, at 4 (statement of France) (noting in connection with another Russian veto that the proposal "is aimed at precisely situations of this kind. It is now clearly more topical than ever and reflective of our concerns").
[322] *See* Laurent Fabius, *A Call for Self-Restraint at the U.N.*, N.Y. TIMES, Oct. 4, 2013 (op-ed by France's Minister of Foreign Affairs calling on the P-5 to voluntarily refrain from exercising the veto).
[323] *Why France Wishes to Regulate the Use of the Veto in the United Nations Security Council*, FRANCE DIPLOMATIE, https://www.diplomatie.gouv.fr/en/french-foreign-policy/united-nations/france-and-the-united-nations/article/why-france-wishes-to-regulate-use#.

of Mass Atrocity has received the support of almost 100 U.N. member states.[324] The United Kingdom eventually joined France in calling for this veto restraint.[325] Several states mentioned these efforts in connection with France's failed ICC referral. Kuwait, for example, expressed its support for "the code of conduct whereby the States members of the Security Council would commit to not opposing draft resolutions dealing with crimes against humanity, genocide and war crimes" and "the French-Mexican initiative on abstention in the use of the veto in cases of human rights violations."[326]

It was not clear how such a requirement might be imposed on the Council short of an amendment to the U.N. Charter, which would require the support of two-thirds of the General Assembly's membership as well as the assent of the P-5 according to Article 108 of the U.N. Charter.[327] In 2012, in the face of intense pressure from the P-5,[328] the S-5 ultimately withdrew a draft General Assembly resolution, entitled "Enhancing the Accountability, Transparency and Effectiveness of the Security Council,"[329] after the then-United Nations Legal Counsel and Under-Secretary-General for Legal Affairs, Patricia O'Brien, advised that the resolution concerned "important questions," which would likely require a two-thirds majority vote of the General Assembly to pass, rather than the simple majority vote required to pass other resolutions.[330] The proposed Resolution would have recommended that the P-5

> 19. Explain[] the reasons for resorting to a veto or declaring its intention to do so, in particular with regard to its consistency with the purposes and principles of the Charter of the United Nations and applicable international law. A copy of the explanation should be circulated as a separate Security Council document to all members of the Organization.

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[324] *See* Political Statement on the Suspension of the Veto in Case of Mass Atrocities, presented by France and Mexico, Open to Signature to the Members of the United Nations, *available at* http://www.globalr2p.org/media/files/2015-07-31-veto-political-declaration-final-eng.pdf.

[325] Richard Dicker, *As ICC Caseload Expands, UN Security Council's Support Lags Far Behind*, INTERNATIONAL CRIMINAL JUSTICE TODAY (Dec. 10, 2015), https://www.international-criminal-justice-today.org/arguendo/as-icc-caseload-expands-un-security-councils-support-lags-far-behind/.

[326] *See* S/PV.8228, *supra* note 231, at 11.

[327] *But see* JENNIFER TRAHAN, LEGAL LIMITS TO THE USE OF THE VETO POWER IN THE FACE OF ATROCITY CRIMES (forthcoming 2020). Trahan articulates the legal limits on the exercise of the veto derived from *jus cogens* norms, the obligation of the Council to act in accordance with the purposes and principles of the U.N. Charter, and human rights treaties.

[328] William Pace, *21 Member States Launch New Initiative to Improve the Working Methods of the Security Council*, Center for UN Reform Education (May 12, 2013), http://www.centerforunreform.org/?q=node/541; *Putting Down their Cards: Limiting the Veto in RtoP Cases* (Oct. 28, 2013). *See also* S/PV.7285, *supra* note 311, at 9 ("we wish to reiterate in this context that Chile favours a serious debate in the General Assembly on the French proposal to limit the veto in cases of crimes that involves the responsibility to protect, and to strengthen the preventative role [of the] Security Council") (statement of Chile). Australia, Lithuania, Jordan, Luxembourg, France, Switzerland, Costa Rica, and Liechtenstein all spoke in favor of these initiatives to reform the use of the veto in mass atrocities situations. *Id.*

[329] Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland: revised draft resolution, Enhancing the Accountability, Transparency and Effectiveness of the Security Council, U.N. Doc. A/66/L.42/Rev.2 (May 15, 2012). *See Switzerland Withdraws Draft Resolution in General Assembly Aimed at Improving Security Council's Working Methods to Avoid 'Politically Complex' Wrangling*, U.N. Doc. GA/11234 (May 16, 2012).

[330] *See* Letter from Patricia O'Brien to Dr. Mutlaq Al-Qahtani, Chef de Cabinet, office of the President of the General Assembly (May 14, 2012), *available at* http://www.innercitypress.com/OLA2PGAs5May.pdf.

> 20. Refrain[] from using a veto to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity.[331]

None of these initiatives, which many consider compelled by the Responsibility-to-Protect imperative,[332] has yet resulted in any concrete action by the Council, however, and is unlikely to do so in the heat of a live controversy such as Syria. The paradox that members of the P-5 have shown a willingness to go around the Security Council rather than work towards its reform has not been lost on observers.[333]

Conclusion

Although the Security Council's Syria proceedings are largely a study of dysfunction, and the perils of subjecting justice initiatives to a political veto, the Syria situation has generated a few new developments that serve as precedent, or provide lessons learned, for future work within the Council. For one, the Council has been able to agree on a robust counter-terrorism platform, but is unable to agree on who the terrorists are—a problem that extends well beyond the Council chamber. As a result, ceasefires that carve out exceptions for kinetic operations against "terrorist groups" provide cover for the parties to continue to use force and undermine the ability to institute a genuine cessation of hostilities. On the flip side, the presence of ISIL (and to a lesser extent Al Qaida) also forged a strange tripartite alliance between Russia, the West, and the Assad regime that occasionally laid a foundation for collective action. The presence of terrorist elements within the battlespace also inspired the Council to issue strong accountability language, directly linking the pervasive impunity in Syria with the continued use of violence in violation of international law. The Council also produced important pronouncements on the illegality of siege warfare, the use of starvation as a weapon of war, the neutrality of medical personnel and journalists, and the deployment of indiscriminate weapons, such as barrel bombs, that may advance international law. The Council proved willing to mandate the provision of humanitarian assistance even absent the territorial state's consent (although Assad ultimately maintained significant control over how this aid was distributed). Finally, members also confirmed that any use of chemical weapons triggers Chapter VII as a threat or breach of international peace and security. This rhetoric did not translate into concrete support for accountability, however; besides the failure of the ICC referral, the Council could not even garner the necessary votes to backstop the United Nations' own COI or impose sanctions on regime actors.

Beyond the forceful denunciations of abuses and the enunciation of norms, all other concrete proposals to place real constraints on the Syrian regime have been blocked by the failure of the Council to garner the necessary P-5 consensus. And many of the initiatives that did move forward—the demise of the JIM offers a case in point—were in constant jeopardy of being terminated by virtue of Russia's veto. This history exemplifies the risks of making multilateral policy through the Council and the fragility of institutions subject to the veto.

As discussed elsewhere in this text, this recurrent paralysis in the Council created fruitful openings for other institutions—within and without the United Nations—to step in and find ways

[331] U.N. Doc. A/66/L.42/Rev.2, *supra* note 329, at Annex.

[332] This is the rationale behind the European Parliament's support for the Code of Conduct. *See* European Parliament Recommendation to the Council of 18 April 2013 on the UN Principle of the "Responsibility to Protect," 2012/2143(INI).

[333] Matt Cannock, *International Justice Trends in Microcosm at the OPCW—Three Observations as States Adopt 'Attribution Mechanism,'* AMNESTY INTERNATIONAL (July 27, 2018).

to constrain Assad and address the accountability gap. The result has been an inventive upwelling of new institutions dedicated to promoting accountability or at least to preserving evidence for when there is a court—domestic, hybrid, or international—capable of exercising jurisdiction. Most importantly, in December 2016, as the Council dithered over the localized crisis in Aleppo, a large contingent of states opposed to Assad overcame obvious collective action problems in the General Assembly to adopt Resolution 71/248, establishing the International, Impartial, and Independent Mechanism (IIIM) to assist in the investigation and prosecution of international crimes being committed in Syria,[334] a development taken up in chapter 8.

[334] G.A. Res. 71/248, U.N. Doc. A/RES/71/248 (Jan. 11, 2017).

The Voting Patterns and Exercise of the Veto in the Security Council in Connection with the Conflict in Syria							
Draft Resolution	Sponsor(s)	Date	Focus	China	Russia	P-3	Other No Votes
S/2011/612	France, Germany, Portugal & the United Kingdom	Oct. 4, 2011	Denounced violence and called for a political process	1	1		
S/2012/77	Bahrain et al. (19 co-sponsors)	Feb. 4, 2012	Encouraging a peaceful resolution of the crisis	2	2		
S/2012/538	France, Germany, Portugal, the United Kingdom & the United States	July 19, 2012	Creating a political process in keeping with Annan's 6-point plan	3	3		
S/2014/348	Albania et al. (64 co-sponsors)	May 22, 2014	ICC referral	4	4		
S/2016/846	Andorra et al. (45 co-sponsors)	Oct. 8, 2016	End violence in Aleppo	Absta in	5		Venezuela
S/2016/847	Russia	Oct. 8, 2016	Calling on the opposition forces to cease operations with terrorists			France, U.K., U.S.	
S/2016/102 6	Egypt, New Zealand & Spain	Dec. 5, 2016	Calling for an end to violence and Aleppo	5	6		Venezuela
S/2017/172	Albania et al. (41 co-sponsors)	Feb. 28, 2017	Condemning chemical weapon use and imposing sanctions	6	7		Bolivia
S/2017/315	France, the United Kingdom & the United States	Apr. 12, 2017	Condemning chemical weapon attack in Khan Sheikhoun and calling for support for the JIM	Absta in	8		Bolivia
S/2017/884	Albania et al. (40 co-sponsors)	Oct. 24, 2017	Extending the JIM for a year	Absta in	9		Bolivia
S/2017/962	France, Italy, Japan Sweden, Ukraine, the United Kingdom & the United States	Nov. 16, 2017	Extending the JIM	Absta in	10		Bolivia

S/2017/970	Japan	Nov. 17, 2017	Extending the JIM	7	11		Bolivia
S/2018/321	Albania et al. (25 co-sponsors)	Apr. 10, 2018	Establishing a new independent, impartial and transparent investigation into chemical weapon use	Abstain	12		Bolivia
S/2018/175	Russia	Apr. 10, 2018	Empowering the Security Council to attribute chemical weapon use			France, U.K., U.S.	Netherlands, Peru, Poland, Sweden
S/2018/322	Russia	Apr. 10, 2018	Condemning chemical weapon attacks			France, U.K., U.S.	Poland
S/2018/355	Russia	Apr. 14, 2018	Condemning airstrikes in Syria as acts of aggression			France, U.K., U.S.	Côte d'Ivoire, Kuwait, Netherlands, Poland
S/2019/756	Belgium, Germany & Kuwait	Sept.19, 2019	Imposing a ceasefire in Idlib	8	13		
S/2019/757	China & Russia	Sept. 19, 2019	Calling on parties to maintain a ceasefire in Idlib & refrain from supporting terrorists			France, U.K., U.S.*	Belgium, Dominican Republic, Germany, Kuwait, Peru & Poland*
S/2019/961	Germany, Belgium & Kuwait	Dec. 19, 2019	Extend cross-border humanitarian aid	9	14		
S/2019/962	Russia	Dec. 19, 2019	Extend cross-border humanitarian aid but with reduced checkpoints			France, U.K., U.S.	Dominican Republic, Peru, Poland
Total Vetoes/ Failed Resolutions				9	14	5	

* This resolution did not garner the necessary 9 votes in favor and so failed on that ground.

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4

Prospects for Justice before the International Criminal Court

Courts and tribunals ... are the best instrumentalities that our civilization has yet devised to subdue violence by giving that which is rightful a forum where it may prevail over that which is merely strong.[1]

Since Syria is not presently a party to the Statute of the International Criminal Court (ICC),[2] the ICC would have plenary jurisdiction over international crimes in Syria only in the event that the U.N. Security Council effectuates a referral of the situation to the Court.[3] For reasons discussed in chapter 3, this has not been forthcoming. Even putting aside the acrimony on the Council Chamber, Russia is on record in connection with the situation in Libya indicating that it does not intend to support future referrals. As such, a Council referral is a prospect that is currently, and perhaps indelibly, foreclosed when it comes to Syria.[4]

As a result, the ICC has jurisdiction over only a portion of the full panoply of crimes that have been committed, and are being committed, in and around Syria.[5] To be sure, a new Syrian administration could later ratify the Rome Treaty, giving the Court prospective jurisdiction over Syrian territory. In addition, or in the alternative, Syria could issue a declaration under Article 12(3) of the Rome Statute, which could render the ICC's jurisdiction retroactive.[6] The Palestinian Authority,[7] Côte d'Ivoire,[8] and Ukraine[9] have all utilized Article 12(3) declarations in this fashion to expand—and control—the temporal jurisdiction of the Court. Although Article 12(3) offers an

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[1] Robert H. Jackson, *Mechanisms and Techniques to End International Lawlessness*, speech at the Annual Banquet of the New York State Bar Association (Jan. 24, 1942), *in* 7 VITAL SPEECHES OF THE DAY 356.
[2] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter *Rome Statute*].
[3] Negotiators of the Rome Treaty rejected a German proposal to give the ICC "universal jurisdiction" over crimes committed by anyone anywhere, regardless of whether any of the implicated states had ratified the treaty. *See* The Jurisdiction of the International Criminal Court: An Informal Discussion Paper Submitted by Germany, U.N. Doc. A/AC.249.1998/DP.2 (March 23, 1998). In addition, a proposal to include the custodial state as among the states whose ratification could enable the Court to move forward met the same fate. *See* Proposal Submitted by the Republic of Korea, U.N. Doc. A/CONF.183/C.1/L.6 (June 17, 1998). *See generally* Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 583 (Antonio Cassese et al. eds., 2002).
[4] U.N. SCOR, 73rd Sess., 8250th mtg., at 7, U.N. Doc. S/PV.8250 (May 9, 2018) ("Our delegation is determined to do whatever is necessary to enable the members of the Council to avoid repeating the unsuccessful experiment of referring Security Council issues to the ICC.") (statement of Russia).
[5] Rome Statute, *supra* note 2, at arts. 12-13. *See* Jennifer Trahan, *New Paths to Accountability for Crimes in Syria and Iraq (Including ICC Jurisdiction Over Foreign Fighters)*, JUST SECURITY (Nov. 12, 2014).
[6] Article 12(3) states: "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9." Rome Statute, *supra* note 2, at art. 12(3).
[7] Ali Kashan, Minister of Justice, Declaration recognizing the Jurisdiction of the International Criminal Court (Jan. 2009).
[8] Mamadou Bamba, Minister of Foreign Affairs, Declaration Accepting the Jurisdiction of the International Criminal Court (April 2003).
[9] Pavlo Klimkin, Minister of Foreign Affairs, Declaration Accepting the Jurisdiction of the International Criminal Court (Sept. 2015).

expedient way for non-party states to dip their toes into the ICC's waters, Rule 44(2) clarifies that states cannot utilize Article 12(3) to narrow the scope of the Court's jurisdiction *ratione materiae*. That rule states that when such a declaration is lodged, "the Registrar shall inform the State concerned that the declaration … has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation."[10]

Absent such a move on the part of Syria, which seems fantastical at this point, there are nonetheless several subsets of crimes related to Syria over which ICC jurisdiction currently exists even without a Security Council referral. First are crimes committed by ICC member state nationals who are operating in Syria, with foreign or dual citizenship. Second are crimes committed on the territory of other ICC member states—both near and far—with a nexus to the Syrian conflict. Third are crimes committed on the territory of other states already before the Court (notably Libya), by individuals also active in Syria.[11] Finally, given that the Council has been united in its opposition to ISIL, there are theoretical arguments that the Security Council might be persuaded to refer "the situation involving ISIL" to the Court. Such a referral could encompass either the organization itself, untethered from any territorial space, or the transboundary statelet that once encompassed ISIL's self-proclaimed caliphate. Civil society organizations and legal chambers have filed a number of submissions with the Office of the Prosecutor advocating that she move forward on the basis of these various jurisdictional angles.[12]

It should be noted at the outset that even if latent jurisdiction exists, there are multiple practical impediments to the ICC engaging on Syria. As a threshold challenge, the ICC's Office of the Prosecutor (OTP) does not yet have access to its full powers until it opens a formal investigation into a situation, which requires the approval of a Pre-Trial Chamber unless there is a referral from a State Party or the Security Council. Until that point, the OTP must rely on information gathered by outside organizations and provided to it pursuant to Article 15 of the Rome Statute.[13] Gathering such evidence poses acute hazards given the security conditions on the ground, although efforts are afoot nevertheless. In addition, given its limited investigatory and judicial resources, the OTP has announced its intention to focus on those "most responsible" for the most egregious abuses, although there are no hard and fast rules in this regard.[14] In its most recent strategic plan, the OTP indicated a willingness to build cases upwards with an eye towards laying a foundation with lower-level indictments to eventually prosecute those at the apex of the relevant organizational pyramid.[15] Specifically, the OTP noted the need to:

> consider the investigation and prosecution of a limited number of mid- and high-level perpetrators in order to ultimately build the evidentiary foundations for case(s)

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[10] Rules of Procedure and Evidence, Addendum to the Report of the Preparatory Commission for the International Criminal Court, U.N. Doc. PCNICC/2000/INF/3/Add.1 of 12 July 2000. *See* Luigi Prosperi, *A Closer Look—Non-Party States' ad hoc Declarations Before and After 1 July 2015: The General Legal Effects of the Palestinian bid to the International Criminal Court*, PROGRESSIVE LAWYER (Mar. 2, 2015).

[11] *See* Cóman Kenny, *Prosecuting Crimes of International Concern: Islamic State at the ICC?*, 33(84) UTRECHT J. INT'L & EUR. L. 120 (2017).

[12] *ICC Urged to Investigate Syria's Forced Deportations*, AL JAZEERA, Mar. 8, 2019.

[13] *See* Office of the Prosecutor, ICC, *Policy Paper on Preliminary Examinations*, ¶ 12 (Nov. 2013) [hereinafter *PE Policy Paper*].

[14] *See* Office of the Prosecutor, ICC, *Policy Paper on Case Selection and Prioritisation* (Sept. 15, 2016) [hereinafter *OTP Policy Paper on Case Selection*].

[15] *See* Office of the Prosecutor, ICC, *Strategic Plan 2016-2018*, ¶ 35 (July 6, 2015).

> against those most responsible. The Office may also decide to prosecute lower level-perpetrators where their conduct has been particularly grave or notorious.[16]

As such, even if jurisdiction exists, the OTP is unlikely to pursue isolated Syria cases unless they involve, or are expected to generate evidence against, more senior figures within the Court's reach or implicate the most grave international crimes.

This chapter explores the viability and utility of all these options for promoting accountability for Syria within the framework of the ICC. Although so far the Prosecutor has declined to move forward with a preliminary examination or a petition to open a full investigation into the situation in Syria, new jurisdictional theories may pave the way for her to change course or inspire Jordan, or another ICC member state, to initiate a referral. This chapter closes with a short discussion about whether initiating the ICC is, in fact, a desirable end state as compared to other justice alternatives discussed in this volume. Although many justice advocates have called for an ICC referral, there are a number of grounds for caution, including the ICC's limited jurisdiction over war crimes in non-international armed conflicts, over-stretched resources, expanding docket, and diminished legitimacy.

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ICC Jurisdiction Over Foreign Fighters in Syria

Thousands of foreign fighters of diverse nationalities—variously defined as non-citizens of the conflict state who are motivated by ideology, religion, or kinship to join the fight[17]—have flocked to the overlapping conflict zones in the Levant.[18] At a high mark, it was estimated that

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[16] OTP Policy Paper on Case Selection, *supra* note 14, at ¶ 42. This position has the support of the Court itself, which criticized an earlier PTC ruling that Bosco Ntaganda was not a high enough figure within his militia to come before the Court. On the Prosecutor's appeal, the Appeals Chamber refocused the inquiry on qualitative rather than purely quantitative factors. *See* Beth Van Schaack, *The Gravity of International Crimes*, INTLAWGRRLS, Dec. 22, 2008.

[17] GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, FOREIGN FIGHTERS UNDER INTERNATIONAL LAW, Academy Briefing #7 (Oct. 2014).

[18] *See* Peter R. Neumann, *Foreign Fighter Total in Syria/Iraq Now Exceeds 20,000; Surpasses Afghanistan Conflict in the 1980s*, Int'l Centre for Study of Radicalisation & Political Violence, King's College London, Jan. 26, 2015. For a comparative discussion of the definition of "foreign fighter," *see* David Malet, *Foreign Fighter Mobilization*

there were approximately 40,000 foreign fighters in the region from over 100 countries, including 5,000 from Western Europe.[19] The phenomenon is so striking that the Security Council has identified it as an "acute and growing threat" and invoked Chapter VII to order U.N. member states to take measures to thwart the movement of terrorists or terrorist groups, prevent radicalization and recruitment at home, prosecute their nationals who travel abroad for the purpose of participating in terrorist acts or training, and cooperate with each other in these efforts.[20]

A significant number of foreign fighters operating on Syrian territory (and in Iraq for that matter) hail from ICC member states—such as Australia, Belgium, France, Georgia, Germany, Jordan, Tunisia, and the United Kingdom—and thus fall within the ICC's personal jurisdiction.[21] Many of these fighters have returned home and so are within reach of domestic prosecutorial authorities and, by extension, the ICC. For example, a study by the International Centre for Counter-Terrorism suggests that 30% of foreign fighters from European Union states have returned home after fighting with either ISIL or pro-Assad groups.[22] The Soufan Group estimates that of the 850 British subjects who joined ISIL, half are back in the United Kingdom; by contrast, only a sixth of the French nationals had apparently repatriated at the time the study was conducted.[23] This revolving door phenomenon raises fears in these states of origin about "blowback"—the risk that returning fighters, who are experienced in handling explosives and hardened by war, will plan attacks at home, fund terrorist networks, or recruit new members.[24] These fears have prompted many states to refuse to take their nationals back or to denaturalize or expatriate them (which presumably would not divest the ICC of jurisdiction).

Most of the top leadership positions within ISIL and other armed groups in Syria are not occupied by individuals originating from ICC member states or bearing dual nationalities. For example, the former head of ISIL, Abu Bakr al-Baghdadi, was from Iraq as is his successor, Amir Mohammed Abdul Rahman al-Mawli al-Salbi. Likewise, ISIL's inner circle largely hail from Iraq and Syria.[25] Nor has sufficient evidence emerged of foreign fighters' involvement in orchestrating the many grave international crimes that have come to characterize this conflict.[26] That said, there are some notable exceptions to these general observations about who is "most responsible" for the depredations in Syria, and some potential defendants might satisfy the OTP's case selection criteria and fall within the Court's jurisdiction. For example, Georgian national Abu Omar al-Shishani (a.k.a. Tarkan Tayumurazovich Batirashvili), regarded as ISIL's "minister of war" until he was killed in 2016, would have been a worthy target for the ICC, primarily in connection with his

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& Persistence in a Global Context, TERRORISM & POL. VIOLENCE 1 (2015); *see generally* DAVID MALET, TRADITIONAL IDENTITY IN CIVIC CONFLICT (2013).

[19] Martin Reardon, *The Real Threat of Foreign Fighters in Syria*, AL JAZEERA, Dec. 13, 2015.

[20] *See* S.C. Res. 2170, U.N. Doc. S/RES/2170 (2014); S.C. Res. 2178, U.N. Doc. S/RES/2178 (2014).

[21] *See* Richard Barrett, *Beyond the Caliphate: Foreign Fighters and the Threat of Returnees*, SOUFAN GROUP 7 (Oct. 2017) (compiling data on foreign fighters).

[22] International Centre for Counter-Terrorism, *The Foreign Fighters Phenomenon in the European Union* 3-4 (April 2016).

[23] Barrett, *supra* note 21, at 12-13. For information on the fate of foreign fighters from the United Kingdom, see *Tracking Britain's Jihadists*, BBC, Oct. 12, 2017.

[24] Geneva Academy, *supra* note 17, at 12.

[25] *See* Gloria Kirovska, *Prosecuting ISIS Under International Criminal Law*, 11-13 (unpublished B.A. thesis, Tilburg University) (identifying the succession of ISIL's leadership, many of whom hail mainly from Iraq or, to a lesser degree, Syria); KYLE ORTON, PROFILES OF ISLAMIC STATE LEADERS (2016).

[26] Pieter Omtzigt & Ewelina U. Ochab, *Bringing Daesh to Justice: What the International Community Can Do*, J. GENOCIDE RES. 9 (2018) (noting practical barriers to the ICC prosecuting ISIL fighters including the dearth of individualized linkage evidence and the death of suspects in combat).

participation in operations in Aleppo and elsewhere in Northern Syria.[27] French citizen Abu Sulayman al-Firansi (a.k.a. Abdelilah Himich) reportedly heads ISIL's foreign intelligence service, *Amn al-Khariji*.[28] Likewise, foreign fighters have been thoroughly involved in establishing, sustaining, and exploiting ISIL's system of gender persecution and the sexual slavery of Yezidi women and girls, particularly as part of the group's administrative bureaucracy (*diwans*).[29]

And finally, we have the so-called "Beatles": El Shafee Elsheikh and Alexanda Amon Kotey, who were British subjects until they were stripped of their citizenship.[30] The two are linked to the British terrorist Mohammed Emwazi (a.k.a. "Jihadi John"), who was killed in a 2016 airstrike,[31] and are believed to have been involved in the 2014 beheadings of at least three U.S. citizens—Journalists James Foley and Steven Sotloff and aid worker and former Army Ranger Peter Kassig—as well as the deaths and mistreatment of multiple other ISIL hostages. The fourth Beatle, Aine Lesley Davis, was arrested and tried in Turkey for terrorism.[32] All three beheadings were gruesomely captured on trophy videos in which the victims appear in orange jumpsuits reminiscent of early Guantánamo photographs.[33] The two Beatles were in the custody of the Syrian Democratic Forces (SDF), a U.S.-backed opposition group, when President Trump abruptly ordered the removal of U.S. troops from Syria.[34] In order to avoid the prospect of their escape, U.S. forces reportedly made plans to take custody of several dozen "high-value" ISIL detainees before pulling out. In the chaos, however, U.S. forces reportedly only succeeded in taking custody of these two high-value ISIL detainees (and maybe some more lower-level fighters), whose fate now remains in question.[35] As such, they could conceivably be transferred to the ICC for trial if the United States was so inclined, which seems doubtful in light of invectives directed towards the ICC that have issued from the White House.[36] More likely, they will be prosecuted in U.S. courts

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[27] Mitchell Prothero, *U.S. Training Helped Mold Top Islamic State Military Commander*, MCCLATCHY DC, Sept. 15, 2015; *ISIS Admits 'Minister of War' Omar the Chechen is Dead*, THE GUARDIAN, July 13, 2016. Shishani was subject to reward for his capture under the U.S. Rewards for Justice program. *See* Rewards for Justice, Information that Brings to Justice Tarkan Tayumurazovich Batirashvili Up to $5 Million Reward, https://web.archive.org/web/20150518171047/https://www.rewardsforjustice.net/english/tarkhan_batirashvili.html.

[28] *See Abu Suleyman al-Firansi*, Counter Extremism Project, https://www.counterextremism.com/extremists/abu-suleyman-al-firansi. The United States designated Firansi as a Specially Designated Global Terrorist, attesting to his influence. *See* U.S. Department of State, Bureau of Counterterrorism, Individual and Entities Designated by the State Department under E.O. 13224, https://www.state.gov/j/ct/rls/other/des/143210.htm.

[29] *See* The Human Rights and Gender Justice Clinic of the City University of New York School of Law, MADRE & Organization of Women's Freedom in Iraq, *Communication to the ICC Prosecutor Pursuant to Article 15 of the Rome Statute Requesting a Preliminary Examination into the Situation of: Gender-Based Persecution and Torture as Crimes Against Humanity and War Crimes Committed by the Islamic State of Iraq and the Levant (ISIL) in Iraq,* ¶¶ 142-164 (Nov. 8, 2017); Emily Chertoff, *Prosecuting Gender-Based Persecution: The Islamic State at the ICC*, 126 YALE L. J. 908 (2017).

[30] Deborah Haynes, *Two ISIS 'Beatles' are Stripped of British Citizenship*, THE TIMES UK, Feb. 9, 2018.

[31] '*Jihadi John' Death: Islamic State says Mohammed Emwazi Killed*, BBC, Jan. 19, 2016.

[32] Martin Chulov & Jamie Grierson, *British Jihadi Aine Davis Convicted in Turkey on Terror Charges*, THE GUARDIAN, May 9, 2017.

[33] Dan Lamothe, *Once Again, Militants use Guantanamo-inspired Orange Suit in an Execution*, WASH. POST, Aug. 28, 2014.

[34] Rob Crilly & Harriet Alexander, *Last of 'The Beatles' British Jihadists Arrested in Syria*, THE TELEGRAPH, Feb. 8, 2018.

[35] Charlie Savage, *U.S. Moves to Take 'High Value' ISIS Detainees, Including Britons Who Abused Hostages*, N.Y. TIMES (Oct. 9, 2019).

[36] *See* Owen Bowcott, et al., *John Bolton Threatens War Crimes Court with Sanctions in Virulent Attack*, THE GUARDIAN, Sept. 10, 2018.

and indeed might be the first defendants to activate the United States' dormant War Crimes Act given that their victims were U.S. citizens.[37]

Given the uncontentious existence of personal jurisdiction over nationals hailing from ICC member states, the Prosecutor could conceivably seek to open an investigation into the commission of crimes committed by this brutal cohort of perpetrators in Syria (and Iraq while she is at it). At this stage of the proceedings, admissibility would be determined on the basis of potential cases within the context of the situation involving foreign fighters.[38] Any number of perpetrators discussed above could potentially meet the criteria of the OTP's case selection and prioritization policy paper in that they qualify as notorious perpetrators or mid-level perpetrators whose prosecution could help build cases upward.

Nevertheless, the Prosecutor has already indicated (at least for now) that "the jurisdictional basis for opening a preliminary examination into [alleged ISIL crimes] is too narrow at this stage."[39] Although there is some ambiguity as to the precise grounds being articulated by the Prosecutor for declining to go forward with a preliminary examination,[40] describing the jurisdictional basis as "narrow" sounds like a concern about insufficient gravity. Elsewhere in the statement, the Prosecutor noted that "ISIS is a military and political organization primarily led by nationals of Iraq and Syria. Thus, at this stage, the prospects of my Office investigating and prosecuting those most responsible, within the leadership of ISIS, appear limited."[41] As such, it may not appear jurisdictionally possible for the OTP to reach up the chain of command beyond these mid-level foreign perpetrators.

All that said, the ICC's gravity threshold remains inexact and elastic.[42] And, the concept encompasses qualitative and quantitative components, including "the scale, nature, manner of commission, and impact of the crimes."[43] These characteristics give the Prosecutor a fair amount of space to maneuver if she were so inclined. Indeed, there are situations that have been under consideration before the ICC that appear to be of comparable gravity to the crimes being committed by foreign fighters in Syria, notably the case involving the death of 12 peacekeepers in Darfur.[44] In that situation, the crime in question was specifically criminalized in Article 8(2)(b)(iii) and the OTP noted the heightened gravity associated with attacking humanitarian actors, particularly because of the deleterious effect it had on the entire mission with respect to millions

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[37] *See* Beth Van Schaack & Julia Brooks, *"With a Little Help from Our Friends": Prosecuting the ISIL "Beatles" in U.S. Courts*, JUST SECURITY (Oct. 22, 2019).

[38] Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, ¶¶ 48-50 (Mar. 31, 2010).

[39] ICC, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS* (April 8, 2015), https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1. Such explanations are not required by the Rome Statute, but are issued in the interests of transparency.

[40] This determination involves four phases of analysis. The first is a simple filter to weed out manifestly inappropriate matters. The second concerns jurisdiction, including temporal and subject matter. The third involves admissibility, which has two components: gravity and complementarity. The fourth phase concerns the interests of justice and involves a set of countervailing considerations that might counsel against going forward even if the matter would be within the Court's jurisdiction and admissible. *See* PE Policy Paper, *supra* note 13, ¶ 77.

[41] OTP ISIS Statement, *supra* note 38.

[42] *See generally* Margaret M. DeGuzman, *The International Criminal Court's Gravity Jurisprudence at Ten*, 12 GLOBAL STUDIES L. REV. 475 (2013) (discussing ICC's flexible approach to gravity).

[43] *See* OTP Policy Paper on Case Selection, *supra* note 14, at ¶ 37.

[44] Prosecutor v. Bahar Idriss Abu Garda, Decision on the Confirmation of Charges, Case No. ICC-02/05-02/09-243-Red, ¶¶ 31-34 (Feb. 8, 2010).

of civilians in need.[45] Similarly, the U.N. Human Rights Council has determined that the involvement of foreign fighters has exacerbated these overlapping conflicts in Iraq and Syria, thus heightening the gravity of the situation writ large. Specifically, the Council condemned "the intervention of foreign combatants fighting on behalf of the Syrian regime in Al Qusayr, and expressed deep concern that their involvement further exacerbates the deteriorating human rights and humanitarian situation, which has a serious negative impact on the region."[46] For these reasons and others, the swift decision by Prosecutor Bensouda not to move forward is not without its detractors given that ISIL crimes fall squarely within the ICCs subject matter jurisdiction and there are few other avenues for accountability.[47]

The determination not to proceed is not irreversible and the Prosecutor has indicated that her office "remains open to receive additional information which could provide further clarity on the positions occupied by State Party nationals within the ISIS organizational hierarchy."[48] There is precedent for reversing course; the ICC's first Prosecutor, Luis Moreno Ocampo, originally halted his preliminary examination into potential war crimes committed by U.K. servicemembers in Iraq on the grounds that the gravity threshold was not met.[49] At that time, the OTP had received information relating to civilian deaths and injuries, including allegations regarding the use of cluster munitions, custodial abuses, and injury to civilians during occupation policing operations. Although he rejected the *jus in bello* allegations as unfounded or not attributable to British troops, Ocampo determined that there was a reasonable basis to believe that custodial abuses and wilful killings had been committed against 4 to 20 Iraqi victims. He determined, however, that the required gravity threshold was not met, particularly as compared with other situations before the Court and in light of Article 8(1), which indicates that the Court should focus on war crimes "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."[50] Later, however, as additional abuses came to light, the current Prosecutor reversed course.[51] The issue of complementarity is likely to be consequential given the work of the Iraq Historical Allegations Team and its successor, the Service Police Legacy Investigation, which

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[45] *Situation in Darfur*, *The Sudan, Prosecutor's Application under Article 58 filed on 20 November 2008 now filed pursuant to the request of Pre-Trial Chamber I of 7 May 2009*, ICC-02/05-02/09-16-Anx1, ¶ 8 (May 20, 2009) (noting the exceptional gravity associated with attacking peacekeepers). *See also Situation of Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, ICC-01/13/58/Red, ¶74 (Feb. 23, 2018) (disputing the Prosecutor's assessment of gravity in the Comoros case given that "this was a civilian campaign trying to assist other civilians in Gaza who were in need of food, humanitarian aid and medical supplies" and the attack "threatened diplomatic relations and stability in the region, severing inter-State ties which have taken many years to try to restore.").

[46] United Nations Human Rights Council, The deteriorating situation of human rights in the Syrian Arab Republic, and the recent killings in Al-Qusayr, U.N. Doc. A/HRC/RES/23/1 (June 19, 2013).

[47] *See* Mohammad Had Zakerhossein, *To Bury a Situation Alive—A Critical Reading of the ICC Prosecutor's Statement on the ISIS Situation,* 16(4) INT'L CRIMINAL L. REV. 613, 619 (2016) (arguing that the OTP's statement suffered from procedural and substantive defects).

[48] OTP's ISIS Statement *supra* note 38.

[49] *See generally* Response to Communications received by the Chief Prosecutor regarding alleged crimes in Iraq 9 (Feb. 10, 2006), available at http://www.icccpi.int/library/organs/otp/OTP_letter to senders re lraq_9_ February_2006.pdf.

[50] Rome Statute, *supra* note 2, at art. 8(1).

[51] *See* Owen Bowcott, *The Hague says Claims of War Crimes by UK Troops have 'Reasonable Basis*,' THE GUARDIAN, Dec. 4, 2017. *See* Beth Van Schaack, *Backgrounder: Preliminary Examination into Abuses by United Kingdom Personnel in Iraq*, JUST SECURITY (May 14, 2014).

were convened domestically to examine the wartime allegations against the United Kingdom.[52] In a dramatic development, much of the new information conveyed to the OTP was determined to be tainted by ethics violations on the part of one of the human rights lawyers involved, who was later disbarred.[53] Even with this new information, the situation in Iraq involving British subjects seems comparable in terms of gravity to the crimes committed by foreign fighters in the current conflicts in Syria and Iraq.

Even if Prosecutor Bensouda were to reverse her foreign fighters decision, ICC jurisdiction might still remain elusive. As set forth in greater detail in chapter 6 on domestic suits, states have by and large heeded the Security Council's call and been relatively aggressive about enacting legislation aimed at prosecuting returning foreign fighters who have traveled to do battle in the Levant.[54] Tunisia, an ICC member state, stands out as an exception.[55] As such, there is some risk that the complementarity bar would divest the ICC of jurisdiction even if the gravity threshold were surmounted. In this regard, it is the alleged conduct, rather than its legal characterization, that matters for admissibility.[56] Most of these domestic prosecutions in ICC member states involve counter-terrorism charges that would not constitute crimes under the Rome Treaty. Such proceedings might not fulfil the ICC's same person/substantially the same conduct test for admissibility[57] or trigger the ICC's inter-jurisdictional double jeopardy provisions, which provide that the Court must decline to prosecute a case in situations in which the individual has been prosecuted for the same conduct also prescribed by the Rome Statute unless the proceedings were for the purpose of shielding the person concerned or were otherwise not conducted independently.[58] While many acts of terrorism (such as attacks on civilians or the mistreatment of prisoners of war) might also constitute war crimes or even crimes against humanity, simply engaging in combat as part of a *jihadi* group and against other combatants would not.[59] This mismatch could open the door for the ICC to prosecute this category of perpetrators for atrocity crimes in parallel with any domestic counter-terrorism proceedings, so long as different conduct

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[52] *See generally* Kenneth Watkin, *Accountability Fatigue: A Human Rights Law Problem for Armed Forces?*, JUST SECURITY (Nov. 1, 2008) (discussing U.K. process).
[53] *See* Beth Van Schaack, *International Criminal Law Roundup Series: Part I*, JUST SECURITY (Sept. 6, 2018), (discussing history).
[54] *See* Council of Europe, Committee on Legal Affairs and Human Rights, *Prosecuting and Punishing the Crimes against Humanity or Even Possible Genocide Committed by Daesh, Replies to Questionnaire*, AS/Jur (2017) (Sept. 20, 2017); *see, e.g.*, Counter Terrorism and Security Act, c. 6, 2015 (Eng.).
[55] Anthony Dworkin & Fatim-Zohra El Malki, *The Southern Front Line: EU Counter-Terrorism Cooperation with Tunisia and Morocco*, European Council on Foreign Relations 14 (Feb. 15, 2018) (noting that although Tunisians who join *jihadi* groups can be prosecuted for terrorism crimes or made subject to administrative surveillance, Tunisia does not have a systemic policy in place for dealing with returned foreign fighters).
[56] Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi", No. ICC-01/11-01/11-547-Red OA4, ¶¶ 62, 72-74 (May 21, 2014)
[57] Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Judgement on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute No. ICC-01/09-02/11 OA, ¶¶ 39-41, 61 (Aug. 30, 2011) (confirming same person/substantially the same conduct test).
[58] *See* Rome Statute, *supra* note 2, at art. 20(3).
[59] *See* OTP, Situation in the Republic of Korea: Art. 5 Report, ¶ 20 (June 2014) (determining that North Korea's attack on the *Cheonan* could not be prosecuted before the ICC because the warship was a lawful military objective and the Korean peninsula remained in an international armed conflict).

and incidents are involved.[60] For example, Australian Neil Prakash is being prosecuted in Turkey for terrorism crimes, after that country rejected Australia's extradition request.[61] In any case, given the OTP's and the Court's limited resources, a case premised solely on the atrocity crimes committed by foreign fighters may be unwarranted, given that the OTP's case selection criteria would caution against opening a case when the person or members of the same group "have already been subject to investigation or prosecution either by the Office or by a State for another serious crime." This situation of prudential complementarity would necessitate a consideration of other fora.[62]

Another non-legal barrier to this route to ICC jurisdiction merits a brief mention. Many of ISIL's senior personnel continue to be killed in battle or by Western airstrikes.[63] By way of example, Rawand Dishlan Taher, a Danish citizen subject to the ICC's personal jurisdiction, was killed in Raqqa on December 7, 2015. Taher was reputed to exercise command authority over ISIL troops and potentially even foreign operations, such as the Paris attacks in November 2015.[64] German national Reda Seyam, ISIL's minister of education, met the same fate.[65] This stark reality renders any ICC jurisdiction over foreign fighters rather transitory.

ISIL Activity on the Territories of Other ICC States

Crimes With a Nexus to Neighboring ICC States Parties

A second theory for how the ICC might engage with the Syrian conflict involves the cross-border effects of crimes committed within Syria but having an impact within ICC member states. Article 12(2)(a) of the Rome Statute, which outlines the Court's territorial jurisdiction, indicates that the Court has jurisdiction if "conduct" occurs on the territory of a state party; this language is contrasted with other provisions of Article 12 that speak of the commission of a "crime."[66] The impact of the war in Syria has been felt across the region, including in ICC member states. Jordan immediately comes to mind. As a member of the ICC since 2002, it could self-refer the situation on its territory to the Court.[67] The commission of grave crimes within Syria has produced dire impacts in Jordan whose government continues to struggle to address the unprecedented influx of Syrian refugees.[68] According to the U.N. High Commissioner for Refugees (UNHCR), there are over 665,000 registered Syrian refugees and persons of concern in Jordan—85% living under the

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[60] Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Judgment on the Appeal of Mr. Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the Admissibility of the Case against Abdullah Al-Senussi", No. ICC-01/11-01/11-565 OA6, ¶ 119 (July 24, 2014) (indicating that a case is inadmissible if the domestic system is prosecuting the same conduct, regardless of whether it is legally characterized as an international crime). *See generally* Rod Rastan, *What is 'Substantially the Same Conduct?': Unpacking the ICC's 'First Limb' Complementarity Jurisprudence*, 15 J. INT'L CRIM. JUST. 1 (2017) (discussing the Court's complementarity jurisprudence).
[61] Mehmet Guzel, *Turkey Convicts Australian-Born IS Militant on Terror Charge*, AP, Mar. 15, 2019.
[62] *See* OTP Case Selection Policy, *supra* note 15, ¶ 50(b).
[63] *See* Paul Hutcheon, *RAF Fighters Preparing to Target Daesh Leadership*, THE HERALD, Dec. 5, 2015.
[64] Hamoud Almousa, *The Killing of Rawand Tahir, One of the Planners of the Paris Attacks*, RAQQA IS BEING SLAUGHTERED SILENTLY (Dec. 11, 2015).
[65] Daniel H. Heinke & Jan Raudszus, *German Foreign Fighters in Syria and Iraq*, 8(1) CTC SENTINEL 16, 16 (Jan. 2015).
[66] Rome Statute, *supra* note 2, at art. 12(2)(a) and (b).
[67] *Ratification Ceremony at UN paves war for International Criminal Court*, UN NEWS (April 11, 2002).
[68] *See* Michael Jenson, *Jordan Economy Groans under the Weight of Refugee Crisis*, THE IRISH TIMES (Oct. 2018).

poverty line—and estimates indicate that more may be unregistered.[69] Almost 80,000 Syrian refugees live in the Zaatari camp, which has become the fourth largest city in Jordan.[70] Other neighboring states (such as Lebanon or Iraq) could utilize Article 12(3) to accept the Court's jurisdiction on an *ad hoc* basis. In so doing, these states could confer active nationality and objective territorial jurisdiction over events involving the conflict in neighboring Syria. This theory finds affinity in the effects principle of territorial jurisdiction, which as discussed more fully in chapter 6 allows a state to prosecute crimes committed extraterritorially if they cause tangible effects on its territory.

Triggering the ICC jurisdiction over events in Syria by virtue of Jordan's ratification (or an *ad hoc* declaration by another neighboring state) is bolstered by the theory being pursued with respect to Myanmar's mass persecution and expulsion of the Rohingya Muslim minority to Bangladesh, also an ICC member state that is playing reluctant host to almost a million Rohingya refugees.[71] In connection with that dire situation, the Prosecutor originally sought what could be described as an advisory ruling on jurisdiction under Article 19(3) of the Rome Statute[72] (although others have insisted that any Court ruling is legally binding) to the effect that she could potentially charge Myanmar officials with the crime against humanity of deportation. The Rome Treaty defines "deportation or forcible transfer of population" as the "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law."[73]

As compared to the crime of forced transfer of population, which is co-located in the same statutory provision, the crime against humanity of deportation is not complete until the victims have crossed an international border, even if this state of affairs is not necessarily meant to be permanent.[74] The Prosecutor's theory was that an essential element of the crime against humanity of deportation—the crossing of an international border—was being committed in Bangladesh.[75] The definitional reference to "coercive acts" suggests that the Court can prosecute deportations in connection with direct expulsions but also scenarios in which a people cross an international border in order to escape violence targeted against them in their state of origin.[76] Because such "coercive

[69] UNHCR Data, https://data2.unhcr.org/en/situations/syria/location/36 (last visited Feb. 26, 2020); UNHCR, Jordan Fact Sheet (May 2019), https://reliefweb.int/sites/reliefweb.int/files/resources/69826.pdf (last visited Sept. 17, 2019).

[70] Phoebe Weston, *Inside Zaatari Refugee Camp: the Fourth Largest City in Jordan*, THE TELEGRAPH (Aug 2015).

[71] *See* Kate Vigneswaran & Sam Zarifi, *A Pathway to Accountability for Syria? The Broader Implications of the ICC's Findings on Jurisdiction over Cross-Border Crimes*, OPINIO JURIS (Sept. 19, 2018).

[72] Article 19(3) states: "The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility." Rome Statute, *supra* note 2, at art. 19(3). For a critique of this process, see Alex Whiting, *Process as well as Substance is Important in ICC's Rohingya Decision*, JUST SECURITY (May 15, 2018).

[73] Rome Statute, *supra* note 2, at art. 7(2)(d).

[74] *See Prosecutor v. Milomir Stakić*, Case No. IT-97-24, Appeals Judgment, ¶¶ 300, 319 (Mar. 22, 2006) ("the crime of deportation requires the displacement of individuals across a border"). *But see* Roi Bachmutsky, *Too Clever by Half: Why the ICC Will Probably Find No Jurisdiction over the Deportation of the Rohingya*, OPINIO JURIS (June 4, 2018) (arguing that deportation and forced transfer constitute a single crime of "forcible displacement" that can come in two forms, such that the crossing of an international border is not an essential element of the crime).

[75] Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," Case No. ICC-RoC46(3)-01/18-37, ¶ 28 (Sept. 6, 2018) [hereinafter *Myanmar Jurisdiction Decision*].

[76] The ICC's Elements of Crimes make clear that "forcibly" is "not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive

acts" constitute an element of the offense (and also satisfy the chapeau element of the existence of a widespread or systematic attack against a civilian population), a prosecution for deportation could involve the admissibility of evidence of a wide variety of international crimes being committed in neighboring Myanmar.[77] *Amici* involved in the Myanmar proceedings advanced other analogous jurisdictional theories that would expand potential prosecutable crimes: that genocide is a continuing crime whose consequences/effects are felt in Bangladesh (analogizing to the domestic jurisdictional theory of objective territoriality); that violence is taking place on and along the border; that the crimes have a sufficient nexus to Bangladesh regardless of where precisely they are committed; and that ICC crimes such as cruel treatment and murder culminate in Bangladesh given the high mortality rate and degree of suffering in Cox's Bazar.[78]

Ultimately, a Pre-Trial Chamber (PTC) of the ICC gave the Prosecutor more than she asked for. In its decision on jurisdiction, which is not without its detractors,[79] PTC I ruled that the OTP could, in theory, begin to investigate a range of potential crimes committed against the Rohingya in Myanmar.[80] In addition to the anticipated deportation charges, the PTC also implied that the Prosecutor could charge any ICC crime of which "a part" occurred on Bangladeshi territory.[81] The PTC reasoned that this approach should attract no resistance since many states (including Myanmar and Bangladesh) allow for the exercise of territorial jurisdiction if one legal element, or some conduct in connection with a crime, occurs within its borders.[82] At a minimum, and by way of example, the PTC suggested that this could include the crime against humanity of persecution,[83] which encompasses "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity"[84] on "political, racial, national, ethnic, cultural, religious, gender[,] … or other grounds that are universally recognized as impermissible under international law."[85] The theory here seems to be that by virtue of having been expelled from Myanmar and rendered a refugee in abject conditions, the Rohingya have been deprived of many fundamental rights, including the right not to be stateless, and have suffered serious physical and mental harm in Bangladesh.[86] Persecution can only be charged before the ICC "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the

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environment." ICC Elements of Crimes, Crime against humanity of deportation or forcible transfer of population, at art. 7(1)(d), n.12 [hereinafter *ICC Elements of Crimes*].

[77] Prosecutor v. William Samoei Ruto, et al., Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Case No. ICC-01/09-01/11-373, ¶ 244 (Jan. 23, 2012) (holding that deportation is an "open-conduct crime" which is to say that "the perpetrator may commit several different conducts which can amount to 'expulsion or other coercive acts.'").

[78] *See Amicus Curiae* Observations by the Bangladeshi Non-Governmental Representatives (pursuant to Rule 103 of the Rules) on the "Prosecutor's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", Case No. ICC-RoC46(3)-01/18 (June 18, 2018) [hereinafter *BNGR brief*]; *Amicus Curiae* Observations by Guernica 37 International Justice Chambers (pursuant to Rule 103 of the Rules), Case No. ICC-RoC46(3)-01/08 (June 18, 2018).

[79] *See* Bachmutsky, *supra* note 74.

[80] *Myanmar Jurisdiction Decision*, *supra* note 75.

[81] *Id*. ¶ 64.

[82] *Id*. ¶ 66 (citing statutes).

[83] *Id*. ¶ 75.

[84] Rome Statute, *supra* note 2, at art. 7(2)(g).

[85] *Id*. at art. 7(1)(h).

[86] *Id*. *See* Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277.

Court."[87] The PTC no doubt reasoned that because the deportation charges are supported by the factual matrix, the persecution charge can "piggyback" onto the deportation charge.

The catch all "other inhumane acts" might also qualify per the PTC.[88] Indeed, any ICC crime involving a results element—such as the war crime and crime against humanity of torture (which involves the imposition of "severe physical or mental pain or suffering") or the war crime of "wilfully causing great suffering, or serious injury to body or health"—might also fall within this form of extraterritorial jurisdiction since these adverse effects are experienced on the territory of an ICC state party. Under this theory, the ICC could even assert jurisdiction over the commission of genocide against the Rohingya, which can be committed through the imposition of "serious bodily or mental harm" or "conditions of life calculated to bring about [the group's] physical destruction in whole or in part."[89] So far, the Prosecutor only sought approval to open an investigation into the crimes of deportation, other inhumane acts, and persecution in Bangladesh, although she reserved the right to pursue additional crimes that may be identified during an authorized investigation.[90] The PTC confirmed that she may investigate crimes "when part of the criminal conduct takes place on the territory of a State Party," including the consequences of such conduct.[91]

The persecution charge alone has the potential to be quite capacious. Although the ICC has not fully interpreted this crime against humanity, the International Criminal Tribunal for the former Yugoslavia (ICTY) has treated it both as a catch all charge and an enhancement charge. In *Kupreškić*, for example, the ICTY determined that persecution encompasses "the deprivation of a wide variety of rights"[92] not enumerated as crimes elsewhere in the ICTY Statute, including ethnic cleansing, but also violations of human rights emblematic of the World War II era: "the exclusion of members of an ethnic or religious group from aspects of social, political, and economic life, the imposition of a collective fine on them, the restriction of their movement and their seclusion in ghettos, and the requirement that they mark themselves out."[93] At the same time, the ICTY ruled that persecution could also be charged in connection with all *other* enumerated crimes against humanity when these crimes are committed with the discriminatory *animus* that defines persecution.[94] In other words, any enumerated crime against humanity—murder, imprisonment, or extermination for example—could be charged as persecution so long as there was proof that such crimes were committed with discriminatory intent. Assuming the ICC adopts the ICTY's

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[87] *Id.*
[88] Myanmar Jurisdiction Decision, *supra* note 75, ¶ 77.
[89] *See* Beth Van Schaack, *Determining the Commission of Genocide in Myanmar: Legal and Policy Considerations*, 17 J. INT'L CRIM. L. 285 (2019). *But see* Kevin Jon Heller, *Three Cautionary Thoughts On The OTP's Rohingya Request*, OPINIO JURIS (Apr. 9, 2018) (arguing that only deportation can be charged because all other crimes occurred on Myanmar territory); Kevin Jon Heller, *The ICC Has Jurisdiction over One Form of Genocide in the Rohingya Situation*, OPINIO JURIS (Sept. 7, 2018) (arguing that by the same reasoning, the ICC could exercise jurisdiction over "deliberately inflicting conditions of life calculated to bring about physical destruction").
[90] Situation in the People's Republic Of Bangladesh/Republic Of The Union Of Myanmar, Request for Authorisation of an Investigation Pursuant to Article 15, Case No. ICC-01/19 (July 4, 2019).
[91] Situation in the People's Republic of Bangladesh/Republic of The Union of Myanmar, 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 of the Union of Myanmar, Case No. ICC-01/19, ¶¶ 43, 50, 124 (Nov. 14, 2019) [hereinafter *Myanmar Investigation Authorisation*].
[92] Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement, ¶ 614 (Jan. 14, 2000).
[93] *Id.* ¶ 610.
[94] *Id.* ("Although the *actus reus* of persecution may be identical to other crimes against humanity, what distinguishes the crime of persecution is that it is committed on discriminatory grounds.").

reasoning, the ICC OTP could charge every other crime against humanity as the crime of persecution. The PTC in the Myanmar matter indicated that the persecution umbrella could be used to charge a whole range of fundamental rights violations, including "the right to life, the right not to be subjected to torture or cruel, inhuman or degrading treatment, freedom of expression, freedom of assembly and association and the right to education."[95]

So far, Myanmar has not participated formally in these proceedings before the ICC and has indicated that it intends to ignore the Court.[96] Not surprisingly, it has hinted that it has objections to this course of action in light of the fact that it has not ratified the Rome Statute and so is not bound by its terms; Myanmar also denied that it had deported anyone, citing bilateral arrangements with Bangladesh to repatriate refugees.[97] These arguments echo those articulated by other non-party states—notably Israel and the United States—whose nationals may be within the ICC's sights by virtue of their alleged commission of crimes on the territory of ICC states parties, the Palestinian Territories and Afghanistan respectively.[98] In its Myanmar opinion, the PTC acknowledged those arguments only insofar as it asserted the ICC's objective international personality and insisted that the ICC may engage with, and have effects on, non-party states consistent with the principles of international law.[99]

The extraterritorial jurisdictional scenario—called an "unprecedented back-door to The Hague" by one commentator[100]—being developed in connection with violence in Myanmar maps neatly onto the Syria-Jordan situation.[101] When it comes to the crime of deportation, although there have been fewer reports of victims being physically deported across Syria's borders, people are clearly fleeing Syria in the millions in reaction to the commission of "coercive acts" within and against their communities. That said, it might be difficult to tease out whether these acts are the work of pro-government forces or other belligerents involved in the conflict.[102] Furthermore, the Prosecutor would need to develop a theory of *mens rea*, assuming that the crime of deportation requires proof that the perpetrator intended that the victims cross an international border (or knew with virtual certainty that they would do so).[103] Demonstrating intent with a crime defined by its result requires proof that the perpetrator meant to cause the detrimental consequence or knew that they would occur in the ordinary court of events.[104] This may be more difficult to prove in the absence of a government policy to cleanse an area of opposition supporters. Nonetheless, it seems clear that at least some defendants could be charged in connection with violence committed against

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[95] *Myanmar Investigation Authorisation*, *supra* note 91, ¶ 101.

[96] Htet Naing Zaw, *Government to Ignore ICC Request for Response on Rohingya Case*, THE IRRAWADDY, June 25, 2018.

[97] Myanmar Jurisdiction Decision, *supra* note 75, ¶ 35, n.54 (reproducing Myanmar government statement).

[98] *See, e.g.*, Lee A. Casey & David B. Rivkin, Jr., *The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties*, 44 VA. J. INT'L L. 63 (2003).

[99] Myanmar Jurisdiction Decision, *supra* note 75, ¶¶ 34-49.

[100] Payam Akhavan, *The Radically Routine Rohingya Case: Territorial Jurisdiction and the Crime of Deportation Under the ICC Statute*, 17 J. INT'L CRIM. L. 1, 5 (2019).

[101] *But see id.* at 10 (arguing that satisfying the *mens rea* of deportation requires proof of an intention to deport the victims and the Rohingya are being deliberately expelled because they are seen as "foreigners" in their own land, a scenario that does not necessarily apply find a parallel in Syria).

[102] Ruto, *supra* note 77, ¶ 245.

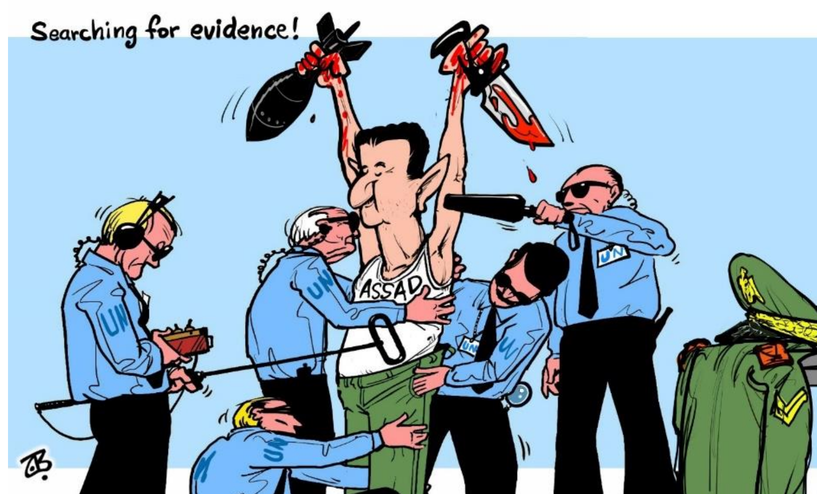
[103] *See* Kate Vigneswaran & Sam Zarifi, *A Pathway to Accountability for Syria? The Broader Implications of the ICC's Findings on Jurisdiction over Cross-Border Crimes*, OPINIO JURIS (Sept. 19, 2018); Kevin Jon Heller, *The ICC and the Deportation of Civilians from Syria to Jordan*, OPINIO JURIS (Mar. 5, 2019).

[104] Rome Statute, *supra* note 2, at art. 30.

Syrians from Rif Damascus, Daraa, and other southern governorates who now find themselves living as refugees in Jordan.

Given that "political" and "ethnic" grounds can undergird a persecution charge per the Rome Treaty, there should be no impediment to charging persecution in connection with events in Syria that cause continuing harm in neighboring Jordan. The persecution charge could serve as a vehicle for the ICC to consider other crimes against humanity—murder, imprisonment, torture, and sexual violence—under the *Kupreškić* theory so long as they have a nexus to Jordan. In addition, persecution and the catch all "other inhumane acts" can encompass severe denials of fundamental rights, such as the right to enter one's own country, as well as the deplorable conditions of life facing refugees in Jordan.

In March 2019, several legal teams submitted Article 15 communications to the OTP encouraging it to open a preliminary examination, and ultimately an investigation, into this component of the Syrian conflict through the Myanmar "jurisdictional gateway."[105] First to file was the Guernica Centre for International Justice, whose lawyers argued that Syrian are fleeing to avoid coercive acts, such as torture and bombardment, but also forcible conscription into the armed forces and other forms of persecution.[106] If the Prosecutor decides to move forward, she will need to receive approval from a Pre-Trial Chamber, which could follow the Myanmar precedent.



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ICC States Farther Afield

An alternative territorial theory of ICC jurisdiction involves the aggregation of ISIL crimes committed on the territory of ICC states farther removed—such as Belgium, Canada, Denmark, France, Germany, Nigeria, and Tunisia—into one mega transnational case premised on the ICC's territorial jurisdiction.[107] Over 100 deadly attacks in dozens of countries have been attributed to

[105] *Syria War: Lawyers Submit First War Crimes Cases Against Assad*, BBC, Mar. 7, 2019.
[106] Ned Vucijak, *Update on ICC Filing*, THE GUERNICA GROUP (Mar. 7, 2019); Toby Cadman & Carl Buckley, *Filling the Vacuum: Syria and the International Criminal Court*, JUSTICE IN CONFLICT (Mar. 19, 2019).

[107] Kai Ambos, *The New Enemy of Mankind: The Jurisdiction of the ICC over Members of "Islamic State"*, EJIL TALK! (Nov. 26, 2015).

ISIL,[108] although it remains a challenge to distinguish between crimes inspired by ISIL, crimes for which ISIL claims responsibility, crimes committed by *bona fide* "members" of ISIL (however that might be determined), and crimes actually directed by ISIL's leadership.[109]

To be sure, the ICC has no jurisdiction over acts of terrorism *per se*. Although delegates have expressed an interest in eventually amending the ICC Statute to include terrorism, this has not yet come to pass.[110] Nonetheless, many of such acts can be charged as war crimes,[111] assuming protected persons or objects are harmed and there is a sufficient nexus to the armed conflict in Syria or Iraq.[112] The OTP is open to such theories of aggregation; it argued, for example, that CIA black sites in Lithuania, Romania, and Poland (all ICC member states) were sufficiently connected to events in Afghanistan to fall within that putative situation.[113] ISIL's attacks within Europe—singly or considered *en masse*—could also conceivably be charged as crimes against humanity, the definition of which requires no armed conflict nexus but does necessitate proof of a widespread or systematic attack against a civilian population.[114] In particular, ISIL's coordinated and multifaceted attack in Paris in November 2015, which took the lives of 130 civilians, would exceed any gravity threshold inherent to the concept of crimes against humanity.[115] The Security Council did not call the attacks "crimes against humanity" *per se*, but did use language drawn from the definition of the crime (the element of a widespread or systematic attack against civilians) in condemning ISIL's attacks in Paris and elsewhere.[116]

Although temporal, territorial, and subject matter jurisdiction exist over such tragic events, admissibility *vis-à-vis* the Court will emerge as an issue. When it comes to ICC member states, complementarity may present a bar to the ICC moving forward, particularly since states are highly motivated to prosecute terrorist acts committed in their territories and are not likely to cede jurisdiction to the ICC.[117] Furthermore, even if preparatory acts may have taken place in Syria, the ICC exercising jurisdiction over these terrorist attacks will do little to bring justice to the vast majority of ISIL's victims, who are in Syria, Iraq, or subsisting in a refugee camp abroad. This is unless the Court obtains custody over the accused, which might neutralize their ability to cause further harm.

Piggyback Off the Libya Referral

A third jurisdictional hook would invoke existing ICC jurisdiction in Libya. ISIL has operated in Libya since 2015 and was the *de facto* governing body in Sirte and *environs* until it

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[108] Tim Lister et al., *ISIS Goes Global: 143 Attacks in 29 Countries Have Killed 2,043*, CNN, Feb. 12, 2018.
[109] *See* Greg Myre & Camile Domonoske, *What Does It Mean When ISIS Claims Responsibility For an Attack?*, NAT'L PUBL. RADIO (May 24, 2017).
[110] *See* Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/10, Annex I (July 17, 1998) (recommending that the ASP at a Review Conference consider adding the crime of terrorism to the jurisdiction of the Court).
[111] *See* Prosecutor v. Galić, Case No. IT-98-29-A, Judgement (Nov. 30, 2006).
[112] *See ICC Elements of Crimes*, *supra* note 76, at art. 8 (indicating that the conduct must have taken "place in the context of and [been] associated with an international armed conflict.").
[113] Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17-7-Conf-Exp, Public Redacted Version of "Request for Authorisation of an Investigation Pursuant to Article 15" (Nov. 20, 2017).
[114] Rome Statute, *supra* note 2, at art. 7.
[115] *See* Ambos, *supra* note 107 (arguing that ISIL's attacks in Paris constitute crimes against humanity).
[116] S.C. Res. 2249, pmbl, ¶ 3, U.N. Doc. S/RES/2249 (Nov. 20, 2015).
[117] Alissa J. Rubin & Milan Schreuer, *Paris Attack Suspect is Convicted for Shooting at Police*, N.Y. TIMES, Apr. 23, 2018.

was expelled in December 2016.[118] Its forces have been accused of orchestrating an attack on a hotel in Tripoli and committing other acts of terrorism.[119] The fact that the ICC has pre-existing jurisdiction over the Libyan situation might allow it to prosecute key ISIL principals who are active in both theaters of war. The OTP has already taken the position in its Security Council reports that the referred "situation" in Libya includes violence committed by ISIL, citing to various Council resolutions that make reference to ISIL activity in Libya in connection with mention of Resolution 1970, which effectuated the ICC referral. For example, in her Office's Tenth Report on Libya to the Council, the Prosecutor noted that "ICC jurisdiction granted by virtue of UNSCR 1970 (2011) *prima facie* extends to contemporary crimes committed on the territory of Libya, including those committed by groups purportedly affiliated with or representing the self-proclaimed 'Islamic State of Iraq and the Levant.'"[120] So far, the Council has issued unfocused calls for accountability but has yet to specifically encourage the ICC to pursue ISIL actors in Libya.[121]

By way of background, the Security Council issued Resolution 1970 in 2011 in which it decided "to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court."[122] The Libya referral is much broader geographically than the Darfur referral since it encompasses the entire sovereign territory. Moreover, although inspired by the events surrounding the Libyan revolution, the referral is temporally open-ended. This took on renewed relevance when the Council issued Resolution 2259 in 2015, urging "Member States to swiftly assist the Government of National Accord in responding to threats to Libyan security and to actively support the new government in defeating ISIL."[123] The Council did not, however, specifically sanction a military intervention or recite the magic words "all necessary means," which would have more clearly signaled an authorization to use military force.[124] With Operation Odyssey Lightening, the United States and its allies supported the new government's campaign to eliminate ISIL in Libya, including through airstrikes and special operations raids.[125] Resolution 2259 also recalled Resolution 1970 and affirmed "the importance of the new Government of National Accord's full cooperation"[126] with the ICC and the Prosecutor and in particular the obligation to:

> hold to account those responsible for violations of international humanitarian law and violations and abuses of human rights, including those involving sexual

[118] *See* Frederic Wehrey, *When the Islamic State Came to Libya*, THE ATLANTIC, Feb. 10, 2018.
[119] *See* Suliman Ali Zway and David Kilpatrick, *Group Linked to ISIS Says It's Behind Assault on Libyan Hotel*, N.Y. TIMES, Jan. 27, 2015; Sudarsan Raghavan, *ISIS Suicide Bombers Attack Libyan Electoral Commission, Killing at least 12*, WASH. POST, May 2, 2018.
[120] *See, e.g.*, Tenth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970, ¶ 22 (Oct. 26, 2015). *See also* Eleventh Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011) 4 (May 26, 2016) (discussing potential to expand its investigations into crimes committed by ISIL in Libya).
[121] *See, e.g.*, S.C. Res. 2213, ¶ 4, U.N. Doc. S/RES/2213 (Mar. 27, 2015) (calling for accountability for ISIL's use of violence against civilians and the civilian infrastructure in Libya).
[122] S.C. Res. 1970, ¶ 4, U.N. Doc. S/RES/1970 (Feb. 26, 2011).
[123] S.C. Res. 2259, ¶ 12, U.N. Doc. S/RES/2259 (Dec. 23, 2015).
[124] That said, the fact of Libyan consent to such military assistance would obviate the need for Council approval under public international law. *See* Ryan Goodman, Beth Van Schaack & Alex Whiting, *Does the Int'l Criminal Court have Jurisdiction over U.S. Forces in Libya?*, JUST SECURITY (Sept. 7, 2016).
[125] Elham Saudi, Thomas Ebbs & Riad Alakar, *The US Is Focusing on Counterterrorism in Libya, at Human Rights' Expense*, JUST SECURITY (Mar. 21, 2018).
[126] S.C. Res. 2259, *supra* note 119, at pmbl.

> violence, and to co-operate fully with and provide any necessary assistance to the International Criminal Court and the Prosecutor.[127]

Venezuela invoked the ICC in its explanation of vote, urging Libya to facilitate the handover of Saif Qaddafi to the ICC.[128] (The ICC had found the case against Gaddafi *fils* to be admissible, but Libya has to date refused to hand him over.[129])

The facts undergirding a more recent ICC arrest warrant to emerge from the Libya referral are only tenuously connected to the Libyan revolution.[130] The defendant, Mahmoud Mustafa Busayf Al-Werfalli,[131] stands accused of committing, or ordering the commission of, 43 execution-style killings of prisoners from various anti-government militia who were detained in Benghazi in 2016-17,[132] acts apparently caught on video and broadcast on social media. In other circumstances, the Court has implied that a tighter nexus between the original referral and subsequent violence might be required for state party self-referrals (*vice* Security Council referrals) in order to prevent a state from abdicating its responsibility to prosecute international crimes.[133] Likewise, the ICC has asserted continuing jurisdiction with respect to the Democratic Republic of Congo situation. There, an ICC Pre-Trial Chamber determined that it retained jurisdiction over events in the Kivus even though the original state referral had involved crimes committed in Ituri. The PTC observed:

> Crimes committed after the time of a referral may also fall within the jurisdiction of the Court, provided only that they are sufficiently linked to the situation of crisis which was ongoing at the time of the referral and was the subject of the referral. It is the existence, or non-existence of such link, and not the particular timing of the events underlying an alleged crime, that is critical in determining whether that crime may or may not fall within the scope of the referral.[134]

It is unclear if the Trial Chamber would countenance such an expansion of the existing Security Council referral vis-à-vis the Libya situation. There are some indications that the judges see themselves as having a role in the question of whether the Prosecutor should close an

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[127] *Id.* ¶ 14.

[128] U.N. SCOR, 70th Sess., 7598th mtg., at 5, U.N. Doc. S/PV.7598 (Dec. 23, 2015).

[129] Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Public Redacted Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi (May 31, 2013).

[130] Nadine Dahan, *Fresh Footage of Libya Executioner at Work, in Spite of International Arrest Warrant,* MIDDLE EAST EYE (Jan. 25, 2018).

[131] Incidentally, Werfalli's superior, Khalifa Haftar, is a U.S. citizen, bringing him within the jurisdiction of U.S. war crimes laws. There is startling evidence that Khalifa Haftar has ordered these summary executions, perhaps even the very acts that undergird the Werfalli indictment. *See* Ryan Goodman & Alex Whiting, *Smoking Gun Videos Emerge: US Citizen, Libyan Warlord Haftar Ordering War Crimes*, JUST SECURITY (Sept. 19, 2017).

[132] Prosecutor v. Mahmoud Mustefa Busayf Al-Werfalli, Warrant of Arrest, ICC-01/11-01/17-2 (Aug. 15, 2017); Prosecutor v. Mahmoud Mustefa Busayf Al-Werfalli, Second Warrant of Arrest, ICC-01/11-01/17-13 (July 4, 2018) (detailing eight incidents involving the death of upwards of 40 people).

[133] *See* Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10-451, Decision on the "Defence Challenge to the Jurisdiction of the Court," ¶ 16 (Oct. 26, 2011) (reasoning that when it comes to state referrals, "such a situation can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis which was ongoing at the time of the referral. This link is necessary, precisely with a view to avoiding that referrals become instruments 'permitting a State to abdicate its responsibility for exercising jurisdiction over atrocity crimes for eternity [which] would be wholly antithetical to the concept of complementarity').

[134] *Id.* ¶ 41 (determining that the DRC did not just refer the situation in Ituri).

investigation, although so far no investigation has been formerly closed.[135] In addition, member states might resist the Court's continual exercise of jurisdiction over subsequent events in Libya given that the actors and geopolitics can change in unanticipated ways, and the idea of the Court exercising ever-lasting jurisdiction over "forever situations" would transform it from a treaty body with seemingly limited jurisdiction into a more far-reaching institution.[136]

Notwithstanding the Security Council's grant of jurisdiction over Libya as a non-ICC party, the ICC could not prosecute ISIL leaders for abuses committed within Syria in connection with the Libya referral unless it exercised a novel (and no doubt highly controversial) form of pendant jurisdiction. Nonetheless, even a trial focused on ISIL's Libyan crimes could incapacitate ISIL's leadership and potentially contribute to a lessening of criminal conduct in Syria. It could also produce evidence (such as of ISIL's command structure) that might be applicable to future trials involving events in Syria. Although this route to jurisdiction exists, the barriers to such an outcome are daunting, not the least of which is the need to obtain custody over the accused. Given the ongoing standoff with Gaddafi *fils*, Libya might be more motivated to hand over an ISIL captive, if it had one, which might win it some praise. But, this remains speculative at present.

The Situation Involving ISIL

Even if the Council remains deadlocked on the propriety of referring the entire situation in Syria to the Court, it could potentially attempt to refer something akin to "the situation involving ISIL," which has been identified by the Council as an unprecedented threat to international peace and security.[137] A focus on extremist elements operating in Syria might be more palatable to Russia, which remains intent on shielding the Assad regime from formal opprobrium while at the same time it is engaged in airstrikes against ISIL (and opposition) forces.[138]

The Council may have powers to craft a narrow referral in ways not enjoyed by ICC states parties.[139] This fractional approach finds some support in the fact that the Security Council's referral of "the situation in Darfur,"[140] a sub-national conflict, generated no objection from the Court or from members of the Assembly of States Parties for that matter.[141] A Trial Chamber merely stated:

> by referring the Darfur situation to the Court, … the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory

[135] *See, e.g.*, Situation in Uganda, No. ICC-01/04-01/05-68, Decision to Convene a Status Conference on the Situation in Uganda in Relation to the Application of Article 53 (Dec. 2, 2005).
[136] *See* Rebecca J. Hamilton, *Closing ICC Investigations: A Second Bite at the Cherry for Complementarity*, Research Working Paper Series HRP 12-001, Harvard Human Rights Program (May 2012) (discussing the need to develop principled grounds for closing an ICC investigation).
[137] S.C. Res. 2249, pmbl, U.N. Doc. S/RES/2249 (Nov. 20, 2015).
[138] Carla del Ponte, former Chief Prosecutor of the ICTY, has suggested this possibility. *See* Julian Border, *Call for Special Tribunal to Investigate War Crimes and Mass Atrocities in Syria*, THE GUARDIAN, Mar. 17, 2015.
[139] *But see* Rod Rastan, *Jurisdiction*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 141, 158 (Carsten Stahn ed., 2015) (arguing that the Council cannot limit the jurisdictional parameters of a situation to one side of the conflict or exclude certain nationals from investigation).
[140] S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005) ("Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court").
[141] *See generally* Matthias Neuner, *The Darfur Referral of the Security Council and the Scope of the Jurisdiction of the International Criminal Court*, 8 Y.B. INT'L HUMANITARIAN L. 320 (2005) (exploring negotiation processes).

> framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.[142]

By contrast, the attempt by President Yoweri Museveni of Uganda to self-refer "the situation involving the Lord's Resistance Army" to the Court presents a more potent counterpoint. At the time, Ocampo made clear that he at least believed that it was not possible to refer only one party to a conflict to the Court.[143] This reflects the principle of impartiality and equality before the law, as reflected in human rights treaties made applicable to the Court by virtue of Article 21(3) of the Rome Treaty.[144] Uganda eventually broadened its self-referral.[145] In a subsequent case following a self-referral from the Democratic Republic of Congo, an ICC Pre-Trial Chamber confirmed that, pursuant to Articles 13 and 14,

> a referral cannot limit the Prosecutor to investigate only certain crimes, e.g. crimes committed by certain persons or crimes committed before or after a given date; as long as crimes are committed within the context of the situation or crisis that triggered the jurisdiction of the Court, investigations and prosecutions can be initiated.[146]

It is not clear whether this articulated rule would apply to a Security Council referral as well. France in its Syria referral resolution did attempt to limit the reach of Court by carefully crafting the referral in ways that would exclude any crimes committed by intervening foreign powers. Because that resolution garnered a double veto, the ability of the Council to further tailor a referral has never been fully explored. That said, efforts by the Council to exclude certain categories of persons from the reach of the ICC in connection with peacekeeping mandates and ICC referrals have proven to be highly controversial.[147]

In the alternative, the Council could conceivably refer the situation within historical territory of the self-proclaimed ISIL caliphate, even though its outer territorial edges were constantly in flux[148] and did not conform to formal sovereign boundaries, and even though ISIL did not manifest all attributes of statehood or achieve anything in the way of recognition as a state.[149] This scheme would have been more viable at a time when ISIL actually governed

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[142] *Prosecutor v. Omar Al Bashir*, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 45 (Mar. 4, 2009).

[143] *See* Press Release, Prosecutor of the International Criminal Court opens an investigation into Nothern [sic] Uganda, ICC-OTP-20040729-65 (July 29, 2004); June 17, 2004 Letter of Luis Moreno Ocampo to Philippe Kirsch, President of the ICC, annexed to Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, Doc. No. ICC-02/04 (July 5, 2004) ("My office has informed the Ugandan authorities that we must interpret the scope of the referral consistently with the principles of the Rome Statute, and hence we are analyzing crimes within the situation of northern Uganda by whomever committed.").

[144] International Covenant on Civil and Political Rights art. 14, Dec. 19, 1966, 999 U.N.T.S. 171.

[145] The Court ultimately indicated that it was asserting jurisdiction over the "situation in Uganda." *See* Situation in Uganda, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, Case No. ICC-02/04-01/05 (Sept. 27, 2005).

[146] Mbarushimana, *supra* note 133, at ¶ 27.

[147] *See, e.g.*, S.C. Res. 1593, ¶ 6, U.N. Doc. S/RES/1593 (March 31, 2005) (deciding that officials hailing from non-ICC parties are subject to the exclusive jurisdiction of the contributing state).

[148] *See* Pieter Omtzigt & Ewelina U. Ochab, *Bringing Daesh to Justice: What the International Community Can Do*, J. GENOCIDE RES. 8 (2018) (suggesting a referral could encompass parts of Syria and Iraq).

[149] *See* Convention on Rights and Duties of States (Montevideo Convention) art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

significant swaths of Syria and Iraq;[150] its geographic reach has shrunk considerably in recent years, almost to the vanishing point.[151] One risk of such a territorial approach is that it reifies ISIL's statist ambitions, although nothing in the Rome Statute would prevent the Council from referring the situation in a *de facto* or wannabe state to the Court. As another potential source of concern to the P-5, such a quasi-territorial referral might still sweep in international crimes committed by Syrian government forces (protected by Russia), by Syrian opposition members (intermittently aligned with the West), and even by the two dueling superpowers (who both deployed armed force within and around ISIL-controlled territory). Moreover, it would leave Assad's crimes unaddressed unless they were committed against ISIL members (such as the execution or torture of ISIL fighters in Syrian custody or intentional attacks against civilians in ISIL territory).

These more speculative jurisdictional options all hinge on the meaning of "situation," a term that goes undefined in the Rome Statute. The treaty states simply that the ICC can move forward once:

> A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.[152]

The drafters of the Rome Statute very deliberately did not employ the term "state" here, implying that it may be possible for the Council to refer international crimes that are untethered to, or that transcend, sovereign territory. In this regard, the ICC has noted that the term "situation" is "defined in terms of temporal, territorial and in some cases personal parameters" and delimits the jurisdictional boundaries of the OTP's investigations and prosecutions.[153] Scholars have opined that the term "situation" might encompass violence that crosses over state borders, so long as the jurisdictional preconditions are met and the Court's jurisdiction has been appropriately triggered.[154] Others insist that the ICC could not open a preliminary examination dedicated only to violence committed by ISIL absent a territorial nexus.[155] In any case, notwithstanding these theoretical options, the practical prospects of any Council referral—even a narrowly tailored one—have become even dimmer following the incendiary speech issued by then-U.S. National Security Advisor John Bolton in which he announced that "the ICC is already dead to us."[156]

The Propriety of Pursuing Accountability and an ICC Referral

All of these artful jurisdictional theories would yield a fragmented investigation and prosecution. As a result, many of the hallmarks of the war, including the Assad regime's relentless attacks on his compatriots, might remain out of reach of the Court. The resulting patchwork of justice would raise serious legitimacy concerns and could generate disillusionment and stroke

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[150] *See* Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *Rule of Terror: Living under ISIS in Syria* ¶¶ 16, 19-31 (Nov. 14, 2014) (describing ISIL's governance model).
[151] *See* Rukmini Callimachi, *The Fight to Retake Last ISIS Territory Begins,* N.Y. TIMES, Sept. 11, 2018.
[152] ICC Statute art. 13(b).
[153] Situation in the Democratic Republic of the Congo, Decision on Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6, ICC-01/04-101-tEN-Corr, ¶ 65 (Jan. 17, 2006).
[154] *See* Rod Rastan, *Situation and Case: Defining the Parameters*, *in* THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 421, 426-28 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).
[155] Carsten Stahn, *Why the ICC Should be Cautious to Use the Islamic State to Get Out of Africa: Part 1*, EJIL: TALK! (Dec. 3, 2014).
[156] *See* Craig Kafur, *The ICC is Dead to John Bolton, But Not the Public*, CHICAGO COUNCIL ON GLOBAL AFFAIRS (Sept. 10, 2018).

grievances rather than contribute to reconciliation. Indeed, an ICC investigation could exert a negative impact on justice transitional processes in Syria if those who are considered "most responsible" end up enjoying international protection from prosecution. Syrians, and survivors the world over, could lose confidence in the international justice system, thus eroding any impact that the Court might have on instantiating the rule of law and delivering justice. Of course, some selectivity is inevitable in any criminal justice system, *a fortiori* in international criminal law.[157] But, this degree of continued impunity really rankles.

The enduring inaccessibility of the Court comes as a big disappointment to many advocates of international justice. Likewise, many victims and survivors still see the ICC as the "gold standard" of accountability—notwithstanding its mounting setbacks—and lament the international community's failure to invoke the Court. At the same time, there are principled reasons to be cautious about an ICC referral while the underlying conflict is ongoing and its outcome uncertain.[158] For one, until the war ends (and even afterwards, assuming an Assad victory), ICC investigators are not likely to have access to Syrian territory in order to conduct their investigations, rendering the referral a potentially futile exercise. One set of judges ruled in a recent controversial ruling (since overturned) that the feasibility of proceedings is a factor to be taken into account when ruling upon *proprio motu* requests to open an investigation.[159] (Oddly, the judges did not follow, or even gesture to, the Afghanistan Pre-Trial Chamber's reasoning in the recent Myanmar decision, notwithstanding that the prospects of investigating within that country are equally dim, perhaps signaling the opinion's transience.[160]) That said, triggering the Court's jurisdiction would enable ICC investigators and prosecutors to undertake their version of a "structural investigation" into the conflict writ large with an eye towards homing in on particular incidents and actors later. And, when it comes to Syria, the OTP would stand to uniquely benefit from the extensive investigations already underway by the U.N. Human Rights Council's Commission of Inquiry; the General Assembly's International, Impartial and Independent Mechanism; the Commission on International Justice & Accountability; the OPCW's (and its predecessors') chemical weapons investigations, and the work of the network of civil society organizations dedicated to the task of preserving potential evidence of international crimes.

The irresoluble peace versus justice debate also complicates these deliberations. Although a strong plurality of the international community supported France's proposed ICC referral, some states acknowledged that a referral would complicate ongoing peace negotiations, such as they were.[161] There may be times when it is preferable to sequence conflict resolution and the pursuit of justice, so long as the latter is not permanently deferred given that peace and justice are mutually reinforcing and complementary.[162] The reality is that every situation will be different when it

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[157] Thomas Christiano, *The Problem of Selective Prosecution and the Legitimacy of the ICC* (Mar. 14, 2015).
[158] Dov Jacobs, *Why a Syria UNSC Referral to the ICC is Not Necessarily a Good Idea (and Why we Should be Allowed to say that)*, SPREADING THE JAM (May 22, 2014).
[159] Situation in the Islamic Republic of Afghanistan, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17/33 (Apr. 12, 2019); Situation in the Islamic Republic of Afghanistan, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17 OA4 (Mar. 5, 2020).
[160] *See Myanmar Investigation Authorisation*, *supra* note 91, ¶ 119.
[161] Mark Kersten, *The ICC and the Security Council: Just Say No?*, JUSTICE IN CONFLICT (Feb. 29, 2012) (quoting Hillary Clinton's concerns that indictments limit "options to persuade leaders perhaps to step down from power.").
[162] Paul R. Williams, et al., *The Peace vs. Justice Puzzle and the Syrian Crisis*, 24 ILSA J. INT'L & COMP. L. 417, 443-446 (2018).

comes to the degree to which Court proceedings will impact upon conflict resolution.[163] The empirical research in this regard is mixed and tentative. Greig & Meernik, for example, find that the initiation of ICC investigations tends to dampen the chances that warring parties will seek third-party mediation whereas the issuance of ICC warrants is actually associated with increases in a willingness to resort to mediation.[164] Other research suggests that ICC involvement in non-international armed conflicts reduces the likelihood of peace where the risk of domestic punishment is low, although this effect diminishes when there is a robust domestic justice system.[165] So far, however, the Syrian peace negotiations have not yielded *any* appreciable results, even absent action by the ICC or any sort of accountability process.

There is some potential that triggering the ICC might have exerted a deterrent effect, especially early in the conflict when regime figures still had time to defect. Emergent scholarship has only just begun to focus on the ICC's ability to deter crimes within ICC situation countries and beyond. Recent empirical evidence does not support strong claims of deterrence, but it does suggest that action by the ICC exerts a conditional deterrent effect, taking into account the type of conflict, the type of actor, the type and strength of the intervention, and the particulars of the state in question.[166] For example, in an empirical study, Jo & Simmons present evidence of a deterrent effect of various types of ICC action in (1) governments that depend on aid relationships and (2) rebel groups with secessionist or governance goals.[167] They posit that the ICC exerts a moderating effect through both prosecutorial deterrence (where the threat of legal retribution changes actors' behavioral calculi) and social deterrence (where support for accountability signals potential social costs to would-be perpetrators).[168] These effects are stronger in countries with established governmental or non-governmental human rights institutions.[169]

The deterrent impacts also appear stronger if the state has ratified the Rome Statute, because this often leads to the incorporation of international crimes into states' domestic legal frameworks. This, in turn, is correlated with a reduction in hostilities and human rights violations. That said, it is difficult to tease out the deterrent effect of ratifying the Rome Statute versus the impact of the concomitant implementing legislation—which may be more salient to the relevant parties—and other endogenous variables.[170] Nor is it clear whether social deterrence via informal societal sanctions is stronger than a fear of arrest and punishment.[171] Drawing on traditional criminological theory, which posits that the certainty of punishment is the most important factor

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[163] Mark Kersten, *The ICC May Not Bring Justice to Syria*, WASH. POST, May 12, 2014.

[164] J. Michael Greig & James D. Meernik, *To Prosecute or Not to Prosecute: Civil War Mediation and International Criminal Justice*, 19(2) INT'L NEGOTIATION 257 (2014). Joseph Kony, for example, reportedly told Jan Egeland, then the head of the U.N. Office for the Coordination of Humanitarian Affairs (OCHA), that he wanted the ICC warrants lifted as a condition to entering into formal talks. DAVID BOSCO, ROUGH, JUSTICE: THE INTERNATIONAL CRIMINAL COURT'S BATTLE TO FIX THE WORLD, ONE PROSECUTION AT A TIME 129 (2014).

[165] Alyssa K. Prorok, *The (In)compatibility of Peace and Justice? The International Criminal Court and Civil Conflict Termination*, 71 INT'L ORG. 213 (2017).

[166] Yvonne M. Dutton & Tessa Alleblas, *Unpacking the Deterrent Effect of the International Criminal Court: Lessons From Kenya*, 91 ST. JOHN'S L. REV. 105-75 (2017).

[167] Hyeran Jo & Beth A. Simmons, *Can the International Criminal Court Deter Atrocity*?, 70 INT'L ORG. 443 (2016).

[168] *Id*. at 444.

[169] Wade Cole & Francisco Ramirez, *Conditional Decoupling: Assessing the Impact of National Human Rights Institutions, 1981 to 2004*, 78 AM. SOC. REV. 702-25 (2013).

[170] *See* Beth Ann Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT'L ORG. 225 (2010).

[171] Jo & Simmons, *supra* note 180, at 450-52.

in whether prosecutions will deter crime, Mullins & Rothe argue that the probability of a conviction before the ICC is still too low to exert a credible deterrent effect standing alone.[172] Other causal pathways exist, however. ICC investigations are statistically correlated with more domestic prosecutions of state agents, but not necessarily for ICC crimes. The theory is that ICC action emboldens reform advocates within civil society who are engaged in a struggle with ruling coalitions and who feel empowered to lobby for more accountability, to propose judicial reform measures, to file cases, and to support prosecutions.[173] This all suggests that ardent theoretical arguments against the efficacy of the ICC are overstated or altogether unsubstantiated. Many of the factors that increase the impact of the ICC, however, are not present in Syria. As such, it remains speculative if action at the Court can deter crimes—especially this late in the conflict.

A final consideration against the Council triggering the ICC stems from the fact that past Security Council referrals have not visibly advanced justice and, in many respects, have produced more problems than solutions.[174] The situation in Libya offers a compelling object lesson. Elements within the Court moved very quickly following the Council's Libya referral, with the OTP immediately issuing arrest warrants for Muammar Qaddafi, his son Saif, and his henchman Abdullah Al-Senussi.[175] (The proceedings against Gaddafi *père* were discontinued when he was murdered by members of the opposition).[176] The ICC referral instantaneously imposed upon the fledgling Libyan government a set of complex international law obligations towards a distant international institution at a time when it was still desperately trying to consolidate its home rule. Indeed, Gaddafi *fils* was in the custody of the Zintan militia, who controlled swaths of northwestern Libya and were not likely to transfer him to the central authorities without considerable concessions, if not cash. Libya immediately filed parallel complementarity challenges. Defence counsel argued that their clients could not possibly receive fair trials in Libya and should be transferred to The Hague.[177] The government, by contrast, wanted to assert its newly-acquired sovereign prerogative to prosecute reviled members of the *ancien régime*. With the ICC referral, the Libyan government was suddenly thrust into a set of a legal proceedings for which it was ill-prepared given the chaos on the ground and the need to rebuild state institutions in keeping with international human rights standards. In the end, the Court's rulings on admissibility were Solomonic. The Appeals Chamber confirmed the Pre-Trial Chamber's earlier rulings: Libya could retain jurisdiction over the Senussi case but should surrender Gaddafi to the Court.[178] At the moment, Libya and the Court are in a standoff over the latter request.[179] This casts neither Libya

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[172] Christopher Mullins & Dawn Rothe, *The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment*, 10 INT'L CRIM. L. REV. 771-86 (2010).
[173] Geoff Dancy & Florencia Montal, *Unintended Positive Complementarity: Why ICC Investigations Increase Domestic Human Rights Prosecutions*, 111 *AM. J. INT'L L.* 689 (2017).
[174] *See* Mark Kersten, *Missing the Mark: The ICC on its Relationship with the UN Security Council*, JUSTICE IN CONFLICT (Oct. 24, 2012).
[175] *See, e.g.*, Prosecutor v. Saif Al-Islam Gaddafi, Warrant of Arrest, ICC-01/11-01/11-3-tARB (June 27, 2011).
[176] Prosecutor v. Saif Al-Islam Gaddafi, Case No. ICC-01/11-01/11-28, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi (Nov. 22, 2011).
[177] Michele Tedeschini, *Complementarity in Practice: the ICC's Inconsistent Approach in the* Gaddafi *and* al-Senussi *Admissibility Decisions*, AMSTERDAM L. FOR. 76 (Summer ed. 2015).
[178] *See* Gaddafi, *supra* note 56; Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC–01/11–01/11 OA6, Judgment on the Appeal of Mr. Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the Admissibility of the Case against Abdullah Al-Senussi" (July 24, 2014).
[179] Gaddafi, *supra* note 56.

nor the Court in a good light. Similar qualified outcomes may have plagued a Syrian referral if one were to materialize.

In any case, the ICC has stood largely silent with respect to Syria. Once the conflict comes to an end, which it must, the current Syrian regime is unlikely to engage the Court. Even if a political transition were to occur, it may not be prudent to bind a future government to rigid international law obligations or to set the stage during the fragile post-transition period for a complementarity confrontation that risks undermining both the Court and the fledgling government. In addition, the Court is currently beleaguered, fending off multiple challenges to its legitimacy just as it becomes increasingly over-stretched in terms of its investigative and prosecutorial resources. The ICC will have limited bandwidth, and the international crimes underway in Syria are legion. If it is to operate effectively, the Court cannot work alone and must be part of a multifaceted set of responses with robust support from the international community, including the Security Council, ICC member states, and non-party states willing to underwrite parallel international justice efforts. All of these concerns with ICC action in Syria, plus the obvious unavailability of the Court, have led to the emergence of other proposals for asserting international jurisdiction outside the ICC—the subject of the next chapter.

5

A Menu of Models: Options for an *Ad Hoc* Tribunal for Syria

There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance.[1]

At present, there is no international court with jurisdiction over events in Syria. As such, there is no multilateral judicial forum that is empowered to pronounce upon the injustice or illegality of the warring parties' conduct in Syria. This seemingly unyielding impunity undermines the integrity of the effort to build an international order based upon the rule of law and a global architecture dedicated to atrocities prevention and response. Although recourse to the International Criminal Court is largely foreclosed for reasons discussed in chapter 4, the fact that there has been little justice for Syria is not the fault of the ICC or its architects. Indeed, it is perhaps unrealistic to expect that the P-5 would put politics aside and allow the Security Council to refer every worthy situation to the Court.[2] The fault rather resides in part with the international community and its failure to meaningfully consider other ideas—some tried and true, others more inventive—that exist for bringing justice to Syria. This chapter identifies some of the justice innovations that could have been, and perhaps still could be, pursued even in the face of Russia's veto and Syria's intransigence, but if only the political will existed elsewhere within the international community. Indeed, many of these models offer a better option for the situation in Syria than the ICC given the extent of the international crimes being committed. In a desired, but increasingly unlikely, contingency, any tribunal could be subsequently accepted by a new Syrian regime and integrated into its domestic legal framework if a genuine transition ever occurs.

It was originally hoped that the establishment of the ICC as a permanent judicial institution with potentially global reach would obviate the need to establish additional *ad hoc* tribunals in connection with particular conflicts. This presumption has proven to be misguided. It is increasingly recognized that the ICC cannot be expected to prosecute all, or even a substantial percentage, of the atrocities ravaging our planet either because of jurisdictional gaps, the unwillingness of the Security Council to refer atrocity situations—such as Syria—to the Court, or basic resource constraints. Indeed, given the duration, scale, complexity, and nature of the Syrian conflict, there is no way that the ICC could take the lead on handling the administration of justice at the international level, even if the principle of complementarity were fully functioning. Although the Court is now operating at peak capacity, its jurisdiction remains incomplete and its resources limited. Furthermore, the Court is plagued by challenges to its legitimacy, erratic state cooperation, and persistent perceptions of inefficacy and inefficiency. Given this confluence of realities, there is an enduring need for the international community to create, enable, and support additional accountability mechanisms. Such institutions are needed to respond to the commission of international crimes when the political will for an ICC referral is lacking, the ICC is inappropriate or foreclosed for whatever reason, only a fraction of the abuses or perpetrators in question are before the Court, or the situation is one—like Syria—that deserves a focused accountability

[1] BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARDS WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS 1 (1980).
[2] Correspondence with Mark Kersten, Dec. 22, 2018.

mechanism. *Ad hoc* tribunals dedicated to particular situation countries thus remain a viable and valuable mechanism for increasing the prospects for justice.

Putting politics and practicality to the side, the international community could have established, and could still establish, an *ad hoc* tribunal dedicated to Syria, with or without the Security Council. There are a number of different modalities by which such a tribunal could be established, although models that have been successful thus far provide little solid precedent given the current dynamics within the international community. The Security Council is an obvious place to start. However, in light of entrenched blockages within the Council and animosity among the P-5, any multilateral prosecutions would need to be initiated through alternative means. Other available avenues include action by the General Assembly or the League of Arab States, or building an institution akin to the Nuremberg Tribunal by way of an international agreement among supportive and specially-affected states. The latter institution could be conceptualized as a membership organization operating on the basis of a pooled repository of states' individual jurisdictional competencies, or it could enjoy an independent international legal personality exercising a form of universalist international jurisdiction working on behalf of a subset of the international community. These proposals enjoy some precedent in international law, but run up against legal arguments—which remain controversial—about the propriety of prosecuting potential perpetrators without the nationality state's consent.[3]

Such an institution could remain fully international or contemplate the inclusion of a range of hybrid elements to integrate Syrian legal precepts and talent.[4] Indeed, the trend in international justice institutions has been towards hybrid models following the Security Council's establishment of the two original international tribunals for the former Yugoslavia and Rwanda, which were almost purely international when it comes to personnel, subject matter jurisdiction, and institutional design. This inclination towards hybridity can be seen in the newest such bodies in operation, under construction, or in contemplation: the Kosovo Specialist Chambers and Prosecutor in The Hague;[5] the Central African Republic's Special Criminal Court (SCC), which has been stood up in Bangui;[6] and the proposed hybrid courts for the Democratic Republic of the Congo, South Sudan, and Liberia, which still exist exclusively on paper. All these hybrid models envision the involvement of the territorial state, which would require the existence of genuine interlocutors within the Syrian government. But, it is possible to envision other forms of hybridity involving Syrian actors, such as the Free Syrian Lawyers group, who are unconnected to the state. That said, identifying willing partners within Syria's fractious political environment is an undeniable challenge to pursuing any measure of hybridity, particularly at this stage in the conflict. Furthermore, these institutions have generally been contemplated after the events in question, rather than mid-conflict.

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[3] *See* David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L. J. 47, 65 (2001) ("The U.S. legal position was that customary international law does not yet entitle a state … to delegate to a treaty-based International Criminal Court its own domestic authority to bring to justice individuals who commit crimes on its sovereign territory or otherwise under the principle of universal jurisdiction, without first obtaining the consent of the individual's state of nationality either through ratification of the Rome Treaty or by special consent").

[4] *See generally* Beth Van Schaack, *The Building Blocks of Hybrid Justice*, 44 DENVER J. OF INT'L L. & POL'Y 169 (2016) (outlining various models and the multiple ways in which justice can be hybridized).

[5] The Kosovo Specialist Chambers and Prosecutor's Office form part of the judicial system of Kosovo but are staffed by international judges, prosecutors, and administrators. *See* https://www.scp-ks.org/en.

[6] Tessa Alleblas, *Special Criminal Court for CAR: A New Opportunity for Accountability?*, THE HAGUE INSTITUTE FOR GLOBAL JUSTICE (Nov. 28, 2016).

If the international community had committed itself to such a project early in the conflict, work could have resulted in the establishment of a fully-functioning tribunal. In the alternative, the international community could have created the shell of a legal framework that would later be handed over to a new government in a turnkey arrangement (e.g., by way of an international agreement or the enactment of national legislation) whereby Syrian constituencies would play central roles and ultimately take ownership of the process. This latter eventuality, however, assumes a genuine transition or at least a post-war government that is willing to consider an international crimes accountability program. As the conflict appears increasingly asymmetrical, with the opposition in desperate retreat or trapped in a frozen conflict in de-escalation zones under Turkish supervision, any justice model requiring a measure of Syrian government consent or commitment seems impossible.

Such a mechanism would have to be created and operate consistently with international law to ensure its legitimacy and inoculate it against proper challenges by defense counsel to its jurisdiction and procedural fairness. Presumably, any defendant prosecuted before an international tribunal that does not enjoy the Security Council's backing would immediately challenge its legality under a range of theories. These would likely include human rights protections requiring that tribunals be "established by law"[7] and the U.N. Charter's provisions giving executive primacy to the Security Council. In so doing, defendants would be following in the footsteps of the first defendant before the International Criminal Tribunal for the former Yugoslavia (ICTY), Duško Tadić, who was unsuccessful in this approach.[8] Pursuant to the principle of *compétence sur la compétence*, considered an inherent component of the judicial function, international and hybrid tribunals regularly consider the legality of their own founding, although none has, to date, declared itself to be unlawful or *ultra vires* and shut itself down.[9]

This chapter focuses on several options for the exercise of international or quasi-international jurisdiction beyond the ICC. Models include the establishment of an *ad hoc* international tribunal, a regional or multilateral tribunal involving pooled jurisdictional capabilities, and an international court exercising a form of international jurisdiction. Any of these models could be hybridized with Syrian elements. Multiple proposals for establishing such a tribunal were floated and were considered, to varying degrees, by members of the international community, both before and after the failed ICC referral effort. None has gathered sufficient traction to date. Most, however, remain viable if the collective political will emerges and the articulated commitment to justice prevails.

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[7] International Covenant on Civil and Political Rights art. 14, 999 U.N.T.S. 171 (1976) ("In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."). *See Castillo Petruzzi et al. v. Peru* Judgment, Inter-Am. Ct. H.R. (ser. C) No. 52, (May 30, 1999) (holding that defendants are entitled to procedures previously established by law).

[8] *Prosecutor v. Duško Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995). *See also* Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Decision on Jurisdiction (June 18, 1997); Virginia Morris, *International Decisions, Prosecutor v. Kanyabashi, Decision on Jurisdiction, Case No. ICTR-96-15-T (June 18, 1997)*, 92 AM. J. INT'L L. 66 (1998) (discussing similar challenge before the ICTR).

[9] *See* Michael Vagias, *Useful in Theory, Useless in Practice? The Right of the Accused to Challenge the Jurisdiction of International Criminal Courts and Tribunals* (unpublished manuscript).

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Action Within the United Nations Security Council

The most obvious way to establish an *ad hoc* tribunal for Syria is through the Security Council, the progenitor of the ICTY[10] and the International Criminal Tribunals for Rwanda (ICTR)[11] by way of U.N. Charter Articles 29 (allowing the Council to create subsidiary bodies)[12] and 41 (allowing the Council to implement non-forcible coercive measures).[13] At the moment, this route is not available for the same reasons that the ICC referral effort has failed: since the Syrian conflict first appeared on the Council's agenda, Russia has been unwilling to allow most forms of coercive action contemplated against President Assad, as detailed in chapter 3. Furthermore, given Russia's active involvement in the conflict since 2015—on the ground and in the air—there is a clear self-interest in avoiding any accountability for Syria.[14] As such, it is unlikely that Russia would countenance the establishment of an *ad hoc* tribunal with the kind of open-ended personal jurisdiction that characterized past tribunals and allowed them to prosecute all sides of a conflict.[15]

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[10] S.C. Res. 827, ¶ 7, U.N. Doc. S/RES/827 (May 25, 1993).
[11] S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).
[12] Article 29 reads: "The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions." U.N. Charter art. 29.
[13] Article 41 reads: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." U.N. Charter art. 41.
[14] The U.N. Commission of Inquiry, for example, has linked a Russian plane to airstrikes on a market in Atarib that killed and injured dozens of civilians. *See* Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. Doc. A/HRC/37/72, ¶¶ 77-78 (Feb. 1, 2018).
[15] For example, the ICTY was empowered to "prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." *See* Article 1, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, as amended (Sept. 2009). NATO's 1998 intervention in Kosovo fell within this formulation, although the Prosecutor never moved forward with an investigation of these

The Council might, however, coalesce around a tribunal dedicated to prosecuting members of only one party to the conflict: the Islamic State in the Levant (ISIL),[16] which has been deemed a threat to international peace and security.[17] The Kurdish-backed administration in northern Syria is looking for ways to establish a tribunal within and without the Council and has advanced this proposal, in part to deal with the thousands of ISIL fighters it has in custody.[18] The model envisioned would base the tribunal in territory currently under control of the Syrian Democratic Forces, although locating the court in the territory of a neighboring state would put it on firmer footing.[19] Enabling ISIL trials in an extraterritorial venue might find favor with two sets of states: those that have suffered ISIL attacks but are wary of seeking the extradition of responsible individuals and those that produced a high number of ISIL recruits but fear the prospect of taking back their nationals, who are deemed a security threat.[20]

Any such institution inspired by the situation in Syria could easily address crimes committed in both Syria and Iraq given the high degree of conflict spillover and the mobility of potential defendants across their shared border.[21] Indeed, and as discussed in chapter 8, the Council established a multilateral investigative team—dubbed the U.N. Investigative Team to Promote Accountability for Da'esh/ISIL Crimes (UNITAD)—that is starting to investigate ISIL crimes in Iraq with an eye towards enhancing domestic Iraqi prosecutions (as difficult as this may be given the endemic due process deficits and the prevalence of the death penalty there).[22] This effort could be upgraded into a full-fledged tribunal, although such a move would likely be opposed by the government of Iraq. Were this to occur, the investigative team could then be folded into an office of the prosecutor as was done with respect to the Special Tribunal for Lebanon (STL).[23]

As a source of controversy, UNITAD's singular focus on the crimes committed by ISIL—as heinous and deserving of censure as they are—overlooks crimes committed by other armed groups involved in the conflict,[24] prioritizes terrorism crimes over crimes against humanity, and

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events. *See* Anne-Sophie Massa, *NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate; An Abusive Exercise of Prosecutorial Discretion*, 24 BERKELEY J. INT'L L. 610 (2006). The ICTR's Statute was similar, but in the end, and due to Rwandan intransigence, the Rwanda Tribunal only prosecuted Hutu individuals accused of harming Tutsis and moderate Hutus. Rory Carroll, *Genocide Tribunal 'Ignoring Tutsi Crimes*,' THE GUARDIAN, Jan. 12, 2005.

[16] *See* Ulrich Haxthausen, *The Opportunities and Impediments to Holding ISIS Accountable for International Crimes and the Crime of Terrorism Committed in Iraq and Syria* 87 (June 19, 2019) (unpublished LLM thesis, Copenhagen University) (on file with the author) ("The crimes committed by ISIS in Iraq are sufficiently heinous to warrant a singular prosecutorial focus.").

[17] S.C. Res. 2249, ¶ pmbl, U.N. Doc. S/RES/2249 (Nov. 20, 2015).

[18] *Islamic State Group: Syria's Kurds Call for International Tribunal,* BBC NEWS, Mar. 26, 2019; *Could Foreign Daesh Suspects be Tried in Northeast Syria?*, ARAB NEWS, July 16, 2019.

[19] Helen Maguire & Khalil Hamlo, *Syria's Kurdish Forces Call for UN Tribunal for Foreign IS Fighters*, DPA-INTERNATIONAL (Feb. 18, 2019).

[20] Tim Lister, et al., *ISIS Goes Global: 143 Attacks in 29 Countries have Killed 2,042*, CNN, Feb. 12, 2018.

[21] *See* C.M.J. Ryngaert & D.W. Hora Siccama, *Justice for Sexual Crimes Committed by IS: Exploring Accountability and Compliance Mechanisms* 6, Report for the European Parliament, Committee on Legal Affairs (2016) (noting that an *ad hoc* tribunal could have transborder jurisdiction); Andrew Solis, *'Only [ ] Can Judge: Analyzing Which Courts Have Jurisdiction over ISIS*, 40 S. ILLINOIS UNIV. L.J. 69, 81-82 (2015).

[22] S.C. Res. 2379, § 2, U.N. Doc. S/RES/2379 (Sept. 21, 2017).

[23] Cécile Aptel, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUSTICE 1107, 1112 (2007) (noting that a prior commission of inquiry essentially became the Office of the Prosecutor of the STL).

[24] Zachary Kaufman, *New UN Team Investigating ISIS Atrocities Raises Questions About Justice in Iraq and Beyond*, JUST SECURITY (Sept. 28, 2017).

amounts to a bill of attainder and a form of selective—even victors'—justice.[25] All this, however, was the price to be paid to secure Iraq's consent to this initiative.[26] An ISIL tribunal could assert jurisdiction over ISIL members anywhere they acted, either within the overlapping conflicts in Syria and Iraq or farther afield. Because ISIL undertakes a formal induction process,[27] it would be possible to confirm ISIL membership through documents seized from the organization by journalists,[28] criminal investigators, and civil society organizations.[29] Such a limited tribunal, while feasible, would be blind to the many depredations attributable to the Assad regime (as well as to the opposition and other actors for that matter). This would do little to satisfy victims' calls for comprehensive justice. It might also delay the establishment of more inclusive proceedings rather than setting the stage for them.

Even if the blockages within the Council were to miraculously resolve themselves and the political will to prosecute crimes committed in Syria were to materialize, the Council would likely be reluctant to launch a new stand-alone tribunal. Following the establishment of the ICTR, a strain of tribunal fatigue set in within the Council, inspired in part by the high costs of the ICTY and ICTR which, as subsidiary bodies of the Council, were funded out of U.N.-assessed contributions.[30] China, in particular, made it plain that it would not support the establishment of yet another *ad hoc* tribunal (although it was not alone in its reservations).[31] As such, even were it to become newly harmonious, the Council would still be more likely to bless an effort that came into fruition through other means, as it has done in the past with the STL, for example.

There is one additional Security Council option to mention, even though its utility in the Syrian context is limited. The Security Council helped to animate hybrid judicial processes in Kosovo and Timor-Leste, which emerged out of comprehensive U.N. transitional administrations. This was made possible by the fact that both Kosovo and Timor-Leste were, as a matter of international law, new "state-like" entities at the time of the United Nations' intervention. In Kosovo, the Security Council invoked Chapter VII to establish the U.N. Mission in Kosovo ("UNMIK"), a transitional administration charged with overseeing the development of self-governing institutions pending the determination of Kosovo's future status.[32] The Special Representative of the Secretary-General subsequently issued a directive convening criminal panels with a majority of international judges to adjudicate war crimes trials and other politically-sensitive cases, even though this was not expressly in his mandate.[33] The European Union Rule of Law

[25] I am grateful for Ingrid Elliot for this observation. *See* United States v. Brown, 381 U.S. 437 (1965) (finding a statute that made it a crime for members of an executive board of a labor organization to belong to the Communist Party to be an unconstitutional bill of attainder).
[26] *See* Beth Van Schaack, *The Iraq Investigation Team and Prospects for Justice for the Yazidi Genocide*, 16 J. INT'L CRIM. JUST. 113, 119 (2018) ("Although having Baghdad's consent will be crucial to the [investigative team's] ability to operate in the country, it comes at the expense of an impartial investigation that follows the evidence rather than one targeting a single armed group, no matter how heinous.") (citations removed).
[27] Wissam Abdallah, *What it Takes to join the Islamic State*, AL-MONITOR, Aug. 6, 2015.
[28] Rukmini Callimach, *The ISIS Files*, N.Y. TIMES, Apr. 4, 2018.
[29] Marlise Simons, *Investigators in Syria Seek Paper Trails that Could Prove War Crimes*, N.Y. TIMES, Oct. 7, 2014.
[30] General Assembly, Committee on Contributions, Tribunals, http://www.un.org/en/ga/contributions/tribunals.shtml. The United Nations continues to fund the International Residual Mechanism for Criminal Tribunals. *See* S.C. Res. 1966, ¶ 1, U.N. Doc. S/RES/1966 (Dec. 22, 2010).
[31] WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 425 (6th ed. 2011).
[32] S.C. Res. 1244, ¶ 10, U.N. Doc. S/RES/1244 (June 10, 1999).
[33] UNMIK Reg. 2000/64, § 1.1 (Dec. 15, 2000).

Mission in Kosovo (EULEX) continues to provide judges for select cases within the Kosovo justice system.[34]

In Timor-Leste, the Council deployed the U.N. Transitional Administration in East Timor ("UNTAET"), a peacekeeping operation organized to exercise Timorese legislative and executive authority, including the administration of justice, during the fledgling country's transition to self-government.[35] UNTAET established a system of Special Panels for Serious Crimes within the Dili District Court with exclusive and universal jurisdiction over serious criminal offenses, including genocide, war crimes, crimes against humanity, murder, sexual offenses, and torture.[36] UNTAET administrators appointed a mix of international and Timorese judges, with the former making up a majority of each panel.[37] This Regulation also incorporated the international crimes of genocide, war crimes, and crimes against humanity into Timorese law. In 2000, UNTAET created a Serious Crimes Unit, which was eventually housed in the public prosecutor's office, and a Defence Lawyers Unit, both of which were dominated by international staff.[38] Notwithstanding the United Nations' post-conflict management endeavors in Timor-Leste and Kosovo, the United Nations has not subsequently assumed such a comprehensive administrative role elsewhere. It is unlikely to do so for Syria.[39] So this route to justice is not a promising one.

In the persistent exercise of its veto of virtually any coercive measures involving Syria, Russia effectively foreclosed potential justice activity before the Security Council. It is worth revisiting, however, whether there may have been a time when Russia would have been willing to countenance interim steps towards accountability in Syria, before the current dynamic of Russian obduracy had fully set in within the Council and before Russia became directly involved in the conflict.[40] There may have been other proposals that could have made their way successfully through the Council, such as a resolution ordering the Assad government to "consent" to an *ad hoc* tribunal established by the General Assembly or the League of Arab States—an indirect route reminiscent of the STL's origins, as discussed below. To be sure, it seems unlikely that Russia would permit even this degree of coercive action against its Syrian ally, especially after being pushed to exercise its veto again and again in the Syrian context. That said, exploring interim steps earlier in the conflict may have allowed Russia a face-saving route out of its current corner and an opportunity to express support for accountability in a less confrontational manner. China, however, may not have followed Russia's lead in any such exercise. Although its own direct interests in Syria are minimal, China's resistance to such efforts is primarily ideological, based upon its firm fealty to the principles of state consent and non-intervention. Furthermore, many European states remained fixated on the ICC, so would not necessarily have thrown their weight behind an *ad hoc* tribunal. Given all the barriers to action within the Council identified above, it is necessary to look elsewhere within the U.N. organization to animate a new justice institution to ensure some measure of accountability for the crimes committed in Syria.

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[34] Report of the Secretary-General on the United Nations Interim Mission in Kosovo, U.N. Doc. S/2018/76, 11 (Jan. 31, 2018).

[35] S.C. Res. 1272, ¶ 1, U.N. Doc. S/RES/1272 (Oct. 25, 1999).

[36] *See* Caitlin Reiger & Marieke Wierda, *The Serious Crime Process in Timor-Leste: In Retrospect*, INT'L CTR. FOR TRANSITIONAL JUSTICE 8 (Mar. 2006).

[37] UNTAET Reg. No. 2000/15, U.N. Doc. UNTAET/REG/2000/15, at ¶ 22.1, ¶ 23.1 (June 6, 2000).

[38] UNTAET Reg. No. 2000/11, U.N. Doc. UNTAET/REG/2000/11, at ¶ 9.5 (Mar. 6, 2000).

[39] DANIEL JACOB, JUSTICE AND FOREIGN RULE: ON INTERNATIONAL TRANSITIONAL ADMINISTRATION (2014).

[40] *See Russia Backs Future Syria War Crimes Probe*, AL JAZEERA, Apr. 12, 2013; Mark Kersten, *Searching in Vain: Perfect Justice in Syria*, JUSTICE IN CONFLICT, Nov. 10, 2013.

Agreement With The United Nations

Although the ICTY and ICTR owe their provenance to the Security Council, subsequent *ad hoc* tribunals—bearing various indicia of hybridity—in Sierra Leone and Cambodia were created by way of an agreement between the United Nations and the target state, often with a nudge from the Council. Towards the end of the brutal civil war in Sierra Leone, the Security Council requested that the U.N. Secretary-General negotiate an agreement with the Government of Sierra Leone to create what became the Special Court for Sierra Leone ("SCSL").[41] By virtue of the agreement in question,[42] the SCSL was conceived as a stand-alone international tribunal, fully separate from the domestic legal order.[43] By contrast, though the Extraordinary Chambers in the Courts of Cambodia ("ECCC") have their origins in a similar bilateral treaty between Cambodia and the United Nations, the final result was a domestic tribunal with pervasive international elements, including the incorporation of international criminal law, the provision of technical assistance and staff provided through the United Nations Assistance to the Khmer Rouge Trial ("UNAKRT"), and a complex (and not to be repeated) dual staffing structure.[44] This treaty was the work of the U.N. Secretary-General and General Assembly, who at times found themselves at odds with each other on the best path forward.[45]

This bilateral treaty route is not presently an option for Syria given that the Assad regime would never consent to such an enterprise. Although many states acknowledged the Syrian National Council (SNC) and then the National Coalition for Syrian Revolutionary and Opposition Forces (SOC) as "a", and then "the", legitimate representatives of the Syrian people,[46] these organizations never cohered sufficiently to offer a genuine interlocutor for a justice agenda.[47] Without a credible and united Syrian opposition—enjoying the recognition of the international community as the legitimate representative of the Syrian people and exercising some measure of consolidated control over liberated areas—it is difficult to identify an alternative Syrian entity that could offer its consent to such an exercise. As such, any *ad hoc* tribunal dedicated to Syria would have to be created without Syrian consent, at least in the immediate term. Some options suggest themselves.

Action by the General Assembly

The General Assembly has a long history of establishing commissions of inquiry and other fact-finding bodies, most recently (but not exclusively) by way of the Human Rights Council, itself

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[41] S.C. Res. 1315, ¶ 1, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

[42] Agreement Between the United Nations and The Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Sierra Leone-U.N. Jan. 16, 2002, 2178 U.N.T.S. 137 [hereinafter *SCSL Statute*].

[43] Prosecutor v. Morris Kallon et al., Case No. SCSL–2004–15–AR72(E), Decision on Constitutionality and Lack of Jurisdiction, ¶¶ 49-52 (Mar. 13, 2004).

[44] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Cambodia-UN, June 6, 2003, 2329 U.N.T.S. 117.

[45] *See* Peter J. Hammer & Tara Urs, *The Elusive Face of Cambodian Justice*, *in* BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 27-29 (Jaya Ramji & Beth Van Schaack eds., 2005) (discussing of the many twists and turns of these negotiations).

[46] *See* Stefan Talmon, *Recognition of Opposition Groups as the Legitimate Representative of a People*, 12(2) CHINESE J. INT'L L. 219 (2013).

[47] Members of the opposition did form a Syrian Commission on Transitional Justice headed by Dr. Radwan Ziadeh. *Ziadeh Named Head of Syrian Commission on Transitional Justice*, Syrian Center for Political and Strategic Studies, http://scpss.org/en/?p=1326.

a subsidiary body of the General Assembly.[48] The Assembly has also been intimately involved in the creation of prior *ad hoc* tribunals, as discussed, but always with the participation and consent of the target state.[49] Nonetheless, there has been speculation that a super-majority of the Assembly could circumvent the Security Council's paralysis and create an *ad hoc* tribunal devoted to the Syrian conflict.[50] Overcoming perennial collective action obstacles in the Assembly would be aided by the fact that Russia finds itself increasingly isolated there in light of its steadfast support for the Assad regime and other objectionable behavior.[51] In addition, the General Assembly is progressively more willing to urge Security Council action and to criticize the P-5 for its failures on the accountability front when there is broad support for it among member states.[52] Although creating such a would-be tribunal would break new ground, it is within the realm of the possible.

This avenue to justice has been proposed with greater frequency for a number of situations beset by the commission of international crimes. These include circumstances that fall outside the Security Council's accepted jurisdiction (e.g., accountability for historical crimes committed during the Khmer Rouge era in Cambodia)[53] or that have triggered resistance on the part of one or another member the P-5 (such as violence in Gaza[54] and North Korea,[55] or the 2014 downing of Malaysian Airlines Flight MH17).[56] Indeed, the U.N. Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (DPRK) recently recommended this route in light of the widespread and systematic crimes against humanity in North Korea, although it offered little in the way of concrete details for how this might be effectuated. In support, it cited the international community's Responsibility to Protect and the likelihood that China would veto any coercive action by the Council directed toward North Korea, its important, but at times exasperating, trading partner.[57]

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[48] *See* Office of the United Nations High Commissioner for Human Rights (OHCHR), International Commissions of Inquiry, Commissions on Human Rights, Fact-Finding Missions and other Investigations, https://www.ohchr.org/EN/HRBodies/HRC/Pages/COIs.aspx. The Commission of Inquiry on the Reported Massacres in Mozambique was established directly by the General Assembly. G.A. Res. 3114, ¶ 1, U.N. Doc. A/RES/3114 (XXVIII) (Dec. 12, 1973).

[49] *See* Beth Van Schaack, *The General Assembly & Accountability for International Crimes*, JUST SECURITY (Feb. 27, 2017).

[50] For example, Kenneth Roth, Executive Director of Human Rights Watch, advocated this approach for Syria. Kenneth Roth (@KenRoth), TWITTER, https://twitter.com/KenRoth/status/468323433135505408.

[51] Ariel Cohen, *Moscow's Veto of MH17 Tribunal: A Blunder of Potentially Huge Proportions*, ATLANTIC COUNCIL (Aug. 5, 2015).

[52] *See* Michael Ramsden & Tomas Hamilton, *Uniting Against Impunity: The UN General Assembly as a Catalyst for Action at the ICC*, 66 INT'L & COMP. L. Q. 893, 896 (2017) (noting examples of the General Assembly urging action before the Council).

[53] Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, U.N. Doc. A/53/850, ¶ 146 (Mar. 16, 1999) (suggesting that the General Assembly could create a tribunal under its Chapter IV recommendatory powers).

[54] Report of the United Nations Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, ¶ 1971 (Sept. 25, 2009) ("The General Assembly may consider whether additional action within its powers is required in the interests of justice, including under its resolution 377 (V) on uniting for peace"). *See* Afua Hirsch, *Israel May Face Court Ruling on Legality of Gaza Conflict*, THE GUARDIAN, Jan. 13, 2009.

[55] HUMAN RIGHTS WATCH, NORTH KOREA: UN SHOULD ACT ON ATROCITIES REPORT (Feb. 17, 2014).

[56] Thomas Escritt, *After Russian U.N. Veto, Countries Seek Court for Flight MH17 Prosecutions*, REUTERS, July 30, 2015. The working theory is that the plane was hit by a Russian-made missile wielded by Russian-backed Ukrainian separatists. *MH17 Missile Owned by Russian Brigade, Investigators Say*, BBC, May 24, 2018.

[57] Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, U.N. Doc. A/HRC/25/CRP.1, ¶¶ 1200-01 (Feb. 7, 2014).

The U.N. Charter offers no immediately obvious mandate for such action by the Assembly.[58] When faced with a threat to international peace and security, the Council's powers are much more plenary, coercive (vis-à-vis the target entity), and mandatory (vis-à-vis member states) than the General Assembly's.[59] Dedicated articles empower the Assembly to "discuss" any matter within the scope of the Charter, "make recommendations" to members of the United Nations or the Security Council regarding such matters (but without legislative effect), and "initiate studies" to promote international cooperation.[60] Article 13 in particular empowers the Assembly to "assist[] in the realization of human rights and fundamental freedoms for all without distinction."[61] The Assembly lacks an equivalent to the Council's Article 41 inviting it to implement measures in situations under its consideration. Indeed, Article 12 indicates that while the Security Council is "exercising … the functions assigned to it" with respect to "any dispute or situation," the General Assembly is to refrain from acting, absent a request from the Security Council.[62]

Subsequent state practice, however, has significantly weakened the command of this textual division of labor. In this regard, the International Court of Justice (ICJ) has noted that

> there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security. … The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12.[63]

In any case, the recurrence of the veto arguably implies that the Council is not, in fact, exercising its assigned functions (assuming, of course, that these include justice and accountability). As such, that the Council has had Syria on its agenda for years is no immediate bar to the General Assembly acting, as has been seen with the establishment of the International, Impartial and Independent Mechanism for Syria (IIIM). Indeed, Syria and South Africa raised Article 12 during the deliberations around the establishment of the IIIM. The Chair determined that Article 12, as currently interpreted by the Office of Legal Affairs and the ICJ, did not preclude consideration of the proposal. Syria did not formally challenge the ruling, although its delegate was fuming and accused the lawyers of "cheating."[64]

In addition, although the General Assembly has been empowered with a recommendatory role only, it has over the years issued resolutions that have been treated as definitive by other U.N. organs and external actors, particularly when pariah states are involved or there is a firm international consensus around a course of conduct. These include resolutions containing within

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[58] *See* Derek Jinks, *Does the U.N. General Assembly have the Authority to Establish an International Criminal Tribunal for Syria?*, JUST SECURITY (May 22, 2014) (arguing that the legal support for such a proposal is minimal).
[59] *Tadić*, *supra* note 8, at ¶ 31.
[60] *See* U.N. Charter arts. 10-11, 13-14.
[61] U.N. Charter art. 13.
[62] *Id*. at art. 12.
[63] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶¶ 27-28 (July 9).
[64] *See* U.N. GAOR, 71st Sess., 66th plen. mtg., at 21-29, U.N. Doc. A/71/PV.66 (Dec. 21, 2016) (setting forth colloquy).

them determinations of territorial claims[65] and statehood,[66] enunciating norms,[67] articulating the scope and applicability of treaties,[68] ending South Africa's mandate over Namibia,[69] or identifying the legal effects of state action.[70] Particularly germane, the ICC Prosecutor considered the General Assembly's resolution on Palestinian statehood to be determinative of the question of Palestine's ability to ratify the Rome Statute.[71] The acceptance of such pronouncements and their external effects imply that the Assembly enjoys latent powers that go beyond the merely recommendatory. It remains uncertain how far these powers extend, however.

The most enabling U.N. Charter provision is found in Article 22, which envisions the General Assembly establishing "subsidiary organs deemed necessary for the performance of its functions."[72] On the strength of this provision, the General Assembly stood up an internal administrative tribunal to adjudicate U.N. employment claims. In an Advisory Opinion seeking guidance on whether the tribunal was capable of binding the U.N. Organization, the ICJ determined that the General Assembly had created a judicial entity as opposed to a merely advisory body.[73] The ICJ noted that this was the case even though "the General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ."[74] While the ICJ found no express authorization in the Charter for the Assembly to create such a tribunal, it indicated that the power was conferred by necessary implication given that there was an obvious need to resolve internal organizational matters, such as disputes between staff members and the United Nations.[75] This was particularly so given presumed jurisdictional immunities enjoyed by the Organization in

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[65] G.A. Res. 63/307/, ¶ 1, U.N. Doc. A/RES/63/307 (Sept. 30, 2009) (affirming that South Ossetia is part of Georgia); Situation in Georgia, Request for an Authorization Pursuant to Article 15, Doc. No. ICC-01/15/4/Corr2 (Nov. 17, 2015) (authorizing an investigation into crimes committed within South Ossetia on the basis of Georgia's ICC membership). *See* Ramsden & Hamilton, *supra* note 52, at 904-5 (citing additional examples).
[66] *See* G.A. Res. 3067 (XXVIII), ¶ 7, U.N. Doc. A/RES/3067 (Nov. 16, 1973) (directing the Secretary-General to invite Guinea-Bissau and Viet Nam to participate in a treaty conference); G.A. Res. 67/19, ¶ 2, U.N. Doc. A/RES/67/19 (Dec. 4, 2012) (according Palestine "non-member observer State status in the United Nations"). *See also* Ramsden & Hamilton, *supra* note 52, at 903 n.67 (citing statehood resolutions); *id*. at 910-11 (citing voluntary sanctions).
[67] *See* Marko D. Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUROP. J. INT'L L. 879, 896 (2005).
[68] *See* G.A. Res. 70/88, ¶ 1, U.N. Doc. A/RES/70/88 (Dec. 9, 2015) (noting that the Geneva Conventions are applicable in the Occupied Palestinian Territories).
[69] G.A. Res. 2145, ¶ 4, U.N. Doc. A/RES/2145 (Oct. 27, 1966) ("Decides that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations").
[70] G.A. Res. 68/262, ¶ 6, U.N. Doc. A/RES/68/262 (Mar. 27, 2014) (calling upon states not to recognize the attempted annexation of Crimea by Russia).
[71] *See The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine*, ICC-OTP-20150116-PR1083 (Jan. 16, 2015).
[72] U.N. Charter art. 22.
[73] *See Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion,* 1954 I.C.J. Rep. 47, 53 (July 13) ("the Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions.").
[74] *Id*. at 56.
[75] *Id*. at 56-57. *See also* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, 182 (April 11) ("Under international law, the [U.N.] Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.").

national courts and the preoccupation of the United Nations with the promotion of "freedom and justice"—principles that should extend to its own staff.[76]

In confirming the legality of the tribunal, the ICJ noted that the Assembly was not delegating one of its own functions[77] but rather selecting the modality of a tribunal to exercise an inherent power under the Charter to regulate staff relations.[78] In other words, Article 22 enables the General Assembly to exercise pre-existing authorities through organizational means of its choosing. The ICTY invoked similar reasoning when Tadić challenged the ability of the Security Council—which has not been expressly granted any adjudicative powers by the Charter either—to establish a war crimes tribunal by way of Chapter VII. The Appeals Chamber thus concluded: "The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia."[79]

The Assembly could presumably create a judicial body devoted to Syria as a subsidiary organ into which the IIIM could be folded. Obviously, the administrative tribunal precedent is an imperfect analogy to a criminal tribunal dedicated to adjudicating crimes committed within the territory of a member state, particularly a non-consenting one. The argument that such a body would be authorized "by necessary implication" is quite a stretch when compared to the in-house labor tribunal blessed by the ICJ. Increasingly, however, the role of the United Nations in promoting human rights and justice has taken on greater prominence and urgency within the U.N. system. Besides the express Charter reference to human rights (*inter alia*) in Article 13, this burgeoning emphasis is demonstrated by the Responsibility to Protect doctrine;[80] the 2005 World Summit Outcome Document;[81] the Secretary-General's "Human Rights up Front"[82] action plan; the expanding operations of the Third Committee, which is devoted to humanitarian affairs and human rights; soft and hard law obligations aimed at ending impunity;[83] and Sustainable Development Goal #16, which strives to improve access to justice for the world's people.[84] In addition, at a 2012 High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, heads of state and government committed themselves to

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[76] *Id*. at 57. Article 105(1) of the U.N. Charter indicates that "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." U.N. Charter art. 105.

[77] *Bruno Simma, et al., The Charter of the United Nations: A Commentary* 427 (2nd ed. 2002) (arguing that the Assembly cannot create a body exercising powers it does not itself enjoy).

[78] *Effect of Awards, supra* note 73, at 61.

[79] *Tadić*, *supra* note 8, ¶ 38.

[80] *See* U.N. Office on Genocide Prevention and the Responsibility to Protect, http://www.un.org/en/genocideprevention/.

[81] G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

[82] Ekkehard Strauss, *The UN Secretary-General's Human Rights Up Front Initiative and the Prevention of Genocide: Impact, Potential, Limitations*, 11 Genocide Studies & Prevention 48 (2018). The Human Rights Up Front initiative is an internal action plan to introduce cultural and operational changes within the United Nations to enable early action in the face of potential atrocities.

[83] *See, e.g.*, S.C. Res. 2150, ¶ 1, U.N. Doc. S/RES/2150 (Apr. 16, 2014) (calling on all states to take measures to prevent and respond to atrocity crimes).

[84] Sustainable Development Goals Knowledge Platform, *Sustainable Development Goal 16*, https://sustainabledevelopment.un.org/sdg16.

> ensuring that impunity is not tolerated for genocide, war crimes, crimes against humanity and for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law.[85]

Collectively, these initiatives elevate human rights and justice among the purposes and principles of the United Nations.[86] The General Assembly's increased activity around human rights—as crucial "functions" of the body—might justify innovative action in the service of justice to respond to the twin phenomena of widespread violations of international law in Syria and Security Council political paralysis.[87]

An additional modality for General Assembly action may be found in the extraordinary Uniting For Peace Resolution,[88] which provides that in urgent situations in which the Security Council has failed to act to maintain international peace and security due to the exercise of the veto by one of the P-5, the Assembly shall consider the matter immediately.[89] The heart of the Resolution states:

> if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.[90]

Resolution 377 contemplates "possibilities of observation which would ascertain the facts and expose aggressors; for the existence of armed forces which could be used collectively; and for the possibility of timely recommendation by the General Assembly to Members of the United Nations for collective action."[91] The Assembly can consider the matter in an emergency special session (ESS), which can be called through a procedural vote of the Council (which cannot be blocked by

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[85] G.A. Res. 67/1, ¶ 22, U.N. Doc. A/RES/67/1 (Nov. 30, 2012).
[86] U.N. Charter art. 1(3) (identifying the promotion and encouragement of "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" as fundamental purposes of the organization).
[87] Thus, "when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization." Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. Rep. 151, 168 (July 20).
[88] G.A. Res. 377A, U.N. Doc. A/RES/377A (Nov. 3, 1950). The "Uniting for Peace" resolution was adopted by member states (52 votes in favor, 5 against, and 2 abstentions) at the initiative of the United States in the early months of the Korean War. It laid the groundwork for U.N. operations in Korea—arguably the most robust application of the Uniting for Peace resolution yet. *See* Christina Binder, *Uniting For Peace Resolution (1950)*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (May 2017).
[89] *See* Michael Ramsden, *"Uniting for Peace" in the Age of International Justice*, 42 YALE J. INT'L L. ONLINE 1 (2016) (suggesting the utility of Resolution 377 in establishing justice mechanisms).
[90] A/RES/377A, *supra* note 88, ¶ 1.
[91] *Id*. at pmbl.

the veto but must garner nine votes to pass) or at the request of a majority of U.N. members.[92] That said, because the General Assembly now meets year-round, there is no need to call an ESS anymore except for symbolic reasons.[93] The theory is that action under the Uniting for Peace resolution does not encroach on the Council's exclusive power to impose coercive measures under Chapter VII, because the Assembly still only makes recommendations to member states.[94] Whether or not such a General Assembly resolution offers a legal justification to act or would preclude wrongfulness on the part of states that implement its recommendations remains an open legal question.[95]

The Uniting for Peace resolution has been invoked a number of times by members of the Security Council (to outflank a member wielding its veto) or increasingly by other member states (to bypass the Security Council altogether and promote issues of common concern).[96] In total, ten ESSs have been called over the years,[97] the most recent of which involves the resumption of the 10th Emergency Session and U.S. President Donald Trump's decision to move the U.S. embassy to Jerusalem.[98] Previous quasi-coercive actions pursuant to the Uniting for Peace resolution have resulted in the General Assembly calling on member states to impose so-called "voluntary sanctions" on South Africa for its acts of aggression in and occupation of Namibia and to provide military assistance to freedom fighters;[99] establishing a commission of inquiry to consider foreign intervention in Hungary;[100] referring a matter to the ICJ (on the legal consequences of Israel's construction of a wall in Occupied Palestinian Territory);[101] and establishing, sustaining, or financing peacekeeping forces (albeit with the erstwhile consent of the territorial state).[102] Some

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[92] *See* Parliamentarians for Global Action, *The PGA Handbook: A Practical Guide to the United Nations General Assembly* 14-15 (2011).
[93] *See* Larry D. Johnson, *"Uniting for Peace": Does It Still Serve Any Useful Purpose?*, AJIL UNBOUND (July 15, 2014).
[94] *Id*.
[95] Stefan Talmon, *The Legalizing and Legitimating Function of UN General Assembly Resolutions*, 108 AJIL UNBOUND 123 (July 18, 2014).
[96] *See* Security Council Report, *Security Council Deadlocks and Uniting for Peace: An Abridged History* (Oct. 2013). *See generally* Dominik Zaum, *The Security Council, the General Assembly, and War: The Uniting for Peace Resolution*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, 154 (Vaughan Lowe et al. eds., 2008) (recounting origins and General Assembly practice).
[97] General Assembly, Emergency Special Sessions, http://www.un.org/en/ga/sessions/emergency.shtml. *See also* Resolutions adopted by the General Assembly—Emergency Special Sessions, http://research.un.org/en/docs/ga/quick/emergency.
[98] *UN General Assembly Votes to Condemn Trump's Jerusalem Recognition*, MIDDLE EAST MONITOR (Dec. 21, 2016).
[99] G.A. Res. ES-8/2, ¶¶ 4, 12, U.N. Doc. A/RES/ES-8/2, Question of Namibia (Sept. 14, 1981) (condemning South Africa's illegal occupation in Namibia and calling on the Security Council to act). The General Assembly has also recommended voluntary sanctions against South Africa without invoking the Uniting for Peace resolution. *See* G.A. Res. 41/35 A, ¶ 13, U.N. Doc. A/RES/41/35 A (Nov. 10, 1986) (requesting all states to expand sanctions against South Africa). *See also* G.A. Res. 2107 (XX), ¶ 7, U.N. Doc. No. A/RES/2107 (Dec. 21, 1965) (calling on states to impose sanctions on Portugal).
[100] *See* G.A. Res. 1004 (ES-II), ¶¶ 1, 2, 4, U.N. Doc. A/RES/1004 (ES-II) (Nov. 4, 1956) (calling on the Soviet Union to desist its interventions in Hungary and requesting the Secretary-General to investigate the situation).
[101] *See* G.A. Res. ES-10/14, U.N. Doc. A/RES/ES-10/14 (Dec. 12, 2003); Press Release, *General Assembly Adopts Text Requesting International Court of Justice to Issue Advisory Opinion on West Bank Separation Wall*, GA/10216 (Dec. 8, 2003). This ESS was convened by Qatar.
[102] A United Nations Middle East Emergency Force (UNEF) and United Nations Operation in the Congo (ONUC) were both created or sustained by way of the Uniting for Peace Resolution. In both cases, an ESS was called by a Security Council member in the face of the then-Soviet Union's veto. *See* G.A. Res. 1000, ¶ 1, U.N. Doc.

of these initiatives piggybacked off prior engagement by the Council, which could not pursue further action.[103] One of these was the U.N. Operation in the Congo (UNOC), which the General Assembly confirmed was the only legitimate international presence in the Congo.[104] In an Advisory Opinion, the ICJ determined that the creation and funding of a peacekeeping force by the General Assembly was not *ultra vires* since it furthered the purposes of the United Nations; in its estimation, to rule otherwise would leave the Organization "impotent in the face of an emergency situation."[105] The United Kingdom also considered invoking the United for Peace resolution to seek a legal basis for NATO's operation in Kosovo in 1998. It ultimately determined, however, that the Assembly was unlikely to bless the intervention without the target state's consent.[106]

In recent years, Resolution 377 has begun to be invoked in connection with justice deadlocks within the Council. For example, the Human Rights Council's Commission of Inquiry (COI) dedicated to the DPRK recommended recourse to the resolution in the event that action through the Security Council remained blocked. The DPRK COI, which was tasked with identifying means by which responsible individuals could be rendered accountable for their criminal conduct, thus recommended that the Assembly invoke its "residual powers" under the Uniting for Peace resolution and the "combined sovereign powers of all individual Member States to try perpetrators of crimes against humanity on the basis of the principle of universal jurisdiction."[107] Even the League of Arab States has noted the potential relevance of the Uniting for Peace resolution to promote accountability, albeit in connection with the perennially polarizing Israel-Palestine conflict and Palestine's *ad hoc* acceptance of ICC jurisdiction.[108] In all of these cases, the breaches in question are of *erga omnes* obligations and involve pariah states or divisive situations, which strengthens plenary action by the Assembly. Besides these efforts above, the Assembly has never been formally called upon to unite for peace to establish a judicial or quasi-judicial body,[109] no less a criminal tribunal. When it came to Syria, concerned states—with Canada in the lead—and civil society actors did attempt to invoke this concept on humanitarian grounds around the time of the Aleppo siege.[110] This effort fizzled as attention shifted to the IIIM proposal.

Any such action by the Assembly would have to enjoy a high degree of consensus; Article 18 of the U.N. Charter indicates when "important questions"—deemed to include those involving international peace and security—are at issue, Assembly recommendations require the support of

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A/RES/1000 (Nov. 5, 1956) (establishing UNEF); G.A. Res. 1474 (ES-IV), ¶¶ 2, 5, U.N. Doc. A/RES/1474 (ES-IV) (Sept. 20, 1960) (requesting the Secretary-General to enable ONUC to assist the Congo in the restoration of law and order and calling upon states to refrain from intervention in the Congo). In both cases, and against the wishes of the Soviet Union, the General Assembly apportioned the expenses between member states.

[103] Ramsden & Hamilton, *supra* note 52, at 912.

[104] *See* A/RES/1474, *supra* note 102.

[105] Certain Expenses, *supra* note 87, at 167.

[106] Zaum, *supra* note 96, at 165-66.

[107] DPRK COI Report, *supra* note 57, at ¶ 1201.

[108] League of Arab States, Report of the Independent Fact-Finding Committee on Gaza: No Safe Place, ¶ 610 (Apr. 30, 2009) (recommending that the Arab League "request the General Assembly to endorse Palestine's declaration under Article 12(3) of the Rome Statute in a meeting convened under the Tenth Emergency Special Session").

[109] *But see* Michael Ramsden, *Uniting for MH17*, 7 ASIAN J. INT'L L. 337 (2017) (arguing that the General Assembly could create a tribunal under Resolution 377).

[110] *See* HUMAN RIGHTS WATCH, UNITING FOR PEACE IN SYRIA: GLOBAL CIVIL SOCIETY APPEAL TO UN MEMBER STATES (Dec. 1, 2016); Melissa Kent, *Canada Leads New Push on Syria Crisis at UN as 'Frustration' over Security Council Deadlock Grows*, CBC (Oct. 13, 2016).

a two-thirds majority of members present and voting (which works out to 129 states if attendance is perfect).[111] The Assad regime has earned widespread condemnation, and there was a high degree of cross-regional support shown for the IIIM. Indeed, the resolution to establish the IIIM only garnered 15 "no" votes from a mostly rogue's gallery of states.[112] That said, fifty-two states abstained. As such, this two-thirds threshold, if required, could be within reach with appropriate advocacy.

Ideally, any General Assembly tribunal would be funded from U.N.-assessed contributions, which are within the ambit of General Assembly to allocate. If the IIIM is any guide, however, funding would likely come from voluntary contributions by supportive member states, at least at first. It goes without saying that this is an imperfect way to fund a justice institution, but one that has been used extensively for previous hybrid tribunals that do not enjoy Security Council provenance.[113] In these other institutions, donor fatigue has threatened institutional sustainability and required exhaustive efforts in outreach to ensure adequate funding.[114] To the extent that a host state is willing to take on the institutional costs, this would lessen the amount of external fundraising that would be necessary. Any agreement establishing such a tribunal should include concrete funding commitments and other guarantees of support (such as in-kind donations and seconded personnel, etc.).

Although the General Assembly could undertake this project, the imagined tribunal would likely lack the compulsory powers with which a subsidiary body of the Security Council could be imbued and could only operate on the basis of voluntary state cooperation. As such, any pronouncement by the envisioned court would not be automatically binding on member states absent an upgrade by the Security Council acting under Chapter VII.[115] That said, there would be nothing stopping member states from voluntarily cooperating with or otherwise assisting with the work of such an institution. So, the putative tribunal could build upon the IIIM's efforts gathering and preserving evidence by inviting witness testimony, issuing shadow indictments, holding hearings, and even potentially issuing notional or advisory decisions. It could recommend that national authorities detain or indict particular individuals or extradite them to willing judicial fora. Indeed, it could even conceivably commence full-scale prosecutions and issue notional judgments. Without having the ability to detain suspects, these proceedings would likely proceed *in absentia* unless the defendants were in the custody of a willing state.[116] These latter pronouncements would

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[111] U.N. Charter art. 18(2) ("Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting."). *See also* U.N. Functions and Powers of the General Assembly, http://www.un.org/ga/about/background.shtml. According to Rule 86 of the Rules of the General Assembly, "members present and voting" are defined as "members casting an affirmative or negative vote," which excludes states that abstain or that do not otherwise participate. Rules of Procedure of the General Assembly U.N. Doc. A/520/Rev.18 (Feb. 21, 2017).

[112] The following states voted no: Algeria, Belarus, Bolivia (Plurinational State of), Burundi, China, Cuba, Democratic People's Republic of Korea, Iran (Islamic Republic of), Kyrgyzstan, Nicaragua, Russian Federation, South Sudan, Syrian Arab Republic, Venezuela (Bolivarian Republic of), and Zimbabwe. *See* U.N. GAOR, 71st Sess., 66th plen. mtg., at 30, U.N. Doc. A/71/PV.66 (Dec. 21, 2016) (setting forth the voting record).

[113] *See* Rupert Skilbeck, *Funding Justice: The Price of War Crimes Trials*, 15(3) HUM. RTS BRIEF 6 (2008).

[114] Stuart K. Ford, *How Leadership in International Criminal Law is Shifting from the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts*, 55 ST. LOUIS U. L. J. 953 (2011).

[115] *See* Öberg, *supra* note 67 (discussing limited areas where General Assembly resolutions are binding, e.g., budgetary matters, UN membership, etc.).

[116] International law does not prohibit *in absentia* proceedings so long as certain procedural protections are in place. *See* Eduardo Demeterio Crespo & Ágata María Sanz Hermida, In Absentia *Proceedings in the Framework of a*

not necessarily have the force of international law, but they could be subsequently ratified by national courts. States with concurrent jurisdiction over the events in question could offer to undertake the process of transforming the tribunal's recommended judgment and sentence into an enforceable legal instrument that could be executed by obliging states, akin to the summary proceedings national courts employ to confirm arbitral awards.[117] The General Assembly could tap into its plenary status to help coordinate such efforts under Article 11(1) of the U.N. Charter.[118]

The proposed tribunal could later have its work "ratified" by the Council if the geopolitical winds shift course, a sequencing that has occurred in other contexts. For example, during the brutal Liberian civil war, the Economic Community of West African States (ECOWAS) fielded a peacekeeping force—the Economic Community Cease-Fire Monitoring Group (ECOMOG)—which intervened in Liberia without Security Council approval.[119] Later, the Council passed several resolutions effectively blessing the intervention.[120] The Special Tribunal for Lebanon offers another interesting precedent in this regard.[121] The Council did not formerly create the STL, but it inspired its creation by other U.N. bodies. Specifically, Security Council Resolution 1664 called for the United Nations and Lebanon to negotiate an agreement to bring an international tribunal into fruition.[122] Once finalized, the agreement was never ratified by Lebanon due to intense domestic opposition among some political factions. In light of this political deadlock, supporters within the Lebanese government asked the United Nations for assistance in operationalizing the tribunal.[123] To this end, the Security Council issued Resolution 1757, which brought the bilateral agreement and the proposed STL Statute into force by way of Chapter VII, effectively bypassing the domestic constitutional order.[124] As it turned out, activating the STL proved to be a lighter political lift than creating it *ab initio* within the Council. In the same way, if

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Human Rights-Oriented Criminal Law, *in* PERSONAL PARTICIPATION IN CRIMINAL PROCEEDINGS 559 (Serena Quattrocolo & Stefano Ruggeri eds. 2019).

[117] *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, TIAS No. 6997.

[118] U.N. Charter art. 11(1) ("The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security … and may make recommendations with regard to such principles to the Members or to the Security Council or to both.").

[119] *See* Human Rights Watch, Waging War to Keep the Peace: *The ECOMOG Intervention and Human Rights* (June 1993), https://www.hrw.org/reports/1993/liberia/.

[120] *See* S.C. Res. 788, pmbl, U.N. Doc. S/RES/788 (Nov. 19, 1992) ("Welcoming the continued commitment of the Economic Community of West African States (ECOWAS) to and the efforts towards a peaceful resolution of the Liberian conflict"); S.C. Res. 813, ¶ 2, U.N. Doc. S/RES/813 (Mar. 26, 1993) (commending "ECOWAS for its efforts to restore peace, security and stability in Liberia").

[121] Global Policy Forum, *Special Tribunal for Lebanon*, https://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts/special-tribunal-for-lebanon.html (discussing Syria's role in inspiring the creation of the STL). Notwithstanding the fact that the STL is effectively targeting Syrian involvement in Lebanese affairs, Russia continues to generally support the STL. *See Russia Reiterates Support to STL, Lashes Out on 'Politicizing' Tribunal*, NAHARNET NEWSDESK, Oct. 19, 2011, http://www.naharnet.com/stories/en/18000; Ministry of Foreign Affairs of the Russian Federation, On the Special Tribunal for Lebanon (July 1, 2011), http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/201334.

[122] S.C. Res. 1664, ¶ 1, U.N. Doc. S/RES/1664 (Mar. 29, 2006).

[123] Jamal Saidi, *Lebanon's Siniora Asks U.N to Set Up Hariri Court*, REUTERS, May 14, 2007, http://www.reuters.com/article/worldNews/idUSL1420555620070514.

[124] S.C. Res. 1757, ¶ 1, U.N. Doc. S/RES/1757 (May 30, 2007). *See* Van Schaack, *supra* note 4, at 113-15 (recounting process).

the Assembly were to proceed, the Council could subsequently bless the entire institution or render individual decisions binding by later adoption.[125]

With the establishment of the IIIM, the General Assembly has moved at least partway down this path. This mechanism is an important "stop-gap measure" to procure and secure evidence until a court can exercise jurisdiction.[126] The IIIM could conceivably be "upgraded" by the General Assembly, or even by the Security Council, to a stand-alone *ad hoc* court. In the alternative, the IIIM could eventually be inserted into a tribunal framework if one is ever established through whatever means.

The Arab League

Besides Western states, which have consistently broadcast unfocused calls for accountability or supported an ICC referral, the Arab League issued more consequential resolutions against the Assad regime. After an initial period in which the Arab League gave space for President Assad's calls for a "national dialogue" to resonate, the League eventually soured on the regime. In an unprecedented move, it suspended Syria's membership on November 12, 2011.[127] It later supported the imposition of peacekeepers in Syria,[128] imposed sanctions,[129] called for accountability,[130] and advocated other forms of coercive action—all drawing the ire of Syria. To date, however, this regional rhetoric around accountability has not translated into concrete institution building. In any case, relations in the region are normalizing and it appears that the League is ready to readmit Syria.[131] Prior to and even after this apparent *rapprochement*, there is nothing preventing the League from establishing a regional tribunal. Regional courts have the potential to exert greater influence given their geopolitical proximity to the events in question, the economic interdependence of neighboring states, and their ability to respond more nimbly to unfolding events.[132]

The most recent, though still somewhat oblique, precedent for this route is the tribunal established to prosecute Hissène Habré for crimes committed while he was President of

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[125] Cambodia Group of Experts Report, *supra* note 52, at ¶ 145 ("even if a court were created under Chapter VI, the Council could nonetheless decide to make individual decisions under Chapter VII on specific issues where the consent of the States concerned was not forthcoming, and enforce them accordingly."). *See, e.g.*, S.C. Res. 748, ¶ 1, U.N. Doc. S/RES/748 (Mar. 31, 1992) (upgrading Security Council Resolution 731 and rendering it binding on Libya).
[126] DPRK COI Report, *supra* note 57, at ¶ 1200 (advocating a similar structure dedicated to North Korea).
[127] *See* T. Metzger, *The Arab League's Role in the Syrian Civil War*, 6(07) INQUIRIES JOURNAL/STUDENT PULSE (2014).
[128] *See* Matthias Vanhullebusch, *The Arab League and Military Operations: Prospects and Challenges in Syria*, 22 INT'L PEACEKEEPING 151 (2015).
[129] Neil MacFarquahar & Nada Bakri, *Isolating Syria: Arab League Imposes Broad Sanctions*, N.Y. TIMES (Nov. 27, 2011).
[130] In July 2012, the Arab League floated a draft resolution in the General Assembly condemning the violation of international criminal law on all sides and calling for accountability. *See* UN Report, *Arab League Draft Resolution on Syria in the General Assembly* (July 27, 2012), http://un-report.blogspot.com/2012/07/arab-league-draft-resolution-on-syria.html (stressing "again the importance of ensuring accountability and the need to end impunity and hold to account those responsible for human rights violations, including those violations that may amount to crimes against humanity").
[131] Bethan McKernan & Martin Chulov, *Arab League Set to Readmit Syria Eight years after Expulsion*, THE GUARDIAN, Dec. 26, 2018.
[132] *See generally* Firew Kebede Tiba, *Regional International Criminal Courts: An Idea Whose Time Has Come?*, 17 CARDOZO J. CONFLICT RESOL. 521 (2016).

Chad: the Extraordinary African Chambers (EAC) in Senegal.[133] The EAC owe their provenance to a 2012 agreement between the African Union (A.U.) and Senegal, where Habré had sought safe haven.[134] In entering into this arrangement, the African Union asked Senegal to prosecute Hissène Habré "on behalf of Africa."[135] The EAC demonstrate the flexibility of the hybrid court model.[136] Established under Senegalese law and within Senegal's judiciary, the Chambers are comprised of a mix of Senegalese and Pan-African judges. The United States, the European Union, the African Union, and a number of individual states supported the effort financially, which was a bargain at under $10 million.[137] The EAC operated with the acquiescence—if diffident—of Chad but not its formal consent. The EAC were largely devoted to prosecuting Habré, although indictments were issued against five other associated individuals who remain at large.[138] These latter defendants have no contacts at all with Senegal, other than Habré's presence there; as such, the EAC exercised an internationalized form of universal jurisdiction.[139] Given the A.U.'s involvement, the EAC has operationalized one of the core tenets of the A.U. Constitutive Act: a rejection of impunity.[140]

Relatedly, the Kosovo Specialist Chambers (KSC) also provide precedent for regional accountability efforts. The Specialist Chambers and Specialist Prosecutor's Office emerged from the Special Investigative Task Force (SITF) created and funded by the European Union. Ultimately, however, it took domestic legislation within Kosovo to establish the Chambers.[141] The KSC limits Kosovar participation (except as parties and witnesses) and also have the benefit of Security Council Resolution 1244 and its progeny, which largely render participation and cooperation mandatory.[142] Although technically part of the Kosovar judiciary, the KSC sit extraterritorially in The Hague for security reasons and to hinder political interference in their work.

Finally, still on the drawing board is the proposed African Court of Justice and Human Rights ("ACJHR").[143] Like the ICC, it will be the product of a multilateral treaty, albeit a regional one. By way of background, the African Charter on Human and Peoples' Rights (also known as

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[133] Statute of the Extraordinary African Chambers, https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers.

[134] Agreement Between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System, 52 I.L.M.1024 (2017). *See Hissène Habré: Senegal and AU Agree on Special Tribunal*, BBC, Aug. 23, 2012.

[135] African Union, Assembly/AU/Dec.127 (VII), Doc.Assembly/AU/3 (VII) (2006).

[136] *See* Mark Kersten & Kirsten Ainley, *Hybridization – A Spectrum of Creative Possibilities* (unpublished manuscript on file with the author).

[137] Human Rights Watch, *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal* (May 3, 2016), https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal#22 (listing funders).

[138] Thijs B. Bouwknegt, *Chad—Dakar: Habré Trial is Litmus Test for Pan-African Justice*, AFRICAN ARGUMENTS (June 1, 2015), http://africanarguments.org/2015/06/01/chad-dakar-habre-trial-is-litmus-test-for-pan-african-justice-by-thijs-b-bouwknegt/.

[139] Celeste Hicks, *Is Habré's Landmark Conviction a New Model for International Justice?*, WORLD POLITICS REVIEW (June 6, 2016).

[140] Afr. Union, Constitutive Act of the African Union, AU Assembly, 36th sess., art. 4(o) (July 11, 2000) [hereinafter AU Constitutive Act].

[141] *See* Law on Specialist Chambers and Specialist Prosecutor's Office, 05/L-053 (Aug. 3, 2015) (Kos.).

[142] S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

[143] *See generally* Chacha Bhoke Murungu, *Towards a Criminal Chamber in the African Court of Justice and Human Rights*, 9 J. INT'L CRIM. JUSTICE 1067 (2011); Max du Plessis & Nicole Fritz, *A (New) New Regional International Criminal Court for Africa?*, ILAWYER (Oct. 1, 2014) (discussing initiative).

the Banjul Charter),[144] the continent's omnibus human rights treaty, gave rise to the African Commission on Human and Peoples' Rights, a body analogous to the Inter-American Commission on Human Rights (but with weaker enforcement powers) that is dedicated to enforcing the Banjul Charter within AU member states. A 1998 Protocol to the Charter led to the creation of the African Court on Human and Peoples' Rights ("ACHPR") in 2004.[145] The Court (which can hear claims against those states parties that have accepted its jurisdiction) entertains petitions submitted by states parties, African intergovernmental organizations, NGOs, and individual citizens concerning the interpretation and application of the Banjul Charter or any other human rights treaty that has been ratified by the state concerned.[146] Meanwhile, the Constitutive Act of the AU[147] envisioned the creation of the African Court of Justice ("ACJ"), a forum to resolve disputes between AU member states that is roughly analogous to the European Court of Justice. Although the ACJ's Protocol entered into force, the Court itself did not come into existence because an intervening Protocol approved by the AU in 2008 envisioned that the ACJ would be merged with the ACHPR to create a bicameral African Court of Justice and Human Rights.[148]

In 2009, while this institution was awaiting activation, the AU Assembly of Heads of State and Government began considering the possibility of expanding the jurisdiction of the not-yet-formed African Court of Justice and Human Rights to include a third chamber with the power to assert penal jurisdiction over individuals accused of having committed international crimes, such as war crimes and crimes against humanity, and a number of transnational crimes, such as trafficking and corruption (among others).[149] This effort was motivated in part by animosity among some African leaders towards the ICC but it also reflects a genuine effort to expand African justice institutions. Some proposed crimes do not enjoy universal jurisdiction under international law, although they are frequently prosecuted pursuant to the protective principle of jurisdiction. Discussions, drafting, and negotiations ensued, and in 2012, a Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights was finalized (with the one contentious crime bracketed).[150] The Protocol awaits the necessary ratifications to enter into force.[151] If this occurs, the ACJHR will be a regional criminal court with the power to exercise jurisdiction over individuals so long as certain preconditions are met. These track the bases of domestic jurisdiction discussed in chapter 6: that the territorial state, the state of nationality of the accused, or the state of nationality of the victim have ratified the Protocol. In addition, the proposed court will have jurisdiction over "[e]xtraterritorial acts by non-nationals that threaten a vital interest of that State."[152] The proposed court shares many features with the ICC, including trigger mechanisms, a prosecutor able to act *proprio motu* with the approval of a pre-trial chamber, and a

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[144] *See generally* African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 26363.
[145] OAU, Protocol to the African Court on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (1998).
[146] *Id.* at arts. 3, 5.
[147] AU Constitutive Act, *supra* note 140.
[148] Afr. Union, *Protocol on the Statute of the African Court of Justice and Human Rights*, Annex. (July 1, 2008).
[149] Afr. Union Assembly/AU/Dec. 213(XII), *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction–Doc. Assembly/AU/3(XII)*, 12th Sess. (Feb. 1-3, 2009).
[150] Afr. Union Specialized Technical Comm. on Just. and Legal Aff., *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, Exp/Min/IV/Rev.7 (May 15, 2012).
[151] Other regional courts have also contemplated adding criminal jurisdiction. *See* Chimp Reports, *East African Court to Hear "Crimes Against Humanity"* (Apr. 29, 2013), https://chimpreports.com/9681-east-african-court-to-hear-crimes-against-humanity/ (discussing agreement to extend the jurisdiction of the East African Court to cover crimes against humanity).
[152] ACJHR Protocol, *supra* note 145, at art. 46E.

complementarity regime.[153] Like the ICC, it will assert jurisdiction over the nationals of non-African Union states if they commit crimes within Africa.

Finally, a third regional model can be found in the hybrid arrangement under consideration for South Sudan, which has its roots in the Agreement for the Resolution of the Conflict in South Sudan (ARCSS).[154] Chapter V of the agreement is devoted to transitional justice and envisions the creation of the Hybrid Court for South Sudan (HCSS) by the African Union Commission (with other transitional justice mechanisms to be established by the government).[155] The judges are to be prominent African principals, from outside of South Sudan,[156] lending a regional flavor to the Court and minimizing "perceptions that the hybrid court is an imperialist or Western imposition."[157] Indeed, the African Union Executive Council described the HCSS as an "African-led and African-owned legal mechanism."[158] Per the terms of the agreement, the African Union could theoretically create the proposed tribunal without the involvement or support of the current Government of South Sudan, although it would be difficult for the HCSS to operate without some cooperation from the government.[159] So far, however, the AU has refrained from doing so, although memoranda of understanding have been exchanged with the government.[160]

A Tribunal By Way Of A Multilateral Agreement

As another alternative, a group of concerned states (*e.g.*, regional states, Arab League member states, NATO members, and/or other pro-accountability states) could conceivably conclude an agreement among themselves to establish an *ad hoc* international tribunal with the necessary jurisdiction. At least two potential models present themselves: one involves the pooling of individual jurisdictional competencies and the other involves creating an ICC-like institution that can invoke a form of international jurisdiction reserved for the core international crimes. The underlying premise of either version would be that the international crimes at issue are of concern to all members of the international community and thus can be prosecuted individually or collectively so long as international fair trial protections are afforded to defendants.

Starting with the first model of pooled jurisdiction, many multilateral treaties (and, arguably, customary international law) permit, and in some cases mandate, individual states to prosecute international crimes in their national courts, as discussed more fully in chapter 6.[161] None of these treaties requires Syrian government consent to any domestic prosecution. Founding states could thus utilize their treaty-making powers to "pool" their individual jurisdictional powers

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[153] *Id*. at arts. 46F-46H.
[154] Agreement for the Resolution of the Conflict in South Sudan, Aug. 17, 2005 (Addis Ababa), *available at* https://unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf.
[155] *Id*. at 40, 42.
[156] *Id*. at 43 ("3.3.2. A majority of judges on all panels, whether trial or appellate, shall be composed of judges from African states other than the Republic of South Sudan.").
[157] Elise Keppler, *Innovations in Hybrid Justice: Comparative Opportunities and Challenges of the Central African Republic's Special Criminal Court and the Proposed Hybrid Court for South Sudan*, *in* HYBRID JUSTICE 28 (Kirsten Ainley & Mark Kersten eds., forthcoming 2020) (unpublished manuscript on file with the author).
[158] AU Executive Council, Decision on the Supplementary Budget for the 2017 Financial Year, AU Doc. EX.CL/Dec.940 (XXX), at 1 (Jan. 27, 2017).
[159] *Id*. at 22.
[160] *Id*. at 24.
[161] *See* Diane F. Orentlicher, *'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency*, 1 J. INT'L CRIM. JUSTICE 20 (2007).

to create a multilateral institution exercising delegated jurisdiction. As such, in the words of the Nuremberg Tribunal, a group of states could join together to do collectively what any one state could do individually: "[t]he Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any of them might have done singly."[162] The resulting jurisdiction could be conceptualized as a form of delegated jurisdiction, whereby each treaty signatory essentially delegates its existing domestic jurisdictional competencies to a multilateral institution. This scheme would enable states to share the burden of prosecuting international crimes committed in Syria since 2011 (or before for that matter), avoid duplication of efforts, and be more strategic about which cases to pursue. The resulting "jigsaw" court would gain "the jurisdiction of the sum of its parts rather than the lowest common denominators."[163] The more states that agree to cooperate, the more effective the court would be when it comes to securing suspects and evidence and to avoiding duplicative efforts.

In terms of the basis of jurisdiction being exercised by of such a tribunal, the principle of universal jurisdiction—which empowers all states to prosecute individuals accused of the commission of international crimes regardless of any nexus to the prosecuting state—is available to any state that is so inclined to move forward with the prosecution of individuals responsible for the commission of war crimes and crimes against humanity. As such, the tribunal could be conceptualized as a transnational universal jurisdiction institution, with precedent in the Extraordinary African Chambers in Senegal. Nonetheless, some states remain squeamish about advancing the universal jurisdiction norm, perhaps all the more so in a new collective form.[164] There is an obvious utility to identifying directly-affected states that could exercise domestic jurisdiction on the basis of other, less contentious grounds, such as the effects or protective jurisdiction principles. Indeed, any of the bases of domestic jurisdiction might be pooled in this way.[165] With this model, the date on which the relevant jurisdictional competencies became actionable might be relevant when it comes to adherence to the principle of legality, particularly given that the incorporation of universal jurisdiction domestically is ramping up around the globe. That said, some articulations of the *ex post facto* prohibition are concerned more with the creation of new crimes or stiffer penalties after the conduct in question has been committed and not the recognition of new fora or forms of jurisdiction over conduct already recognized to be criminal.[166] Furthermore, the human rights treaties indicate that that there is no prohibited retroactivity if the conduct in question was criminal under international law at the time the defendant acted, even if it was not penalized under domestic law.[167]

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[162] Judgment of 1 October 1946, *in* 22 TRIAL OF THE MAJOR GERMAN WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 461.
[163] Correspondence with Ingrid Elliot, Dec. 30, 2018.
[164] *See generally* Beth Van Schaack, *Crimes Against Humanity: Repairing Title 18's Blind Spots*, *in* ARCS OF GLOBAL JUSTICE 341 (Diane Amann & Margaret DeGuzman eds., 2018) (noting U.S. interagency debates over the enactment of a crimes against humanity statute enabling the United States to exercise "present in" jurisdiction).
[165] *See* Beth Van Schaack, *Alternative Jurisdictional Bases for a Hybrid Tribunal for Syria*, JUST SECURITY (May 29, 2014).
[166] *See* Calder v. Bull, 3 U.S. 386 (1798); Landgraf v. USI Film Products, 511 U.S. 244, 274 (1994) ("Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'") (citations removed).
[167] ICCPR, *supra* note 7, at art. 15(2) ("Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.").

This delegation argument has been advanced to explain the nature of the jurisdiction exercised by the ICC, which can assert jurisdiction over crimes committed on the territory of states parties and by their nationals anywhere in the world.[168] This theory, however, offers an imperfect explanation for the ICC (and potentially for the proposed Syrian endeavor as well). When it comes to the former, some states that have ratified the Rome Statute cannot yet exercise domestic jurisdiction over ICC crimes (or could not do so at the time they ratified the treaty) and so they would not be able to "delegate" such a power to the Court pursuant to the old maxim *nemo dat quod non habet* (one cannot delegate a power that one does not have). At the same time, it could be argued that states are delegating a latent jurisdictional authority to exercise jurisdiction over ICC crimes—one that they inherently enjoy by virtue of international law but (for whatever reason) have chosen not to exercise domestically.[169] Indeed, it is settled that "the Court does not have to establish the existence of matching legislation at the national level before its jurisdiction can be exercised in a particular case."[170] These considerations suggest that a strict delegation theory does not explain the ICC's jurisdiction or any analogous Syrian proposal.

A second model underlying this multilateral treaty idea is predicated on the observation that international law creates individual criminal responsibility for, and supports the exercise of universal and other forms of jurisdiction over, perpetrators of the core international crimes. In other words, individual criminal responsibility for these crimes is grounded in a precept of *international* law, as opposed to any specific articulation or principle of *domestic* law.[171] As such, the core international crimes are amenable to a form of international jurisdiction that does not depend on an exercise of delegation or consent by any particular state.[172]

Applying this conceptualization to the ICC, the "act of accession to the [Rome] Statute merely activates the power of the ICC to exercise a jurisdiction grounded in international law"[173] over the territories or nationals of the ratifying state. In the words of one noted commentator, "[t]his theory posits that the normative justification of punishment is independent of the will of the respective sovereign."[174] Indeed, at the time the ICC was being conceptualized, a leading proposal

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[168] *See* Michael A. Newton, *How the ICC Threatens Treaty Norms*, 49 VAND. J. TRANSNAT'L L. 371 (2016).
[169] *See* Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, *in* I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 583, 587 (Antonio Cassese et al. eds., 2002) ("all states may exercise universal criminal jurisdiction. … Contracting Parties of the Statute can confer through ratification this right on the new institution").
[170] Rod Rastan, *The Jurisdictional Scope of Situations Before the International Criminal Court*, 23 CRIM. L. F. 1, 20 (2012).
[171] The ICC OTP seemed to embrace this argument in a filing before a Pre-Trial Chamber when it noted the many multilateral treaty regimes devoted to international crimes that allow states to prosecute the nationals of states that are not parties to those treaties. The brief states: "such crimes attract universal opprobrium and thus demand repression by each of the members of the international community on behalf of the whole." Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17 ICC-02/17-7-Conf-Exp, Public Redacted Version of "Request for Authorisation of an Investigation Pursuant to Article 15", ¶ 45 (Nov. 20, 2017).
[172] *See* Yuval Shany, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yaël Ronen*, 8 J. INT'L CRIM. JUST. 329, 331–33 (2010) (comparing the universalist and delegation theories of international courts).
[173] *See* Carsten Stahn, *Response: The ICC, Pre-Existing Jurisdiction Treaty Regimes, and the Limits of* the Nemo Dat Quod Non Habet *Doctrine—a Reply to Michael Newton*, 49 VAND. J. TRANSNAT'L L. 443, 448 (2016). *See also id*. at 447 (arguing that ICC jurisdiction is "not derived from the territorial or national jurisdiction of a specific state, but grounded in a broader entitlement of states and the international legal community under international law.") (citations removed).
[174] Stahn, *supra* note 173, at 447-48.

originating from Germany would have granted the ICC jurisdiction over any perpetrator acting anywhere in the world, regardless of whether the territorial or nationality state had ratified the treaty.[175] This proposal hinged on the fact that all international crimes are subject to universal jurisdiction such that states could endow the ICC with jurisdiction without the necessity of satisfying any additional jurisdictional preconditions or requirements.[176] The German scheme fell away as part of a grand compromise involving multiple, and often unrelated, moving pieces in an effort to achieve maximum consensus, not because states determined it was not legally available to them. Applying this theory to our hypothetical *ad hoc* tribunal, even states that do not choose to exercise their ability to prosecute international crimes at all, or to prosecute such crimes when they are committed extraterritorially by a non-national, could in theory join a multilateral treaty creating a court exercising comprehensive international jurisdiction over international crimes.

To be sure, the theory that the ICC's jurisdiction is inherently international in nature—based upon the nature of the crimes in question rather than a form of delegated domestic jurisdiction—is not without its detractors. As two commentators have argued: "There is no international law doctrine that would support either the existence or the manufacture of some generalized, inchoate prosecutorial and judicial right in the international community at large, separate and apart from that enjoyed by individual states."[177] As a softer critique, just because the entire international community agrees on the criminality of certain conduct does not mean it accepts the validity of supra-national penal enforcement, including against the nationals of non-consenting states. These critiques find expression in the academic literature, but they have not been taken up by any court. Indeed, the ICC Appeals Chamber essentially adopted a theory of international jurisdiction in the context of Jordan's non-cooperation appeal.[178]

Proceeding on the theory that states can utilize a treaty to create an international institution to exercise jurisdiction based on international law precepts, any number of states could ratify a multilateral instrument aimed at prosecuting international crimes committed in Syria through the creation of an international court exercising a form of international jurisdiction—a common organ of the participating states on which they would confer international legal personality.[179] Such an institution would not be dependent on the delegation of any particular species of domestic jurisdictional competency. In essence, such a court could be considered a mini-ICC, which is an international organization with an international legal personality with which all states—even non-members—must interact, even if they do not have formal treaty-based duties towards that organization. Thus, the principle of complementarity dictates that non-party states can avoid ICC jurisdiction if they adequately prosecute crimes committed by their nationals, even though they have not "accepted" the concept of complementarity through ratification of the Rome Statute. Even

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[175] *See* Kaul, *supra* note 169, at 591 ("States have a legitimate and acknowledged legal basis to use, if they so wish, the universality approach with regard to these core crimes, either in their national criminal jurisdiction systems or when establishing together a new and completely international criminal justice system."); Andreas Zimmerman, *The Creation of a Permanent International Criminal Court*, 2 MAX PLANCK Y.B. INT'L L. 169, 205-06 (1998).
[176] *Id*. at 210.
[177] Lee A. Casey & David B. Rivkin Jr., *The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties*, 44 VA. J. INT'L L. 63, 75 (2003).
[178] Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re: Al-Bashir Appeal, Case No. ICC-02/05-01/09 OA2 (May 6, 2019).
[179] Kaul, *supra* note 169, at 591.

organizations with relatively few members have been accorded international legal personality and such juridical capacity as against non-members.[180]

To be sure, some states may object to such an enterprise on the grounds that their nationals cannot be prosecuted by an international body without the state's consent, but this position does not find authority in any caselaw. In the *Reparations For Injuries Case*, for example, the ICJ ruled that the United Nations could bring an international claim against the government of a non-member state to obtain reparation for injuries suffered by U.N. personnel.[181] The *Monetary Gold* principle—which states that an international tribunal is not competent to pronounce upon the rights and duties of a state absent its consent—is inapplicable vis-à-vis the ICC, except maybe in the context of the crime of aggression, because the Court does not exercise jurisdiction over states themselves but rather over their nationals.[182]

Under either theory—pooled national jurisdiction or institution exercising international jurisdiction—an agreement to create such an *ad hoc* international institution for Syria could be open to any number of states committed to contributing to the establishment, funding, and staffing of the new judicial body. By involving fewer states, such arrangements are potentially easier to negotiate, but that leaves the institution with fewer sources of funding and other forms of support while also opening it up to allegations of undue influence. While states have collectively created multilateral tribunals for discrete incidents, as discussed more fully below, they have not created a judicial institution of this projected magnitude (when it comes to the number of crimes committed and potential defendants) since the World War II period. To be sure, finding a critical mass of states to support a tribunal (politically and financially) with such a potentially expansive docket will pose a challenge. One obvious incentive to highlight is that the institution would offer a forum for burden sharing since many states are already pursuing individual cases within their domestic courts. Assuming Russia will continue to block any decisive action by the Security Council, additional democratic legitimacy and cooperative assistance could be afforded to any such effort by the U.N. General Assembly, which has regularly issued resolutions commending and recommending various international justice efforts,[183] or the League of Arab States, as a regional effort. Under these circumstances, the tribunal could enjoy binding authority at least among the states involved or otherwise acceding to this effort.

If this proposal were to move forward, treaty signatories would need to locate an appropriate venue. Given that liberated areas within Syrian territory are in short supply or overtaxed, a willing state would likely have to be identified to host the nascent institution and provide related services (such as prisons and security). Obvious options include the immediate border states. However, these governments are overwhelmed by refugee flows, cross-border violence, and other spillover effects from the Syrian and Iraq conflicts and may be reluctant to further antagonize the Assad regime by hosting a controversial accountability mechanism. In any

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[180] Philippe Gautier, *The Reparations for Injuries Case Revisited: The Personality of the European Union*, 4 MAX PLANCK Y.B. U.N. LAW 331 (2000) (discussing the legal personality of the EU); İslam Safa Kaya & Mustafa Aykanat, *International Legal Personality of International Organizations: OPEC Case*, J. INSTITUTE OF SOCIAL SCIENCES 63 (Dec. 2016) (discussing same for OPEC).
[181] *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion 1949 I.C.J. 174 (Apr. 11).
[182] Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland, and United States of America), 1954 I.C.J. 19, 32-33 (June 15) (Preliminary Question).
[183] *See, e.g.*, G.A. Res. 69/188, ¶ 8, U.N. Doc. A/RES/69/188 (Dec. 18, 2014) (recommending that the Security Council refer the situation in North Korea to the ICC) (116 states in favor).

case, Lebanon remains within Syria's orbit and Jordan is working to normalize relations now that the war is winding down. This leaves Iraq, which has rejected an international tribunal for crimes committed at home, and Turkey, which faces potential liability for its own actions in Syria (particularly around Afrin).[184] Few of these border states have empowered their own courts to exercise extraterritorial jurisdiction, so the pooled competency model is less viable here.

At the level of individual Arab League members, Qatar has played an active role in the accountability space. In addition to its controversial role financing elements of the opposition,[185] it has also consistently called for criminal trials,[186] commissioned human rights documentation efforts,[187] co-sponsored with Liechtenstein the proposal to create the IIIM, and then pledged $500,000 towards the mechanism.[188] Given this degree of investment in accountability, and its own indigenous resources, Qatar might have been persuaded to host such a tribunal. Were this to move forward, international involvement could and should be mobilized to ensure greater independence and fairness given that Qatar—like many countries in the region—has deep political interests in the conflict and its own due process deficits.[189] Absent more multilateral involvement, a tribunal set in any of the neighboring states could raise serious questions of impartiality and undermine the legitimacy of any outcome.

Any of the models above could be fully international—with judges, lawyers, and staff drawn from the international community applying international criminal law. There are certain benefits that accrue to being considered an "international" court in terms of having the ability to override elements of domestic law. In a number of instances—such as with respect to domestic amnesty laws,[190] pardons,[191] or immunities[192]—international courts, even some with extensive hybrid elements, have asserted special prerogatives to prosecute offenders that inure to them by virtue of their status as an autonomous international institution not bound by domestic legal arrangements or customary international law rules geared towards national institutions. The

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[184] Bulent Aliriza, *Understanding Turkey's Afrin Operation*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (Jan. 28, 2018).
[185] Roula Khalaf and Abigail Fielding-Smith, *How Qatar Seized Control of the Syrian Revolution*, FINANCIAL TIMES, May 17, 2013.
[186] *Qatar stresses the Need for Accountability in Syrian War*, GULF TIMES, Mar. 3, 2017, http://www.gulf-times.com/story/535080/Qatar-stresses-need-for-accountability-in-Syrian-w.
[187] *A Report into the Credibility of Certain Evidence with regard to Torture and Execution of Persons Incarcerated by the Current Syrian Regime*, http://i2.cdn.turner.com/cnn/2014/images/01/20/syria-board.of.inquiry.doha.jan.2014.18.1.version.x.to.print..pdf. *See* Ian Black, *Syrian Regime Documentary Shows Evidence of 'Industrial Scale' Killing of Detainees*, THE GUARDIAN, Jan. 21, 2014.
[188] Ministry of Foreign Affairs, *Qatar Says Accountability Will End Violence in Syria* (Feb. 28, 2017), https://www.mofa.gov.qa/en/all-mofa-news/details/1438/06/01/qatar-says-accountability-will-end-violence-in-syria. *Id*.
[189] Human Rights Council, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, *Mission to Qatar*, U.N. Doc. A/HRC/29/26/Add.1 (Mar. 31, 2015) (identifying shortcomings in the administration of justice within Qatar).
[190] Michael Adenuga, *The Amnesty Provision of the Lomé Agreement and its Impact on the Special Court for Sierra Leone* (Dec. 6, 2007), http://lipietz.net/The-Amnesty-provision-of-the-Lome-Agreement-and-its-impact-on-The-Special-Court.
[191] Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne Bis In Idem* and Amnesty and Pardon), Case File 002/19-09-2007/ECCC/TC (Nov. 3, 2011).
[192] *See* Paola Gaeta, *Does President Al Bashir Enjoy Immunity from Arrest?*, 7 J. INT'L CRIM. JUST. 315 (2009).

International Court of Justice in the Arrests Warrant Case, for example, recognized that international institutions are not bound by immunities that might apply in domestic courts.[193]

Notwithstanding these practical challenges, a number of prior models suggest that there are no legal bars to this proposal. One early, though somewhat orthogonal, precedent for this idea of pooling jurisdiction to create multilateral courts is found in the mixed slavery courts established by Great Britain in the early 19th century in an effort to eradicate the slave trade, a forgotten chapter in the story of international criminal law that was rediscovered by scholars.[194] The British strategy involved executing a network of bilateral treaties with maritime states, including Spain, Brazil, the Netherlands, and Portugal.[195] These treaties gave parties the right to search and condemn vessels engaged in the slave trade and to subject them to trial before a mixed commission featuring judges from the capturing nation, the flagship nation, and potentially a "neutral" nation.[196] The mixed commissions were established in treaty-partners' ports-of-call, including Freetown, Sierra Leone; Havana, Cuba; Rio de Janeiro, Brazil; and Suriname.[197] This network of otherwise bilateral treaties established something close to a global enforcement regime even without the involvement of France (which never joined) and the United States (which joined late in the game).

These tribunals were not strictly penal in nature. Rather, they "had jurisdiction only over the ships and their cargo; the crew would either be let loose or repatriated for prosecution."[198] Later, "the mixed courts were authorized to hold slave crews in custody until they could be transferred to national authorities for trial."[199] The ships were generally auctioned off, with the proceeds going toward the expenses associated with the courts, the two governments, and the captors as prize money.[200] As such, these courts administered what were more in the nature of *in rem* actions, although it has been argued that "[c]ondemnation of a vessel, while nominally *in rem*, can be criminal when done to punish the owner"[201] as with civil forfeiture laws.[202] All told, upwards of 80,000 would-be slaves were freed by these mixed courts over the course of their existence.[203] A similar model using a web of treaties has been considered in the piracy context.[204]

More recently, and more on point, the Nuremberg Tribunal owes its provenance to a quadripartite agreement (the London Agreement of August 8, 1945) between states specially affected by the Third Reich's acts of aggression and other international crimes.[205] As contemplated by Article 5, nineteen other states eventually adhered to the treaty, which contained the Tribunal's

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[193] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, ¶ 61 (Feb. 14).
[194] *See* Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law,* 117 YALE L. J. 550, 552-53 (2008).
[195] *Id.* at 603.
[196] *Id.* at 579.
[197] *Id.*
[198] Eugene Kontorovich, *The Constitutionality of International Courts: The Forgotten Precedent of Slave Trade Tribunals*, 158 U. PA. L. Rev. 39, 83 (2010).
[199] Martinez, *supra* note 194, at 591 n.180.
[200] *Id*. at 591.
[201] Kontorovich, *supra* note 198, at 84.
[202] *Id.* at 84-85.
[203] Martinez, *supra* note 194, at 602.
[204] *See* Van Schaack, *supra* note 4, at 148.
[205] Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 280.

substantive Charter in an annex.[206] Germany did not consent to these trials, although it was, at the time, under occupation with its sovereignty being held essentially in trust by the occupying powers that collectively created the Tribunal. The Nuremberg Tribunal implied as much when it stated: "the making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world."[207] The Tokyo Tribunal was even more intimately tied to the postwar occupation since it was created by a unilateral proclamation of General Douglas MacArthur, who had been declared the Supreme Commander of the Allied Powers in occupied Japan.[208] A number of other states who were party to the Japanese instrument of surrender supported the effort, in word and deed.[209]

To be sure, the juridical basis for the two postwar Tribunals remains somewhat unsettled. Some have argued that they were essentially occupation courts premised on the victorious Allies' exercise of German and Japanese sovereignty in trust.[210] Under this view, the Allies were channeling these states' inherent criminal jurisdiction when they prosecuted the Nazi and Imperial Japanese leadership. They could also be conceptualized as the collective exercise of military jurisdiction, which at the time included jurisdiction over war crimes under customary international law.[211] Others have argued that the Nuremberg and Tokyo Tribunals were exercising a form of *sui generis* international jurisdiction not grounded in, or limited by, any source of domestic law. The fact that the Allies prosecuted crimes that did not find expression in local law (or international law for that matter)—i.e., crimes against humanity and crimes against the peace—suggests that the two tribunals were unmoored from any particular municipal legal framework. Given that the United Nations was founded as these tribunals were carrying out their work, the judicial proceedings received their multilateral imprimatur only by virtue of the accession of other states to the tribunals' constitutive documents and signatories' subsequent participation in the trials. That said, the General Assembly later blessed the Nuremberg Principles,[212] setting in motion a process that would eventually lead to the establishment of the ICC and the entire system of international criminal justice, albeit decades later.

Another idiosyncratic example of states combining forces to prosecute international crimes (though on rather traditional grounds) is found in the Lockerbie proceedings, which prosecuted Libyan nationals accused of participating in the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland, under Scottish law at a decommissioned U.S. Air Force base in the Netherlands. This arrangement came about following a joint national investigation, which led to the conclusion that the bombing had been the work of two Libyan agents.[213] The United Kingdom

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[206] *Id*. at art. 5.
[207] Nuremberg Judgment, *supra* note 162, at 461.
[208] International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml.
[209] *See* Zachary Kaufman, *Transitional Justice for Tōjō's Japan: The United States Role in the Establishment of the International Military Tribunal for the Far East and Other Transitional Justice Mechanisms for Japan After World War II*, 27 EMORY INT'L L. REV. 755, 769 (2013).
[210] *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, CONTEMPORARY CHALLENGES TO IHL—OCCUPATION: OVERVIEW (June 11, 2012).
[211] I am indebted to Professor Yuval Shany for this insight.
[212] G.A. Res. 1/95, U.N. Doc. A/RES/1/95 (Dec. 11, 1946) (affirming the principles of international law recognized by the IMT Charter and judgment).
[213] Jesse Greenspan, *Remembering the 1988 Lockerbie Bombing*, THE HISTORY CHANNEL (Dec. 20, 2013), http://www.history.com/news/remembering-the-1988-lockerbie-bombing.

and the United States both issued indictments in 1991.[214] Libya, however, refused to extradite its nationals, asserting the right to prosecute them itself under the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, which contains an *aut dedere aut judicare* provision at Article 7.[215] In an unprecedented move, the Security Council demanded that Libya cooperate with the investigations and surrender the suspects to either the United Kingdom or the United States for trial. In Resolution 731, it also imposed sanctions on Libya for non-cooperation, which marks the first Security Council resolution to, in essence, require a state to hand over its nationals for trial abroad.[216] These demands were reiterated in subsequent Security Council resolutions, which also imposed strict sanctions in light of Libya's non-compliance with Resolution 731.[217]

Following a decade of negotiations and a foray to the ICJ,[218] an agreement was reached in 1998[219] that would allow the suspects to be prosecuted in the "neutral" forum described above.[220] Although the Security Council blessed the arrangement,[221] implementation required the passage of Scottish legislation to enable a Scottish court, possessing a full juridical personality and enjoying all applicable privileges and immunities, to sit extraterritorially.[222] The United Kingdom covered any costs incurred by the Netherlands.[223] The deal also enjoyed the endorsement of the Organization of African Unity (now the African Union), the League of Arab States, the Non-Aligned Movement, and the Organization of the Islamic Conference.[224] Libya remained involved because the suspects were there; theoretically, this arrangement could have moved forward without Libyan consent if the suspects were found elsewhere or if local law allowed for trials *in absentia*.

This arrangement had some of the features of the Nuremberg Tribunal in that it was empowered by the agreement of a small number of implicated states. It embodied a negotiated

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[214] *Id.*

[215] The Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 7, Sept. 23, 1971, 24 U.S.T 564, 974 U.N.T.S. 177; *see generally* JOHN P. GRANT, THE LOCKERBIE TRIAL: A DOCUMENTARY HISTORY (2004).

[216] S.C. Res. 731, ¶ 3, U.N. Doc. S/RES/731 (Jan. 21, 1992).

[217] *See* S/RES/748, *supra* note 125, ¶¶ 4-5; S.C. Res 883, ¶ 3, U.N. Doc. S/RES/883 (Nov. 11, 1993).

[218] Libya brought suit under the Montreal Convention, arguing that neither the United States nor the United Kingdom could compel it to surrender its nationals. The respondents claimed that the ICJ lacked jurisdiction under the treaty and that the claims had been rendered moot by action before the Security Council. The parties voluntarily discontinued the proceedings. *See* Press Release, 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, I.C.J. Press Release 1998/5 (Feb. 27, 1998).

[219] Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands Concerning a Scottish Trial in the Netherlands, U.K.–Neth., Sept. 18, 1998, art. 3, 2062 U.N.T.S. 81 [hereinafter *Lockerbie Treaty*]. (The terms of the arrangement were set forth in an August 24, 1998, letter from the United Kingdom and the United States to the U.N. Secretary-General, which is attached as an annex to the aforementioned treaty).

[220] *See* Donna E. Arzt, *The Lockerbie "Extradition by Analogy" Agreement: "Exceptional Measure" or Template for Transnational Criminal Justice?*, 18 AM. UNIV. INT'L L. REV. 163 (2002).

[221] S.C. Res. 1192, ¶ 3, U.N. Doc. S/RES/1192 (Aug. 27, 1998) (calling upon the United Kingdom and the Netherlands to take steps to enable a Scottish court to operate on Dutch territory, mandating that all states cooperate with the proceedings, and indicating an intention to suspend sanctions when the two accused arrived in the Netherlands).

[222] 1998 No. 2251, United Kingdom High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998, § 3, as *reprinted in* 38 I.LM. 942 (1999).

[223] Lockerbie Treaty, *supra* note 219, at 91.

[224] KHALIL I. MATAR & ROBERT W. THABIT, LOCKERBIE AND LIBYA: A STUDY IN INTERNATIONAL RELATIONS 95-96 (2004).

compromise of competing entitlements to jurisdiction as between Libya (which asserted the nationality principle), Scotland (entitled to invoke the passive personality and territorial principles), and the U.S. (passive personality, but also territoriality given that Pan Am was a U.S. airline). The similarities between Lockerbie and Nuremberg end there, however. Besides the obvious difference in scope, the Lockerbie Tribunal also proceeded with the overt consent—albeit coerced by crippling sanctions—of the nationality state.

A model similar to the Lockerbie solution and the proposed pooling of jurisdiction for Syria has been under consideration for the 2014 downing of Malaysia Air Flight 17 ("MH17") as a way of circumventing Russia's veto of a Dutch/Malaysian proposal to establish an international tribunal.[225] The Minister for Transport of Malaysia presented the draft resolution, which received eleven affirmative votes and three abstentions (Angola, China and Venezuela).[226] Russia's veto reflected its views that any international tribunal would be "politicized" and "counterproductive."[227] If such a tribunal were to move forward, the most affected states at a minimum would include Ukraine, as the territorial and potentially nationality state; Malaysia, as the state of registration as well as the state of nationality of some of the victims; and the Netherlands (and others), also invoking the passive personality principle (two-thirds of those killed were Dutch).[228] These states could, in essence, combine their respective jurisdictional competencies,[229] including potentially the collective exercise of universal jurisdiction if the attack amounted to a war crime or one of the many acts of terrorism that is subject to treaty- or customary international law-based universal jurisdiction.[230] The nationality of the perpetrators is unknown, which complicates the question of whether Russia's assent would be at all relevant, as a legal or practical matter, for any tribunal to function. The proposed tribunal has not come to be; instead, the Dutch have submitted legislative proposals that will allow the District Court of The Hague to prosecute the attack, regardless of the nationality of the victims, a setup more similar to the Lockerbie precedent.[231] The states in question (the above referenced states plus Australia) have formed a Joint Investigative Team to investigate the attack and will provide political and financial support to the Dutch adjudication.[232]

Notwithstanding these prior arrangements and active projects, the idea of a tribunal being created by a multilateral agreement to target the nationals of, and events occurring within, a non-consenting state continues to raise acute political concerns among some states. In particular, if

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[225] *See* Rick Gladstone, *Russia Vetoes U.N. Resolution on Tribunal for Malaysia Airlines Crash in Ukraine*, N.Y. TIMES, July 29, 2015.
[226] Press Release, Security Council, *Security Council Fails to Adopt Resolution on Tribunal for Malaysia Airlines Crash in Ukraine, Amid Calls for Accountability, Justice for Victims*, U.N. Press Release SC/11990 (July 29, 2015).
[227] *Moscow Explains Why it Sees Establishment of International Tribunal on MH17 Crash as Premature*, RUSSIA BEYOND THE HEADLINES (July 30, 2015).
[228] *See* Aleksandra Gjorgievska, *The Lives Lost in the MH17 Disaster*, TIME, July 21, 2014 (providing the breakdown of number of deaths).
[229] Aaron Matta & Anda Scarlat, *Malaysia Airlines Flight MH-17—Possible Legal Avenues for Redress (Part 2)*, OPINIO JURIS (Aug. 28, 2015).
[230] *See, e.g.*, Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation art. 5, 974 U.N.T.S. 177 (Sept. 23, 1971) (calling on parties to establish their jurisdiction when offenders are present in their territory and not extradited).
[231] Government of the Netherlands, Legislative Proposals Submitted to Dutch House of Representatives for Criminal Proceedings Related to Downing of MH17, Mar. 21, 2018, https://www.government.nl/topics/mh17-incident/news/2018/03/21/legislative-proposals-submitted-to-dutch-house-of-representatives-for-criminal-proceedings-related-to-downing-of-mh17.
[232] Openbaar Ministerie, MH17 Crash, https://www.om.nl/onderwerpen/mh17-crash/.

such a tribunal can be created to prosecute crimes committed in Syria and by Syrian regime officials, what is to stop a handful of states from pooling their domestic jurisdictional competencies to prosecute individuals accused of committing international crimes and hailing from any other state that might also be on the receiving end of such an exercise in lawfare? The United States or Israel, for example, might become immediate targets of a parallel effort given controversial elements of their foreign policies. At some level, the principle of universal jurisdiction and the network of international criminal law treaties mandating prosecutions for their breach already create the real possibility that individuals accused of committing international crimes abroad may be prosecuted anywhere in the world. At the same time, there is something more potent about the idea of multiple states banding together to redress perceived criminal conduct, particularly in the face of entrenched impunity. In any case, the Syria proposal continues to circulate among diplomatic circles, but no concrete progress has yet been made.

A Once and Future Hybrid Court

Many of the above models could be hybridized in multiple ways by including Syrian personnel and law as appropriate.[233] The hybrid model—and the prioritization of the local over the international—is having a bit of a renaissance in international affairs, in part because it allows states to reclaim the justice imperative while also responding to the international community's unwillingness to invest in additional standalone *ad hoc* tribunals.[234] Such an institution has the potential to marry the imperative of Syrian leadership, agency, and ownership with the utility, and at times necessity, of international expertise and, in so doing, build "dual international and national legitimacy."[235]

International justice can be hybridized in multiple ways. Historically, the legal foundation of hybrid courts has been an agreement between the United Nations and the affected country forged after the conflict has ended.[236] In the alternative, "mixed" chambers have been created pursuant to domestic legislation allowing for the integration of international personnel within the courts of a domestic legal system and the application of international as well as local law, both substantive and procedural. In this way, hybridity can be part of the legal foundation of an institution or infused operationally. Either way, the hybrid model allows elements of the local legal culture to find expression, subject to the constraints of international human rights law, and encourages capacity building and norm diffusion.[237]

The specialized chambers in Bosnia-Herzegovina (BiH)[238] offer an example of the archetypal mixed chambers. The BiH chambers owe their provenance to a proposal developed by the ICTY and the U.N. High Representative for Bosnia and Hercegovina that was blessed by the Security Council as part of the ICTY's completion strategy and funded through a donors' conference.[239] The operative domestic legislation allowed for the injection into the domestic

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[233] *See generally* Van Schaack, *supra* note 4 (discussing various hybrid models); Beth Van Schaack, *A Mixed Chamber for Syria: An Idea Whose Time has Come?*, JUST SECURITY (May 28, 2014).
[234] *See* Shannon Maree Torrens, *State Dissent and the Reemergence of the Hybrid Court*, JUSTICE IN CONFLICT (Mar. 14, 2018). *See generally* The Hybrid Justice Project, https://hybridjustice.com/.
[235] Keppler, *supra* note 157.
[236] *See generally* Laura Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003).
[237] *See* Jane Stromseth, *Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?*, 1 HAGUE J. RULE OF L. 87 (2009).
[238] Law on Court of Bosnia and Herzegovina, Off. Gazette of BiH, No. 49/09 (Bosn. & Herz.) http://www.sudbih.gov.ba/files/docs/zakoni/en/Law_on_Court_BiH_-_Consolidated_text_-_49_09.pdf.
[239] S.C. Res. 1503, ¶ 1, U.N. Doc. S/RES/1503 (Aug. 28, 2003).

system of international staff who were gradually phased out over the years.[240] The mixed chamber idea is being deployed in the Central African Republic[241] and was contemplated in the Democratic Republic of Congo (although this effort has largely stalled).[242] Many hybrid institutions also allow for prosecutions under a mix of international and domestic criminal law.

Ordinarily, it is the territorial state whose courts are hybridized with international elements so that the accountability exercise is deeply rooted in the domestic system. In the prior models, state consent was thus a crucial element. That said, a new form of non-governmental hybridity can be envisioned. There is nothing stopping one of the border states with Syria from allowing its domestic system to be hybridized through the inclusion of international, as well as Syrian, experts and staff if it were to take on the task of prosecuting international crimes in Syria.[243] This would offer options for capacity building and burden sharing while rectifying due process deficits in these legal systems. The Extraordinary African Chambers, which included non-Senegalese judges, stand as a notable example. To be sure, "[e]mbarking on a hybrid court without the partnership of a government is in many respects counter to some of the traditional objectives that have fueled the establishment of hybrid accountability mechanisms."[244] But, many of these benefits can accrue even absent Syrian state involvement.

Obviously, no agreement with the Syrian government or domestic legislation is likely to be forthcoming in the Syrian context at this point. This was not always the case, however.[245] When there was some possibility that the war would result in a genuine political transition, the shell of a hybrid or mixed court could have been created that integrated Syrian expertise from the diaspora and the ranks of juridical defectors, as represented by the Free Syrian Lawyers and Free Syrian Judges.[246] The international community could have incorporated these ideas into peace talks. Progress could have been made with the assistance of international expertise, which would involve international and domestic judges, prosecutors, defense counsel, and staff working in tandem.[247] In addition, international partners could provide technical and practical support on issues such as

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[240] BiH Law, *supra* note 238, at art. 49.

[241] *See* Loi 15/003 du 3 juin 2015 portant création, organisation et fonctionnement de la Cour pénale spéciale, Journal Officiel de la République Démocratique du Congo; Patryk Labuda, *The Special Criminal Court in CAR: Failure or Vindication of Complementarity?*, 17 J. INT'L CRIM. JUST. 1 (2017).

[242] International Center for Transitional Justice, *The Accountability Landscape in Eastern DRC* (July 2015), https://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-Prosecutions-2015_1.pdf. For various models that could have been established in the DRC, see Patryk I. Labuda, *Applying and "Misapplying" the Rome Statute in the Democratic Republic of Congo*, *in* CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS 416 (Christian De Vos et al. eds., 2015).

[243] Ryngaert & Siccama, *supra* note 21, at 7.

[244] Keppler, *supra* note 157, at 22.

[245] *But see* DPRK COI Report, *supra* note 57, at ¶ 1202 (concluding that a hybrid court is unfeasible even if North Korea's consent were forthcoming, because in "the absence of profound reforms to the DPRK's political and justice system, any DPRK judges designated to participate in such a hybrid court would lack the impartiality and independence necessary to carry out criminal trials that would likely involve very senior officials as defendants.").

[246] For a discussion of these organizations and the response of the legal profession generally to the revolution, see INTERNATIONAL LEGAL ASSISTANCE CONSORTIUM, ILAC RULE OF LAW ASSESSMENT REPORT: SYRIA 2017 68-71 (2017). For example, one notable jurist of Syrian descent is Judge Rosemary Barkett, formerly of the 11th Circuit and now on the U.S.-Iran Claims Tribunal. American Bar Association, Rosemary Barkett, https://www.americanbar.org/content/dam/aba/directories/women_trailblazers/barkett_bio.authcheckdam.pdf.

[247] Beth Van Schaack, *"More than a Domestic Mechanism": Options for Hybrid Justice in Sri Lanka*, *in* TRANSITIONAL JUSTICE IN SRI LANKA: MOVING BEYOND PROMISES 331 (Bhavani Fonseka ed., 2017) (profiling models for integrating international personnel into transitional justice mechanisms).

witness protection and training for judges, lawyers, and other personnel; and international actors could lend expertise for a baseline review of Syrian criminal and military law and support drafting necessary legislation, rules of procedure, codes of conduct, and other related documents. In addition to laying the groundwork for future accountability, once the political will and resources arrive, this preliminary work offers a form of capacity building and technology transfer. Under certain circumstances, such an entity could potentially operate in liberated areas or an internationally-protected buffer zone.[248] The former are now in short supply, and the latter will not exist without a robust no-fly zone, so any institution building would have to happen outside of Syria with the idea of transitioning internally if and when conditions allow. Such a proto-tribunal could undertake this preliminary work and await activation from the Security Council or a new Syrian government when it could be injected as a special judicial chamber into the Syrian judicial system.

Over the course of the conflict, some Syrian opposition voices have issued strong calls for justice, providing a clear indication that Syrians were committed to pursuing some form of domestic accountability early in any transition. Syrians as a whole, however, remained unprepared to meaningfully conceptualize or launch prosecution processes given a deteriorated judiciary and limited expertise on international law. In general, opposition Syrians seemed to express somewhat contradictory preferences for a domestic mechanism under Syrian control, on the one hand, and an ICC referral, on the other. Considering the lack of cohesion among the Syrian opposition, and by extension the lack of clear interlocutors with whom the international community could collaborate on a tribunal concept, it would be necessary to engage in outreach to the various elements of the Syrian opposition to socialize this idea and identify willing collaborators. In connection with meetings in Doha, Qatar, in November 2012, the opposition attempted to streamline its structure and organize a new leadership council.[249] This provided an opportunity for the international community to advocate for the establishment of a Transitional Justice or Accountability Committee, which could have served as legitimate interlocutors in discussions surrounding the necessary preparatory activities and received the proffered technical support. This Committee could eventually form the basis of a more permanent Ministry of Human Rights or Transitional Justice.

In any hybrid arrangement, involving Syrians experts from the start (and not just as defense counsel) could lend greater local ownership and thus legitimacy to the process while contributing to building domestic capacity. Getting the balance right between Syrian ownership and international legitimacy would be vitally important to ensure both fair outcomes and appropriate international engagement.[250] International and Syrian justice architects would need to determine what degree of international involvement would be necessary, desirable, and/or palatable. If such an effort moves forward post-conflict, the international community should encourage any

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[248] Mark Lattimer et al., *A Step Towards Justice: Current Accountability Options for Crimes Under International Law Committed in Syria*, CEASEFIRE CENTRE FOR CIVILIAN RIGHTS & SYRIA JUSTICE & ACCOUNTABILITY CENTER 5 (2015).

[249] *Guide to the Syrian Opposition*, BBC, Oct. 17, 2013 (describing formation of the National Coalition of Syrian Revolutionary and Opposition Forces).

[250] For example, the Iraqi High Tribunal did not receive broad international support, in part because it was seen as an outgrowth of an unlawful war launched by the United States but also because there were elements of Iraqi criminal procedure, most notably the availability of the death penalty, that made international support virtually impossible. *See generally* M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT'L L. J. 327 (2005).

transitional government to accept and enable expert assistance—either by way of embedded staff or dedicated advisors—including by drawing expertise from the diaspora. That said, pushing for this too aggressively can ultimately be counter-productive if it generates resistance on sovereignty or nationalism grounds. It can also trigger claims of victors' justice (or losers' justice) if individuals from only one side of the conflict are represented. Getting advanced buy-in and building productive relationships in advance of a transition can mitigate these sources of resistance.

To a certain degree, future personnel of such a tribunal could be identified in advance through the process of consultation and negotiation with Syrian jurists. An obvious place to start would be the networks developed through the Syria Justice and Accountability Centre (SJAC); the U.S. State Department and U.K. Foreign Office-funded Office of Syrian Opposition Support (OSOS),[251] the Commission on International Justice & Accountability (CIJA), and the Access, Research & Knowledge (ARK) consultancy, which helped to stand up the OSOS and train future Syrian civil administrators.[252] In addition, the IIIM could be tasked with mentoring Syrian jurists. These organizations could sponsor focused training sessions covering the knowledge and skills necessary to host a credible and fair accountability process. That said, focusing on integrating legal experts only associated with the opposition would politicize the process and render it more difficult to work collaboratively with lawyers who remained loyal to the regime.

Building Diplomatic Support For Any of These Models

The viability and sustainability of any form of *ad hoc* tribunal would be significantly enhanced with international support and sponsorship (diplomatic and financial) by regional organizations and interested states, acting as guarantors—and funders—of the process. There are a number of diplomatic steps that could have been taken, and still could be taken, in various multilateral vectors to build support around any of these justice models. Outreach activities would be dedicated to identifying allies and partners in this endeavor, building momentum for a tribunal outcome, and developing a shared vision of a tribunal and a common strategic approach to pursuing the necessary preliminary steps. This would ensure effective burden sharing, cross-regional leadership, and multilateral buy-in. This process would also need to include a careful consultative process to socialize transitional justice concepts amongst influential Syrian groups and retain space for Syrian involvement while at the same time harnessing external resources, political will, oversight, and expertise to enhance any accountability outcome and avoid the threat of victor's justice and post-transition vigilantism.

Initial outreach would target a discrete set of states that demonstrated positive leadership on Syria and/or accountability (specifically Australia, Canada, Denmark, France, Morocco, Switzerland, Qatar, the United Kingdom and other states that supported the IIIM) as well as elements of the Arab League and other members of the Friends of the Syrian People (FOSP), in order to develop a common assessment of the situation, lock in states' commitments, identify the tribunal's ideal parameters and core principles, and agree upon a formula for burden-sharing. Including members of the Arab League would signal regional solidarity, address local sensitivities, and help engender support for international criminal law in a region where norms of accountability remain fledgling. This focused advocacy could coincide, or be followed by, consultations with a range of traditional accountability-centric donors, other members of the P-5, and relevant U.N.

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[251] Damien McElroy, *Britain and US Plan a Syrian Revolution from an Innocuous Office Block in Istanbul*, THE TELEGRAPH, Aug. 26, 2012.
[252] ARK, Our Offer, https://www.arkgroupdmcc.com/.

actors, including the U.N.-Arab League *Special Representative* and the members of the U.N. Commission of Inquiry and IIIM. Once multilateral support from a core group of interested states was secured, the tribunal concept could be rolled out and advocated in a range of diplomatic fora—including the full FOSP, the Human Rights Council, the Security Council, the Geneva and Astana negotiations,[253] and the U.N. General Assembly—to build further momentum. This could be done either as part of the formal agenda of these bodies or as side events.

In the context of any outreach process, there would be a need to placate ICC devotees who perceived a proposed Syrian tribunal as threatening to the Court, which was designed to be a standing body, with close to universal membership. Among the likely concerned actors are Switzerland, which first disseminated an international petition seeking an ICC referral by the Security Council;[254] France, which tabled the doomed ICC referral resolution; and the various High Commissioners for Human Rights, who have called for Council action and an ICC referral.[255] With these interlocutors, it would have to be emphasized that an ICC referral was foreclosed at the Security Council and that the Court, in any case, would not be prepared to take on the entire Syrian situation, given its current caseload, shrinking budget, and efforts to consolidate its investigations and prosecutions already underway. Assuming a successful referral was achieved, the Court would be unlikely to pursue more than a handful of cases, involving those most responsible for abuses, which would require a credible complementarity arrangement with domestic courts or other judicial bodies to avoid broad-based impunity, address accountability at all levels of responsibility, and pre-empt acts of private vengeance. Even strong ICC aficionados should recognize the need for credible, fair, and even-handed complementarity mechanisms to ensure more broad-based accountability given the scale of criminal conduct during the Syrian uprising and war. Lastly, it could be emphasized that a future Syrian government would always retain the right to refer the situation to the Court if it so chose, whether or not a standalone tribunal exists. Indeed, the situation in the Central African Republic (CAR) presents a unique example of the exercise of concurrent jurisdiction between the SCC and the ICC, which has two CAR scenarios under consideration (the civil war from 2002-3 and the subsequent outbreak of violence between the Séléka and anti-Balakas starting in 2012).[256]

Many strong supporters of an ICC referral eventually expressed a willingness to consider other alternatives. The European Union and its member states, for example, "have been staunch allies of the ICC from its inception, offering continued political, diplomatic, financial and logistical support, including the promotion of universality and the defence of the integrity of the Rome

[253] *What is the Geneva II Conference on Syria*, BBC, Jan. 22, 2014; Patrick Wintour, *Syrian Government to Join UN Peace Talks in Geneva*, THE GUARDIAN.

[254] *See* Letter dated 14 January 2013 from the Chargé d'affairs a.i. of the Permanent Mission of Switzerland to the United Nations addressed to the Secretary-General, U.N. Doc. A/67/694-S/2013/19 (Jan. 16, 2013). Russia responded with a statement of its own indicating that the letter was "ill-timed and counterproductive." HUMAN RIGHTS WATCH, WORLD REPORT 2014: SYRIA, https://www.hrw.org/world-report/2014/country-chapters/syria.

[255] *'Syria Must be Referred to the ICC'—UN Human Rights Commissioner*, AMN, Mar. 3, 2018 (recounting statement by Prince Zeid Raad Zeid al-Hussein).

[256] *See* Patryk Labuda, *The Special Criminal Court in The Central African Republic*, 22(2) ASIL INSIGHTS (Jan. 22, 2018) (discussing jurisdiction overlap between SCC and the ICC).

Statute system,"[257] and has signed an agreement on cooperation and assistance with the Court.[258] As the conflict wore on, and the potential utility of the ICC receded, the EU suggested that its members should explore other means to prosecute crimes committed in Syria, including through the establishment of an International Criminal Tribunal for Syria and Iraq.[259] Likewise, members of the COI originally supported an ICC referral but eventually backed the idea of an *ad hoc* tribunal as well.[260]

Had it commenced earlier, this work could have culminated in the formation of a multilateral accountability working group—as a subset of the FOSP or a more discrete stand-alone collective of like-minded states. Such a working group could have taken up the challenge of building the shell of a tribunal in consultation with Syrian partners. This working group would have a mandate to look at a range of accountability and transitional justice issues and serve as the primary forum for building and supporting an eventual tribunal. This work could include assembling pledge commitments and an international assistance package in order to underwrite a range of subsequent activities (including technical support and international secondments) for the tribunal. Operational activities that could be undertaken include drawing up a notional statute for the court, gaining a better understanding of the local judicial system to look for legal synergies, identifying personnel, and ramping up support for efforts to gather evidence that could be used to prosecute those responsible for atrocities, including signaling that dossiers are being compiled on individual perpetrators. Public and consultative efforts to draw up the foundational elements of the tribunal's statute would have provided a key indicator that accountability was forthcoming and demonstrate the international community's commitment to justice for atrocities in Syria. Consultation and discussion around drafting the elements of a tribunal statute would clarify questions related to which of the *ad hoc* and hybrid models is best-suited for Syria. Given the number of open issues, it would be conceivable to initiate a process that would leave open the possibility of multiple outcomes, rather than explicitly endorsing an international/hybrid tribunal or a domestic special chambers model at the outset.

Consultations and drafting sessions could be undertaken at several existing platforms—such as the FOSP; the Geneva peace process; the competing Astana gatherings; the proposed constitutional commission (which has not gained traction); or an *ad hoc* multilateral assembly dedicated to this task. Elements of the Syrian opposition—including legal aid and bar associations, human rights activists, law professors, and expatriate jurists—could be actively engaged in this process in a way that would lend Syrian ownership and legitimacy to the future court and ensure that it reflects those local judicial traditions that are also consistent with international due process standards. Organizing this discussion might offer a collective challenge around which the opposition could cohere under international auspices to ensure that any mechanism is not seen as

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[257] *See* Addressing Human Rights Violations in the Context of War Crimes, and Crimes Against Humanity, Including Genocide, 2018/C 334/07, Official Journal of the European Union (July 4, 2017), P8_TA(2017)0288, ¶ O. *See also* Common Council Position 2003/444/CFSP on the International Criminal Court, Official Journal L 150 (June 16, 2003), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:r10150&from=EN (declaring the crimes within the jurisdiction of the ICC are of concern to all Member States, which are determined to cooperate on the prevention of those crimes and on putting an end to impunity for the perpetrators thereof).
[258] Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, EU Doc. 14298/05 (Dec. 6, 2005).
[259] Addressing Human Rights Violations, *supra* note 257, ¶ 43.
[260] Julian Borger, *Call for Special Tribunal to Investigate War Crimes and Mass Atrocities in Syria*, THE GUARDIAN, Mar. 17, 2015 (recounting remarks by commissioners).

one-sided or unfair. A process of building an accountability mechanism pre-transition would also contribute to capacity-building within the Syrian legal community to hold fair and effective trials as well as the inculcation of rule-of-law principles in keeping with the principle of positive complementarity. If undertaken earlier in the conflict, these various lines of effort could have converged around, and culminated in, an "accountability convention" of sorts whose participants could negotiate and finalize a more complete set of constitutive documents for the future tribunal as well as resolve outstanding issues about the degree of international involvement and support, the precise modalities of any turnkey mechanism, a regime for allocating jurisdiction to parallel judicial bodies, etc.

Necessary Elements of Any Model

A constitutive instrument would likely include draft provisions on a number of essential issues, some of which might have been easier to achieve early in the conflict.[261] First, it would be necessary to define the tribunal's subject matter jurisdiction—i.e., the prosecutable crimes. Options include: the core international crimes prosecutable before other international tribunals (war crimes, crimes against humanity and genocide), other discrete international crimes (torture, summary execution, disappearances, and terrorism) subject to expansive principles of jurisdiction, and extant domestic crimes if appropriate. The war crimes provisions could include reference to the war crimes that have come to define the conflict: the prevalence of unlawful means and methods of warfare, including the discharge of prohibited weapons (such as cluster munitions and chemical/biological weapons), and the use of starvation as a weapon of war. Syria has not codified any international crimes, but its provisions on ordinary crimes (murder, assault) could be invoked alongside customary international law.[262] The incorporation of domestic law would allow the tribunal to address other crimes—such as abuse of power and corruption—that may have facilitated the commission of atrocities. Appropriate gravity thresholds could be formulated to control the breadth of the tribunal's jurisdiction. In addition, the statute of an *ad hoc* tribunal could include reference to Islamic international criminal law.[263] This would be a novelty and might enable the tribunal to establish the responsibility of ISIL actors under their own espoused value system.[264]

Second, the basic documents would also outline the tribunal's personal jurisdiction and address prosecutorial priorities, e.g., whether the tribunal would be empowered to prosecute potentially all offenders, only the top leadership, only those who bear the greatest responsibility for atrocities, or those whose prosecution would help dismantle criminal networks or structures.[265] In order to encourage defections of the rank-and-file and manage expectations, the draft statute

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[261] *See* The Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes, http://insct.syr.edu/wp-content/uploads/2013/09/Chautauqua-Blueprint1.pdf.

[262] *See* Syrian Penal Code, Promulgated by Legislative Decree No. 148/1949, WIPO, http://www.wipo.int/wipolex/en/text.jsp?file_id=478172; AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD—2012 UPDATE 111 (2010), https://www.amnesty.org/download/Documents/24000/ior530192012en.pdf (noting that the Syrian penal code contains no provision for war crimes, crimes against humanity, genocide, or torture).

[263] *See* FARHAD MALEKIAN, PRINCIPLES OF ISLAMIC INTERNATIONAL CRIMINAL LAW: A COMPARATIVE SEARCH (2011).

[264] Sergey Sayapin, *A "Hybrid" Tribunal for Daesh?*, EJIL: *TALK!* (May 4, 2016).

[265] *See* Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff, U.N. Doc. A/HRC/27/56, ¶¶ 33-43 (Aug. 27, 2014) (discussing the importance of adopting a prosecutorial strategy where mass crimes are at issue given the impossibility of prosecuting all perpetrators).

could signal that the tribunal would focus on prosecuting persons in leadership positions as well as individuals, whether military or civilian, who are deemed "most responsible" for crimes against the Syrian people.[266] Many other hybrid tribunals envision a division of labor whereby the international body prosecutes those who unleashed a campaign of abuses or committed exemplary atrocities, whereas the domestic authorities prosecute perpetrators linked to more discrete crimes or mete out conditional pardons or amnesties.[267] If this effort had been initiated with anti-government actors, it would have been necessary to address with a degree of sensitivity the fact that there may be members of the opposition who would fall within the future tribunal's jurisdiction, even if it is limited to those "most responsible" for abuses, given the commission of crimes on all sides, including custodial abuses and the use of human shields by pro-regime elements.[268]

Furthermore, in light of the degree of international involvement in the conflict—in the form of individual foreign fighters as well as great power interventions—it would be necessary to determine whether the tribunal would have jurisdiction over only Syrian nationals or other nationals committing crimes on Syrian territory.[269] The ICTR, for example, could assert jurisdiction over crimes committed within Rwanda and crimes committed by Rwandan citizens elsewhere.[270] It will be difficult to craft a personal jurisdiction regime that reaches Syrian perpetrators and foreign fighters, but not individuals associated with foreign interventions. ISIL membership, or limiting the court's temporal jurisdiction to crimes post-2014, offer options for cabining the tribunal's jurisdiction, but such limitations threaten to undermine the legitimacy of the institution in the eyes of Syrians and others in the region. By way of precedent, the Council limited the ICTR's jurisdiction to 1994 against the wishes of Rwanda, which argued that "pilot projects" that preceded the genocide should fall within the ICTR's temporal jurisdiction, but violence post-genocide should not.[271]

Third, there would undoubtedly be the need to undertake some deliberations over the tribunal's temporal or geographic jurisdiction. One of the benefits of an *ad hoc* tribunal as compared to the ICC is the potential to be flexible when it comes to these elements. Many Syrians

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[266] SCSL Statute, *supra* note 42, at art. 1(1).

[267] *See* Louise Mallinder, *Can Amnesties and International Justice be Reconciled?*, 1 INT'L J. TRANSITIONAL JUST. 208 (2007).

[268] *See, e.g.*, Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/34/64, ¶ 65 (Feb. 2, 2017) (noting that rebels used civilians as human shields as they fled Aleppo).

[269] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 art. 1, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994). The latter power was never exercised notwithstanding revenge crimes committed against Hutu refugees in neighboring countries. Ofelia de Pablo, et al., *Congo Examines Mass Graves to Find Proof of Revenge Genocide on Hutus*, THE GUARDIAN, Sept. 11, 2010.

[270] Art. 1, Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, Annex, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

[271] Faustin Mafeza, *The Temporal Jurisdiction of the International Criminal Tribunal for Rwanda (ICTR) and its Impact on the Establishment of Evidences of Conspiracy to Commit Genocide: Case of Théoneste Bagosora, Ferdinand Nahimana and their Co-Defendants*, 3(3) GLOBAL J. INTERDISC. SOC. STUD. 156 (May-June 2014).

would insist that any tribunal not be limited to the current conflict but also be empowered to assert jurisdiction over exemplary historical massacres, such as the 1982 Hama Massacre,[272] or systemic repression under the Assad regime.[273] In terms of geographic jurisdiction, the degree of overlap between the conflicts in Syria and Iraq, and the crossover crimes involving Yezidi trafficking and enslavement victims and the use of child soldiers by ISIL, might suggest that crimes with a nexus to Iraq should also fall within the tribunal's jurisdiction. The Kosovo Specialist Chambers, for example, have jurisdiction over crimes committed or commenced in Kosovo, which will include crimes consummated in neighboring Albania.[274] That said, any tribunal that threatened to address events in the Golan Heights might trigger resistance from supporters of Israel. It is not clear whether President Trump's recognition of the Golan as part of Israel would change these negotiation dynamics.

Fourth, it might also be possible to identify available defenses, as well as mitigating and aggravating factors for sentencing. Although controversial, the statute could include some formulation of the superior orders defense, allowing for mitigation or even pardon in situations in which the orders that were followed were not manifestly unlawful.[275] The statute, or accompanying sentencing guidelines, may also suggest mitigation in cases in which the defendant is willing to accept responsibility for crimes or sincerely participate in a genuine transitional justice program (along the lines of the conditional amnesty granted by the South African Truth and Reconciliation Commission)[276] or community service (as was the case in Timor-Leste).[277] Likewise, the statute could indicate that individuals willing to implicate higher-ups responsible for ordering or orchestrating offenses would be eligible for something akin to use immunity[278] or criminal diversion.[279] Additional mitigating factors might include the fact of desertion or defection. Although building these sentencing options into international criminal law institutions is uncommon, signaling the possibility of clemency for those who deserted, defected, defied orders, or otherwise undertook acts of resistance and for those willing to participate meaningfully in a

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[272] The Swiss have opened an investigation into Rifaat Al-Assad, Bashar Al-Assad's uncle, for historical crimes when he was in commend of the dreaded Defense Brigades. These include massacres in Tadmor prison in 1980 (which resulted in the death of almost 1,000 prisoners) and in Hama in 1982 (in which thousands were killed following an uprising). Stephanie Nebehay, *Swiss War Crimes Inquiry Into Assad's Uncle Stalled, Rights Group Says*, REUTERS, Sept. 25, 2017. He has been investigated elsewhere in Europe for tax fraud and money-laundering. *Id*.

[273] Jason Rodrigues, *1982: Syria's President Hafez al-Assad Crushes Rebellion in Hama*, THE GUARDIAN, Aug. 1, 2011.

[274] Law on Specialist Chambers and Specialist Prosecutor's Office, Law No. 05/L-53, art. 8, http://www.kuvendikosoves.org/common/docs/ligjet/05-L-053%20a.pdf ("Consistent with the territorial jurisdiction of Kosovo courts under applicable criminal laws in force between 1 January 1998 and 31 December 2000, the Specialist Chambers shall have jurisdiction over crimes within its subject matter jurisdiction which were either commenced or committed in Kosovo.").

[275] Rome Statute of the International Criminal Court art. 33, July 17, 1998, 2187 U.N.T.S. 90.

[276] *See* Promotion of National Unity and Reconciliation Act, Act 95-34 (July 26, 1995) (S.Afr.).

[277] Simon Chesterman, *Truth and Reconciliation in East Timor*, GLOBAL POLICY FORUM (May 2001).

[278] *See, e.g.*, 18 U.S.C. § 6002 ("no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.").

[279] *See, e.g.*, CENTER FOR PRISON REFORM, DIVERSION PROGRAMS IN AMERICA'S CRIMINAL JUSTICE SYSTEM (Aug. 2015).

national reconciliation program, might work to balance a pro-defection/desertion policy with a desire to lay the groundwork for more robust accountability.

Fifth, the statute could, and likely should, include provisions setting out the tribunal's relationship to other tribunals with potentially concurrent jurisdiction, such as domestic courts in Europe hearing discrete cases, or even the ICC in the event that a referral is eventually forthcoming. If an ICC referral eventuates, the *ad hoc* tribunal's relationship to the complementarity regime may need clarification to avoid unnecessary admissibility and jurisdictional challenges in either forum. Furthermore, the ICC Statute's complementarity regime does not envision regional or *ad hoc* tribunals with concurrent jurisdiction, so the legal relationship between a dedicated Syria court and the ICC might need to be thought through. Sixth, these core documents may also include a sunset provision, which would wind down the tribunal, transfer its docket to the domestic system, or eliminate international involvement once a set of benchmarks had been reached and full domestic capacity had been achieved. This option proved useful in the BiH special chambers.[280] Building the demise of the tribunal into its constitutive documents might obviate the need to create a separate residual mechanism, as has been done with the ICTY/R and the SCSL.[281]

Seventh, working with Syrian jurists, it would also be possible to identify the rules of procedure and evidence. There may be elements of the civil law tradition, or other indigenous dispute resolution traditions, that could be incorporated into any constitutive document. Fully considering the scope of extant penal law and procedure would lend a degree of local ownership and relevance that may be attractive to future Syrian authorities. Any international instrument, however, would have to be consistent with international fair trial rules and principles, which would help insulate it from challenge.[282] The tribunal's statute could preserve the potential for domestic civil redress and criminal asset forfeiture or even a more fulsome reparations regime.

Eighth, it might also be useful to consider how to integrate the tribunal into a broader transitional justice strategy. Historically, prosecutions and other forms of transitional justice (such as truth commissions or lustration programs) have operated in virtual acoustic separation.[283] The constitutive documents under consideration, by contrast, could creatively conceptualize ways the tribunal could be integrated into a larger transitional justice strategy that might include limited and conditional amnesties for rebels who engaged in the armed conflict without the privilege of doing

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[280] HUMAN RIGHTS WATCH, BOSNIA: KEY LESSONS FROM WAR CRIMES PROSECUTIONS (Mar. 12, 2012).

[281] *See* U.N. International Residual Mechanism for Criminal Tribunals, http://www.irmct.org/en.

[282] *See* Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with the inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) art. 1 (providing for jurisdiction over "senior leaders of Democratic Kampuchea [the Khmer Rouge] and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia.").

[283] *See* Charles C. Jalloh, *Toward Greater Synergies between Courts and Truth Commissions in Post-Conflict Contexts: Lessons from Sierra Leone, in* ARCS OF GLOBAL JUSTICE: ESSAYS IN HONOR OF WILLIAM A. SCHABAS 417 (Meg deGuzman & Diane Amann eds. 2018); HUMAN RIGHTS WATCH, THE INTERRELATIONSHIP BETWEEN THE SIERRA LEONE SPECIAL COURT AND TRUTH AND RECONCILIATION COMMISSION (Apr. 18, 2002), https://www.hrw.org/news/2002/04/18/interrelationship-between-sierra-leone-special-court-and-truth-and-reconciliation# (setting forth proposals for how the two institutions should interact).

so;[284] a release mechanism for detainees based upon agreed upon criteria;[285] a truth commission to compile a definitive history of the origins, patterns, and practices of violence that is resistant to revisionism; a lustration/vetting program to ensure that perpetrators do not retain positions of power or influence in the new government; restitution programs covering land, property, and other contested assets; and institutional reform. As part of this process, negotiators could consider how to reconcile the establishment of a mechanism for accountability with other potential outcomes to the Syrian crisis, such as a "soft landing" for President Assad and his inner circle.

When embedded within a comprehensive transitional justice framework, accountability processes can contribute to broader stabilization and atrocity prevention goals. To be sure, the emphasis on legal or judicial responses can privilege retributive forms of justice over more restorative options and complicate efforts to resolve conflicts. Under any arrangement, penal accountability efforts constitute just one among various transitional justice processes that serve to generate a definitive record of events, individuate guilt to prevent collective retribution, rehabilitate victims, reform institutions, and build a climate for reconciliation and the establishment of the rule of law, which would address many of the issues that drove the revolution from the start. Any criminal accountability program could be designed at the outset such that it could be later integrated into a broader transitional justice agenda.

Conclusion

This chapter demonstrates that there is no shortage of ideas and options for accountability; what has been missing is a political consensus from which to proceed. Any of these proposals could have been pursued early in the conflict or over its course. To be sure, it may be too late for many of these models to be implemented, given that the parties are now indelibly polarized and Assad is close to all-out victory. This suggests the value of pursuing accountability immediately, as atrocities commence, rather than pushing it off on the assumption that it will be dealt with later. In addition to keeping more accountability options open, this alacrity also has the benefit of capturing any potential deterrent power of the international community taking concrete action around accountability.

To be sure, advancing the international/hybrid tribunal model would have undoubtedly entailed significant diplomatic exertion in order to build and sustain robust international support. Widespread and consistent calls for perpetrators to be held to account—including for an ICC referral—from a range of countries demonstrates that there may have been sufficient appetite in the international community to contribute to a multilateral accountability initiative early in the conflict if powerful states were willing to step forward with viable proposals. In the end, the international community remained fixated on the ICC as the most desirable forum for justice while also working to halt the war and the concomitant atrocities. As a result, other worthy options for justice did not receive the attention they deserved.

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[284] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art 6(5), 1125 U.N.T.S. 1979 (June 8, 1977) ("At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.").

[285] *See* Independent International Commission of Inquiry on the Syrian Arab Republic, *Detention in the Syrian Arab Republic: A Way Forward* (Mar. 8, 2018).

6

National Courts Step Up: Syrian Cases Proceeding in Domestic Courts

Selective justice is better than no justice.[1]

Historically, what we today call international criminal law was primarily adjudicated before domestic courts. While the international community has established international tribunals in the past, and some singular cases involving the commission of core international crimes are at the moment proceeding before international courts, there is no question that domestic legal systems will continue to play an essential role in defining, prosecuting, and enforcing international criminal law. This decentralization is particularly so given a confluence of factors on the international scene, including the limited jurisdiction and resources of the International Criminal Court (ICC), the understandable reluctance of the international community to create new stand-alone justice institutions, the centrality of the concept of complementarity to the Rome Statute system, obligations contained in many international crimes treaties to either prosecute those who breach treaty rules or to extradite them elsewhere for trial, and the increased capacity of domestic legal systems to address the commission of international crimes.[2] The ability and responsibility to prosecute international crimes thus exists across multiple domestic jurisdictions.

Ideally, international criminal law cases would go forward in the domestic courts in the impacted country itself. This proximity to the events in question ensures greater societal visibility to maximize the expressive function of the law, to tap into the potential of such proceedings to help instantiate the rule of law, and to prevent impunity and an often-concomitant recurrence of violence.[3] On a practical level, local proceedings also facilitate access to evidence and for victims. All that said, where courts in the affected country are foreclosed, as is the case in Syria, legal processes in the courts of other countries offer an advantageous second-best alternative.

The ability of domestic courts to adjudicate international crimes depends, of course, on having in place the requisite legal framework with respect to both jurisdiction and substantive law. Nations can apply their criminal laws to events that happened extraterritorially on a number of grounds. These include principles of nationality and passive-personality jurisdiction, territoriality and the effects doctrine, and the protective principle.[4] When it comes to international crimes, most

[1] Mohammad Hadi Zakerhossein, *To Bury a Situation Alive—A Critical Reading of the ICC Prosecutor's Statement on the ISIS Situation,* 16(4) INT'L CRIMINAL L. REV. 613, 618 (2016).
[2] *See* ILC Study by the Secretariat, *The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare), U.N. Doc. A/CN.4/Ser.630 (June 18, 2010) (discussing the range of treaties containing this formulation); Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 422 (July 20) (discussing this obligation in connection with the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).
[3] David A. Kaye, *Justice Beyond The Hague: Supporting the Prosecutions of International Crimes in National Courts*, COUNCIL ON FOREIGN RELATIONS, 6 (June 2011) ("There are good reasons to support prosecutions at national levels. According to the World Bank, national-level justice contributes to 'legitimate institutions and governance' that are 'crucial to break cycles of violence.'"); KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING THE WORLD 129 (2011) (arguing from empirical research that post-conflict human rights trials lead to more stable democracies).
[4] *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 409-412 (AM. LAW INST. 2018) (describing these bases for jurisdiction to prescribe under customary international law) [hereinafter

important has been the principle of universal jurisdiction.[5] Since the 1990s, this concept has evolved: blossoming at first, then withering slightly, and now experiencing new growth, nurtured in part by the imperative to prosecute the crimes committed during the Syrian war.[6] Although this phenomenon once generated hyperbolic antagonism,[7] the exercise of extraterritorial jurisdiction over international crimes is now a regular feature of international affairs, as domestic and regional legal systems reorder themselves to facilitate the investigation and prosecution of crimes with a transnational dimension.

In the Syrian context, European and regional domestic courts have emerged as fertile grounds for justice given the failure of the ICC referral effort, the lack of multilateral support for a hybrid or *ad hoc* tribunal devoted to Syria, and the perceived impediments to building international justice institutions outside the Security Council. The Syrian Commission of Inquiry (COI) has expressly called upon states to utilize universal jurisdiction to "investigate and prosecute persons and groups implicated in egregious violations."[8] Individual states have begun to oblige, leading to the revival of the concept of universal jurisdiction after a period of retrenchment and the activation of diverse principles of jurisdiction.[9]

As a result, a number of domestic trials involving events and actors in Syria are underway, featuring a range of criminal charges and fact patterns. These cases fall into two general buckets. One set of cases involves charges under anti-terrorism legislation or laws criminalizing participation in foreign wars—effectively crimes against a sovereign. These defendants are ISIL members and former foreign fighters who have returned home. States are highly motivated to prosecute such cases because they perceive these defendants as posing an acute national security threat, both from the perspective of bringing the violence home but also as potential recruiters and radicalizers.[10] In this regard, the Paris attacks of November 2015, among others, stand as a stark reminder of the risk posed by "weaponized" foreign recruits.[11] In addition, by virtue of Security Council Resolution 2178, states are under U.N. Charter-based duties to comprehensively address the phenomenon of foreign terrorist fighters.[12] Many states have accordingly enacted expansive

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FOURTH RESTATEMENT]. *See generally* William S. Dodge, *Jurisdiction in the Fourth Restatement of Foreign Relations Law*, 18 Y.B. PRIV. INT'L L. 143 (2016/2017).

[5] *Id*. § 413 (describing universal jurisdiction under customary international law).

[6] *See* Máximo Langer & Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction*, 30 EUR. J. INT'L L. 779 (2019) (citing empirical data showing a gradual yet inexorable expansion in the number, geographic distribution, and national origin of defendants in universal jurisdiction prosecutions and trials).

[7] Goldsmith and Krasner argue, with little substantiation, that "a universal jurisdiction prosecution may cause more harm than the original crime it purports to address." Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS 47, 51 (2003). *See also* Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFFAIRS (July/Aug. 2001); Ken Roth, *The Case for Universal Jurisdiction*, FOREIGN AFFAIRS (Sept//Oct. 2001).

[8] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/28/69, ¶ 145(a) (Feb. 5, 2015).

[9] Trial International estimates that universal jurisdiction cases worldwide are up 18% since 2018. Trial International, *Evidentiary Challenges in Universal Jurisdiction Cases*, *Universal Jurisdiction Annual Review 2019*, at 11 [hereinafter *Trial International, Evidentiary Challenges*].

[10] Rukmini Callimachi, *How a Secretive Branch of ISIS Built a Global Network of Killers*, N.Y. TIMES, Aug. 3, 2016 (discussing efforts by ISIL to arrange attacks abroad).

[11] Jean-Charles Brisard, *The Paris Attacks and the Evolving Islamic State Threat to France*, 8(11) CTC SENTINEL (Nov/Dec 2015) (noting that at least eight of the attackers were returning foreign fighters).

[12] S.C. Res. 2178, U.N. Doc. S/RES/2178 (Sept. 24, 2014). The Council has defined this concept as: "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in

legislation enhancing their ability to prosecute participation in acts of terrorism,[13] raising concerns among rights groups and advocates about the misuse of such laws.[14]

A second subset of cases involves individuals who stand accused of committing international crimes *stricto sensu*—i.e., crimes against human beings. These latter prosecutions are enabled by the incorporation of international criminal law—and particularly war crimes—into domestic penal codes, a global legislative trend occasioned in part by the ratification of the ICC Statute (even though that treaty technically does not require domestic incorporation of ICC crimes).[15] Although most domestic cases involving Syria feature some combination of these two sets of criminal charges, states may only able to resort to immigration remedies for foreign defendants for lack of evidence or other legal impediments—a last-ditch option for accountability.

Facilitating these cases is the proliferation of special prosecutorial units dedicated to investigating international crimes;[16] global mutual legal assistance arrangements (including INTERPOL);[17] the formation of multinational "joint investigative teams" focused on the prosecution of transnational crimes;[18] training programs dedicated to investigating international crimes;[19] and Europe-wide institutions such as EUROPOL,[20] the European Arrest Warrant

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connection with armed conflict." *Id*. at pmbl. *See also* Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination, U.N. Doc. A/70/330, ¶ 13 (Aug. 19, 2015) ("individuals who leave their country of origin or habitual residence and become involved in violence as part of an insurgency or non-State armed group in an armed conflict. Foreign fighters are motivated by a range of factors, notably ideology.").

[13] *See, e.g.*, Council Framework Decision on Combating Terrorism, 2002/475/JHA, 2002, O.J. (L 164) 3 (EU).

[14] *See Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, U.N. Doc. A/73/45453 (Sept. 3, 2018).

[15] *See* U.N. Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction*, U.N. Doc. A/66/93 (June 20, 2011); AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD—2012 UPDATE (2012); Beth Van Schaack & Zarko Perovic, *The Prevalence of "Present-In" Jurisdiction*, 107 PROCEEDINGS OF THE ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 237, 239 (2013) ("there is a marked upward trend in the degree to which states are incorporating atrocity crimes into their domestic codes and empowering their courts to exercise various forms of extraterritorial jurisdiction."). The General Assembly has invited member states to submit information on the scope and application of the principle of universal jurisdiction. G.A. Res. 70/119, U.N. Doc. A/RES/70/119 (Dec. 14, 2015) (creating a working group to study universal jurisdiction).

[16] Human Rights Watch, *The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands* (2014) [hereinafter *HRW, The Long Arm*]. Many of these units were originally established to track Nazi war criminals discovered abroad. *See* Redress/FIDH, *Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes Units* 7-8 (December 2010).

[17] INTERPOL is mainly focused on facilitating cooperation and mutual legal assistance among national police organizations and serving as a repository and distributor of international arrest warrants, including those that allege the commission of international crimes. *See* Mark Leon Goldberg, *What an "Interpol Red Notice" Actually Means*, UN DISPATCH (Dec. 1, 2010).

[18] Council Framework Decision of 13 June 2002 on Joint Investigative Teams, 2002/465/JHA.

[19] The Institute for International Criminal Justice regularly hosts such trainings for domestic investigators and other legal professionals. *See* https://iici.global/. INTERPOL has offered such trainings as well in connection with investigators with the International Criminal Court. *See Interpol Simulation Exercise for War Crimes Investigators*, DEFENCEWEB (Nov. 20, 2018).

[20] *See, e.g.*, Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and Replacing and Repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, L 135/53, art. 3 (May 24, 2016) (indicating that Europol "shall support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating serious crime affecting two or more Member

(EAW),[21] and the Eurojust Genocide Network.[22] In addition, domestic prosecutors have benefited from institutional learning and assistance from non-governmental investigative efforts that jumpstart domestic processes and render these cases less daunting.[23] Besides these criminal cases, and important in their own right, a handful of civil cases have moved forward, particularly in the United States, including against the sovereign state of Syria. The latter cases—which offer victims the opportunity to shape justice without having to work through the national prosecutorial authorities or the criminal justice system—will be taken up in the next chapter.

This chapter thus focuses on the growing class of criminal cases that have been brought to date in courts around the globe that are exercising jurisdiction over perpetrators hailing from, or active within, Syria. This jurisprudential survey yields a number of interesting observations and trends in prosecutorial practice. *First*, the cases skew towards charges of terrorism, as opposed to atrocity crimes. As compared to war crimes charges and given the broad reach of material support for terrorism statutes, these crimes are easier to prove with available evidence while also responding to sovereign national security priorities. Indeed, all that may be necessary is proof of an association between the defendant and an identified or designated foreign terrorist organization.[24] Australia, for example, has used its statute criminalizing the offense of entering, or remaining in, a "declared area," with Al-Raqqa—the epicenter of the wannabe caliphate—being a declared area from 2014-2017.[25] These charges are particularly common when states are charging their own nationals who have endeavored to join the fight but then returned to the comforts of Europe.

Such terrorism charges paint an incomplete picture, however. As one commentator has noted: "Resorting to terrorism charges for reasons of prosecutorial convenience and disregarding international crimes charges from the get-go, runs the risk of legally misrepresenting the potential involvement in international crimes of such fighters."[26] Leveling and proving international law charges presents a more complex exercise, especially because investigators do not have access to the Syrian crime scene, key witnesses may be languishing in sprawling refugee camps, and linkage evidence—connecting specific perpetrators to particular criminality—is elusive. All that said, some states have utilized domesticated international humanitarian or international criminal law to

States, terrorism and forms of crime which affect a common interest covered by a Union policy, as listed in Annex I," which includes international crimes).

[21] Council Framework Decision on the European Arrest Warrant and the Surrender Procedures Between Member States, 2002/584/JHA [2002] OJ L 190/1. The EAW replaces the process of extradition between EU member states and abolishes dual criminality for many categories of crimes.

[22] Council Decision 2203/335/JHA, Official Journal 118/12, of 8 May 2003 on the Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes. Europol and the European Investigation Order Directive also support member states in combatting forms of international organized crime and terrorism. *See* Eurojust, Genocide Network, http://www.eurojust.europa.eu/practitioners/networks-and-fora/pages/genocide-network.aspx. *See also* HRW, *The Long Arm*, *supra* note 16, at 86. A similar network is being stood up across Africa. *See* Network for Investigations and Prosecution of Genocide, Crimes Against Humanity and War Crimes, *Conclusions of the 16th Meeting of the European Network of Contact Points for Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes* (May 21-22, 2014).

[23] Langer & Eason, *supra* note 6, at 792.

[24] *See, e.g.*, 19 U.S.C. § 2339A.

[25] *Declared Area Offense*, Australian National Security, https://www.nationalsecurity.gov.au/whataustraliaisdoing/pages/declaredareaoffence.aspx.

[26] *Alexandra Lily Kather & Anne Schroeter, Co-Opting Universal Jurisdiction? A Gendered Critique of the Prosecutorial Strategy of the German Federal Public Prosecutor in Response to the Return of Female ISIL Members: Part I*, OPINIO JURIS (Mar. 7, 2019).

charge a variety of war crimes, particularly when it comes to foreign nationals who have ended up in their territories. Some states can even invoke ordinary criminal law, particularly the law governing aspirational crimes, incitement, or simple weapons offenses, or maybe even treason or extraterritorial mayhem, if available.[27] Several cases involve all three types of charges. This decision often turns on the available evidence, the degree of risk aversion exhibited by prosecutorial authorities, political pressure from the populace, and the self-conceptualization of prosecutorial authorities as champions of international law.

Second, most of the existing indictments involve single incidents (rather than large operations or systemic abuses). To the extent that war crimes charges are forthcoming, they tend to involve relatively minor offenses, often for lack of evidence of more serious crimes that are implied—but not conclusively established—by the proof at hand. These include crimes such as desecrating a corpse, rather than the more serious charges associated with targeting civilians, custodial abuses, or the use of chemical weapons. States have also been creative about coupling these international law-based charges with ordinary penal charges and enhancements, such as unlawful weapons use. Together, the types of substantive charges being filed are more easily proven—often through the defendant's trophy images, social media profile, or phone records—than more grave war crimes or crimes against humanity.

Third, these cases present interesting gender dynamics. None of the cases that have moved forward involves sexual violence charges, even though these crimes have been legion in Syria (especially in detention centers) and documentation centers have compiled large quantities of relevant evidence.[28] Although most defendants are men, some women who have joined ISIL have faced charges for their involvement in, or the provision of material support to, acts of terrorism.[29] The case of Samantha El-Hassani in the United States is instructive; she was charged with, and pled guilty to, material support for terrorism but not for her apparent involvement in the purchase and detention of three Yezidi children, who were abused by her late husband.[30] Although some have argued that the partners of ISIL fighters should be treated as victims, this assumption can overlook the role that women can play in sustaining armed groups, even intensely misogynistic ones. Indeed, the Security Council in its resolution on foreign fighters notes the multifaceted role played by women in terrorist organizations.[31]

Fourth, from the perspective of other trends in the demographics of the defendants targeted for prosecution, most indictments—with a few exceptions—tend to focus on low-level perpetrators, rather than the architects of violence or those most responsible. *Fifth*, and also troubling, is that the vast majority of cases that have moved forward have targeted members of opposition groups—including ISIL members—rather than Syrian government personnel. These two observations reflect the fact that senior figures from all sides, and particularly regime actors, have simply not traveled to Europe or to other states that might be motivated to prosecute, or extradite, them. This asymmetry, coupled with an over-emphasis on charging terrorism as opposed

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[27] On incitement to terrorism, see Yael Ronen, *Incitement to Terrorist Acts under International Law*, 23 LEIDEN J. INT'L L. 654 (2010).

[28] *See* Columbia School of Public Health, *Sexual Violence in the Syrian Conflict* (Aug. 30, 2012) (discussing effort by Women Under Siege to crowdsource information on sexual violence).

[29] *See* Fionnuala Ní Aoláin & Jayne Huckerby, *Gendering Counterterrorism: How to, and How Not to—Part I*, JUST SECURITY (May 1, 2018); Fionnuala Ní Aoláin & Jayne Huckerby, *Gendering Counterterrorism: How to, and How Not to—Part II*, JUST SECURITY (May 3, 2018).

[30] Jessica Roy, *Two Sisters and the Terrorist Who Came Between Them,* ELLE (Aug. 27, 2019).

[31] S.C. Res. 2396, ¶ 31, U.N. Doc. S/RES/2396 (Dec. 21, 2017).

to atrocities crimes, has become a source of controversy, frustration, and disappointment within the growing Syrian diaspora.[32]

That said, national authorities are increasingly organizing structural investigations of the conflict and its various armed groups—essentially far-reaching investigations *in absentia*—which will allow them to move quickly against particular individuals as soon as they are within reach. And, a handful of indictments have been issued against more senior regime figures. Some defendants have been arrested; a few are subject to extradition proceedings; the majority are still at large, subject to investigations that remain aspirational works in progress. None of the regime cases moving forward, however, has been hindered by any immunity defenses, which is consistent with the International Law Commission's current thinking on the topic of immunities for state officials.[33]

Sixth, as is apparent from the available evidentiary records, many of these cases are benefiting from the sophisticated documentation work of non-governmental organizations that are sharing their holdings with national authorities. As discussed in chapter 8, these groups are compiling dossiers on potential defendants, producing memoranda on key background inquiries (such as the chain of command), coding their holdings for ease of search, and authenticating digital and documentary evidence. *Seventh*, regardless of the nature of the charge, essential evidence is often drawn from the defendant's own digital profile, attesting to the importance of social media companies retaining such information even if they remove it from public view on the grounds that they offend community standards or their terms of service.[34] These digital artifacts of atrocities—including WhatsApp messages, YouTube videos, and social media posts—increasingly offer ready, and largely unimpeachable, evidence of the commission of certain war crimes and domestic offenses.

Eighth, in many European systems, Syrian lawyers and experts are intimately involved in conceptualizing, encouraging, and proving these cases—signaling to the emergence of a new model of hybridity and complementarity. *Ninth*, national authorities are gradually developing a track record of invoking international criminal law to address the presence of perpetrators within their jurisdictional reach rather than relying solely on immigration remedies (e.g., deportation or immigration fraud charges). As domestic courts grapple with international humanitarian and criminal law, they are generating state practice and *opinio juris*—the two ingredients of customary international law. This jurisprudence has inspired new thinking on such issues as combatant immunity, the required nexus to armed conflict, conflict classification, and the elements of lesser war crimes that have rarely been prosecuted, such as the aforementioned desecration of a corpse.

Tenth, and finally, many cases also come to light on the basis of tips from refugees about the presence of suspected Syrian war criminals among their ranks, as typically happens in

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[32] Syrian Justice and Accountability Center, *Sweden's First Steps Towards Justice Prove Controversial Among Syrians* (Mar. 9, 2015), https://syriaaccountability.org/updates/2015/03/09/swedens-first-steps-towards-justice-prove-controversial-among-syrians/ (discussing case of Mouhannad Droubi, who was shown on a Facebook video abusing someone who appeared to be a bound Syrian soldier); Human Right Watch, *"These are the Crimes we are Fleeing:" Justice for Syria in Swedish and German Courts* 4, 36 (2017) [hereinafter *HRW, "These are the Crimes"*].
[33] International Law Commission, Report on the Work of the Sixty-Eighth Session, *Chapter VII: Immunity of State Officials from Foreign Criminal Jurisdiction*, GAOR 71st Sess., Supp. No. 10 (A/71/10), ¶¶ 83-86 (2016) (denying any immunities for international crimes).
[34] *See* Malachy Browne, *YouTube Removes Videos Showing Atrocities in Syria*, N.Y. TIMES, Aug. 22, 2017.

connection with conflict situations that produce massive outflows of people.[35] The testimony of asylum-seekers and others who have sought refuge in prosecuting states has thus proven to be crucial to these accountability efforts, attesting to the importance of prosecutorial authorities building trust and genuine connections with Syrian (indeed all) diaspora communities. Furthermore, these migrants are essential sources of evidence and often confirm the commission of war crimes in their refugee or asylum applications, which can trigger an investigation or prosecution. And, many legal systems allow victims to initiate criminal actions, which has generated some Syrian cases in foreign courts.[36]

All told, while important, these domestic proceedings remain episodic and opportunistic. Given the investigatory and prosecutorial realities, the cases in the aggregate are not representative of the full scope of the international crimes being committed in Syria. If the goal is comprehensive accountability, these results are disappointing; nonetheless, these cases are establishing important legal precedents, providing domestic authorities with valuable experience prosecuting international crimes, offering a measure of justice to victims, and punishing individuals accused of horrific acts. In addition to putting a dent in impunity and denying safe haven to perpetrators, cases in foreign courts promote stability by preventing victims and victim groups from taking justice into their own hands in their places of refuge.[37] Even singular cases can be highly salient and can exert a multiplier effect, signaling that justice is possible and helping advocates overcome political resistance elsewhere. Finally, the availability of this accountability outlet, notwithstanding its limitations, has also helped to galvanize and sustain civil society organizations whose documentation energies might wane without some evidence of tangible impact during this seemingly endless conflict. When situated against the previous chapters on the obstacles to exercising international jurisdiction, these results should be celebrated, since domestic courts have emerged as the only potential forum to administer justice to date—one case at a time.

A Partial Inventory of the Domestic Cases Emerging from the Syrian Conflict

A number of investigations and prosecutions arising out of events in Syria are proceeding in domestic courts around the world under various principles of jurisdiction. Notwithstanding this proliferation of cases, advocates rightly insist that there is more to be done to provide justice for victims.[38] At the same time, civil society organizations are concerned about expanding the reach of counter-terrorism laws and have recommended that states focus on the rehabilitation of some foreign fighters rather than their aggressive prosecution for mere membership.[39] With these caveats in mind, the remainder of this chapter offers a survey—necessarily incomplete given the

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[35] *Refugees in Germany Reporting Dozens of War Crimes*, DEUTSCHE WELLE, Apr. 11, 2016 (noting that German police are receiving dozens of reports per day about war crimes from arriving refugees and asylum seekers); Stine Jacobsen, *Norway Police Search for Syrian War Criminals Among Asylum Seekers*, REUTERS, Jan. 15, 2016.
[36] FOURTH RESTATEMENT, *supra* note 4, at § 407, reporters' note 5.
[37] *Developments in the Law, International Criminal Law*, 114 HARV. L. REV. 1943, 1967 (2001) (noting that legal proceedings can provide a "controlled substitute for vigilantism"). *See* Sonya Swink, *Pari Ibrahim: Without Justice, Yezidis Will get Revenge*, THE GLOBAL POST, Aug. 9, 2018.
[38] Human Rights Watch, *EU: Use National Courts to Fight Impunity* (May 19, 2016) (noting that the refugee crisis "creates a unique opportunity for European states to make a meaningful contribution to justice").
[39] *See* Yuki Fukumoto, *International Cases Studies of Terrorist Rehabilitation*, 13 J. POLICING, INTELLIGENCE & COUNTER-TERRORISM 376 (2018).

enduring difficulty of tracking domestic proceedings—of the types of Syrian cases moving forward in domestic courts worldwide.[40]

Cases in the Region

Starting with Syria itself, multiple legal systems have operated in Syria over the course of the conflict—in government-controlled areas, in opposition redoubts (around Aleppo, Daraa, Idlib, and Ghouta), in territory under ISIL occupation, and in parts of northern Syria under Kurdish control.[41] As one commentator put it: "With the loss of territorial control in large areas, official Syrian government organs disappeared in these areas, including the justice system. In its place, a variety of systems of justice have emerged in different regions controlled by the various armed groups."[42] In areas that remained under state control, the Syrian courts have not actively or impartially prosecuted war crimes cases emerging from the conflict, as confirmed by the COI. In an early report, the COI noted:

> it has not yet identified any evidence that Syria is making a genuine and credible effort to punish severe crimes. In fact, given the protracted and increasingly sectarian nature of the conflict, it seems highly improbable that effective and independent prosecutions that meet essential international standards could be carried out in Syria anytime in the near future. There is not only a lack of willingness to institute proceedings, a country torn by almost two years of bloody and destructive conflict is also unlikely to be capable of such an effort.[43]

Even if the political will existed, neither the 1953 Penal Code[44] nor the 1950 Military Penal Code[45] contains provisions enabling the prosecution of war crimes, crimes against humanity, or genocide, although ordinary crimes committed on Syrian territory are easily prosecuted as such.[46] This includes the crime of torture in the form of Article 391 of the Penal Code, which criminalizes subjecting "a person to illegal hardship in order to obtain a confession to a crime or information."[47] That said, a number of immunities are provided for by law for state actors and other perpetrators.[48] For one, Syria, like several Middle Eastern states, has a "rape-marriage" law, which exempts criminal punishment for rape if the perpetrator subsequently marries the victim.[49]

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[40] Both Trial International (https://trialinternational.org/) and the International Crimes Database (http://www.internationalcrimesdatabase.org/) are endeavoring to track these cases.

[41] *See generally* Jacques el-Hakim, *Syria*, *in* 1 Y.B. ISLAMIC & MIDDLE EASTERN L. 142 (Eugene Cotran & Chibli Mallat eds., 1994) (discussing Syrian legal framework and foundational legislation).

[42] *See* ILAC RULE OF LAW ASSESSMENT REPORT: SYRIA 2017, INTERNATIONAL LEGAL ASSISTANCE CONSORTIUM 58 (Mikael Elman ed., 2017).

[43] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc A/HRC/22/59, at 124 (Feb. 5, 2013).

[44] *See* Penal Code, Legislative Decree No. 148 of 22 June 1949, as amended (Syr.).

[45] *See* Law No. 61 of 1950, Military Penal Code, as amended (Syr.).

[46] Amnesty International, *supra* note 15, at 111 (discussing the lack of Syrian international crimes legislation).

[47] *Id*. Syria ratified the Torture Convention in July 2004. *See* Legislative Decree 39/2004. The Constitution also specifically prohibits torture. *See* art. 28(3) ("No one may be physically or psychologically tortured or treated in a degrading fashion").

[48] *See* Alternative Report to the Syrian Government's Initial Report on Measures Taken to Fulfil its Commitments under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Damascus Center for Human Rights Studies 5-8 (2010); ILAC, *supra* note 42, at 21-22.

[49] Syrian Penal Code, Legislative Decree No. 148/1949, art. 508 ("If a valid contract of marriage is made between the perpetrator of any of the offenses mentioned in this section, and the victim, the prosecution is

In addition to exceptional national security courts that pre-date the war,[50] the Syrian government established a special Counter-Terrorism Court (CTC) in Damascus,[51] which effectively replaced the Supreme State Security Court, abolished by Decree No. 53 of April 21, 2011, after Assad lifted the state of emergency on the same day with Decree No. 161.[52] Authorities are bringing terrorism charges in closed CTC proceedings against opponents of the regime, including civilian political dissidents,[53] under new counter-terrorism legislation.[54] The latter law criminalizes everything from financing terrorism, to destabilizing public security, to promoting terrorism, to damaging state infrastructure.[55] Many of these offences carry the death penalty.[56] The law itself has become an instrument of terror against members of the opposition. According to the Violations Documentation Center (VDC), Syria had referred over 80,000 suspects, mostly civilians, to the CTC as of April 2015.[57] In 2016, political detainees rioted in one facility demanding the implementation of Security Council Resolution 2254 (2015), which calls for the release of arbitrarily detained individuals,[58] consistent with Article 6(5) of Additional Protocol II to the 1949 Geneva Conventions.[59]

On other fronts, military field courts[60]—which have the authority to prosecute civilians for offenses against state security committed during armed conflict and domestic unrest[61]—are visiting detainees in detention and handing out judgments after summary proceedings.[62] According to the Syrian COI, confessions obtained under torture are regularly submitted as the only evidence in the CTC and other Syrian courts, despite the illegality of the way in which they were obtained.[63] Such summary and selective procedures in special courts violate Common Article 3(d) of the Geneva Conventions, which prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial

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suspended. If judgment was already passed, the implementation of the punishment is suspended."). *See The Middle East's "Rape-Marriage" Laws*, SELFSCHOLAR (July 18, 2012).

[50] ILAC, *supra* note 42, at 42.

[51] Legislative Decree No. 22 of 26 July 2012 established the CTC.

[52] *See* SPECIAL REPORT ON COUNTER-TERRORISM LAW NO. 19 AND THE COUNTER-TERRORISM COURT IN SYRIA, COUNTER-TERRORISM COURT: A TOOL FOR WAR CRIMES, VIOLATIONS DOCUMENTATION CENTER IN SYRIA 2-3 (Apr. 2015) [hereinafter *VDC*]; Observatory For The Protection Of Human Rights Defenders, *Syria*, Annual Report (2011).

[53] Human Rights Watch, *Syria: Counterterrorism Court Used to Stifle Dissent* (June 25, 2013).

[54] Law No. 19 of 2 July 2012.

[55] Syria passed Legislative Decree No. 51 of December 22, 1962 after a series of post-independence coups. It infringed a number of speech and assembly rights and remained in place until the uprising when it was effectively replaced by the Counter-Terrorism Law.

[56] *See* Maëlla Ducassoux, *Enforcing Human Rights in Counter-Terrorism Laws in Syria*, ARAB REFORM INITIATIVE.

[57] VDC, *supra* note 52, at 21.

[58] Zuhour Mahmoud, *Hama Prison Riot Shines Spotlight on Show Trials*, SYRIA DEEPLY (June 9, 2016).

[59] Protocol Additional to the Geneva Conventions of 12 Aug. 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts art. 6(5), 1125 UNTS 609, Jun. 8, 1977 ("At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.").

[60] Legislative Decree No. 109 of 17 August 1968. *See* ILAC, *supra* note 42, at 45, 63; VDC, *supra* note 52, at 5.

[61] INTERNATIONAL BAR ASSOCIATION, HUMAN RIGHTS LAWYERS AND DEFENDERS IN SYRIA: A WATERSHED FOR THE RULE OF LAW 28 (2011); VDC, *supra* note 52, at 6.

[62] Mahmoud, *supra* note 58.

[63] U.N. Human Rights Council, Independent International Commission of Inquiry on the Syrian Arab Republic, *Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic*, U.N. Doc. A/HRC/31/CRP1, at ¶ 35 (Feb. 3, 2016).

guarantees which are recognized as indispensable by civilized peoples."[64] This provision applies equally to non-state actors who may set up informal courts to prosecute regime offenders.[65]

President Assad has also issued a number of successive and overlapping amnesty decrees over the course of the conflict that might exempt certain individuals from prosecution and punishment.[66] Early in the uprising, he issued a partial amnesty for crimes committed before May 31, 2011. The decree reduced the punishments for some crimes (but not for crimes committed in 1980, undoubtedly a reference to the Hama Massacre), including army defectors or individuals who fled the country to avoid compulsory military service.[67] Subsequent iterations continued to advance the drop dead date on which individuals had to turn themselves in in order to benefit from the amnesty.[68] A number of such amnesties focused on "military deserters" and crimes contained in the Military Penalties Law, set forth in Legislative Decree No. 61 (1950), as amended.[69] In 2014, an amnesty was extended to non-Syrian foreign fighters who joined a "terrorist group."[70] Many of the decrees left the ability to bring civil suits intact.[71] As formulated and if applied, these amnesty decrees would not necessarily cover individuals accused of committing international crimes, which would be unlawful under international law.[72]

Turning to other actors, as ISIL began occupying swaths of Syria in 2013, it imposed its radical interpretation of *shariah* law and established proto-courts to legitimize the group, facilitate its hold over captured territory, advance its governance aspirations, and enforce internal discipline.[73] ISIL has also developed its own rules of warfare, including a version of superior

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[64] Convention Relative to the Protection of Civilian Persons in Time of War art. 3(d), Aug. 12, 1949, 75 U.N.T.S. 287.

[65] Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 INT'L REV. RED CROSS 1, 9-10 (2011). *See* Ilaşcu and others v. Moldova and Russia, App. No. 48787/99, 2004-VII, Euro. Ct. H.R. (GC) Judgment, ¶ 460 (July 8, 2004) ("In certain circumstances, a court belonging to the judicial system of an entity not recognised under international law may be regarded as a tribunal 'established by law'").

[66] *See, e.g.*, Amnesty Decree No. 15 (July 28, 2016); Amnesty Decree No. 32 (Oct. 27, 2016) (extending Decree No. 15), available at http://www.parliament.gov.sy/arabic/index.php?node=554&nid=17002&. *See also* Josei Ensor & Joseph Haboush, *Syria's Assad Offers Amnesty to Military Deserters and Dodgers to Encourage Refugee Returns*, THE TELEGRAPH, Oct. 9, 2018.

[67] Legislative Decree No. 61 for the Year 2011 Granting General Amnesty for Crimes Committed before May 31, 2011 (on file with the author); Zeina Karam, *Syria Offers General Amnesty*, WASH. POST, May 31, 2011.

[68] Legislative Decree 71, A General Amnesty for Crimes Committed Before November 23, 2012 (on file with the author); Legislative Decree No. 10 for the year 2012 (applying to crimes related to the laws on peaceful demonstration, draft evasion, and carrying or possessing an unlicensed weapon, and requiring individuals to turn themselves in prior to January 31, 2012) (on file with the author).

[69] Legislative Decree No. 8 of 2016, A General Amnesty for Crimes of Internal and External Desertion and for Crimes Stated in the Military Service Law committed prior to 17 February 2016, *available at* https://www.refworld.org/pdfid/58ac08c74.pdf; Presidential Decree Granting General Amnesty for Military Deserters Inside and Outside Country, Legislative Decree No. 18 (Oct. 9, 2018), *available at* https://sana.sy/en/?p=148449. Legislative Decree No. 22 of 2014, General Amnesty for Crimes Committed before 9 June 2014 (on file with the author).

[70] Legislative Decree No. 22 of 2014, General Amnesty for Crimes Committed before 9 June 2014 (on file with the author).

[71] *See, e.g.*, Legislative Decree No. 23 Granting a General Amnesty for Crimes Committed Before the Date of April 16, 2013 (on file with the author).

[72] *See* Ron Slye, *The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law*, 43 VA. J. INT'L L. 173 (2002).

[73] *See* Mara Revkin, *The Legal Foundations of the Islamic State*, BROOKINGS, 25 (July 2016).

responsibility.[74] Many identified offenses are subject to the death penalty,[75] often by way of public stonings or beheadings.[76] Needless-to-say, none of these proceedings adheres to international standards or advances accountability for the war crimes and crimes against humanity—including torture, summary execution, and sexual slavery—being systematically committed in the region. Such "enactments" by non-state actors purporting to make mayhem "legal" cannot insulate perpetrators from liability under Syrian, international, or—in some cases—foreign law.[77]

Following the rout of ISIL in and around Raqqa, hundreds of ISIL fighters are now in the custody of U.S.-backed opposition groups, such as the Kurdish-led Syrian Democratic Forces (SDF) and the Free Syrian Army.[78] They may be accompanied by their families, including thousands of children who are now languishing in camps that may, or may not, be depriving these people of their liberty under human rights law.[79] Uncertainty abounds as to how to resolve this situation.[80] One option involves trials by their captors. Many opposition groups have rejected Syrian law altogether given its association with the Assad regime. As such, they are applying *ad hoc* rules—in some cases also resorting to *shariah* law, customary international law, or even foreign law—and establishing new justice mechanisms.[81] Although certain groups have formed their own rudimentary administrative and judicial institutions, including the SDF,[82] they do not always have the capacity to undertake long-term detention operations in compliance with international humanitarian law or to conduct fair criminal trials where warranted.[83] The United States is funding trainings and infrastructure improvements, but has resisted directly undertaking detention operations in Syria given its own troubled history with law-of-war detention.[84] Donor states are wary of assisting with these proceedings for fear that fair trial violations that might implicate their own duties under human rights law. It remains unclear whether non-state actors are governed by any *aut dedere aut judicare* obligations to either prosecute detainees themselves or send them to a state that is willing and able to do so, particularly where international crimes are at issue.[85]

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[74] *Id*. at 22-23.
[75] Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/30/48, ¶ 173 (Aug. 13, 2015). The Nusra Front similarly conducts legal proceedings without due process. *Id*. ¶ 97.
[76] Revkin, *supra* note 72, at 17-19.
[77] Kevin Jon Heller, *Islamic State is not a State*, OPINIO JURIS (Oct. 9, 2019).
[78] *See* Dan Stigall, *The Syrian Detention Conundrum: International & Comparative Legal Complexities*, 11 HARV. NAT'L SEC. J. 54 (2020); Sarah El Deeb, *Syrian Militia Says Large Number of IS Foreign Fighters Held,* US NEWS, Feb. 12, 2018.
[79] *See* Robin Wright, *The Kids of the Islamic State*, FOREIGN POLICY, June 3, 2019.
[80] Nicolas Sion, *10 Recommendations for Solving the Issue of ISIS Detainees in North East Syria*, ARMED GROUPS & INTERNATIONAL LAW (July 8, 2019).
[81] ILAC, *supra* note 42, at 76-79; Omar Hossino, *Syria's Secular Revolution Lives On*, FOREIGN POLICY, Feb. 4, 2013; *The Syrian Justice System: What Role do Non-State Courts Play?*, CHATHAM HOUSE (Oct. 25, 2017), https://www.chathamhouse.org/event/syrian-justice-system-what-role-do-non-state-courts-play.
[82] Stigall, *supra* note 77, at 63-64; FIDH & KINYAT, IRAQ SEXUAL AND GENDER-BASED CRIMES AGAINST THE YAZIDI COMMUNITY: THE ROLE OF ISIL FOREIGN FIGHTERS 44 (Oct. 2018) (discussing Kurdish legal proceedings).
[83] Alessandra Spadaro, *ISIS members Detained by Kurdish Forces in Syria: Operational and Legal Challenges*, ARMED GROUPS AND INTERNATIONAL LAW (Mar. 13, 2019). *See generally* REBEL GOVERNANCE IN CIVIL WAR (Ana Arjona, Nelson Kasfir & Zachariah Mampilly eds., 2015).
[84] Eric Schmitt, *Pentagon Wades Deeper into Detainee Operations in Syria*, N.Y. TIMES, Apr. 5, 2018.
[85] Stigall, *supra* note 74, at 84.

Many of those detained by opposition forces are foreign fighters who hail from outside the region. Then-U.S. Secretary of Defense James Mattis urged members of the anti-ISIL coalition to take back their nationals to determine the best course of action,[86] even as the United States has refused the same for its own citizens.[87] According to a Pentagon spokeswoman: "We are working with the coalition [against ISIL] on foreign fighter detainees, and generally expect these detainees to return to their country of origin."[88] Opposition groups in the region have echoed this demand that European states repatriate their nationals.[89] Some, but not all, Western states are heeding this call amidst uncertainty over whether they are under some sort of legal duty to repatriate their nationals.[90] The European Union has indicated that this is a decision for each member state to make within their "national competence" and will not be subject to a "unified response."[91] The SDF have threatened to release detainees if the international community does not step up, a contingency that has become all the more ominous in light of President Trump's decision to withdraw all U.S. forces from the country.

By contrast to the state of play in Syria, the Iraqi legal system has conducted a number of prosecutions of ISIL members alongside individuals who did little more than find themselves living within ISIL-controlled regions. These proceedings may include individuals who were active in Syria. To the extent that there have been domestic cases against ISIL members in Iraq, these have largely involved charges under omnibus counter-terrorism legislation.[92] Such charges carry the death penalty regardless of the severity of the offense or degree of participation of the accused. These prosecutions are proceeding in dedicated counter-terrorism courts and operate according to procedures that are subject to criticism because they are overbroad, vague, and not always fully fair to the accused.[93] Moreover, many cases involve Sunni men who were picked up in mass arrests in previously ISIL-controlled territory and who may have had little involvement with the group other than simply trying to survive under ISIL occupation.[94] In addition, Iraq has prosecuted the wives of ISIL fighters, including some European women.[95]

These counter-terrorism charges are often the only viable option for this class of defendants in Iraqi courts. At the moment, the Iraqi Penal Code (IPC) is silent when it comes to the international criminal law canon.[96] Efforts to draft new penal legislation nationally, or in Iraqi

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[86] *U.S. Urges Home Countries to Take Back Foreign Fighters Caught in Syria*, CBS NEWS, Feb. 12, 2018.

[87] Martin Chulov & Bethan McKernan, *Hoda Muthana 'Deeply Regrets' Joining ISIS and Wants to Return Home*, THE GUARDIAN, Feb. 17, 2019.

[88] Katrina Manson et al., *U.S. Urges Allies to Help With Captured Foreign ISIS Fighters*, FINANCIAL TIMES, Feb. 12, 2018.

[89] *Switzerland Pressured to Repatriate its Jihadists from Syria*, SWISSINFO.CH (Oct. 10, 2018).

[90] Charlie Savage, *As ISIS Fighters Fill Prisons in Syria, Their Home Nations Look Away*, N.Y. TIMES, July 18, 2018.

[91] Helen Maguire & Khalil Hamlo, *Syria's Kurdish Forces Call for UN Tribunal for Foreign IS Fighters*, DPA-INTERNATIONAL (Feb. 18, 2019).

[92] Anti-Terrorism Law, Law No. 13 of 2005 (Iraq).

[93] *See* ABA Center for Human Rights, *Compliance of Iraq's Anti-Terrorism Law (2005) with International Human Rights Standards* (June 2014), available at https://www.americanbar.org/groups/human_rights/justice_defenders/library/2017/08/iraq_antiterrorlaw2005/. *See* N. Houry, *The Justice Question After ISIS*, HUMAN RIGHTS WATCH (Aug. 25, 2017).

[94] Human Rights Watch, *Iraq: Flawed Prosecution of ISIS Suspects* (Dec. 5, 2017).

[95] Joanne Stocker, *Iraq Sentences French Woman to Life in Prison for ISIS Ties*, THE DEFENSE POST (Apr. 18, 2018).

[96] CODE PENAL [C. PEN.] [PENAL CODE] (Iraq), No. 111 of 1969, July 1969, available at http://www.refworld.org/docid/452524304.html (hereinafter *Iraqi Penal Code*).

Kurdistan, have been stalled, in part because there was inadequate international assistance and pressure. The Kurdistan Regional Government (KRG) established an investigative commission, the Commission for Investigation & Gathering Evidence (CIGE), and a People's Defense Court to prosecute captured ISIL members. These efforts will focus on local crimes, however, and are unlikely to substantially contribute to accountability for Syria. The KRG has enacted legislation governing a number of sectors, including a counter-terrorism law, but it does not have its own complete penal code.[97]

These Iraqi prosecutions are being assisted by an investigative mechanism authorized by the Security Council in 2017: the United Nations Investigative Team to Promote Accountability for crimes committed by Da'esh/ISIL (UNITAD), discussed more fully in chapter 8.[98] UNITAD is charged with investigating international crimes committed by ISIL members with an eye towards contributing to, and enhancing, national prosecutions within Iraq.[99] U.N. Security Council Resolution 2379 made oblique reference to the due process concerns that have been repeatedly raised with respect to the Iraqi judicial system[100] when it stated that the information gathered "should be for eventual use in fair and independent criminal proceedings, consistent with applicable international law."[101] Most troubling is the continued availability—and pervasiveness—of the death penalty in Iraq, which has one of the highest rates of capital punishment in the world. Indeed, a death sentence was handed down in the first case involving a foreign fighter in Iraq, a Russian national charged with "carrying out terrorist operations" against Iraqi security forces.[102] Additional mass executions followed.[103]

Although both Baghdad and Erbil are prioritizing terrorism prosecutions, UNITAD is not likely to significantly enhance these proceedings in their current incarnation because its work is limited to "collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide."[104] Terrorism charges *per se* would only fall within UNITAD's ambit if the underlying violent acts also constituted these so-called atrocity crimes, such as attacks on civilians. Even if Iraq were to update its Penal Code or if the KRG were to promulgate its own penal legislation, *nullum crimen sine lege* concerns may arise if ISIL members are charged with crimes in connection with conduct pre-dating any legal reform effort.[105] Precedent emerging from the Iraqi High Tribunal (IHT), however, provides that its Statute, which

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[97] *See* The Kurdistan Parliament, Kurdistan Regional Gov't, http://cabinet.gov.krd/p/p.aspx?l=12&p=229.
[98] *See* S.C. Res. 2379, ¶ 2, U.N. Doc. S/RES/2379 (Sept. 21, 2017). *See generally*, Beth Van Schaack, *The Iraq Investigative Team and Prospects for Justice for the Yazidi Genocide*, 16(1) J. INT'L CRIM. JUSTICE 113 (Mar. 2018).
[99] *See* Terms of Reference of the Investigative Team to Support Domestic Efforts to Hold ISIL (Da'esh) Accountable of Acts that May Amount to War Crimes, Crimes against Humanity and Genocide Committed in Iraq, established pursuant to Security Council resolution 2379 (2017). *See generally* Beth Van Schaack, *UN Releases Guidelines for Team Investigating ISIS Crimes in Iraq*, JUST SECURITY (Feb. 19, 2018).
[100] *See generally* Amnesty International, Iraq 2016/2017; U.N. Assistance Mission for Iraq/Office of the High Commissioner for Human Rights, Report on the Death Penalty in Iraq (Oct. 2014).
[101] S/RES/2379, *supra* note 97, ¶ 5.
[102] Josie Ensor, *Iraq Sentences Russian ISIL Fighter to Death by Hanging in First Ruling of Its Kind on Foreign Jihadists*, THE TELEGRAPH, Sept. 13, 2017.
[103] In December 2017, Iraq executed 38 men for terrorism crimes. *UN Rights Wing "Appalled" at Mass Execution in Iraq*, UN NEWS CENTRE, Dec. 15, 2017.
[104] S/RES/2379, *supra* note 97, ¶ 2.
[105] The Iraqi Constitution, adopted by referendum in 2005, contains a prohibition on *ex post facto* legislation. Constitution, 15 October 2005, art.19(2) (Iraq), Constitute Project. ("There is no crime or punishment except by law. The punishment shall only be for an act that the law considers a crime when perpetrated. A harsher punishment than the applicable punishment at the time of the offense may not be imposed.").

incorporated international crimes but had limited jurisdiction over crimes committed during the Ba'athist regime (1968-2003), did not constitute impermissible retroactive legislation because the conduct in question was unlawful under either conventional or customary international criminal law during the period in question. The IHT also concluded that the constitutive acts that make up the *actus reus* of war crimes and crimes against humanity were already unlawful under Iraqi penal law and the laws of the nations of the world at the time the relevant crime was committed.[106] This observation would *a fortiori* hold true for atrocity crimes committed in the region today. This outcome is consistent with human rights law, which provides that so long as the new provisions reflect the state of international criminal law at the time the defendant acted, there is no due process violation.[107]

In Jordan and Lebanon, which are playing host to millions of refugees, prosecutions are similarly made more difficult by the lack of legislation incorporating international crimes. Although Jordan has been an ICC member since April 11, 2002, it has yet to fully domesticate elements of the Rome Treaty. Likewise, Lebanese law does not account for any international crimes beyond terrorism.[108] Even the Special Tribunal for Lebanon (STL) is capable of asserting jurisdiction only over the crime of terrorism as defined by Lebanese law. A proposal to include crimes against humanity within the STL's subject matter jurisdiction was ultimately rejected by Russia and the United States, likely for fear of lowering the threshold for the crime.[109] In any case, most acts of terrorism committed in Syria would lack the necessary nexus to the Hariri assassination, which forms the nucleus of the STL's work.[110]

For its part, Turkey has enacted domestic statutes devoted to crimes against humanity and genocide,[111] but it does not recognize universal jurisdiction except with regard to the crime of torture.[112] The cases in Turkey that have been announced all involve ISIL perpetrators—sometimes prosecuted *en masse*—charged with terrorism charges.[113] These legislative deficiencies put all these nations in breach of their treaty obligations to domesticate these international

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[106] The Public Prosecutor in the High Iraqi Court et al. v. Saddam Hussein Al Majeed et al., 1/E First/2005 (Nov. 5, 2006). The decision was upheld on appeal. Prosecutor v. Hussein et al., 29/c/2006 (Dec. 26, 2006).

[107] International Covenant on Civil and Political Rights art. 15, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. … Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.").

[108] Amnesty International, *supra* note 15, at 67-68 (compiling Jordanian statutes), 72-73 (compiling Lebanese statutes).

[109] Nidal Nabil Jurdi, *The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUSTICE 1125, 1128 (2007).

[110] The STL has jurisdiction over other attacks in Lebanon that "are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005 … This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators." Statute of the Special Court for Lebanon, art. 1, S.C. Res. 1757, Annex, U.N. Doc. S/RES/1757 (May 30, 2007).

[111] Amnesty International, *supra* note 15, at 115-116 (Turkish statutes). *See* Penal Code of Turkey, Law Nr. 5237 (Sept. 26, 2004), Official Gazette No. 25611 dated Oct. 12, 2004, art. 76 (genocide), art. 77 (crimes against humanity), and arts. 94-95 (torture), *available at* https://www.wipo.int/edocs/lexdocs/laws/en/tr/tr171en.pdf (Turk.).

[112] *Id*. at art. 13(1) (indicating that Turkish law applies to torture "committed in a foreign country whether or not committed by a citizen or non-citizen of Turkey.").

[113] *See, e.g.*, Martin Chulov & Jamie Grierson, *British Jihadi Aine Davis Convicted in Turkey on Terror Charges*, THE GUARDIAN (May 9, 2017).

prohibitions.[114] Theoretically, all these states could amend their penal codes to allow for the prosecution of international crimes, although this might trigger the same *ex post facto* concerns discussed above.[115] In addition, while the European courts generally adhere to established due process protections and are subject to supervision by the European Court of Human Rights, trials in the region can raise acute fair trial concerns. Impartiality may also suffer when neighbors judge their neighbors, especially with Turkey increasingly drawn into the conflict. The potential for trials to be unfair and biased are two downside to relying upon domestic courts to prosecute international crimes.[116]

These cases in the region are important because Western states do not necessarily want to, or may not be able to, undertake prosecutions in their own courts. Bringing potential defendants to Europe raises national security concerns but also the risk that defendants will eventually resist repatriation and assert *non-refoulement* claims if they are acquitted or once they have served any sentence, assuming they have they have well-founded fears of persecution back home.[117] Under the Refugee Convention, an individual is not entitled to refugee status or the protection of *non-refoulement*, however, if there are "serious grounds for considering that the person" has committed war crimes, crimes against humanity, or other serious crimes.[118] All that said, encouraging the Kurds to exercise too much prosecutorial autonomy may raise complications in the future with Turkey and Iraq, which will resist any course of conduct that might appear to advance or be supportive of Kurdish independence.

Cases Farther Afield

This brings us to cases outside the region. Particularly—but not exclusively—in Europe, a number of cases involving events in Syria are proceeding in domestic courts by virtue of the exercise of various forms of extraterritorial jurisdiction.[119] The European cases are spurred by a European Union-wide policy in favor of domestic international crimes prosecutions, including under the principle of universal jurisdiction,[120] and a formal network of international crimes

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[114] *See* Questions Concerning the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep. 422 (July 20), ¶ 75 (noting the obligations of states that are party to international crimes treaties to criminalize acts in question to enable the establishment of extraterritorial jurisdiction).

[115] For a survey of arguments deployed by courts to satisfy the principle of legality, see Beth Van Schaack, Crimen Sine Lege: *Judicial Lawmaking at the Intersection of Law & Morals*, 97 GEORGETOWN L. J. 119 (2008).

[116] HUMAN RIGHTS WATCH, LAWYERS ON TRIAL: ABUSIVE PROSECUTIONS AND EROSION OF FAIR TRIAL RIGHTS IN TURKEY (Apr. 10, 2019).

[117] *See* UNDESIRABLE AND UNRETURNABLE? POLICY CHALLENGES AROUND EXCLUDED ASYLUM SEEKERS AND OTHER MIGRANTS SUSPECTED OF SERIOUS CRIMINALITY WHO CANNOT BE REMOVED (Inst. Adv. Legal Studies, Univ. London, Jan. 25-26, 2016).

[118] Convention Relating to the Status of Refugees arts. 1F, 33, 189 U.N.T.S. 150 (1951). *But see* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, 1465 U.N.T.S. 85 (1984) ("No State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.").

[119] *See* HRW, "*These are the Crimes*", *supra* note 32.

[120] *See* Addressing Human Rights Violations in the Context of War Crimes, and Crimes Against Humanity, Including Genocide, 2018/C 334/07, Official Journal of the European Union (July 4, 2017), P8_TA(2017)0288, ¶ 42 ("Encourages the EU and its Member States to fight against impunity and to lend active support to international efforts to bring to justice members of non-state groups … calls for the development of a clear approach to the prosecution of ISIS/Daesh fighters and their abettors, including by using the expertise of the EU network for investigation and prosecution of genocide, crimes against humanity and war crimes"). *See also id*. at ¶ 51 (encouraging member states to prosecute nationals and people under their jurisdiction who have committed atrocity

units.[121] Many of these cases involve defendants and/or victims who are within the immediate reach of European prosecutorial authorities, although outcomes depend on a whole range of factors, including the ability of the local law to address extraterritorial crimes; the willingness of investigators and prosecutors to take on these cases, which are resource intensive and difficult to win; and the presence of evidence and especially witnesses able to testify. At the same time, a number of states are undertaking so-called structural investigations devoted to Syria—broad inquests that do not necessarily focus on specific suspects but that build an evidentiary cache in an effort to understand the context in which crimes were committed.[122] This latter approach enables investigators and prosecutors to develop expertise on the history of the conflict, the dynamics of violence, the functioning of the operative chains of command, the available evidence, and identities of potential perpetrators, all with an eye towards being able to move quickly once a defendant comes within reach or to offer "anticipated legal assistance to third states or international courts."[123] Importantly, structural investigations also enable evidence to be preserved, when it is fresh, for eventual prosecutions at home and the provision of mutual legal assistance elsewhere. In many civil law systems, victims can initiate criminal prosecutions by constituting themselves as *parties civiles*, although many refugees and asylum seekers are not aware of this option.[124] Human rights groups often fill this gap. In Germany and France, for example, victims' advocates have filed criminal complaints against high-level officials linked to the detention, torture, and murder of detainees in Syrian prisons.

Germany

Germany, home to over a million Syrian refugees, has taken the lead in prosecuting Syrian cases.[125] This activity has been spurred in part by the European Center for Civil and Constitutional Rights (ECCHR), a Berlin-based organization that has played a major role in advancing the principle of universal jurisdiction in European courts.[126] ECCHR is working closely with Syrian civil society organizations and Syrian human rights lawyers to pursue these cases. The latter include Anwar al-Bunni with the Syrian Center for Legal Research and Studies, Mazen Darwish with the Syrian Center for Media and Freedom of Expression, and the Caesar Files Support Group. Together, these advocates have filed multiple criminal complaints in Germany against 27 senior officials of the Syrian Military and Intelligence Service and other alleged perpetrators—known and unknown.

The operative international criminal law framework, the 2003 Code of Crimes Against International Law (CCAIL), gives German courts full universal jurisdiction over acts of genocide,

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crimes in Iraq and Syria); ¶ 52 (calling upon member states to apply the principle of universal jurisdiction in tackling impunity).

[121] Guidelines On The Functioning Of The Network For Investigation And Prosecution Of Genocide, Crimes Against Humanity And War Crimes (Nov. 15, 2018).

[122] *See generally* Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 J. INT'L CRIM. JUSTICE 165 (2018) (discussing German cases and structural investigations).

[123] *Id*. at 179.

[124] HRW, "*These Are The Crimes*," *supra* note 32, at 50.

[125] UNHCR, Germany, Q1 2018, Country Update, https://www.unhcr.org/dach/wp-content/uploads/sites/27/2018/03/Factsheet_Germany_O1_2018.pdf.

[126] *See* ECCHR, *Dossier, Human Rights Violations in Syria*, https://www.ecchr.eu/fileadmin/Sondernewsletter_Dossiers/Dossier_Syria_ArrestWarrant_Austria_Lafarge_2018July.pdf.

crimes against humanity, and a whole range of war crimes.[127] This is the case even if the offense was committed abroad and has no connection to Germany. In general, German law also embodies the principle of mandatory prosecution, although prosecutors have discretion to decline to move forward if the accused is not present in Germany, the accused is being prosecuted elsewhere, or there are no links to Germany.[128] The law allows for the assertion of superior responsibility[129] and removes all statutes of limitations in connection with serious offenses.[130] Germany can also prosecute individuals for being a member or supporter of a foreign terrorist group.[131] Authorities report that they will rely on the terrorism charges if there is insufficient evidence to prosecute for the commission of substantive offenses.[132]

Germany's war crimes unit—the Central Unit for the Fight against War Crimes and further Offenses pursuant to the Code of Crimes against International Law (ZBKV)[133]—has had a structural investigation (*Strukturermittlungsverfahren*) open since 2011 into crimes committed by the Syrian government and its various organs, including the Air Force Intelligence Services.[134] In 2014, Germany opened a second structural investigation involving ISIL with a focus on harm to the Yazidi people in Northern Iraq and Syria.[135] Although Germany does not allow trials *in absentia*, authorities can conduct such investigations while the defendants are at large and either seek the extradition of identified suspects or otherwise share the results of its research with other national authorities that might be in a position to move forward.[136] The website of the Unit, which was established in 2003, indicates that "[i]n principle, … the German law enforcement/prosecution agencies have worldwide jurisdiction. The focus of searches is, however, on perpetrators who seek to use Germany as a 'safe haven' and place of retreat."[137] In this regard, these cases signify the "no safe haven" version of universal jurisdiction rather than the "global enforcer" version.[138]

The numbers of individual cases are hard to come by as many are in the investigative phase, but media suggest that the German authorities have received thousands of submissions and investigative leads about potential war crimes.[139] By February 2016, the Federal Prosecutor of

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[127] *See* VÖLKERSTRAFGESETZBUCH [VSTGB], June 29, 2002, at §§ 6-12, *available at* Act to Introduce the Code of Crimes Under International Law, https://www.mpicc.de/files/pdf1/vstgbleng2.pdf (Ger.). *See generally*, Gerhard Werle & J. Bung, *The German Code of Crimes Against International Law*, *available at* http://werle.rewi.hu-berlin.de/06_German%20CCIL-Summary.pdf.

[128] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], §§ 152, 153f (Ger.) (allowing prosecutors to "dispense with" the prosecution of criminal offenses under the CCAIL under certain defined circumstances); Patrick Kroker & Alexandra Lily Kather, *Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany*, EJIL: TALK! (Aug. 12, 2016).

[129] CCAIL, *supra* note 120, § 13.

[130] *Id*. § 5.

[131] STRAFGESETZBUCH [STGB] [PENAL CODE], §§ 89(a), 89(b), 129a (Ger.).

[132] HRW, "*These are the Crimes*," *supra* note 32, at 39.

[133] Bundeskriminalamt, https://www.bka.de/EN/OurTasks/Remit/CentralAgency/ZBKV/zbkv_node.html.

[134] Ana Carbajosa, *Building the Case against Assad's Regime*, EL PAÍS, June 15, 2018. *See* ECCHR, *Saydnaya Military Prison—Objective is to Physically and Psychologically Break Detainees* (Nov. 2017), https://www.ecchr.eu/en/case/saydnaya-military-prison-objective-is-to-physically-and-psychologically-break-detainees/. Kaleck & Kroger, *supra* note 121, at 180.

[135] *Id*.

[136] *Id*. at 184.

[137] Bundeskriminalamt, *supra* note 132.

[138] Máximo Langer, *Universal Jurisdiction is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction*, 13 J. INT'L CRIM. JUST. 245 (2015).

[139] Benjamin Duerr, *International Crimes: The German Strike Force*, JUSTICEINFO.NET (Jan. 10, 2019). Parliamentary archives indicate an 8000% increase in leads since 2013. *Id*.

Germany was investigating 15 cases of international crimes committed in Syria.[140] Additional investigations followed.[141] In a 2019 speech, the Federal Prosecutor indicated that his section was conducting about 80 investigations into international crimes, about half involving Syria and Iraq. Some of these German cases are proceeding at the state level, and state prosecutors (*Generalstaatsanwalt*) may have additional investigations in the pipeline.[142] Although a number of these cases involve anti-terrorism charges akin to material support for terrorism, the Federal Prosecutor is increasingly charging individuals with more substantive crimes in order to deter German citizens from joining the fight.[143] Four brothers, for example, have been charged with war crimes in addition to membership in a terrorist group.[144]

Germany has produced the most important war crimes cases to emerge from the Syrian war. Its structural investigation has led to the issuance of what has been described as an international arrest warrant against Jamil Hassan, head of the Air Force Intelligence Directorate who has also been indicted in parallel by France.[145] Germany has sought the extradition of Hassan from Lebanon where he had been seeking medical treatment.[146] The United States, which exercises considerable influence over Lebanon, issued a statement in support of the extradition request, a significant gesture in favor of exercises of universal jurisdiction.[147] Another important case to come out of Germany involves two senior figures from the Syrian General Intelligence Service who have been indicted for crimes against humanity: Anwar R. and Eyad A (German privacy law prevents the release of defendants' full names).[148] Anwar R. stands accused of killing and mistreating individuals in Syrian custody during interrogations. Eyad A. allegedly manned a check point where he endeavored to identify deserters, protesters, and members of the opposition and transfer them to the prison where Anwar R. operated. The arrests were the result of a joint investigation team formed between Germany and France. A third suspect, as yet unnamed, was simultaneously arrested in France.[149] Trial is expected to commence in 2020 in Koblenz.

An earlier case involves Abdalfatah H.A., Abdulrahman A.A. and Abdul Jawad A.K., who stand accused of being members of a terrorist group (the Nusra Front) and of committing war

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[140] *See* Kroker & Kather, *supra* note 121.
[141] Kaleck & Kroker, *supra* note 121, at 181.
[142] Correspondence with Wolfgang Kaleck, ECCHR, Nov. 22, 2018.
[143] Kathleen Schuster, *Germany Prosecutors Press Charges Against Returning Jihadists*, DEUTSCHE WELLE, Feb. 25, 2016.
[144] Trial International, *Evidentiary Challenges*, *supra* note 9, at 45.
[145] Louisa Loveluck, *Germany Seeks Arrest of Leading Syrian General on War Crimes Charges*, WASH. POST, June 8, 2018; Jörg Diehl, et al., *Germany Takes Aim at Assad's Torture Boss*, SPIEGEL ONLINE, June 8, 2019.
[146] Anchal Vohra, *Germany 'Seeks Extradition' of Syria's Jamil Hassan from Lebanon*, AL JAZEERA, Feb. 23, 2019.
[147] U.S. Department of State, Press Statement, Support for Germany's Request for Lebanon to Extradite Syrian General Jamil Hassan (Mar. 5, 2019), https://www.justsecurity.org/wp-content/uploads/2019/03/united-states-support-for-germany-request-for-lebanon-to-extradite-syrian-general-jamil-hassan.pdf. *See* Ryan Goodman, *BREAKING: United States Supports Germany's International Arrest Warrant for Accused Syrian War Criminal*, JUST SECURITY (Mar. 6, 2019); Claus Kreß, *Letter to the Editor—Germany's Extradition Request for Gen. Jamil Hassan, with U.S. Support*, JUST SECURITY (Mar. 13, 2019) (arguing that the German authorities took action in the absence of an alternative forum "as fiduciaries of the international community's rightful authority to prosecute").
[148] Kate Connolly, *Germany Arrests Two Syrians Suspected of Crimes Against Humanity*, THE GUARDIAN, Feb. 13, 2019.
[149] Vanessa Romo, *3 Syrian Ex-Intelligence Officials Arrested On Charges Of Torture*, NPR, Feb. 13, 2019.

crimes—the execution of 36 Syrian civil servants in March 2013.[150] An additional notable case involves Suliman Al-S., an asylum seeker who was convicted of complicity in war crimes (attacking personnel involved in a peacekeeping mission) for his role in the detention of a Canadian adviser to U.N. forces deployed to the Golan Heights.[151] He received a sentence of three and a half years' imprisonment for committing a war crime against humanitarian operations, deprivation of liberty for the purpose of blackmail, and membership in a foreign terrorist organization (the Nusra Front)—a verdict the prosecutor appealed as insufficient. The appeals court agreed. One remand, his sentence was extended to four years and 9 months.[152] Similar cases are proceeding against other Nusra Front, ISIL, and Free Syrian Army fighters arrested in Germany.[153] Ibrahim A., for example, was convicted and given a life sentence for leading a Free Syrian Army militia in Aleppo that tortured captives and looted private goods for personal gain.[154] Likewise, in what may be the first trial to involve harm to the Yezidi people, Taha A.-J. and his German wife Jennifer W. are on trial for murder, human trafficking, war crimes, crimes against humanity, and genocide in connection with their purchase and mistreatment of a Yezidi woman and her five-year old daughter, who ultimately died of thirst while in their custody in Iraq.[155]

Many of these cases involve foreign citizens discovered in Germany, but not all of them. For example, one investigation is proceeding against German national Harry Sarfo, who was originally convicted of joining a terrorist organization. However, authorities opened a new case against him when a video surfaced of him seeming to participate in the execution of prisoners in Palmyra.[156] Another German national, Aria Ladjedvardi, became radicalized in Germany and subsequently travelled to Syria to fight against the Assad regime.[157] Upon his return, Ladjedvardi was convicted of the war crime of subjecting a protected person to humiliating and degrading treatment by posing with the heads of executed members of Assad's forces.[158] He was identified from trophy photographs found on Facebook. The court held that it is a war crime to mistreat enemy fighters who are *hors de combat*—including prisoners of war in an international armed conflict and captured fighters of the opposing party in non-international armed conflicts—even when such individuals are already deceased.[159] Ladjedvardi was sentenced to two years'

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[150] *Germany Arrests Suspected Syrian War Criminal*, REUTERS, Mar. 2, 2017; Melissa Eddy, *Germany Arrests 2 Syrians on Terrorism Charges*, N.Y. TIMES, Mar. 2, 2017 (discussing arrest of Abdalfatah H.A. and Abdulrahman A.A. for terrorism offenses).

[151] *German Court Jails Syrian Refugee Over UN Kidnapping*, THE LOCAL, Sept. 21, 2017. *See* BGH StR 149/18 of Aug. 23, 2018. The defendant was charged under §10 of the CCAIL (attacking a person involved in a humanitarian aid mission or peacekeeping mission under the U.N. Charter).

[152] BGH, StR 149/18 (Aug. 8, 2019); Higher Regional Court Stuttgart, *New Ruling in the State Protection Proceedings for a War Crime Against Humanitarian Operations,* inter alia*, on the Occasion of the Kidnapping of a United Nations Official in Syria* (Jan. 1, 2019), https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=OLG%20Stuttgart&Datum=23.01.2019&Aktenzeichen=3%20StE%205%2F16.

[153] Trial International, *supra* note 9, at 52-57. *See, e.g.*, *Germany Detains Suspected 'IS' Member Accused of War Crimes in Syria*, DEUTSCHE WELLE, Aug. 9, 2017 (discussing arrest of Fares A.B. on suspicion of mistreating prisoners and civilians and committing a summary execution while a member of an opposition group).

[154] OLG Düsseldorf, III-5 StS 3/16 (Sept. 24, 2018).

[155] *Germany Indicts Iraqi Man over Death of Yazidi Slave Girl*, AP, Feb. 21, 2020.

[156] Rick Gladstone, *German ISIS Member Who Denied Killing is Charged with Murder*, N.Y. TIMES, Jan. 3, 2017.

[157] For background, see International Crimes Database, http://www.internationalcrimesdatabase.org/Case/3276/Aria-Ladjedvardi/; Eléonore Coeuret, *German Jihadist Convicted of War Crime*, ILAWYER (July 14, 2016).

[158] *See Prosecutor v. Aria Ladjedvardi*, OLG Frankfurt Am Main, Az.: 5-3 StE 2/16-4-1/16 (July 12, 2016).

[159] *Id*. at III, §§1-2. For this proposition, the court cited Prosecutor v. Brđanin, Case No. T-99-36-T, Judgement, (Sept. 1, 2004) and Prosecutor v. Bagasora et al., Case No. ICTR-98-41-T, Judgement (May 8, 2012).

imprisonment, which included mitigation for his youth, the fact that someone else uploaded the photographs (although he approved of them), and his confession.[160] A Düsseldorf court sentenced Nils D. to four and a half years' imprisonment for his confessed involvement in a unit of ISIL responsible for internal security and the Manbij prison.[161] His shorter sentence reflects considerable cooperation with German authorities and his willingness to enter into an *Aussteigerprogramm* (de-radicalization program for former extremists).[162] Later evidence emerged that he may have participated directly in torture; although new charges were filed, they were rejected on double jeopardy grounds.[163] On appeal, the Federal Court of Justice ordered a retrial.[164]

Similar charges were advanced in the case against Abdelkarim El B., a German national convicted of membership in a terrorist organization, weapons use in violation of the Military Weapons Control Act, and humiliating a protected person—a dead Syrian soldier found in Aleppo.[165] The defendant was arrested in Turkey and extradited to Germany; the contents of his phone were provided through mutual legal assistance.[166] Prosecutors proved the membership charge on the basis of ISIL registration documentation obtained by the German police from an informant as well as video evidence from Abdelkarim's phone that made clear he had participated in hostilities as part of ISIL. Although phone videos suggested he was not directly involved in the desecration of the corpse in question, he was convicted on the basis of the common purpose doctrine for filming and commenting upon the events. He was sentenced to over eight years' imprisonment.

It can be difficult to prove charges based upon the conduct of individuals on the battlefield for lack of direct evidence. The German case of Harun P. offers an exception.[167] Harun was convicted of being a member of a terrorist group and an accessory to murder. The charges stem from his involvement in an assault on Aleppo's central prison launched by an Islamist group, *Junud-al-Sham* ("Soldiers of the Levant") with the goal of liberating political prisoners and other *jihadists* imprisoned therein.[168] He was not convicted of murder because the court was unable to determine how many people died in the attack, although there was sufficient evidence that the armed group intended to harm prison guards deemed to be supporters of the Assad regime.[169] Based upon a cellphone video, Harun was also charged with firing a mortar into a civilian zone

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[160] *Id*. at II, Sentencing. The defendant appealed the conviction, but the appeal was quashed by the Federal High Court of Justice.
[161] Manasi Gopalakrishnan, *German Court Sentences former 'Islamic State' Member Nils D.*, DEUTSCHE WELLE, Mar. 4, 2016. *See* OLG Düsseldorf, 4 March 2016, 5 StS 5/15 III.
[162] Jörg Diehl, et al., *Former Islamic State Members Open Up to Investigators*, SPIEGEL ONLINE, Aug. 8, 2016.
[163] OLG Düsseldorf, Oct. 10, 2018 – III – 6, StS 5/18.
[164] OLG Düsseldorf, Sept. 4, 2019 – III – 6, StS 5/18.
[165] Prosecutor v. Abdelkarim El. B., Frankfurt Higher Regional Court, Case 5-3 StE 4/16 - 4 - 3/16, Judgment of November 8, 2016, http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht_lareda.html#docid:7812208.
[166] Prosecutor v. Abdelkarim El. B., International Crimes Database, http://www.internationalcrimesdatabase.org/Case/3297/Prosecutor-v-Abdelkarim-El-B/.
[167] Prosecutor v. Harun P., Oberlandesgerichte München [OLG München] [Higher State Court Munich] July 15, 2015, Urteil 7 St 7/14 (4), (Ger.) http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2015-N-13419.
[168] Hans Pfeifer, *German Jihadi Gets 11-Year Prison Sentence*, DEUTSCHE WELLE, July 15, 2015. *See* Prosecutor v. Harun P, International Crimes Database, http://www.internationalcrimesdatabase.org/Case/3283.
[169] Harun P., *supra* note 166, ¶¶ 427-432.

out of "boredom."[170] In convicting the defendant, the court rejected the defenses of combat immunity (given the lack of an *international* armed conflict), necessity, and self-defense, although Harun did receive some credit for cooperating with authorities.[171] The court also noted that some of the crimes in question were also criminal under Syrian law.[172] The case was assisted by evidence and testimony from the non-governmental Commission on International Justice and Accountability (CIJA), profiled in chapter 8, which early in the conflict established protocols for responding to external requests for information from national authorities. Indeed, CIJA responded to appeals on 500 matters in 2017;[173] it was also instrumental in the conviction of Zoher J. on suspicion of membership in a terrorist organization abroad (Al Nusra).[174]

Although many of these German cases resulted in convictions, charges against other suspects have been dismissed when prosecutors have been unable to prove the identities of the supposed victims or the circumstances of their deaths or mistreatment.[175] This was the fate of the only case involving sexual violence emerging from the war in Syria. Akram A. was indicted for allegedly raping a woman at a checkpoint he was manning for ISIL. The suit was dismissed for lack of evidence.[176]

Although most of the cases that have come to light involve male defendants, the Federal Prosecutor's Office has indicated that women who have joined ISIL will not be spared prosecution under the penal code provision criminalizing membership in a foreign terrorist organization. This is the case even if there is no evidence of these women participating in the conflict on the theory that they strengthen the inner structure of ISIL.[177] This policy statement proved controversial, as some commentators have argued that these women (many of whom are minors) should be seen as victims rather than felons.[178] Others commentators have argued that women can play central roles in armed groups, even highly patriarchal ones, and it should not be assumed that they have been deceived or exploited.[179] These cases have met some resistance from German judges as well. For example, a judge refused to issue an arrest warrant for Sibel H., which would have laid the groundwork for her extradition from Iraq, on the theory that solely being in ISIL territory in Syria was not criminal conduct under German law.[180] The penalties available in Iraq include the death penalty, so extradition to Germany would have resulted in a lower sentence, better detention conditions, and procedures that adhere to European human rights law. In a novel legal theory, German citizen Mine K. was charged with the war crime of pillage and plunder for living with her

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[170] *Id.* ¶ 128.
[171] *Id.* ¶¶ 449-459.
[172] *Id.* ¶ 426.
[173] Correspondence with Stephanie Barbour, CIJA, Dec. 18, 2018.
[174] Press Release, *Criminal Proceedings against Zoher J. on Suspicion of Membership of a Terrorist Organization Abroad ("Jabhat al-Nusra" and "Islamic State")*, Oberlandesgericht München, Mar. 21, 2019.
[175] Schuster, *supra* note 142 (listing dismissed cases).
[176] *Prosecutors Release Syrian Accused of Raping Woman While Fighting for ISIS*, THE LOCAL (June 13, 2017).
[177] Volmar Kabisch, et al., *Mehr Härte gegen IS-Frauen*, SÜDDEUTSCHE ZEITUNG, Dec. 14, 2017.
[178] *Sie sind eher Opfer als Schwerverbrecherinnen*, DEUTSCHLANDFUNK KULTUR, Dec. 15, 2017.
[179] *See* DUTCH MINISTRY OF THE INTERIOR AND DUTCH RELATIONS, GENERAL INTELLIGENCE AND SECURITY SERVICES, JIHADIST WOMEN, A THREAT NOT TO BE UNDERESTIMATED (NOV. 2017).
[180] Jörg Diehl & Fidelius Schmid, *Arrest Warrant against Islamist Sibel H. Rejected*, SPIEGEL ONLINE, May 28, 2018.

ISIL husband in a home that had been seized by ISIL.[181] In a show of gender disparity, such charges have not been leveled against the husbands of these defendants.[182]

Elsewhere in Europe

Additional Syrian cases are moving forward elsewhere in Europe, although these generally involve lower-level actors and anti-terrorism or weapons charges. According to Human Rights Watch, the Dutch war crimes units (located within the immigration, police, and prosecution services) are "the most robust and well-resourced in the world."[183] The Netherlands has relied upon both anti-terrorism legislation and international humanitarian law to charge perpetrators found in its territory.[184] The first returnee to the Netherlands, Maher H., for example, was convicted of incitement and intent to commit terrorist acts in December 2014.[185] His wife, Shukri F., who was charged with attempting to recruit men (including her husband) and women (including some who were underage) to go to Syria, was acquitted of most charges except the dissemination of inciting materials.[186] The *Maher* case is notable because the defendant attempted to argue that the Dutch terrorism law was inapplicable since the existence of a non-international armed conflict in Syria rendered international humanitarian law *lex specialis*.[187] The Dutch court ruled, however, that the defense of combatant immunity is only available in international armed conflicts and cannot be raised by members of a non-state armed group.[188]

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The defense in the so-called *Operation Context* case raised similar arguments on behalf of nine ISIL recruiters who ran a website, maintained social media accounts (including Twitter and

[181] *Arrest of a suspected member of the foreign terrorist organization "Islamic State (IS)"*, Der Generalbundesanwalt beim Bundesgerichtshof (Oct. 17, 2018).
[182] *See* Kather & Schroeter, *supra* note 26.
[183] HRW, *The Long Arm*, *supra* note 16, at 32.
[184] For a discussion of the Dutch practice, see Martin Zwanenburg, *Foreign Terrorist Fighters in Syria: Challenges of the Sending State*, 92 INT'L L. STUD. 204 (2016).
[185] *Prosecutor v. Maher H.*, Rechtbank-Gravenhage [District Court of The Hague], No. 09/767116-14, Dec. 1, 2014, http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:14652 (Neth.). *See also* International Crimes Database, http://www.internationalcrimesdatabase.org/Case/3299.
[186] *Prosecutor v. Shukri F.*, Gerechtshof Den Haag, No. 22-005387-14, July 7, 2016, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2016:1979 (Neth.). *See Three Years and Acquittal for 'Jihad Couple,'* TROUW (Dec. 1, 2014).
[187] Maher, *supra* note 184, ¶ 3.
[188] *Id*.

Facebook), and disseminated other publications online and via YouTube.[189] The court held that although there was significant involvement by other states in the conflict, it did not yet rise to the level of an international armed conflict.[190] As such, participation in the armed conflict with ISIL would not give rise to combatant immunity and would inherently involve the commission of terrorist acts that might be charged under international humanitarian law or Dutch law.[191] Furthermore, although not all the defendants' conduct was criminal, the court rejected the argument that statements inciting violence in the Netherlands and acts of recruitment to an armed struggle were protected by the right to freedom of expression under European human rights law. Rather, the court ruled that the criminalization of incitement to prevent the commission of criminal offenses (including inciting others to take part in the "armed *jihadi* struggle" on social media platforms) was a legitimate restriction on the freedom of expression.[192] One individual was sentenced to seven days' imprisonment for retweeting inciting material; others received longer sentences for more elaborate recruitment efforts.

Unlike other European states, the Dutch have actively sought the extradition of their nationals when they are within reach. For example, Dutch citizens Reda Nidalha and Oussama Achraf Akhala were convicted in Turkey of being part of a terrorist organization, but were later deported home to be charged under Dutch law. Among other charges, Oussama was prosecuted for posing with a crucified body.[193]

Turning to Austria, like many European states, Austria updated its penal law following its ratification of the Rome Statute. Austria can now exercise universal jurisdiction over several international crimes—including torture, genocide, crimes against humanity, forced disappearances, and war crimes[194]—so long as Austria is under an obligation to prosecute them. This duty exists even if the conduct happens abroad and was not criminalized in the place where committed.[195] Austrian law also allows for the prosecution of other extraterritorial crimes (including crimes of sexual violence) if the perpetrator has a habitual residence in Austria or is present there and cannot be extradited.[196] ECCHR filed an additional complaint under this legislation in May 2018 against 24 Syrian intelligence officials on behalf of several individuals detained and mistreated in Syria, including an Austrian citizen. The investigation is ongoing. As is true elsewhere, many of the other Syrian cases involve opposition fighters, such as one Syrian asylum seeker who confessed to killing 20 wounded Syrian soldiers as a member of the Farouq

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[189] Prosecutor v. Imane B. et al., Rechtbank-Gravenhage [District Court of The Hague] (ECLI:NL:RBDHA:2015:14365), ¶ 7.4, Dec. 10, 2015, http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:14365. *See also* Prosecutor v. Imane B. et al., International Crimes Database, http://www.internationalcrimesdatabase.org/Case/3270; *"Context" Case on the Applicability of Dutch Criminal Law in the Context of International Humanitarian Law*, Prosecutor v. Imane B. et al. (District Court of The Hague, 10 December 2015), 18 Y.B. HUMANIT. L., CORRESPONDENTS' REPORTS 2 (2015).
[190] Imane B., *supra* note 188, ¶¶ 7.5-7.13.
[191] *Id.* ¶¶ 7.18-7.27.
[192] *Id.* ¶ 11-14-11.15.
[193] *Alleged ISIS Militant Tried in Netherlands over War Crimes*, 7D NEWS, July 8, 2019. *See generally* Stephanie Van Den Berg, *The Dutch War Crimes Unit Hits Harder on Syrian Suspects*, JUSTICEINFO.NET (May 23, 2019).
[194] STRAFGESETZBUCH [STGB] [PENAL CODE], § 312a (torture), § 312b (disappearances), §321 (genocide), § 321a (crimes against humanity), § 321b (war crimes), https://www.jusline.at/gesetz/stgb (Austria).
[195] *Id.* § 64 (acts punishable when committed abroad).
[196] *Id.*

Brigade of the FSA.[197] This individual was convicted of war crimes but his conviction was overturned on the grounds that key witnesses had not been questioned.[198]

The most high-profile case has caused a bit of a scandal in Austria. Brigadier General Khalid Halabi, who headed Syria's State Security in the town of Raqqa, was granted asylum in Austria. His application had not moved forward in France, so he relocated to Austria and then applied again in a refugee camp.[199] He was spotted by former victims. CIJA provided witness evidence that he was directly involved in war crimes in Raqqa.[200] Austria has now opened an investigation into these allegations and also into the functioning of its asylum system.[201]

The Caesar files have spun off a number of investigations and cases around Europe, as people recognize their loved ones as among those who were tortured to death in Syrian detention centers. In Spain, Amal Hag-Hando Anfalis, the sister of a victim depicted in the Caesar files, initiated suit against nine Syrian officials within the Security and Intelligence Forces[202] in connection with the enforced disappearance, torture, and execution of her brother. The crime alleged was "state terrorism" under Spain's international crimes legislation,[203] because unlike with respect to other international crimes, terrorism can be prosecuted in Spain when the victim has Spanish nationality.[204] An investigative judge, Eloy Velasco Núñez, declared the complaint admissible,[205] reasoning that the victim's sister was also a victim of terrorism within the understanding of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[206] The prosecutor appealed; in July 2017, the Spanish National

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[197] Kate Connolly, *Austrian Court Jails Asylum Seeker for War Crimes in Syria*, THE GUARDIAN, May 11, 2017.
[198] *See* Trial International, *Evidentiary Challenges*, *supra* note 9, at 16.
[199] *Asylum Scandal about Syrian National Security General in Austria*, KURIER.AT, Oct. 23, 2018.
[200] *Asylum Scandal: Witnesses Massively Incriminate Syrian Stasi General*, KURIER.AT, Oct. 25, 2018.
[201] *Id*. *See also* Zaman Al Wasl, *Austria to Try Syrian Intelligence Officer Who Tortured Detainees*, THE SYRIAN OBSERVER, Oct. 29, 2018.
[202] The defendants were: Mohamed Alhaj Ali, General Jalal Al Hayek, Colonel Sulayman Alyusef, Abdel-Fatah Qudsiyeh, Mohamed Dib Zeitoun, Major General Jamil Hassan, Major General Ali Mamluk, Farouk Al-Sharaa and Mohamed Said Bekheitan. Preliminary Proceedings Summary Procedure 0000011/2017, Central Court of Instruction No. 006 (Mar. 27, 2017).
[203] *See* CÓDIGO PENAL [C.P.] [PENAL CODE] art. 607bis(2)(6) (Spain).
[204] L.O.P.J. at §23.4(e).
[205] Preliminary Proceedings, *supra* note 201, at 2 (noting that the complaint alleged "the implementation of a terrorist security plan conceived and developed by high ranking members of the security, military and intelligence forces; among them, the defendants. The aim of this plan was to spread terror and intimidate the civil population through a campaign of massive illegal detentions and the systematic practice of enforced disappearances and tortures in response to the *Arab Spring*."). Judge Núñez is the same judge hearing a case involving the killing of six priests in El Salvador during the dirty war. Elisabeth Malkin, *From Spain, Charges Against 20 in the Killing of 6 Priests in El Salvador in 1989*, N.Y. TIMES, May 30, 2011. He also dismissed the case against Bush Administration officials (the "Bush Six") for torture at Guantánamo Bay on the grounds that the requirements of Spanish law were not satisfied and the United States was investigating the case itself. *See Accountability for U.S. Torture: Spain*, Center for Constitutional Rights, https://ccrjustice.org/home/what-we-do/our-cases/accountability-us-torture-spain.
[206] Preliminary Proceedings, *supra* note 201, at 6. *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶ 8, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) ("victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights. … Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.").

Court (*Audiencia Nacional*) dismissed the case on the grounds that the complainant was not a "victim" under Spanish law.[207] Lawyers with the Guernica 37 International Justice Chambers lodged an appeal with Spain's Constitutional Court, arguing that the dismissal of the case has amounted to a denial of justice. They have also sought a determination by the European Court of Justice that the definition of "victim" is not in accordance with European directives.[208] This outcome has galvanized a debate within Spain as to whether it should reinstate extraterritorial jurisdiction over international crimes,[209] although the Catalonia secession movement is absorbing legislators' energies.

At the request of the French Minister of Foreign Affairs, French war crimes prosecutors opened a preliminary examination into the crimes depicted in the Caesar photographs in September 2015.[210] France conformed its penal code to the Rome Statute in 2010,[211] but grants jurisdiction to French courts in only narrow circumstances: when the suspect habitually resides in France, when dual criminality is satisfied, and if no other international or domestic court is asserting jurisdiction or has requested the suspect's surrender.[212] Its war crimes investigations unit, the National Office for Investigation of Crimes Against Humanity, is part of the *gendarmerie* and opened a structural investigation on Syria in 2015 inspired in part by the Caesar photos.[213] Although opposed by many NGOs, the specialized crimes against humanity unit has been merged with the terrorism unit. France also boasts a specialized judicial unit within the Paris Tribunal de Grande Instance, which was formed in 2012.[214]

French law recognizes the concept of the *partie civile*—which allows victims to force the opening of an investigation without receiving the green light of a prosecutor—when it comes to ordinary crimes and international crimes solely in connection with the implementation of the statutes of the international tribunals for the former Yugoslavia and Rwanda (the ICTY and ICTR). With respect to other international crimes, prosecutors have a monopoly on initiating suit per the 2010 legislation, so victims cannot trigger a formal investigation under universal jurisdiction.[215] Where the principle of passive personality is at issue, however, victims may request the authorities

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[207] Marcos Pinherio, *The National Court Refuses to Investigate the Syrian Regime for Kidnapping and Terrorism*, ELDIARIOS.ES, July 21, 2017.
[208] *Spanish Court Case Tests the Challenges of Universal Jurisdiction on Syrians*, SYRIA UNTOLD (2017).
[209] *Spain Wants to Re-Establish Universal Jurisdiction Doctrine: Minister*, JUSTICEINFO.NET, July 11, 2018; Declaración de la Sociedad Civil para la recuperación de la Jurisdicción Universal (Oct. 22, 2018), *available at* https://www.ecologistasenaccion.org/?p=108554.
[210] Adam Nossiter, *France Opens Criminal Investigation of Torture in Syria Under Assad*, N.Y. TIMES, Sept. 30, 2015.
[211] *See* Loi No. 2010-930 du 9 août 2010, portent adaptation du droit pénal à l'institution de la cour pénale international, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022681235&categorieLien=id.
[212] CODE DE PROCEDURE PENALE [C. PR. PÉN] [CODE OF CRIMINAL PROCEDURE] art. 689-11 (Fra.). *See* French Coalition for the ICC (CFCPI), *Recommandations De La CFCPI Sur La Loi N°2010-930 Du 9 Aout 2010 Portant Adaptation Du Droit Pénal a L'institution De La Cour Pénale Internationale*.
[213] *See* Décret n° 2013-987 du 5 novembre 2013 portant création d'un office central de lutte contre les crimes contre l'humanité, les génocides et les crimes de guerre (Nov. 5, 2013), http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028160634&categorieLien=id (Fra.).
[214] *See* Loi n° 2011-1862 du 13 décembre 2011 relative à la répartition des contentieux et à l'allègement de certaines procédures juridictionnelles ("Case Distribution Law"), No. 0289, entered into force on December 14, 2011, art. 22, http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=?cidTexte=JORFTEXT000024960344&dateTexte=&oldAction=rechJ O&categorieLien=id (Fra.).
[215] C. PR. PÉN, *supra* note 211, at art. 689-11.

to open an investigation as was done by Obeïda Dabbagh, who together with several human rights organizations, filed a complaint in France alleging that his brother and nephew (both French-Syrian citizens) were arrested in 2013 by the Syrian Air Force Intelligence Directorate and disappeared.[216] Key organizations involved are Fédération Internationale des Ligues des Droits de l'Homme (FIDH), Ligue des Droits de l'Homme (LDH), and the Syrian Center for Media and Freedom of Expression (SCM).[217] French judges recently issued international arrest warrants against three high ranking regime officials—Ali Mamluk,[218] Jamil Hassan, and Abdel Salam Mahmoud—for their complicity in the disappearances and death.[219] Mamluk reportedly visited Italy as recently as February 2018, even though he has been subject to EU sanctions, which include a travel ban, since 2011.[220] The ECCHR has filed a complaint against Italy before the European Commission.[221] U.S. officials may have met with him in Damascus in connection with the counter-ISIL campaign.[222]

When it comes to its own citizens, France has brought prosecutions not only against its nationals for joining ISIL but also against family members and friends who have lent support.[223] For example, Christine Riviere was charged with following her son to Syria and sending him money.[224] A similar result was reached in the Nathalie Haddadi case.[225] For individuals not within France, and opposite to the Dutch approach, France has refused to allow for the repatriation of some of its nationals and is encouraging Kurdish authorities in Kurdish-controlled parts of Syria to prosecute French nationals locally, raising due process concerns.[226] Suspected ISIL recruiter Emilie König, for example, and other French nationals remain in SDF custody.[227]

Sweden—which after Germany is the second largest European destination country for Syrian asylum seekers and refugees[228]—has also pursued a number of these cases through its War Crimes Commission and Unit.[229] Like Germany, it can exercise "pure" universal jurisdiction and investigations can proceed even if the defendant is not present on the territory (although trials *in*

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[216] FIDH, *The Case of Two Disappeared Franco-Syrians in a Bachar El-Assad Jail Referred to the French Justice* (Oct. 24, 2016).
[217] *See* FIDH, *Syria, in Search of Justice*, http://insearchofjustice.fidh.org/.
[218] Trial International, Ali Mamluk (June 6, 2018), https://trialinternational.org/latest-post/ali-mamlouk-marie-colvin-case/. Mamluk is also named in the Spanish case, *see supra* note 201, and the complaint filed on behalf of the family of Marie Colvin, the U.S. war correspondent killed in Syria, discussed in chapter 7.
[219] FIDH, *Q & A on the Dabbagh Case: French Judges Issue 3 International Arrest Warrants against Top Syrian Officials*, May 11, 2018; FIDH, *Breaking: French Judges Issue International Arrest Warrants Against Three High-Level Syrian Regime Officials*, Nov. 5, 2018.
[220] Stephanie Kirchgaessner, *Italian Officials Allegedly Met with Syria's Top Military Adviser*, THE GUARDIAN, June 29, 2018.
[221] *Id.*
[222] Dahlia Nehme et al., *U.S., Syrian Security Officials Met in Damascus: Official, Report*, REUTERS, Aug. 28, 2018.
[223] *See* Marc Hecker, *137 Shades of Terrorism: French Jihadists Before the Court*, ÉTUDE DE L'IFRI (Apr. 2018).
[224] Angelique Christafis, *Radicalised French Woman who Followed Son to Syria Jailed for 10 Years*, THE GUARDIAN, Oct. 6, 2017.
[225] Emmanuel Jarry, *French Court Jails Woman Who Sent Money to Son Killed in Syria*, REUTERS, Sept. 28, 2017.
[226] Amandla Thomas-Johnson, *Legal Fears Over French Plan to Put IS Suspects on Trial in Kurdish Courts*, MIDDLE EAST EYE (Mar. 8, 2018).
[227] Ari Khalidi, *France Says Jihadists can be Tried in Syria Kurdistan, Signaling De Facto Recognition*, KURDISTAN 24, Jan. 5, 2018.
[228] *See* European Parliament, Directorate General for Internal Policies, *Integration of Refugees in Austria, Germany and Sweden: Comparative Analysis* (2017).
[229] Polisen, War Crime—Swedish Police Efforts, https://polisen.se/en/victims-of-crime/war-crime---swedish-police-efforts/.

absentia are not allowed).[230] It does not, however, have an effective terrorism statute, so these international crimes may be its only option. Sweden convicted Haisam Omar Sakhanh, a former member of a Syrian rebel group, of war crimes for killing captured Syrian soldiers.[231] He was charged on the basis of a video published on social media and sent to the *New York Times*.[232] The case is of interest because his defense was that a rebel court had sentenced the captured soldiers to death and he was lawfully acting as executioner.[233] The Swedish courts rejected this line of argument,[234] reasoning that although non-state actors lacking full sovereignty can create courts to enforce international humanitarian law, the tribunal in question was not a "regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples" as required by Common Article 3 of the Geneva Conventions.[235] Sakhanh was sentenced to life imprisonment.

A similar case involved allegations that Mouhannad Droubi—a Syrian citizen who had sought refuge in Sweden after serving in the Free Syrian Army—had assaulted what appeared to be a pro-regime soldier who was *hors de combat*. Droubi was identified by a video on his computer of the assault, which had also been uploaded on Facebook.[236] After he was convicted, the victim was located in Turkey by a Swedish journalist and turned out to be a defected Syrian soldier who had gotten into an altercation with the defendant. On a retrial, the court acquitted the defendant on the war crimes charge (but retained the gross assault charge under the ordinary penal law) on the ground that there was no nexus between the assault and the conflict. On appeal, the war crimes charge was reinstated on the theory that there was an armed conflict at the time of the assault in 2012.[237]

Sweden gets credit for bringing the first extraterritorial case involving a member of the Syrian Army. Sweden convicted Mohammed Abdullah, a Syrian asylum-seeker, of violating the personal dignity of the dead and injured.[238] Abdullah was depicted in a photograph with his boot

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[230] Act 2014:406 on Criminal Responsibility for Genocide, Crimes Against Humanity, and War Crimes, https://www.government.se/49cd62/contentassets/6e0e65c994124235a39387e2dcf5ad48/2014_406-act-on-criminal-responsibility-for-genocide-crimes-against-humanity-and-war-crimes-.pdf. Sweden also has a genocide act dating back to 1964. Law (1964:169) on Punishment for Genocide, http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1964169-om-straff-for-folkmord_sfs-1964-169.

[231] *Prosecutor v. Haisam Omar Sakhanh*, Stockholm District Court, Case B 3787-16, Judgment of February 16, 2017; *Prosecutor v. Haisam Omar Sakhanh*, Svea Court of Appeal, Case B 3787-16, Judgment of May 31, 2017. On July 20, 2017, the Swedish Supreme Court denied Sakhanh's leave to appeal, *Prosecutor v. Haisam Omar Sakhanh*, Swedish Supreme Court, Case B 3157-17, Decision of July 20, 2017. *See* Trial International, Haisam Omar Sakhanh (Oct. 1, 2018), https://trialinternational.org/latest-post/haisam-omar-sakhanh/.

[232] C.J. Chivers, *Syrian Asylum Seeker Linked to Mass Killing Is Arrested in Sweden*, N.Y. TIMES, Mar. 14, 2016.

[233] *See generally* Jenny Wahlberg, *Rebel Courts—The Legality of Courts Established by Non-State Actors in the Context of NIAC* (2017) (unpublished thesis, Stockholm University), http://www.diva-portal.se/smash/get/diva2:1165030/FULLTEXT01.pdf (discussing circumstances in which non-state actors can establish courts in compliance with IHL).

[234] Prosecutor v. Omar Haisam Sakhanh, Stockholm District Court, B 3787-16, Judgement, (Feb. 16, 2017), at 24; Prosecutor v. Omar Haisam Sakhanh, Svea Court of Appeal, B 2259-17, Judgement 31 May 2017, at 3.

[235] Geneva Convention, *supra* note 64, at art. 3.

[236] *Facebook 'Torture' Video Leads to Sweden Arrest*, THE LOCAL, Feb. 2, 2015.

[237] *See* Prosecutor v. Mouhannad Droubi, International Crimes Database, http://www.internationalcrimesdatabase.org/Case/3296/Prosecutor-v-Mouhannad-Droubi/.

[238] Prosecutor v. Mohammad Abdullah, Södertörn District Court, Case B 11191-17, Judgment of September 25, 2017. *See* Al-Kawakibi Human Rights Organization, Report, http://www.nuhanovicfoundation.org/user/file/2017_al_kawakibi_organization_for_human_rights,_swedish_case_against_mohammed_abdullah_(eng).pdf (discussing efforts to get the defendant prosecuted).

on one of several corpses. Activists alerted the authorities to photos on his Facebook page suggesting that he had been a member of the Syrian army.[239] The authorities dropped earlier charges of participating in the execution of the victims for lack of additional evidence.[240] He served an eight-month sentence. Nine torture survivors have since filed suit in Sweden against senior regime officials, alleging their commission of crimes against humanity.[241]

Elsewhere in Europe, Brigadier General Nabil al-Dandal, who headed the Political Security unit of the Ministry of the Interior in Latakia Governorate from 2003 to 2008, was found in Switzerland in 2016 after he apparently deserted in 2012. Swiss authorities denied him asylum, although he was not originally referred to the Federal Prosecutor because there was no evidence of his direct involvement in abuses, notwithstanding his senior position in the notorious intelligence office. Eventually, such evidence emerged, and he is being investigated for his participation in the commission of international crimes.[242] As an example of historical justice, Switzerland is also prosecuting Rifaat Al-Assad, the uncle of the President, for international crimes committed in Syria in the 1980s.[243] One case, which was dismissed and is on appeal, involves the 1980 Tadmor prison massacre that resulted in the death of a thousand detainees in their cells; the other involves the 1982 Hama massacre. The U.N. Special Rapporteurs on Torture and Independence of Judges and Lawyers have expressed concerns that the Swiss war crimes unit has come under political pressure to slow roll universal jurisdiction cases.[244]

Belgium has also been faced with homegrown terrorism cases as well as the prospect of prosecuting criminal conduct committed in Syria. Similar to the Dutch Operation Context case, Belgium also identified a recruitment ring in its midst, *Sharia4Belgium*, and prosecuted 45 members (many *in absentia*) for terrorist offenses.[245] In the United Kingdom, cases have been brought primarily under anti-terrorism legislation[246] in connection with aspirational crimes and crimes of incitement.[247]

Corporate Actors

Some additional cases in Europe have been brought against corporate actors as well for their complicity in international crimes being committed in Syria. For example, the cement company LafargeHolcim and some of its principals (Bruno Pescheux, Frédéric Jolibois, Bruno Lafont, Eric Olsen, and Christian Herrault) have been questioned, detained, investigated and/or charged with financing a terrorist enterprise, complicity in war crimes and crimes against

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239 Heba Habib and Louisa Loveluck, *A Syrian Soldier Has Been Sentenced for Battlefield Crimes. Why Did It Take So Long?*, WASH. POST, Oct. 1, 2017.
240 Anne Barnard, *Syrian Soldier is Guilty of War Crime, a First in the 6-Year Conflict*, N.Y. TIMES, Oct. 3, 2017.
241 Stephanie Nebehay, *U.N. Investigators Hot on Trail of Syrian War Criminals*, U.S. NEWS, Mar. 8, 2019.
242 *Syrian Ex-Intelligence Squad Flees to Switzerland*, SRF, Mar. 28, 2018, https://www.srf.ch/news/international/justiz-eingeschaltet-syrischer-ex-geheimdienst-kader-fluechtet-in-die-schweiz.
243 *Revelations about TRIAL International's Investigation*, TRIAL INTERNATIONAL (Sept. 25, 2017).
244 *See* Trial International, *Is Switzerland Becoming a Safe Haven for War Criminals?* (Sept. 18, 2018) (noting allegations that the Office of the Attorney General has come under pressure from the Federal Department of Foreign Affairs).
245 *Sharia4Belgium Trial: Belgian Court Jails Members*, BBC, Feb. 11, 2015.
246 *See* Counter Terrorism and Security Act, c. 6, 2015 (Eng.), http://www.legislation.gov.uk/ukpga/2015/6/contents/enacted.
247 For information on British subjects who have been prosecuted in the United Kingdom, died in battle, or still operating in theater, see *Tracking Britain's Jihadists*, BBC, May 21, 2015.

humanity, and forced labor (among other charges). The suit is based on the company's breach of an EU embargo on Syrian oil by Lafarge's cement factory in northern Syria, where ISIL was operating, and the endangerment of its employees.[248] It is alleged that the company paid millions to ISIL in order to further its operations knowing that ISIL was engaged in atrocities. On behalf of former Lafarge Syrian employees, the case was initiated by ECCHR and Sherpa, a French NGO devoted to representing victims of economic crimes.[249] This marks the first time that a parent corporation has been criminally indicted for crimes against humanity, an outcome allowed by French law, although those charges were eventually dismissed.[250] Lawyers representing Yazidi victims of ISIL crimes have recently sought or been granted civil party status in the case.[251]

Similarly, Qosmos, a French software company, has been deemed an "assisted witness" (a step that can precede a formal indictment) for its possible complicity in torture for allegedly selling surveillance and interception equipment to the Syrian government that was used to identify, track, and arrest members of the opposition. Qosmos denied the allegations and filed a defamation suit against the human rights organizations that initiated the complaint.[252] ECCHR also filed a complaint against a German joint venture, Utimaco, in 2017; however, prosecutors refused to open an investigation.[253] Flemish companies were convicted in Belgium for illegally exporting chemicals, including one that is a component of sarin gas.[254] A consortium of civil society actors, including the Syrian Archive, has filed an additional complaint against other German, Swiss, and Belgian companies asking prosecutors to commence an investigation into a 2014 shipment of chemical weapons precursors.[255] These European cases implicate E.U. regulations programs that restrict imports and exports to Syria of weapons, certain dual use items, and anything that "might be used for internal repression," among other sanctions.[256]

The United States

Turning to cases outside of Europe, although the U.S. Department of Justice boasts a dedicated Human Rights & Special Prosecutions Unit[257] as well as a robust suite of universal jurisdiction statutes, there have been very few international crimes prosecutions in the United

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[248] Liz Alderman, *France Investigates Lafarge Executives for Terrorist Financing*, N.Y. TIMES, Dec. 8, 2017.
[249] *See* ECCHR, *Lafarge in Syria—Accusations of Complicity in Grave Human Rights Violations*, https://www.ecchr.eu/en/case/lafarge-in-syria-accusations-of-complicity-in-grave-human-rights-violations/.
[250] *See* C. Pén. Art.121-2 (Fr.) ("Legal persons, with the exception of the State, are criminally liable for the offenses committed on their account by their organs or representatives"); *Lafarge Charged with Complicity in Syria Crimes Against Humanity*, THE GUARDIAN, June 28, 2018.
[251] Lin Taylor, *Yazidi Women Seek to Join Case Against French Company Accused of Funding Islamic State*, REUTERS, Nov. 30, 2018.
[252] The complaint was originally brought by the Fédération Internationale des Droits de l'Homme (FIDH) and the Ligue des Droits de l'Homme (LDH). *See* Business & Human Rights Resource Centre, *Qosmos Investigation (re Syria)*, https://www.business-humanrights.org/en/qosmos-investigation-re-syria.
[253] ECCHR, *Surveillance in Syria: European Firms may be Aiding and Abetting Crimes Against Humanity*, https://www.ecchr.eu/en/case/surveillance-in-syria-european-firms-may-be-aiding-and-abetting-crimes-against-humanity/.
[254] Daniel Boffey, *Belgian Firms Prosecuted over Syria Chemical Exports*, THE GUARDIAN, Apr. 18, 2018.
[255] Open Society Justice Initiative, *German & Belgian Prosecutors Urged to Investigate Chemical Shipments to Syria*, June 3, 2019.
[256] E.U. Council Regulation No. 36/2012, Chap. II (Jan. 18, 2012) (restricting, in addition, participation in infrastructure projects and financing certain enterprises).
[257] Department of Justice, Human Rights and Special Prosecutions (HRSP), https://www.justice.gov/criminal-hrsp.

States.[258] One exception is the case against Chuckie Taylor, the son of warlord Charles Taylor of Liberia who was sentenced to life imprisonment by the Special Court for Sierra Leone. Taylor *fils* was convicted of torture in a U.S. court and subjected to the same punishment as his father.[259] Prior to the outbreak of the Syrian war, most U.S. universal jurisdiction cases involved terrorism and piracy statutes, including cases with little tangible nexus at all to the United States. Most salient are the Al Shabaab cases. For example, Al Shabaab Operative, Eritrean citizen, and Swedish resident Mohamed Ibrahim Ahmed pled guilty[260] and was sentenced in March 2013 to 111 months in prison[261] for conspiring to provide material support to terrorists[262] and for receiving military training from Al Shabaab.[263] Congress passed the latter statute after it became clear that it might be difficult to prosecute U.S. citizen John Walker Lindh for joining the Taliban in the absence of other overt criminal conduct.[264] Ahmed was arrested in Nigeria and transported to the United States for prosecution, but this did not divest the court of jurisdiction since that statute requires only that the defendant be "brought into or found" in the United States.[265]

A number of cases involving Syria have proceeded in U.S. courts, mostly involving U.S. foreign fighters, or wannabe foreign fighters, and their facilitators.[266] So far, these have been dealt with through terrorism charges[267] (particularly material support for terrorism) combined with various enhancement charges (e.g., the commission of a crime of violence with a weapon).[268] These cases have yielded close to a 100% conviction rate (mostly following a guilty plea although more ISIL cases go to trial than ordinary criminal cases).[269] For example, U.S. citizen Mohamad Jamal Khweis was convicted by a jury and sentenced to 20 years in prison for providing material support to ISIL.[270] Additional cases involve several women who have been charged with terrorism-related crimes in consort with their romantic partners.[271] Still other cases have been closed following the death of the suspect. For example, the FBI issued a $50,000 reward for information

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[258] *See generally* Beth Van Schaack, *The Parallels between South African and U.S. Law on Universal Jurisdiction*, JUST SECURITY (Dec. 16, 2013).
[259] *See* Elise Keppler, Shirley Jean & J. Paxton Marshall, *First Prosecution in the United States for Torture Committed Abroad: The Trial of Charles 'Chuckie' Taylor, Jr.*, 15 HUM. RTS. BRIEF 18 (2008).
[260] *Eritrean-born Man Tied to Terror Group Sentenced to more than 9 Years*, CNN, Mar. 23, 2013.
[261] Fed. Bureau of Investigations, *Al Shabaab Operative Sentenced in Manhattan Federal Court to 111 Months in Prison for Conspiring to Support and Receive Military-Type Training from a Foreign Terrorist Organization*, Mar. 27, 2013.
[262] 18 U.S.C. § 2339A, 18 U.S.C. § 2339B.
[263] 18 U.S.C. § 2339D.
[264] Beth Van Schaack, *John Walker Lindh's Legacy: To Join The Fight Is Criminal*, JUST SECURITY, Sept. 5, 2014.
[265] *U.S. v. Ahmed et al.*, 2011 U.S. Dist. LEXIS 123182, at *4–5 (S.D.N.Y. Oct. 21, 2011) ("Both the material support and the military-type training statutes explicitly grant extraterritorial jurisdiction, as follows: extraterritorial jurisdiction may be exercised when the 'offender is brought into . . . the United States'").
[266] George Washington University's Program on Extremism has tracked these cases and counts 182 prosecutions as of July 2019. *See* https://extremism.gwu.edu/cases.
[267] CENTER ON NATIONAL SECURITY, *THE AMERICAN EXCEPTION: TERRORISM PROSECUTIONS IN THE UNITED STATES: THE ISIS CASES* (March 2014-August 2017) (Karen J. Greenberg ed., 2017).
[268] 18 U.S.C. § 924(c).
[269] Greenberg, *supra* note 266, at 13, 27-28. For updated statistics on these cases, see Counter-Terrorism Center at Fordham Law, Terrorism Database and Publications, https://www.centeronnationalsecurity.org/research/.
[270] Department of Justice, *American Sentenced to 20 Years for Joining ISIS* (Oct. 27, 2017), https://www.justice.gov/opa/pr/american-sentenced-20-years-joining-isis. Goran Shakhawan & Mewan Dolamari, *Exclusive Interview with the American-Born ISIS Fighter*, KURDISTAN 24, Mar. 17, 2016.
[271] *See Virginia Woman Sentenced for Making False Statements in an International Terrorism Investigation*, FBI (May 11, 2015), https://www.fbi.gov/contact-us/field-offices/richmond/news/press-releases/virginia-woman-sentenced-for-making-false-statements-in-an-international-terrorism-investigation.

leading to the capture of Ahmad Abousamra, a U.S.-Syrian national who ran ISIL's *Dabiq* magazine.[272] He was reportedly killed in an airstrike in January 2017.[273]

Notwithstanding this activity, the United States has not asserted jurisdiction over several high-profile cases involving U.S. nationals. For example, Nasrin As'ad Ibrahim Bahar (a.k.a. Umm Sayyaf), the widow of ISIL leader and *financier* Abu Sayyaf, was captured in a raid on her Syrian home by U.S. special forces and transferred to Kurdish custody.[274] She has been convicted of terrorism in Iraq. She has also been charged in the United States with participating in a conspiracy to provide material support to a foreign terrorist organization under a statute with a broad extraterritorial reach.[275] The United States could additionally charge her with torture,[276] human trafficking,[277] or genocide,[278] given her admitted involvement in the enslavement of Yazidi women.[279] She could also be prosecuted for war crimes[280] because of her participation in the torture and rape of a U.S. citizen by ISIS leader Abu Bakr al-Baghdadi, among others: humanitarian aid worker Kayla Mueller.[281] The United States' War Crimes Act of 1996 gives federal courts jurisdiction over war crimes committed by or against U.S. persons.[282]

Such additional charges have not been forthcoming, for reasons that have not been made public. One explanation may relate to the limits on U.S. extraterritorial jurisdiction and extradition. For example, torture and genocide charges cannot currently be levelled against Sayyaf, because she is not yet "present in" the United States, as is required by those statutes. Even if the United States were to seek her extradition, the principle of specialty creates a bit of a catch-22: the United States cannot charge someone with some international crimes unless they are "present in" the United States, but authorities cannot seek someone's extradition unless they are formally charged. The rule of specialty then requires the state seeking extradition to prosecute the person only for the charges and factual allegations that served the basis for the extradition, request unless the rendering state consents to more charges.[283] Defendants have standing to raise a violation of the

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[272] Fed. Bureau of Investigations, Most Wanted, Ahmad Abousamra, https://www.fbi.gov/wanted/wanted_terrorists/ahmad-abousamra. Michele McPhee and Brian Ross, *Official: American May be Key in ISIS Social Media Blitz*, ABC NEWS, Sept. 3, 2014.
[273] John Hall, *Two US Jihadis who made ISIS Propaganda Videos—including one on the FBI's Most Wanted Terrorist List—'are Killed in Iraqi Air Strike'*, DAILY MAIL, June 1, 2015.
[274] Barbara Starr, et al., *Abu Sayyaf, Key ISIS Figure in Syria, Killed in U.S. Raid*, CNN, May 17, 2015. *See* John Reed, *Background Reading on Umm Sayyaf's Transfer to Kurdish Authorities*, JUST SECURITY (Aug. 7, 2015).
[275] 18 U.S.C. § 2339B (2015). *See* Criminal Complaint, United States v. Nisreen Assad Ibrahim Bahar (E.D. Va. Feb. 8, 2016) (No. 1:16mj63), *available at* https://www.justice.gov/opa/file/822211/download [hereinafter *Sayyaf Criminal Complaint*].
[276] 18 U.S.C. § 2340A ("There is jurisdiction over the activity prohibited in subsection (a) if—…(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.").
[277] *See* United States v. Baston, 818 F.3d 651, 669–70 (11th Cir. 2016) (upholding constitutionality of statute under domestic and international law).
[278] 18 U.S.C. § 1091.
[279] *See* Sayyaf Criminal Complaint, *supra* note 274, ¶ 16.
[280] 18 U.S.C. § 2441.
[281] Other U.S. citizens have been tortured and killed in Syria, which could give rise to legal action in the United States. Conor Finnegan, *Chicago Woman Believed to have been Tortured, Killed in Syria: Human Rights Group*, ABC NEWS, Dec 6, 2018.
[282] *See* Beth Van Schaack, *Iraq and Syria: Prospects for Accountability*, JUST SECURITY, Feb. 22, 2016 (noting potential for Sayyaf to be prosecuted in the United States).
[283] *United States v. Rauscher*, 119 U.S. 407, 430 (1886) ("a person who has been brought within the jurisdiction of the court, by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in that treaty").

rule of specialty.[284] Iraq would thus have to waive the specialty principle in order for the United States to seek Sayyaf's extradition and then add potential torture, genocide, or trafficking charges once she is officially "present in" the United States.[285] The Rome Statute, for example, envisions that states may waive specialty and, in fact, encourages them to do so to allow the ICC to prosecute suspects for the full scope of their criminal behavior.[286] At the moment, and by contrast, there is no such bar to adding war crimes charges to an extradition request. Although the U.S. War Crimes Act[287] does not go as far as it could under international law,[288] it does give U.S. courts clear jurisdiction over war crimes committed by *or against U.S. citizens*. Included in the list of war crimes are various forms of harm to civilians taking no active part in hostilities, crimes that are subject to capital punishment if death results to the victim,[289] which liberates these charges from any statute of limitations.[290]

It remains to be seen whether Sayyaf will be extradited to the United States to stand trial on any additional charges.[291] There is a 1934 extradition treaty between Iraq and the United States that has been used sparingly.[292] A major impediment is that the 2005 Iraqi Constitution seems to prevent the extradition of Iraqi nationals at Article 21: "No Iraqi shall be surrendered to foreign entities and authorities."[293] The Constitution also requires, however, that Iraq must meet its international obligations.[294] There is some precedent for getting around this apparent constitutional contradiction. Two Iraqi nationals, for example, were extradited to the United Kingdom after committing a horrific honor crime in London and then fleeing to Iraq. The Iraqi regional felonies court ruled that the two would not face any due process violations were they to be extradited and

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[284] *United States v. Cuevas,* 847 F.2d 1417, 1426 (9th Cir. 1988) ("A person extradited may raise whatever objections the extraditing country would have been entitled to raise.").

[285] *See United States v. Stokes*, 726 F.3d 880, 889 (7th Cir. 2013) ("It is well-established that the Rule of Specialty may be waived by the surrendering country.").

[286] *See* Article 101:

> 1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.
> 2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court. … States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Rome Statute, Article 101.

[287] 18 U.S.C. § 2441(b).

[288] *See* Beth Van Schaack, *United States War Crimes Statute & Sri Lanka*, JUST SECURITY (May 20, 2014).

[289] 18 U.S.C. § 2441(a).

[290] 18 U.S.C. § 3281.

[291] It has been alleged that the U.S. charges against her are "more of an 'insurance policy' in case Iraqi officials fail to charge her or she is ever transferred to another country or she escapes prison." N.A. Yousseff & S. Harris, *Feds Charge ISIS Widow in American's Death but Won't Say Who Killed Her*, THE DAILY BEAST, Feb. 8, 2016.

[292] *See* Ashley Deeks, *Dusting off the U.S.-Iraq Extradition Treaty?*, LAWFARE (May 11, 2012).

[293] Iraq Constitution (2005), *available at* https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en. *See also* Criminal Proc. Code of 1971, as amended March 14, 2010, Art. 358(4) (Iraq).

[294] *Id*. at art. 8 ("Iraq shall observe the principles of good neighborliness, adhere to the principle of noninterference in the internal affairs of other states, seek to settle disputes by peaceful means, establish relations on the basis of mutual interests and reciprocity, and respect its international obligations.").

that they had forfeited their rights to non-surrender by virtue of leaving and then re-entering Iraq illegally and committing a murder while abroad.[295]

Another significant case with a strong U.S. nexus involves the so-called Beatles—El Shafee Elsheikh and Alexanda Amon Kotey—two British subjects formerly in SDF control who are discussed in chapter 4 because they fall within the ICC's personal jurisdiction as well.[296] The two were reportedly involved in the killing of U.S. journalists, including James Foley, who was abducted in 2012. U.S. personnel have interrogated the two men and confirmed their identities. Foley's mother has poignantly urged the United States to prosecute her son's killers,[297] although the families have called on U.S. officials not to imprison the men at the Guantánamo Bay Naval Base or subject them to the death penalty.[298] The United States has the necessary legal framework in place to prosecute both captured men for the war crime of killing a protected person.[299] Because the Foleys received multiple ransom demands,[300] the pair could also be prosecuted for hostage taking.[301]

As Turkish forces swept into norther Syria after U.S. troops were pulled aside, they made plans to take custody of several "high value" ISIL detainees. The Beatles were among them.[302] At the moment, the plan seems to be for the Beatles to eventually be tried in the United States, an arrangement that drew criticism when it appeared that the United Kingdom was willing to provide mutual legal assistance without seeking assurances that the pair would not be subject to capital punishment in the event of their conviction.[303] On a petition filed by Elsheikh's mother, the U.K. High Court of Justice ruled that it was lawful for the U.K. Home Secretary to authorize the provision of mutual legal assistance to a foreign state for offenses that carry the death penalty without requiring such assurances.[304] The issue may ultimately go to the judges of the European Court of Human Rights,[305] which have ruled in the past that extraditing a person to the United States where he or she might land on death row for extended periods of time violates the European Convention on Human Rights' prohibition of torture and other forms of cruel, inhuman, and degrading treatment or punishment.[306] With the two in U.S. custody, however, any remedy remains speculative.

The United States has never leveled charges under its War Crimes Act. The brutal mistreatment and murders of Foley, Sotloff, Kassig, Mueller, and other U.S. citizens in Syria offer an opportunity to activate this statute. Gaining physical custody of the accused often proves to be a challenge when it comes to war crimes trials. With Elsheikh and Kotey now in the hands of U.S.

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[295] Karen McVeigh, *'Honour' Killing: Pressure Grows on UK to Extradite Suspect from Iraq*, THE GUARDIAN, NOV. 22, 2007; *Extradited Iraqi Charged with Honour Killing*, THE TELEGRAPH, June 30, 2009.
[296] A third Beatle was prosecuted in Turkey.
[297] Diane & John Foley et al., Opinion, *Justice for Our Children, Killed by ISIS*, N.Y. TIMES, Feb. 16, 2018.
[298] *Slain American's Mom Reacts to Capture of Alleged ISIS Executioners*, CBS NEWS, Feb. 9, 2018.
[299] *See* Beth Van Schaack, *Attacks on Journalists A War Crime*, JUST SECURITY (Aug. 20, 2014).
[300] Rukmini Callimachi, *Before Killing James Foley, ISIS Demanded Ransom from U.S.*, N.Y. TIMES, Aug. 20, 2014.
[301] 18 U.S.C. § 1203.
[302] Beth Van Schaack & Julia Brooks, *"With a Little Help from our Friends": Prosecuting the ISIL "Beatles" in U.S. Courts*, JUST SECURITY (Oct. 22, 2019).
[303] Yasmeen Serhan, *ISIS is Shaking Britain's Anti-Death Penalty Resolve*, THE ATLANTIC, July 24, 2018.
[304] R. (on the application of El Gizouli) v. Sec. State Home Dept., [2019] EWHC 60 (Admin) (Eng.).
[305] *See* Antonios Tzanakoloulos, *The "ISIS Beatles" and "Non-Territorial" Applications of the European Convention of Human Rights*, JUST SECURITY (Dec. 17, 2018).
[306] *Soering v. United Kingdom*, App. No. 14038/88, 11 EHRR 439 (July 9, 1989).

forces, that impediment is diminished. Furthermore, if these two can be linked to the videotapes of these deaths or identified by former hostages, such as French journalist Nicholas Henin who escaped ISIL custody, the Department of Justice will have direct evidence of their complicity in the deaths of U.S. citizens. In addition, the journalists were allegedly guarded by French-born Mehdi Nemmouche, who was convicted in Belgian for his involvement in the murder of patrons at the Brussel Jewish Museum in 2014.[307] As such, this is not an opportunistic battlefield capture of anonymous fighters with no direct evidence of their involvement in war crimes, but rather a case involving notorious violations of the law of armed conflict. In any case, if the prospect of a war crimes prosecution is too daunting for the DOJ, the federal penal code also allows for the prosecution of the murder of any U.S. citizen abroad so long as it can be shown that the act "was intended to coerce, intimidate or retaliate against a government or a civilian population"[308]—a caveat easily satisfied in these cases. In any of these scenarios, the families of the victims could intervene in the case under the Crime Victims' Rights Act (CVRA), which grants victims certain procedural rights in criminal prosecutions, such as the right to be present and to be reasonably heard.[309]

In September 2017, the United States took custody of one U.S. citizen-foreign fighter, initially referred to as "John Doe," from U.S.-backed Kurdish forces in Syria.[310] For thirteen months, Doe's fate remained uncertain, and he was the subject of *habeas corpus* litigation by the American Civil Liberties Union (ACLU).[311] Notwithstanding the statutes identified above, there was some question about whether John Doe, who later was determined to be a joint U.S.-Saudi citizen named Abdulrahman Ahmad Alsheikh, could be prosecuted given the evidence on hand.[312] Ultimately, he was released to Bahrain as part of a confidential settlement agreement, which also involved the cancellation of his U.S. passport.[313]

To the north, Boutros Massroua, a Lebanese citizen is defending against charges in Canada for complicity in crimes against humanity in connection with his work repairing vehicles for ISIL.[314] Canadian authorities are now arguing that he should have been barred from entering Canada as a result of his affiliation with the terror group. This marks one of the first cases in which atrocity crimes charges have been brought against ISIL members. On appeal, Massroua is pressing his claim that he worked for ISIL under duress—a defense that has been rejected by two lower courts.

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[307] Christopher Dickey, *French Jihadi Mehdi Nemmouche is the Shape of Terror to Come*, DAILY BEAST, July 12, 2017.

[308] 18 U.S.C. § 2332(d).

[309] 18 U.S.C. § 3771. *See* Jefri Wood, *The Crime Victims' Rights Act of 2004 and the Federal Courts*, FEDERAL JUDICIAL CENTER (June 2, 2008).

[310] Betsy Woodruff & Spencer Ackerman, *U.S. Military: American Fighting for ISIS 'Surrenders'*, THE DAILY BEAST, Sept. 14, 2017.

[311] *See* ACLU v. Mattis, Case No. 17-cv-2069 (TSC), (D.C. Dist. Col. 2017), https://www.documentcloud.org/documents/4336082-ACLUF-v-Mattis-Mem-Op.html (rejecting the government's argument that the ACLU lacked standing to proceed as Doe's "next friend"); Deb Riechmann, *ACLU Challenges Detention of American 'John Doe' Captured in Syria*, MIAMI HERALD, Oct. 5, 2017.

[312] Marty Lederman, *Three Quick Observations on the U.S. Citizen ISIL Detainee*, JUST SECURITY (Oct. 6, 2017).

[313] Charlie Savage et al., *American ISIS Suspect is Freed After Being Held More Than a Year*, N.Y. TIMES, Oct. 29, 2018; Jonathan Hafetz, *U.S. Citizen, Detained without Charge by Trump Administration for a Year, Is Finally Free*, ACLU (Oct. 29, 2018).

[314] Stewart Bell, *The ISIS Mechanic: Man now Living in B.C. Fixed Trucks for Terror Group. Is he Complicit in War Crimes*? GLOBAL NEWS, Apr. 25, 2019.

Mutual Legal Assistance

The crisis in Syria has helped to activate and lessen the friction within multilateral systems of mutual legal assistance. Interpol has established a war crimes directorate and has an existing cooperation agreement with the ICC, which provides for the exchange of information and analysis about international crimes and the whereabouts of ICC fugitives and allows the ICC-OTP to use Interpol's telecommunications system.[315] The Office of the Prosecutor can request Interpol to circulate its various notices: red concerning ICC defendants, blue seeking supplementary information, yellow for tracing missing persons, and black for identifying corpses.[316] Interpol entered into similar arrangements with other international and hybrid tribunals, including the SCSL and STL. So far, however, Interpol has not been engaged when it comes to issuing red notices involving Syria (the closest thing that the international community has to an international arrest warrant).[317]

More promising, European states have begun to utilize joint investigative teams (JITs) to coordinate investigations and the provision of mutual legal assistance around transnational criminal events.[318] A JIT is an "international cooperation tool based on an agreement between competent authorities—both judicial … and law enforcement—of two or more States, established for a limited duration and for a specific purpose, to carry out criminal investigations in one or more of the involved States."[319] One important example is the JIT convened to investigate the downing of Malaysian Airlines Flight MH17,[320] apparently shot down by Ukrainian separatists with a Russian-made missile. That JIT includes representatives from the five states most impacted upon by the attack: the Netherlands (which lost 196 nationals), Australia, Belgium, Malaysia, and Ukraine. The JIT has benefited from the work of the Bell¿ngcat collective,[321] which has been researching the open source information available on the crash and has made some important discoveries about key figures involved.[322] Another JIT devoted to Syria helped lead to the indictment and apprehension of high-level regime figures discussed above.[323]

In 2011, the Dutch announced an initiative to create a new Mutual Legal Assistance Treaty for International Crimes, which would encompass genocide, crimes against humanity, and select

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[315] Co-operation Agreement Between the Office of the Prosecutor of the International Criminal Court and the International Criminal Policy Organization—INTERPOL (Mar. 22, 2005), https://www.interpol.int/About-INTERPOL/Legal-materials/International-Cooperation-Agreements/Global-Organizations.
[316] *Id.* at art 4.
[317] Red notices identify persons who are sought for arrest and extradition. Interpol circulates red notices to member countries to facilitate capture and transfer to the state that issued the original warrant. Goldberg, *supra* note 17.
[318] *See* Europol, *Joint Investigation Teams*, https://www.europol.europa.eu/activities-services/joint-investigation-teams; Council Resolution 2017/C 18/01, Council Resolution on a Model Agreement for Setting up a Joint Investigation Team (JIT), 60 OFFICIAL J. E.U. (Jan. 19, 2017).
[319] COUNCIL OF THE EUROPEAN UNION, JOINT INVESTIGATIONS TEAMS PRACTICAL GUIDE 4 (Feb. 14, 2017); *see also* Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union art. 13, 2000/C 197/01.
[320] Openbaar Ministerie, National Public Prosecutor's Office, *Update in Criminal Investigation MH17 Disaster* (May 24, 2018).
[321] Openbaar Ministerie, *Reaction Joint Investigative Team to Information Bellingcat* (Dec. 8, 2017), https://www.om.nl/onderwerpen/mh17-crash/@101329/reaction-joint/.
[322] *See, e.g.*, Bell¿ngcat, *Russian Colonel General Identified as Key MH17 Figure* (Dec. 8, 2017).
[323] *Syrians held in Germany for Suspected Crimes Against Humanity*, BBC, Feb. 13, 2001.

war crimes.[324] It draws its inspiration from previous MLATs devoted to transnational crimes that fall under the purview of the U.N. Office on Drugs & Crime (UNODC), such as the U.N. Convention against Transnational Organized Crime and its trafficking Protocols.[325] It is unclear when this project will come to fruition; as it stands, states must utilize bilateral MLATs and extradition treaties to facilitate cooperation around the prosecution of international crimes in domestic courts.

Immigration Remedies

In addition to this range of counter-terrorism and international criminal charges, governments have also utilized immigration remedies (such as expulsion orders, entry bans, and passport or citizenship revocation) and other administrative mechanisms (such as travel bans, area restrictions, and control orders) when faced with potential perpetrators either in their midst or attempting to enter the country.[326] Indeed, immigration officials are on the frontlines in identifying potential perpetrators,[327] who often end up inadvertently self-identifying in the context of their asylum proceedings.[328] Governments are improving their ability to screen out individuals who have committed abuses; nonetheless, some perpetrators slip in, either because their names do not make it on a watch list or they misappropriate the identity of an innocent. This risk is inevitable given that the number of asylum seekers from conflict zones around the world is at its highest point in many decades.[329]

Accordingly, several states have set up special war crimes units within their immigration services.[330] In Europe, states have established the European Asylum Office Exclusion Network to coordinate efforts to exclude individuals who fall within Article 1F of the 1951 Convention Relating to the Status of the Refugees.[331] Article 1F withholds the benefits of refugee protection from certain individuals if they have committed international crimes:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior

[324] *See generally* Madaline George, *Some Reflections on the Proposal for a New Mutual Legal Assistance Treaty for International Crimes*, OPINIO JURIS (Jan. 11, 2019).
[325] U.N. Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209.
[326] *See* Bérénice Boutin, *Administrative Measures Against Foreign Fighters: In Search of Limits and Safeguards*, International Centre for Counter-Terrorism (December 2016).
[327] Redress/FIDH, *supra* note 16, at 12.
[328] Langer & Eason, *supra* note 6, at 797 (noting that "65% of all the defendants ever to be tried on the basis of universal jurisdiction had sought asylum status in the prosecuting state").
[329] Imogen Foulkes, *Global Refugee Figures Highest Since WW2, UN Says*, BBC NEWS ONLINE, June 20, 2014.
[330] *See* EU Directive 2003/335/JHA, *supra* note 22, at § 9 (urging member states to "ensure that law enforcement authorities and immigration authorities have the appropriate resources and structures to enable their effective cooperation and the effective investigation and, as appropriate, prosecution of genocide, crimes against humanity and war crimes"). *See also* HRW, *The Long Arm*, *supra* note 16, at 7-10.
[331] Refugee Convention, *supra* note 117. *See* UNHCR, *Note on the Exclusion Clauses*, EC/47/SC/CRP.29 (May 30, 1997).

to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.[332]

The Exclusion Network is empowered to submit potential perpetrators to prosecution rather than extradition if there are credible allegations against them.[333]

In the United States, there is the U.S. Department of Homeland Security's (DHS) Immigration and Customs Enforcement (ICE) Human Rights Violators and War Crime Unit (HRVWCU). The U.S. State Department and the Department of Homeland Security also manage the Consular Lookout and Support System (CLASS), which performs name checks against a massive database on visa and passport applicants to determine eligibility to enter the country.[334]

In addition to the international crimes set forth in Title 18, the U.S. Congress has enacted a range of immigration statutes aimed at the perpetrators of atrocity crimes. Although there are now a number legal barriers to entry into the United States for such individuals,[335] these filters are imperfect. Indeed, in 2011, the Department of Homeland Security (DHS) estimated that there were almost 2,000 perpetrators in the United States.[336] Collectively, U.S. immigration authorities allow the U.S. government to denaturalize,[337] deport, remove, or pursue related remedies against individuals who commit fraud during an immigration proceeding or process, including while completing visa forms to come to the United States.[338] The United States regularly invokes these statutes when it is impossible to prosecute a person for the underlying substantive crime due to a deficiency in substantive law (for example, if the conduct in question involves a mass killing that is not genocide or does not involve torture), some jurisdictional bar (such as the lack of universal jurisdiction over the offense), a constitutional infirmity (such as the prohibition against *ex post facto* prosecutions), evidentiary deficits, or other impediment.[339]

Immigration remedies offer an expedient solution to the presence of a perpetrator in our midst by preventing states from becoming a safe haven for human rights abusers. However, such remedies are unsatisfying when the underlying criminal conduct rises to the level of crimes against humanity. And they may be unavailable if the individual can advance credible *non-refoulement* claims, which may be a factor explaining the upsurge of universal jurisdiction cases in Europe involving Syrian and Iraqi defendants. Administrative proceedings, and even criminal convictions

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[332] Refugee Convention, *supra* note 117, at art. 1F. Article 33 of the Convention addresses individuals who have already received refugee status but who later prove to be associated with criminal conduct and removed the prohibition of *non-refoulement*. *Id*.
[333] *See* European Asylum Support Office (EASO), "EASO Exclusion Network," https://www.easo.europa.eu/easo-exclusionnetwork-0.
[334] *See* U.S. Department of State, 9 FOREIGN AFFAIRS MANUAL § 303.3, https://fam.state.gov/fam/09FAM/09FAM030303.html.
[335] *See* Presidential Proclamation 8697—Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses (Aug. 4, 2011).
[336] Statement of John P. Woods, Deputy Assistant Director, National Security Investigations Division, Homeland Security Investigations, U.S. Immigration and Customs Enforcement, Before the House Committee on Foreign Affairs, Tom Lantos Human Rights Commission, No Safe Haven: Law Enforcement Operations Against Human Rights Violators in the US (Oct. 12, 2011).
[337] 18 U.S.C. § 1425 (1948) (Procurement of Citizenship or Naturalization Unlawfully).
[338] 18 U.S.C, § 1546 (1948) (Fraud and Misuse of Visas, Permits, and Other Documents); 18 U.S.C. § 1001 (1948) (false statements); 18 U.S.C. § 1621 (1948) (perjury). For a list of such statutes, see https://www.justice.gov/criminal-hrsp/immigration-crimes.
[339] *See* Alexandra Insinga, *Mohammed Jabbateh Conviction: A Human Rights Trial Cloaked in Immigration Crimes*, JUST SECURITY (Nov. 7, 2017).

for immigration fraud, do not carry the stigma of the substantive penal law or allow for the imposition of penalties commensurate with the underlying criminal conduct. These statutes also have short statutes of limitation, which may hinder their utility in the atrocity crimes context given that perpetrators may live undercover for years before being recognized.[340] Moreover, the resort to such remedies may result in merely returning a perpetrator to a national system that lacks the legal framework, juridical capacity, or political will to prosecute for the substantive crime or where the suspect's reintroduction could exert a destabilizing effect or result in the intimidation or re-traumatization of victims. Finally, most immigration remedies are not be effective against a state's own citizens.[341] All that said, these cases provide a measure of accountability—albeit imperfect—as a last resort.

Conclusion

Although there has been no movement at the international level to prosecute those responsible for war crimes and crimes against humanity in Syria, domestic prosecutorial authorities and courts are stepping up to pursue these cases. In so doing, courts providing a measure of justice while also developing important jurisprudence and capacities to undertake these cases.

At the same time, this chapter demonstrates that there are myriad challenges to bringing international law cases in national courts. These cases are resource intensive. The evidence is complicated and difficult to amass. Crime scenes may be inaccessible and the territorial state may withhold cooperation or affirmatively obstruct investigations, as is the case with Syria. Evidence may be compromised or ambiguous. Witnesses and victims may be reluctant to come forward because they are terrified of retaliation by still-powerful individuals and distrustful of prosecutorial authorities generally. Witness protection measures remain rudimentary on the international level. Indeed, the name of one of the Yezidi witnesses made public during the course of an investigation by the German Federal Prosecutor.[342] Investigators and prosecutors may be unfamiliar with the conflict and the local culture, which hinders the gathering of evidence, the construction of a theory of the case, and the conduct of witness interviews, although the initiation of structural investigations has helped to alleviate this impediment in some national systems. Important evidence may be located in multiple jurisdictions, attesting to the importance of international cooperation and enhancing states' abilities (and obligations) to engage in mutual legal assistance. Even if these evidentiary impediments can be overcome, international crimes contain idiosyncratic elements that do not lend themselves to easy proof.

No matter how diligent, committed, and experienced national investigators and prosecutors are, war crimes trials in national systems will inevitably be limited and dependent upon significant serendipity when it comes to the presence of perpetrators, victim witnesses, and evidence. But, at the moment, these cases are the most important outlet for justice for Syria.

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[340] *See* 18 U.S.C. § 3282(a) (2006) (five-year statute of limitations for noncapital offenses); 18 U.S.C. § 3291 (1994) (ten-year limitation for crimes involving nationality, citizenship, and passports).
[341] Christophe Paulussen, *Countering Terrorism Through the Stripping of Citizenship: Ineffective and Counterproductive*, INTERNATIONAL CENTRE FOR COUNTER-TERRORISM (Oct. 17, 2018).
[342] *See* Free Yezidi Foundation, *Witness in Universal Jurisdiction Proceedings Ought to Be Protected* (Nov. 7, 2018), https://www.freeyezidi.org/blog/witness-in-universal-jurisdiction-proceedings-ought-to-be-protected/.

7

Civil Suits: The Utility of State Responsibility and the Law of Tort

What distinguishes a criminal from a civil sanction … is the judgment of community condemnation which accompanies and justifies its imposition.[1]

The prior chapters all discuss legal and institutional proposals for attributing criminal responsibility to those individuals answerable for the many international crimes being committed in Syria. Other forms of liability exist. Civil suits—suits for money damages—present another route to accountability. There are several pathways for achieving Syrian *state* responsibility under international law, some of which have been under-explored when it comes to Syria. In addition to proceedings before human rights treaty bodies and the International Court of Justice (ICJ), jurisdiction over sovereign states exists within domestic courts under limited circumstances, notwithstanding long-standing principles of foreign sovereign immunity. Suits against individual perpetrators sounding in tort offer another accountability option with the potential to contribute a form of restorative justice for victims and to jumpstart criminal processes. In the interests of completeness, this chapter canvasses these various options. Although they are no substitute for vigorous criminal liability, these suits extend victims some benefits that may not accrue with participation in a criminal process, even as a *partie civile*. For one, they may better contribute to one express goal of the human rights law edifice: the rehabilitation of survivors of human rights abuses.

Options for State Responsibility

A number of options exist for according state responsibility for the commission of international crimes. Although there is no notion of state criminality in international law for reasons discussed below, states can be held civilly liable before the ICJ and, to a certain degree, in domestic courts. There is also a network of treaty-based human rights bodies in which victims can lodge claims. Jurisdiction before a majority of these fora, however, is premised on an exercise of state consent, which is often withheld by the very states that are most deserving of censure.

State Criminality

International law does not recognize the concept of state criminality. During the drafting of the International Law Commission's Articles on State Responsibility, an early version of Article 19 introduced the concept of state crimes.[2] These were defined as breaches of an international obligation "so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the community as a whole."[3] The concept, and even the notion of extracting punitive damages from a state,[4] could not overcome the attendant controversy and so was eventually dropped from the project.[5] Instead, the draft Articles attached surplus

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[1] Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958).

[2] James R. Crawford, *State Responsibility*, OXFORD PUBLIC INTERNATIONAL LAW (Sept. 2006), at ¶¶ 8, 13.

[3] International Law Commission, 1996 Draft Articles on State Responsibility, adopted by the Drafting Committee on first reading at the forty-eighth session, U.N. Doc A/51/10, 125, at Art. 19.

[4] MATERIALS ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, U.N. Doc. ST/LEG/SER.B/25 (2012), at 261 ("the award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms.").

[5] Crawford, *supra* note 2, ¶¶ 32-33.

consequences to serious breaches of peremptory norms of international law,[6] namely that states not recognize as lawful a situation created by such a breach or otherwise render assistance in maintaining such a situation.[7] The International Criminal Tribunal for the Former Yugoslavia has thus observed: "Under present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems."[8] As a result, state responsibility is limited to civil liability, although punitive damages may be available in some circumstances under domestic law[9]—a feature of U.S. law in particular that is not without its detractors.[10]

Treaty-Based Human Rights Bodies

The first, and arguably least robust, option for achieving some measure of state responsibility involves proceedings before the various human rights treaty and multilateral bodies. As yet there is no regional human rights court governing the Middle East that is akin to the European Court of Human Rights or the Inter-American Court of Human Rights that can exercise jurisdiction over Syria. The closest analog is the Arab Human Rights Committee, which was established in 2009 to oversee states' compliance with the Arab Charter on Human Rights (which Syria ratified in 2007).[11] There is no individual complaints mechanism; rather, the Committee reviews state reports, which are submitted triennially, and makes recommendations.[12] (It does not appear that Syria has submitted any reports.)[13] Although the League of Arab States has approved a Statute of an Arab Court of Human Rights, it is not yet in force.[14] In any case, there is no provision for the future Court to hear individual petitions; it will only be empowered to entertain interstate disputes.[15]

Syria has ratified a number of human rights treaties, some of which contain enforcement and dispute resolution mechanisms that might be of use.[16] Most promising is the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), to

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[6] INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, WITH COMMENTARIES (2001), at Art. 40-41.

[7] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 159 (July 9)

[8] Prosecutor v. Blaškić, Case No. IT-95-14-AR108bis, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 25 (Oct. 29, 1997).

[9] 28 U.S.C. § 1605A(c)(4) (allowing for punitive damages against state sponsors of terrorism); 28 U.S.C. § 1606 (allowing for punitive damages against agencies or instrumentalities of a state but not the state itself).

[10] Haim Abraham, *Awarding Punitive Damages Against Foreign States Is Dangerous and Counterproductive*, LAWFARE (Mar. 1, 2019). *See also* Crawford, *supra* note 2, at ¶ 33 ("The general view is that punitive damages have no application to States.")

[11] League of Arab States, Arab Charter on Human Rights, May 22, 2004, *entered into force* March 15, 2008; Ratification and Signature Status of the Arab Charter on Human Rights (2004), http://unipd-centrodirittiumani.it/en/spilli/Ratification-and-signature-status-of-the-Arab-Charter-on-Human-Rights-2004/147.

[12] *See* Mervat Rishmawi, *The Arab Charter on Human Rights and the League of Arab States: An Update*, 10(1) HUM. RTS. L. REV. 169 (2010).

[13] League of Arab States, Syrian Arab Republic, http://www.lasportal.org/ar/humanrights/Committee/Pages/Reports.aspx.

[14] The Statute of the Arab Court of Justice, LAS Res 7790, Ministerial Council, 142nd Regular Sess., E.A (142) C 3, (2014), available at https://acihl.org/article.htm?article_id=44.

[15] *Id.* at art. 4. *See generally* Konstantinos Magliveras & Gino Naldi, *The Arab Court of Human Rights: A Study in Impotence*, 29(2) REVUE QUÉBÉCOISE DE DROIT INT'L 147 (2016) (discussing Arab human rights mechanisms).

[16] Univ. Minnesota, Human Rights Library, *Ratification of International Human Rights Treaties—Syria*, http://hrlibrary.umn.edu/research/ratification-syria.html.

which Syria acceded in 2004.[17] The CAT requires states parties to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[18] The treaty is clear that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[19] Notwithstanding these treaty obligations to prevent and punish acts of torture within its jurisdiction, torture remains institutionalized in Syria, as confirmed by the United Nations,[20] human rights organizations,[21] and the chilling Caesar photos.[22] In one of its reports, the Syrian Commission of Inquiry (COI) stated "[t]orture is endemic across detention centers and prisons"[23] such that its use rose to the level of a crime against humanity.[24] Although some victims have escaped to tell their stories,[25] many torture victims are ultimately summarily executed by the regime.[26]

The CAT envisions several enforcement mechanisms. These include an individual complaint procedure before the Committee Against Torture, an expert body charged with examining state parties' compliance with the treaty.[27] The Committee can also conduct independent inquiries into well-founded indications that torture is being systematically practiced in the territory of state parties[28] and entertain communications from a state party that another state party is not fulfilling its treaty obligations.[29] These procedures are unavailing against Syria, however, because Syria has not consented to, or has opted out of, them.[30] As a result, the CAT Committee can only comment upon reports on treaty compliance submitted by Syria itself and so-

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[17] Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.
[18] *Id*. at art. 2(1).
[19] *Id*. at art. 2(2).
[20] OHCHR, OPEN WOUNDS: TORTURE AND ILL-TREATMENT IN THE SYRIAN ARAB REPUBLIC (Apr. 14, 2014). The United Nations has also recorded torture and ill-treatment by opposition groups, particularly ISIL and the Nusra Front, which run their own detention centers. *Id*. at 3-4.
[21] HUMAN RIGHTS WATCH, IF THE DEAD COULD SPEAK: MASS DEATHS AND TORTURE IN SYRIA'S DETENTION FACILITIES (Dec. 16, 2015).
[22] Sara Afshar, Opinion, *Assad's Syria Recorded its own Atrocities. The World Can't Ignore them*, THE GUARDIAN, Aug. 27, 2018.
[23] Hum. Rts. Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/23/58 ¶ 82 (June 4, 2013); Hum. Rts. Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/25/65, Annex 5 (Feb. 12, 2014) (listing places of detention where torture has been committed).
[24] *Id*. ¶ 87.
[25] Hans von der Brelie, *Syrian Torture Survivors Speak Out*, EURONEWS, Dec. 21, 2017.
[26] *See* AMNESTY INTERNATIONAL, HUMAN SLAUGHTERHOUSE: MASS HANGINGS AND EXTERMINATION AT SAYDNAYA PRISON, SYRIA (2016).
[27] Convention Against Torture, *supra* note 17, at art. 22 ("A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.").
[28] *Id*. at art. 20.
[29] *Id*. at art. 21 ("A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention.").
[30] *See* OHCHR, Reporting Status for Syrian Arab Republic, https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=SYR&Lang=EN.

called "shadow reports" provided by non-governmental organizations.[31] The Committee's last set of Concluding Observations devoted to Syria (issued following a request for a special report in 2012) reveal the degree to which Syria has utterly and habitually flouted its treaty obligations under the CAT.[32] Not surprisingly, Syria is currently in arrears in responding to the Committee and on its reporting requirements.[33] Likewise, the Working Group on Enforced or Involuntary Disappearances has also concluded that the practice of enforced disappearances in Syria constitutes a policy of crimes against humanity and requested the Security Council to consider an ICC referral.[34] Syria has generally ignored, rebuffed, or only evasively responded to the overtures and criticism of the U.N. Human Rights Council's special procedures.[35]

The International Court of Justice

The International Court of Justice has both contentious and advisory jurisdiction. Like many multilateral treaties, the CAT contains a resolution mechanism for disputes between state parties concerning the "interpretation or application" of the treaty.[36] The concept of a "dispute" has been expansively defined. According to the Permanent Court of International Justice—a precursor to the ICJ—a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[37] The ICJ later elaborated that:

> Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence. … There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen.[38]

Under the system contained within Article 30 of the treaty, the parties concerned must first try to settle their dispute through negotiation and arbitration, if the latter is requested by a state party.[39]

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[31] Torture Convention, *supra* note 17, at art. 19.

[32] *See* Consideration by the Committee against Torture of the implementation of the Convention in the Syrian Arab Republic in the absence of a special report requested pursuant to article 19, paragraph 1, *in fine*, Concluding observations of the Committee against Torture, U.N. Doc. CAT/C/SYR/CO/1/Add.2 (June 29, 2012). Similar concerns were raised even prior to the revolution. *See* Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Syrian Arab Republic, U.N. Doc. CAT/C/SYR/CO/1, ¶ 7 (May 25, 2010) (critically assessing the prevalence of torture in Syria).

[33] OHCHR, Felice D. Gaer, Rapporteur for Follow-up on Concluding Observations of the CAT Committee, to His Excellency Faysal Khabbaz Hamoui (Jan. 22, 2014) (noting additional potential CAT violations and requesting follow-up).

[34] *See* Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. A/HRC/27/49, ¶¶ 32, 54, 99 (Aug. 4, 2014).

[35] *See* Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons on his Mission to the Syrian Arab Republic, U.N. Doc. A/HRC/32/35/Add.2 (Apr. 5, 2016), at ¶ 5 (detailing access issues).

[36] Torture Convention, *supra* note 17, at art. 30 ("Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration.").

[37] The Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. B) No. 3, (Aug. 30), at ¶19.

[38] Interpretation of Peace Treaties, Advisory Opinion, 1950 I.C.J. 65, 74 (Mar. 30).

[39] This precondition is satisfied if negotiations have failed or if they have become futile. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, Judgment, 2011 I.C.J. 70, ¶ 159 (April 1) (finding that Georgia had not attempted to negotiate a solution to its dispute with Russia).

This arbitral mechanism has never been activated.[40] Indeed, although international arbitrations (intra-state and between states and private entities) are on the rise generally, they do not tend to focus on human rights issues.[41] The most prominent recent precedents are state-to-state and include the arbitration between Eritrea and Ethiopia that settled war-related claims between the two countries.[42] The Permanent Court of Arbitration (PCA) established one such panel (a second panel dealt with a boundary dispute) as part of the 2000 peace agreement between the two countries. After years of litigation, the arbitral panel completed its work in 2009, awarding almost equivalent damages to the two countries.[43]

According to the CAT regime, if an arbitral tribunal cannot be convened within six months, then state parties have the option of recourse to t*he* ICJ in The Hague.[44] The ICJ has no criminal jurisdiction, but it can entertain proceedings between sovereign states so long as they have consented to its jurisdiction, either by way of a declaration accepting the compulsory jurisdiction of the Court[45] or through compromissory clauses contained in other treaties, such as the one in the CAT.[46] Syria has not consented to the ICJ's jurisdiction to hear just any contentious dispute, but it is a party to the CAT and is thus bound by that treaty's compromissory clause. Unlike other states, including the United States, Syria did not avail itself of the option to opt out of ICJ jurisdiction at the time of ratification.[47]

It is rare for states to bring suit against other states before the ICJ absent compelling sovereign interests. Perhaps for this reason, the ICJ has not historically been a forum for states to challenge the human rights practices of other states; this reluctance, however, may be changing.[48] One of the first efforts to invoke the ICJ in the human rights context involved the ultimately unsuccessful campaign to identify a state willing to bring suit against Cambodia in the 1970s under the Convention on the Prevention and Punishment of the Crime of Genocide.[49] Article 9 envisions ICJ jurisdiction over suits arising out of the "interpretation, application or fulfilment" of the Convention—a formulation that differs slightly from the CAT.[50] Human Rights Watch subsequently attempted to encourage states to bring a case against Iraq under the Genocide

[40] *See* Nicole M. Hogan, *Arbitration and Protection under the UN Convention Against Torture and other Cruel, Inhuman, Degrading Treatment, or Punishment*, 18 PEPP. DISP. RESOL. L.J. 1 (2018).
[41] *See* ICC Announced 2017 Figures Confirming Global Reach and Leading Position for Complex, High-Value Disputes (March 7, 2918), https://iccwbo.org/media-wall/news-speeches/icc-announces-2017-figures-confirming-global-reach-leading-position-complex-high-value-disputes/.
[42] *See* Permanent Court of Arbitration, Eritrea-Ethiopia Claims Commission, https://pca-cpa.org/en/cases/71/; Won Kidane, *Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of The Ethiopia-Eritrea Claims Tribunal in The Hague*, 25 WIS. INT'L L. J. 23 (2007).
[43] *See* Michael J. Matheson, *Eritrea-Ethiopia Claims Commission: Damage Awards*, ASIL INSIGHTS (Sept. 4, 2009).
[44] Torture Convention, *supra* note 17, at art. 30
[45] United Nations, Statute of the International Court of Justice art. 36(2), 33 U.N.T.S. 993, April 18, 1946.
[46] *See id*. at arts. 36(2), 36(1), and 37. *See* Jonathan I. Charney, *Compromissory Clauses and the Jurisdiction of the International Court of Justice*, 81 AM. J. INT'L L. 855 (1987).
[47] U.N. Treaty Collection, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV 9&chapter=4&lang=en#EndDec.
[48] *See* Rosalyn Higgins, *Human Rights in the International Court of Justice*, 20 LEIDEN J. INT'L L. 745 (2007).
[49] *Campaign Seeks Genocide Trial of Khmer Rouge*, N.Y TIMES, April 13, 1987; Gregory H. Stanton, *Seeking Justice in Cambodia*, GENOCIDE WATCH, http://www.genocidewatch.org/seekingjusticecambodia.html.
[50] Convention on the Prevention and Punishment of the Crime of Genocide art. 9, 78 U.N.T.S. 277, Jan. 12, 1951.

Convention in connection with the Anfal campaign against Iraqi Kurds in the 1980s.[51] The dissolution of the former Yugoslavia later generated two cases against Serbia and Montenegro, first by Bosnia and Hercegovina and then by Croatia. The ICJ ultimately ruled that while genocide was committed in Bosnia and Hercegovina (but not Croatia),[52] Serbia was liable only for failing to prevent acts of genocide committed by Bosnian Serb forces in Srebrenica.[53] There has been an uptick in such cases in recent years, as evidenced by the claims by Ukraine against Russia under the Convention on the Elimination of All Forms of Racial Discrimination[54] and the suit by The Gambia against Myanmar under the Convention on the Prevention and Punishment of the Crime of Genocide.[55]

As a useful precedent for the Syria situation, Belgium initiated proceedings against Senegal under the CAT challenging Senegal's failure to prosecute or extradite former Chadian dictator Hissène Habré, who was enjoying safe haven on Senegalese territory.[56] This was the first opportunity the ICJ has had to entertain a dispute under the CAT.[57] In its 2012 judgment, the ICJ ruled that Belgium's claims under the CAT were admissible because all state parties have standing to enforce these obligations *erga omnes partes*.[58] In particular, the Court stated "The States parties to the Convention have a common interest to ensure, in view of their shared values that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity."[59] In this regard, the Court made a distinction between obligations *erga omnes*, which are owed to the international community as a whole,[60] and obligations *erga omnes partes*, which are owed to a group of state parties to a treaty.[61] It was thus of no moment that no Belgian citizens were harmed under Habré's

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[51] *See* HUMAN RIGHTS WATCH, HUMAN RIGHTS REPORT: IRAQ AND IRAQI KURDISTAN (1994) (discussing proposals to invoke the ICJ).

[52] Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgement, 2007 I.C.J. 43 (Feb. 26).

[53] *Id*. § 434

[54] Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukr. v. Russ.), Judgment, 2019 I.C.J. 1 (Nov. 8).

[55] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gamb. v. Myan.), Order, 2020 I.C.J. 1 (Jan. 23) (authorizing provision measures).

[56] Questions Concerning the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422 (July 20). Belgium attempted to advance claims with respect to Senegal's failure to prosecute other international crimes under customary international law, but the Court found that these claims were foreclosed because Belgium had not sufficiently advanced them in its prior diplomatic exchanges; as such, they did not form part of the dispute referred to the Court. Id. ¶ 54. *See generally* Cindy Galway Buys, *Belgium v. Senegal: The International Court of Justice Affirms the Obligation to Prosecute or Extradite Hissène Habré Under the Convention Against Torture*, 16 ASIL INSIGHTS (Sept. 11, 2012).

[57] In its jurisdictional phase, the ICJ also concluded that the requirements of Article 30 of the CAT had been satisfied because the dispute had not been settled through negotiations and Senegal did not respond to Belgium's request for activate the arbitration provision. Questions Concerning, *supra* note 56, ¶ 63. In a previous case, the ICJ found that the CAT's compromissory clause was not properly activated. *See* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, 2006 I.C.J. 6, ¶ 16 (Feb. 3).

[58] Questions Concerning, *supra* note 56, ¶¶ 68-69.

[59] *Id*. ¶ 68.

[60] Case Concerning the Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain), Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5).

[61] Questions Concerning, *supra* note 56, ¶ 68. *See generally* Inna Uchkunova, *Belgium v. Senegal: Did the Court End the Dispute between the Parties?*, EJIL: TALK! (July 25, 2012).

regime *(though one of the complainants had become a Belgian national) or that Belgium lacked any other "special interest" in Senegal's adherence to the treaty*.[62]

On the merits, the ICJ determined that Senegal had breached several obligations under the CAT to investigate allegations of torture by way of a preliminary inquiry and either prosecute or extradite the offenders.[63] With respect to the latter obligation, the Court found that Article 7(1) of the CAT requires the State to submit the case "without delay"[64] to "its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the subject."[65] This ruling helped to galvanize the establishment of the Extraordinary African Chambers, which ultimately sentenced Habré to life in prison.[66]

Given the above precedent, any state party to the CAT could bring a contentious case against Syria before the ICJ alleging its failure to adhere to its treaty obligations, which include the obligation to desist from torture and to investigate allegations that acts of torture were committed within its territory, including by non-state actors.[67] The complainant state could also seek provisional measures[68]—the equivalent of interim injunctive relief—which can be achieved relatively expeditiously so long as it can be shown that the measures requested are linked to the claims on the merits and that there is a real and imminent risk of irreparable prejudice in the absence of such relief.[69] After some uncertainty premised on the anodyne wording of Article 41 of the ICJ Statute, the Court has indicated that such orders are binding and that their breach gives rise to state responsibility.[70]

Unless there is another basis to invoke the ICJ's jurisdiction, premising jurisdiction on the CAT would limit the Court to considering Syria's responsibility for acts of torture within its territory.[71] Although torture is a war crime when committed within the context of an armed conflict and is an enumerated crime against humanity, Syria's responsibility for the commission of other

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[62] Questions Concerning, *supra* note 56, ¶ 65.
[63] *Id*. ¶¶ 79-177.
[64] *Id*. ¶ 115.
[65] *Id*. ¶ 94.
[66] *See* HUMAN RIGHTS WATCH, Q&A: THE CASE OF HISSÈNE HABRÉ BEFORE THE EXTRAORDINARY AFRICAN CHAMBERS IN SENEGAL (MAY 3, 2016).
[67] Convention Against Torture, *supra* note 17, at art. 6(2) (requiring states parties to conduct a preliminary inquiry into the facts when it takes a suspect into custody).
[68] ICJ Statute, *supra* note 45, at art. 41(1) ("the Court shall have the power to indicate provision measures which ought to be taken.").
[69] *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Request for the Indication of Provisional Measures, Order (July 23, 2018). In addition, the Court must be satisfied that it has *prima facie* jurisdiction and the claims are at least plausible. Massimo Lando, *Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice*, 31(3) LEIDEN J. INT'L L. 641 (2018).
[70] LaGrand Case (Germ. v. U.S.), Judgment, 2001 I.C.J. 466, ¶¶ 101-2 (27 June) ("the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances cal1 for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court.").
[71] At the time it ratified the Genocide Convention in 1955, Syria did not opt out of the ICJ's jurisdiction over breaches of that treaty either. U.N. Treaty Collection, Convention on the Prevention and Punishment of the Crime of Genocide, Declarations and Reservations, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en. Although governmental violence is clearly sectarian, there have been fewer allegations that it rises to the level of genocide. *But see* Genocide Watch, *Genocide and Mass Atrocities Alert: Syria* (April 23, 2013), http://www.genocidewatch.org/syria.html.

war crimes and crimes against humanity would only tangentially adjudged.[72] The challenge is to find a state willing to initiate such a proceeding, either in defense of the anti-torture norm or because they have nationals who have been victimized. The state would have to be a party to the CAT that has recognized the ICJ's jurisdiction over treaty disputes. Although a contentious case would not likely enjoin the Syrian regime, it would establish the facts, develop the law, order a remedy, contribute "to a change of consciousness," and potentially catalyze new international responses.[73]

In addition to these inter-state contentious cases, the ICJ can also exercise a form of advisory jurisdiction enabling it to rule on international law questions presented to it, including the legal consequences of state action and the nature of states' obligations under treaties they have ratified and customary international law.[74] Among other options, the General Assembly by majority vote[75] could request an advisory opinion on Syria's responsibility for its radical breaches of international law and its human rights obligations, beyond the prohibition against torture.[76] The General Assembly made just such a request in 2003 seeking a determination of the legal consequences of Israel's construction of a security wall in Occupied Palestinian Territory.[77] Theoretically, the Court could opine on the responsibility of non-state actors as well, although this is an untested proposition.[78]

Assuming that the General Assembly would issue such a request, the ICJ is unlikely to decline jurisdiction.[79] Such advisory opinions are not technically binding on the target state, but they would carry great moral authority and provide legal clarity, offer a forum in which to consolidate and present evidence collected by the COI and other documentarians, identify responsible parties, make it more difficult for states to deny the prevalence of the practice of torture in Syria, and recommend remedies for victims.[80] Jurisprudence from the ICJ could also help build momentum towards an ICC referral or litigation elsewhere, including potential criminal suits. Notwithstanding some efforts from civil society, no states have proven willing to bring a contentious case before the ICJ or initiate the process for seeking an advisory opinion.

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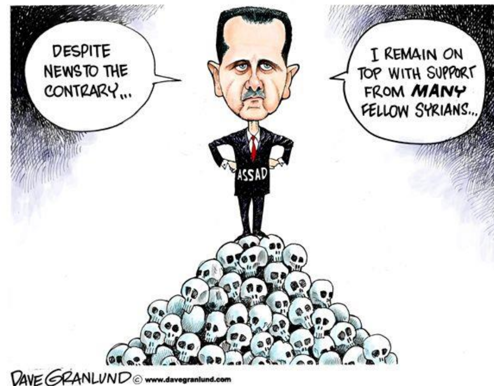
[72] *See* William A. Schabas, *The Crime of Torture and the International Criminal Tribunals*, 37 CASE WESTERN RES. J. INT'L L. 349 (2006).
[73] Philippe Sands, QC, Professor of Law, University College London, Climate Change and the Rule of Law: Adjudicating the Future in International Law, U.K. Supreme Court (Sept. 17, 2015).
[74] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21).
[75] ICJ Statute, *supra* note 45, at art. 18.
[76] *Id*. at art. 96. In addition to the General Assembly, other U.N. organs and agencies can request advisory opinions "on legal questions arising within the scope of their activities." *See* ICJ, Organs and Agencies Authorized to Request Advisory Opinions, https://www.icj-cij.org/en/organs-agencies-authorized.
[77] G.A. Res. ES-10/14, U.N. Doc. A/RES/ES-10/14 (A/ES-10/L.16) (Dec. 8, 2003).
[78] *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 219 (June 27) (discussing the law applicable to the *Contras*); Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 1 (July 22) (determining whether the unilateral declaration of independence by the Provisional Self-Government of Kosovo was in accordance with international law).
[79] Legal Consequences, *supra* note 74, at ¶ 44 ("Given its responsibilities as the 'principal judicial organ of the United Nations' (Article 92 of the Charter), the Court should in principle not decline to give an advisory opinion" absent "compelling reasons").
[80] *See* Aaron Matta & Anda Scarlat, *Malaysia Airlines Flight MH-17—Possible Legal Avenues for Redress (Part 1)*, OPINIOJURIS (Aug. 27, 2015).



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Civil Cases in Domestic Courts

Civil suits offer another option for pursuing accountability for the commission for international crimes.[81] Civil human rights litigation in domestic courts can have a profound impact on victims of human rights violations and their communities.[82] Because the victim controls the essential decisions about the case, participating as a plaintiff in human rights litigation can restore and promote a sense of agency—the impression that we exercise some control over the events that affect us—especially when that sense was destroyed by the very conduct that is the subject of the suit. Beyond physical harm, the human rights abuses at issue typically involve protracted denials of dignity, liberty, choice, personal integrity, and autonomy, and the mere act of re-conceptualizing oneself as a holder of rights can offer a sense of empowerment.[83] Such litigation presents opportunities for corrective justice and an exercise in self-determination that inverts the status of victim and perpetrator.[84] By contrast, pervasive impunity can exacerbate the dignitary harm caused by torture and other abuses by perpetuating feelings of injustice, fear, and vulnerability, especially where abusers live in the same communities as their victims.[85] Tort rhetoric in particular invites the attribution of legal responsibility and moral blameworthiness, thus contributing to the alleviation of feelings of guilt that may arise from past participation in political activities, "allowing" oneself to be captured, capitulating under interrogation, and ultimately surviving.

[81] *See generally* Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L. J. 1 (2004) (discussing advantages of civil suits over criminal suits for victims of trafficking); Gilat J. Bachar, *Collateral Damages: Monetary Compensation for Civilians in Asymmetric Conflict*, 19(2) CHIC. J. INT'L L. 375 (2019).

[82] For a fuller discussion of the impact of litigation on plaintiffs, see Brief of The Center for Justice and Accountability et al. at 7-13, Sosa v. Alvarez-Machain, 124 S.Ct. 2739 (2004) (No. 03-339) (compiling statements by plaintiffs in ATCA-style suits), available at https://cja.org/downloads/Sosa_v_Alvarez_Survivors_Brief.pdf. *See generally* Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. REV. 2305 (2004).

[83] Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 661-62 (1987-88); *see also* Jan Gorecki, *Human Rights: Explaining the Power of a Moral and Legal Idea*, 32 AM. J. JURIS. 153, 154-55 (1987) (conceptualizing the driving power of rights).

[84] Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL ED. 49, 50 (2004).

[85] Mary Fabri, *Torture and Impunity: Legal Recourse May Lead to Healing*, 16(2) STRESSPOINTS (2002) ("The effects of torture are compounded by impunity. Impunity for human rights atrocities contributes to the ongoing state of fear that survivors live with day to day. The unpunished crimes of the perpetrators continue to violate survivors' personal sense of integrity and freedom.").

These discursive processes of "naming, blaming, and claiming"[86] are important features of civil litigation (as compared with criminal prosecutions).[87] The very process of a court determining the validity of a claim will force an examination of the historical record,[88] even if the outcome is ultimately not successful.[89] And, tort suits generally proceed under less rigorous burdens of proof and more generous evidentiary rules than criminal suits.[90] In this way, civil suits may allow plaintiffs to receive more information about what happened to them or their loved ones through the process of discovery, which is often a key motivation for bringing suit.

Taking the perspective of a plaintiff's community, while individual suits involve the allegations of only the named plaintiffs, civil litigation often manifests a representational quality. As such, it may accommodate a more contextual and comprehensive consideration of harm to the body politic as well as to the survivor's body. This is particularly true where the plaintiff can present evidence that she was harmed as part of a policy or practice of human rights violations against similarly situated individuals or where large-scale human rights abuses amounting to genocide or crimes against humanity were committed and are proved. A favorable judgment or verdict in such situations offers a public and official acknowledgement of rights, the stigmatization of violations, a measure of accountability, and a symbolic break with the past. Other victims—of the incident or regime in question and beyond—can experience these dignitary functions of litigation vicariously and can enjoy the reordering of social relations brought about by a finding of liability in an ostensibly bilateral case.

Civil suits involving events in Syria can take a number of forms. The United States boasts several statutes—including the Alien Tort Statute (ATS),[91] the Torture Victim Protection Act (TVPA),[92] the Anti-Terrorism Act (ATA),[93] and the Trafficking Victims Protection Reauthorization Act (TVPRA)[94]—that allow victims to bring civil claims in federal court to seek redress for international law violations. Such claims could also be pled as ordinary torts in federal courts under principles of diversity or in state courts (e.g., assault, kidnapping, and wrongful death)

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[86] William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 LAW & SOC. REV. 631 (1980-81).

[87] Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141, 156-59, 195 (2001) (noting different role of victims in civil and criminal processes).

[88] Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 383 (1987).

[89] *See generally* JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA (2003) (discussing the impact of failed cases on processes of social change).

[90] Kim & Hreshchyshyn, *supra* note 81, at 17.

[91] 28 U.S.C. § 1350.

[92] 28 U.S.C. § 1350 note. The TVPA creates a cause of action for torture and extrajudicial killing (including attempt) without regard to the nationality of the plaintiff or defendant. *Id*. Sec. 2(a).

[93] 28 U.S.C. § 2333 (1992). The ATA requires that the victim be a U.S. national, although there are no limitations on the nationality of the plaintiff, who may be an heir. *Id*. at § 2333(a) ("Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.").

[94] 18 U.S.C. § 1595 (2005). Plaintiffs can be foreign nationals. *Id*. at § 1595(a) ("An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.").

as is done in Israel.[95] To be sure, the ATS has been significantly truncated by the U.S. Supreme Court when it comes to claims that have a strong extraterritorial dimension, particularly in so-called "foreign-cubed" cases: cases in which a foreign defendant committed an offense extraterritorially against a foreign victim.[96] The TVPA and TVPRA (and the ATA to a lesser extent) remain available for a range of claims that might emerge from the war in Syria. One precondition of civil suits against individuals in the United States that has proven so far to be unsurmountable is the need to assert personal jurisdiction over the defendant. Because a willing plaintiff has yet to identify a Syrian perpetrator in the United States, and very few victims have been able to gain access to the United States, these tort statutes have not been a fruitful avenue of accountability.

Beyond the United States, many other legal systems draw the line between "public law" and "private law" differently and permit victims to constitute themselves as *parties civiles* to initiate and join criminal proceedings as civil parties. This allows them certain procedural advantages, including the right to seek damages in the context of a criminal prosecution.[97] A handful of cases proceeding in Europe have invoked this species of civil liability. For example, the European Center for Constitutional and Human Rights and Sherpa have joined a case against Lafarge (now LafargeHolcim) as civil parties, alleging the company financed terrorism by doing business with ISIL.[98] In addition, some national courts recognize the idea of "jurisdiction by necessity" within the "residual forum."[99] This allows for the assertion of jurisdiction over civil claims even absent ordinary connections to the forum state in order to avoid the risk of a denial of justice.[100] In many European systems, the concept is being developed as a response to Article 6(1) of the European Convention on Human Rights, which indicates that "[i]n the determination of his civil rights and obligations …, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[101] This concept has been infrequently invoked,[102] and is alien to U.S. law,[103] but might provide the basis for civil jurisdiction over events in Syria given that access to Syrian courts is foreclosed.

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[95] Bachar, *supra* note 81, at 398-99.
[96] *See Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108 (2013).
[97] RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 407, rptr's note 5 (AM. LAW INST. 2018) (listing legal regimes).
[98] *Important Step in the "Lafarge in Syria" case: Nomination of Three Investigative Judges*, SHERPA (June 13, 2017).
[99] Chilenye Nwapi, *A Necessary Look at Necessity Jurisdiction*, 47 U.B.C. L. REV. 211 (2014) (surveying national jurisdictions). *But see* Sagi Peari, *Three Objections to Forum of Necessity: Global Access to Justice, International Criminal Law, and Proper Party*, 55 OSGOODE HALL L. J. 225 (2018) (critiquing the incorporation of the concept into Canadian law).
[100] Lucas Roorda & Cedric Ryngaert, *Business and Human Rights Litigation in Europe: The Promises Held by Forum of Necessity-based Jurisdiction*, UNIJURIS (UNIVERSITEIT UTRECHT) (discussing the concept of the forum of necessity to address corporate malfeasance).
[101] European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, ETS No. 005. *See* Markovic & Others v. Italy, Appl. No. 1398/03, Judgment of 14 December 2006, ¶¶ 54, 92.
[102] *See, e.g., Bouzari v. Bahremani*, [2011] O.J. No. 5009, ¶ 5 (S.C.J.) (Can.) (finding "no reasonable basis upon which [the plaintiffs could be] required to commence the action in a foreign jurisdiction, particularly, the state where the torture took place, Iran"). On appeal, however, the court determined that the case could proceed in England, where the defendant resided. *Bouzari v Bahremani*, 2015 ONCA 275 (Can.).
[103] *See Helicopteros Nacionales de Colombia SA v. Hall*, 466 U.S. 408, 419 n.13 (1984) ("We decline to consider adoption of a doctrine of jurisdiction by necessity—a potentially far-reaching modification of existing law—in the absence of a more complete record.").

In addition, some legal systems have incorporated no-fault victims-of-crime schemes that may allow remedies (either from the public fisc or a perpetrator's assets) absent an adversarial process. Such statutes may offer limited relief, however, as they often cover only harm committed domestically. It was on this ground that a Civil and Administrative Tribunal dismissed a case in New South Wales. A group of Yezidi women had sought compensation from frozen assets in the estate of Khaled Sharrouf, an Australian who joined ISIL in Raqqa, was later stripped of his nationality, and is presumed dead.[104] The Court ruled that the Victims Rights and Support Act of 2013 applies only to "acts of violence committed in New South Wales;" the survivors were all allegedly abducted, trafficked, and kept as slaves by Sharrouf in Raqqa and none has resided in Australia.[105]

The legal frameworks discussed above involve natural or legal persons as defendants. National courts can, under certain circumstances, adjudicate claims against sovereign entities, although such domestic jurisdiction is circumscribed by principles of foreign sovereign immunity: "the right of a State not to be the subject of judicial proceedings in the courts of another State."[106] Foreign sovereign immunity is governed in the United States by the Foreign Sovereign Immunities Act (FSIA),[107] which offers the exclusive basis to assert jurisdiction over foreign sovereigns in U.S. courts.[108] Under the FSIA, foreign sovereigns enjoy presumptive immunity from suit unless one of the statutory exceptions applies.[109] By way of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),[110] Congress expanded the list of exceptions to sovereign immunity and opened the door to suits involving a range of violations of international law. After some subsequent congressional tweaking, the relevant exception now reads:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.[111]

Three additional requirements must be met for a plaintiff to proceed under this exception: the foreign state must be designated a state sponsor of terrorism; the foreign state must be given a reasonable opportunity to arbitrate the claim if the conduct in question occurred within the United

[104] Danuta Kozaki, *Terrorist Khaled Sharrouf's Frozen Assets Sought by 'Enslaved' Iraqi Women*, ABC (Mar. 12, 2019).
[105] *DRJ et al. v. Commissioner of Victims Rights*, [2019] NSWCATAD 195 (Sept. 20, 2019).
[106] Jurisdictional Immunities of the State (Germ. v. It.), 2012 I.C.J. 97, 147 (Feb. 3) (discussing the rules of state immunity).
[107] 18 U.S.C. § 1602 et seq. *See generally* Joseph W. Glannon & Jeffrey Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 87 GEO. L.J. 675 (1999).
[108] *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992). *See generally* Beth Van Schaack, *Judge (Justice?) Merrick Garland & International Law*, JUST SECURITY (July 12, 2016) (discussing operation of FSIA).
[109] *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (a foreign state is presumptively immune from the jurisdiction of United States courts").
[110] Antiterrorism And Effective Death Penalty Act Of 1996, Pub. L. No. 104-132, 110 Stat. 1214.
[111] 28 U.S.C. § 1605A(a)(1). A similar exception exists for acts of terrorism within the United States, but does not require the state to be designated as a state sponsor of terrorism. 28 U.S.C. § 1605B.

States;[112] and the claimant or victim must be a U.S. national.[113] State sponsors of terrorism are designated by the Secretary of State under Section 6(j) of the Export Administration Act and other statutory authorities.[114] Syria has been on the list since 1979; in fact, it was the inaugural designee. This has become a bit of a shrinking pool over the years; at the moment, only Iran, Sudan, and Syria are so designated.[115] (Cuba was removed from the list in May 2015 with the normalization of bilateral relations, and Iraq has also been delisted.) Personal jurisdiction over the sovereign state is achieved by service of process and the exercise of subject matter jurisdiction.[116]

Several FSIA cases have emerged in connection with the war in Syria. The family of journalist Steven Sotloff, who was captured in 2013 by ISIL and later beheaded,[117] filed the first FSIA case in 2016.[118] A similar suit was filed on behalf of the family of James Foley by the same set of lawyers.[119] As is contemplated by the FSIA, service of process can be effectuated by mail on Foreign Minister Walid al-Mualem in Damascus or through diplomatic channels (the Czech Republic is the United States' Protecting Power in the absence of a U.S. embassy in Syria).[120] All such suits are filed in the District Court of the District of Columbia.[121] Both suits allege that ISIL was operating with the material support of Syria. The Foley complaint, for example, alleges that "Syrian President Bashar al-Assad … deliberately took steps to help create and thereafter greatly assisted Daesh in its terrorist operations, which it used as a sham opponent in the Syrian civil war to bolster Syria's negotiating power against Western powers."[122] This linkage, essential to hold Syria liable for the acts of ISIL, runs counter to the orthodox mapping of the conflict.

The Center for Justice & Accountability (CJA), a human rights legal organization in San Francisco, with pro bono counsel Sherman & Sterling, also brought suit against Syria under the FSIA for the assassination of war correspondent Marie Colvin during the siege of Homs—an

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[112] *See Colvin v. Syrian Arab Republic*, Case 1:16-cv-01423, Offer to Arbitrate (July 9, 2016), https://www.justsecurity.org/wp-content/uploads/2016/07/Colvin-v-Syria-Offer-to-Arbitrate-20160709.pdf.

[113] 28 U.S.C. § 1605A(a)(2)(A). Non-nationals can assert claims for solatium damages based on injuries "suffered by victims who meet the statute's requirements." *Worley v. Islamic Republic of Iran*, 75 F.Supp.3d 311, 327 (D.D.C. 2014).

[114] 50 U.S.C. § 2405.

[115] *State Sponsors of Terrorism*, U.S. DEPARTMENT OF STATE, http://www.state.gov/j/ct/list/c14151.htm (last visited Feb. 27, 2020).

[116] Alexis Haller, *"Head of the Foreign Ministry" is Strictly Construed Under Section 1608(a)*, FSIA LAW: A COMMENTARY ON FSIA JURISPRUDENCE (Oct. 8, 2014). *See, e.g.*, *Stern v. Islamic Republic of Iran*, 271 F. Supp. 2d 286, 298 (D.D.C. 2003) ("The FSIA . . . provides that personal jurisdiction over defendants will exist where service of process has been accomplished pursuant 28 U.S.C. § 1608 and plaintiff establishes the applicability of an exception to immunity pursuant to 28 U.S.C. § 1605.").

[117] Dan Lamothe, *Steven Sotloff, Journalist Held Captive by the Islamic State, Went Missing in Syria*, WASH. POST, Aug. 20, 2014; *Steven Sotloff Beheaded by ISIS, Becoming 70th Journalist Killed Covering Syria Conflict*, DEMOCRACY NOW! (Sept. 3, 2014).

[118] Complaint, *Arthur Barry Sotloff, et al. v. Syrian Arab Republic*, Case: 1:16-cv-00725 (Apr. 8, 2016), *available at* https://www.courtlistener.com/recap/gov.uscourts.dcd.178406.1.0.pdf; Associated Press, *Family of Steven Sotloff, Journalist Slain by ISIS, Sues Syria Over His Death*, NBS NEWS, Apr. 19, 2016.

[119] Britan Eakin, *Syria Sued Over Islamic State Slaying of Journalist Foley*, COURTHOUSE NEWS SERVICE, July 1, 2018.

[120] 28 U.S.C. § 1608; *Czech Republic as the United States' Protecting Power in Syria*, EMBASSY OF THE CZECH REPUBLIC IN WASHINGTON, D.C. (Jan. 1, 2014).

[121] 28 U.S.C. § 1391(f)(4).

[122] Complaint, *Diane Maria Foley, et al. v. Syrian Arab Republic*, Case 1:18-cv-01625 (July 10, 2018), ¶ 1, *available at* https://www.courthousenews.com/wp-content/uploads/2018/07/Foley.pdf.

opposition stronghold—on February 22, 2012.[123] A federal district judge certified that the Syrian government was properly served with the complaint in February 2017 through diplomatic channels, and plaintiffs moved for a quasi-default judgment.[124] As true default judgments are not available against a sovereign under U.S. law, plaintiffs' were obliged to establish their claim "by evidence satisfactory to the court" to prevail.[125] Although, not surprisingly, Syria did not formally participate in the litigation, it denied the allegations through its Minister of Information Ramez Turgeman.[126] Plaintiffs sought compensatory and punitive damages, both of which are available under the FSIA.[127]

Colvin was killed in an artillery attack on the Baba Amr Media Center where she and other journalists were billeted.[128] The Media Center had become the heart of the independent media movement, broadcasting from within the Baba Amr district of Homs while the city was placed under siege by the regime.[129] In their submissions, Plaintiffs presented a damning array of evidence against the regime, much of it provided by documentation centers that have been collecting information since the start of the conflict. This includes over 200 documents from the Commission for International Justice & Accountability (CIJA). The plaintiffs argued that Syria was responsible for the extrajudicial killing of Colvin,[130] a careful claim that did not require proof that an armed conflict existed in Homs at the time of the attack.[131] The complaint alleged that the government of Bashar al-Assad used informants and signals intercepts to track Syrian and foreign journalists who were publishing stories that were critical of the regime or exposing the commission of war crimes by state actors.[132] The plaintiffs further alleged that the Syrian regime deliberately targeted the media center in Homs and assassinated Colvin because her broadcasts were calling the world's attention to the deliberate and indiscriminate attacks against civilians.[133] Indeed, the night before she was killed, Colvin gave a live interview to the BBC and CNN via a portable satellite dish that

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[123] Colvin's remarkable career and untimely death are depicted in the film, *A Private War* (Aviron Pictures 2018).
[124] Memorandum of Law in Support of Plaintiffs' Motion for Default Judgment, *Colvin et al. v. Syrian Arab Republic*, Case 1:16-cv-01423-ABJ (March 22, 2018). All the *Colvin* pleadings are available here: https://cja.org/what-we-do/litigation/colvin-v-syria/pleadings/.
[125] 28 U.S.C. § 1608(e). *See Han Kim v. Democratic People's Republic of Korea*, 774 F.3d 1044, 1047-8 (D.C. Cir. 2014) (noting that while "the FSIA leaves it to the court to determine precisely how much and what kinds of evidence the plaintiff must provide" courts should be mindful that Congress enacted the terrorism exception to sovereign immunity with the aim of "prevent[ing] state sponsors of terrorism … from escaping liability for their sins.").
[126] Dana Priest, *War Reporter Marie Colvin Was Tracked, Targeted and Killed by Assad's Forces, Family Says*, WASH. POST, July 9, 2016.
[127] Complaint, *Colvin et al. v. Syrian Arab Republic*, Case 1:16-cv-01423 (July 9, 2016).
[128] Beth Van Schaack, *Syria, J'Accuse! Syrian State Responsibility for War Crimes*, JUST SECURITY (July 13, 2016).
[129] AFP, *US Reporter Killed in Syria Targeted By Regime, Lawsuit Claims*, AL-MONITOR, July 10, 2016.
[130] Extrajudicial killing under U.S. law is defined as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Torture Victim Protection Act, 18 U.S.C. § 1350 note, § 3(a). *See Letelier v. Republic of Chile*, 488 F.Supp. 665, 673 (D.D.C. 1980) ("Whatever policy options exist for a foreign country, it has no 'discretion' to perpetuate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national or international law.").
[131] *See* Beth Van Schaack, *Mapping the Law That Applies to War Crimes in Syria*, JUST SECURITY (Feb. 1, 2016).
[132] Colvin Complaint, *supra* note 125; Deborah Amos, *Lawsuit Targets Syrian Regime in Journalist's Killing*, NPR, July 9, 2016; Marie Colvin, *Final Dispatch from Homs, the Battered City*, SUNDAY TIMES, Feb. 19, 2012.
[133] *President Assad Delivers Speech at People's Assembly*, SYRIAN ARAB NEWS AGENCY, Mar. 20, 2011; Dana Priest, *War Reporter Marie Colvin Was Tracked, Targeted and Killed by Assad's Forces, Family Says*, WASH. POST, July 9, 2016.

asserted: "[t]here are rockets, shells, tank shells, antiaircraft being fired in parallel lines into the city. … The Syrian Army is simply shelling a city of cold, starving civilians."[134]

The complaint alleged that this call and others were intercepted by the Assad regime, enabling it to target the makeshift media center. The complaint further alleged that: "The rocket attack was the object of a conspiracy formed by senior members of the regime of Syrian President Bashar al-Assad … to surveil, target, and ultimately kill civilian journalists in order to silence local and international media as part of its effort to crush political opposition."[135] According to evidence produced in the suit, government officials believed that the country was the target of a "media-led" conspiracy to undermine the regime. Forces throughout the country were ordered to launch joint military and intelligence campaigns to "cleanse" those who "communicate with people abroad to keep demonstrations on going," those who "tarnish the image of Syria in foreign media and international organizations," and other enemies of the state.[136] Evidence also revealed that the regime utilized informants and satellite intercepts to geo-locate opponents.[137]

The plaintiffs' evidence also included proof that the regime celebrated Colvin's death. A defector testified that Major General Rafiq Shahadah (head of military intelligence and subject to a raft of sanctions)[138] announced, "Marie Colvin was a dog and now she's dead. Let the Americans help her now." [139] President Bashar Al-Assad later said in an interview that Colvin was "responsible for her own death" because she entered the country illegally and worked with "terrorists." [140] However, and not surprisingly, he denied targeting her directly. Plaintiffs' allegations draw upon information from insiders, informants, and leaked government documents, some of which have been obtained by CIJA.[141] Ewan Brown, a seasoned CIJA war crimes analyst and investigator, painstakingly reconstructed the command and control system of the Syrian military and intelligence services.[142] His testimony revealed the role played by senior regime figures in the crackdown against protesters and the journalists giving them voice in the early days of the conflict. Documents attached to his expert report also proved that the regime was intercepting communications in order to track the movements and activity of journalists and monitor opposition websites and Facebook accounts. A Syrian intelligence defector (code named Ulysses) provided a chilling insider account of Al-Assad's efforts to surveil, capture, and eliminate journalists and media activists in Homs.[143] Another defector—Abdel Majid Barakat, former head of information for the Central Crisis Management Cell (Assad's War Cabinet)—smuggled hundreds of meeting minutes and reports out of the country that detailed high-level military and

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[134] Anderson Cooper, *Video: Marie Colvin's Last Call to CNN*, CNN, Feb. 22, 2012.
[135] Colvin Complaint, *supra* note 125, at ¶ 2.
[136] *Exhibit A*, JUST SECURITY (2016), *available at* https://www.justsecurity.org/wp-content/uploads/2016/07/Exhibit-A.pdf.
[137] Expert Report of Ewan Brown, Cathleen Colvin v. Syrian Arab Republic, No. 1:160cv-01423-ABJ (D.D.C. 2018).
[138] *See* E.U. Council Reg. No. 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011, Official J. Europ. Union L 16/1 (Jan. 19, 2012); *Bashar al-Assad's Inner Circle*, BBC NEWS, July 30, 2012.
[139] Declaration of "Ulysses", *Colvin et al. v. Syrian Arab Republic*, Case 1:16-cv-01423-ABJ, Doc. 39-2 (March 22, 2018), ¶ 65.
[140] AFP, *Journalist Colvin 'Responsible' For Own Death, Says Syria's Assad*, YAHOO NEWS, July 14, 2016.
[141] Anne Barnard, *Family of Marie Colvin, Slain U.S. Journalist, Sues Syria*, N.Y. TIMES, July 9, 2016.
[142] Brown Report, *supra* note 135.
[143] Ulysses testimony, *supra* note 137.

security operations against the media—deemed "the highest level of threat" against the state.[144] The court awarded plaintiffs $302 million against the Syrian government.[145]

This case brings to light the degree to which the conflict in Syria has been marked by deliberate attacks against, and the kidnapping and execution of, journalists who might counter the regime's narrative of the war. Indeed, Syria has been designated the most dangerous place to do this work for several years running according to the Committee to Protect Journalists.[146] The *Colvin* complaint included a long list of attacks on journalists who were also reporting on the regime's repression of peaceful demonstrations and responsibility for civilian casualties. In his affidavit, Annouar Nouar Malek, a former member of the Arab League monitoring mission who quit in disgust, detailed a conversation with regime officials who admitted that reporters entering Syria without authorization are military targets.[147] (The mission was later suspended as the situation deteriorated and monitors were under threat.)[148] U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, prepared a declaration devoted to the regime's use of media censorship and the persecution of media workers to silence dissent.[149] A number of former colleagues of Colvin also provided declarations. This included her Syrian interpreter/activist Wael al-Omar and fellow journalist Paul Conroy, who survived the attack on Homs (which he described as a "systematic massacre") and was smuggled out of the country.[150]

The Colvin civil litigation might yet catalyze criminal charges to be filed in the United States. Indeed, because Colvin is a U.S. citizen, the U.S. Department of Justice could also seek to prosecute individual perpetrators and their co-conspirators under the U.S. War Crimes Act.[151] So far, however, this has not come to pass. But additional suits are proceeding elsewhere. Colvin was killed along with French freelance photographer Rémi Ochlik. Ochlik's colleague, Edith Bouvier, was also injured in the attack and was trapped in Homs for over a week in desperate need of medical care.[152] In 2012, Bouvier and Ochlik's mother filed a criminal complaint in France against the unknown perpetrators of the attack. After the case languished for several years, the complainants moved to transfer it to the specialized War Crimes Unit in the *Tribunal de Grande Instance de Paris*.[153] The Unite is considering whether war crimes (murder, attempted murder,

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[144] Ian Black, *Syria: Leaked Documents Reveal Bashar al-Assad's Role in Crushing Protests*, THE GUARDIAN, Mar. 19, 2012; *Several Tons of Documents Reportedly Point to War Crimes for Syria's Assad*, FOX NEWS, April 13, 2016.
[145] *Colvin v. Syrian Arab Republic*, Order, Civ. Action No. 16-1423 (ABJ) (Dec. 12, 2018).
[146] Catherine A. Traywick, *Why Syria Is The Most Dangerous Place To Be a Journalist*, FOREIGN POLICY, Dec. 20, 2013.
[147] Declaration of Abdelmalek Nouar, *Colvin et al. v. Syrian Arab Republic*, Case 1:16-cv-01423-ABJ, Doc. 42-8 (March 22, 2018).
[148] Conal Urquhart, *Arab League Suspends Syria Monitoring Mission*, THE GUARDIAN, Jan. 28, 2012; Nabila Ramdani, *'I Was Threatened With Death for Doing My Job', Says Arab League Observer to Syria*, THE TELEGRAPH, Jan. 14, 2012.
[149] Expert Report, *Colvin et al. v. Syrian Arab Republic*, Case 1:16-cv-01423-ABJ, Doc. 42-15 (March 22, 2018).
[150] *Rescued Journalist Paul Conroy Describes the Situation in the Syrian City of Homs as 'Systematic Slaughter'*, THE TELEGRAPH, Mar. 2, 2012; *Journalist Paul Conroy 'In Good Spirits' After Syria Rescue*, INDEPENDENT, Feb. 28, 2012.
[151] 18 U.S.C. § 2441.
[152] *French Reporter Bouvier Safe in Lebanon after Homs Siege*, FRANCE 24, Mar. 2, 2012; Peter Beaumont, *Syria: French Journalist Edith Bouvier Pleads for Evacuation from Homs*, THE GUARDIAN, Feb. 23, 2012.
[153] Frank Petit, *International Crimes: Spotlight on France's War Crimes Unit*, JUSTICEINFO.NET (Dec. 17, 2018).

conspiracy, and attacks on civilians) were committed in the Baba Amr attack.[154] France has declassified files in support of the investigation.[155] In 2016, the French law firm Vigo, with support from CJA, successfully filed civil party complaints expanding the jurisdiction of the French judicial investigation to encompass non-French victims, including Marie Colvin's family, British photographer Paul Conroy, and Syrian media activist Wael al-Omar. Several witnesses, including insiders, have testified; charges, however, have yet to be filed against named defendants.[156] The original Investigating Judge, Emmanuelle Ducos, was assigned to the Special Criminal Court in the Central African Republic and the case was reassigned in October 2017.

Syria has been sued in the past under the FSIA's state sponsor of terrorism exception for acts of terrorism.[157] Syria has not always defended such suits against it, or has defended late in the process,[158] resulting in several quasi-default judgments against it that may ultimately deplete assets within the United States.[159] Collecting from any sovereign presents its own challenges, which operates as a constraint on recovery.[160] Obstacles include finding and liquidating non-immune assets[161] and gaining the enforcement of judgments in the courts of states where the sovereign defendant may own property[162] (assuming enforcement will be impossible in the target state's own courts).[163] Although many victims who seek justice are not motivated by the possibility of receiving money damages, there is no question that executing upon a judgment can greatly assist in the process of rehabilitation. It remains to be seen whether the plaintiffs in the *Colvin* case are able to find Syrian assets in the United States or elsewhere to satisfy their tremendous judgment.

Conclusion

While no substitute for robust criminal accountability, civil human rights suits—against sovereign entities, legal persons, or individuals—can empower individual survivors and provide a form of legal redress even while they may not necessarily constrain individual perpetrators. As one component of a multifaceted legal strategy, such litigation can contribute to a wider movement toward accountability for rights violations and international crimes involving complementary state and international institutions. In many respects, an enduring value of civil litigation is its

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[154] *Satisfaction de RSF après la Saisine du "Pôle Crimes de Guerre" du TGI de Paris dans le Dossier Ochlick-Bouvier*, RSF, Jan. 20, 2016; CODE PENALE [C. PEN.] art. 462-10 (Fr.).
[155] Commission Consultative du Secret de la Défense Nationale, June 16, 2016, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], June 30, 2016.
[156] Press Release, FIDH, *War Crimes Against Journalists in Homs: FIDH and Victims' Families Call for Charges to Be Brought* (Dec. 3, 2018).
[157] *See List of Foreign Sovereign Immunities Cases*, AMERICAN LEGAL ENCYCLOPEDIA, https://lawi.us/list-of-foreign-sovereign-immunities-cases/. *See, e.g.*, *Thuneibat v. Syrian Arab Republic*, 167 F.Supp.3d 22 (D.D.C. 2016) (suit finding Syria liable for terrorist attack in Jordan that killed two U.S. citizens).
[158] *See Wyatt v. Syria*, 800 F.3d 331, 334-5 (7th Cir. 2015) (noting appeals by Syria in two FSIA cases against it).
[159] Bryan Koenig, *$347M Default Judgment Against Syria for Terror Attack*, LAW360 (Mar. 1, 2016). *See Gates v. Syrian Arab Republic*, 755 F.3d 568, 571 (7th Cir. 2014) (noting that the "FSIA does not provide a mechanism for distributing equitably among different victims any Syrian assets in the United States that are subject to attachment" creating a "winner-take-all" system).
[160] *See generally* George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments against States and Their Instrumentalities, and Some Proposals for Its Reform*, 25 ARIZ. J. INT'L & COMP. L. 665 (2008).
[161] *See, e.g.*, 28 U.S.C. § 1610 (denying immunity if the property is used for commercial activity or if the agency or instrumentality of the state that owns the property is engaged in commercial activity).
[162] *See generally* Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L. J. 141 (2001).
[163] Foster, *supra* note 158, at 670.

transformative potential for individual participants. From the perspective of the parties, this includes the rehabilitation of victims and the establishment of a measure of accountability for rights violations. In terms of second order effects, such suits contribute to the empowerment of victimized communities. They can also articulate enforceable expectations of behavior, operate as a denunciation of violations, contribute to the clarification of applicable norms and the reinforcement of social values, and exert a deterrence pressure. Ultimately, the hope is that such suits will help to strengthen the worldwide human rights movement as part of a multifaceted system of accountability.

8

Innovations in International Criminal Law Documentation Methodologies and Institutions

Documentation keeps the issue of justice in Syria alive.[1]

The conflict in Syria has become the most documented crime base in human history. Although the outside world was largely ignorant of the 1982 Hama massacre, information about today's events on and off the Syrian battlefield is instantaneously disseminated around the globe through formal and informal media and social networks. From the beginning of the uprising, and in real-time, citizen journalists wielding smartphones from the grassroots began uploading videos and photographs of the revolution, the government's crackdown, and the ensuing armed conflict at a rate never before seen in previous conflicts.[2] The degree of citizen activity is particularly remarkable given the heretofore autarkic nature of the Syrian state. And, the amount of information available is overwhelming. Google has estimated that there are "more hours of footage of the Syrian civil war on YouTube then there actually are hours of the war in real life."[3]

These civil society efforts—led by non-governmental organizations (NGOs), human rights activists, and ordinary citizens—became all the more crucial once foreign journalists and U.N. representatives experienced difficulties entering and operating in the country. Because the current information environment is increasingly internet-based and digital, human rights advocates have had to update their collection, storage, authentication, and analytical protocols.[4] NGOs are thus exfiltrating regime documents, taking witness/victim testimonials remotely on new communications platforms, scrubbing social media sites for potential open-source evidence, digitizing gigabytes of data that are then subjected to big-data and statistical analytical techniques, improving optical character recognition (OCR) software (no easy feat with Arabic script), and securing potential evidence in encrypted digital vaults. These data are supporting classic human rights advocacy tools—naming and shaming exercises and the dissemination of damning human rights reports based upon moving accounts by victims. At the same time, new human rights outputs are emerging or being produced with greater sophistication, such as statistical analyses, three-dimensional crime scene recreations and other forms of data visualization, and detailed dossiers and proto-indictments on potential defendants for future prosecutions. Added to these non-governmental efforts are governmental intelligence collections amassed for sovereign national security and foreign policy purposes. States will occasionally declassify this information for their own objectives, which may range from enhancing their strategic messaging to applying diplomatic pressure to promoting accountability. In the multilateral sphere, multiple United Nations fact-

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[1] *See* Noha Aboueldahab, *Writing Atrocities: Syrian Civil Society and Transitional Justice*, Brookings Doha Center Analysis Paper No. 21, at 1 (May 7, 2018).

[2] *See* Rebecca J. Hamilton, *User-Generated Evidence*, 57 COLUM. J. TRANSNAT'L L. 1, 5 (2018) (arguing that user-generated evidence is "the most visible sign yet of the fundamental disruption underway within the investigatory ecosystem" of international criminal law).

[3] Armin Rosen, *Erasing History: YouTube's Deletion of Syria War Videos Concerns Human Rights Groups*, FAST COMPANY, Mar. 7, 2018 (quoting Google executive).

[4] *See* Brianne McGonigle Leyh, *Changing Landscapes in Documentation Efforts: Civil Society Documentation of Serious Human Rights Violations*, 33(84) UTRECHT J. INT'L & EUR. L. 44 (2017); Els De Busser, *Open Source Data and Criminal Investigations: Anything You Publish Can and Will be Used Against You*, Vol 2(2) GRONINGEN J. INT'L L. 90, 91 (2014); Lindsay Freeman, *Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Investigations and Trials*, 41 FORDHAM INT'L L.J. 283 (2018).

finding efforts are also underway, at times with overlapping substantive mandates and employing varying methodologies. All told, the Fourth Industrial Revolution has brought about a transformation in human rights technology and documentation.

Together, these documentation projects have catalogued the commission in Syria of almost every type of war crime and crime against humanity known to humankind. The assumption is that this information will lay the groundwork for a whole range of transitional justice mechanisms—in the event that there is ever a transition. From the perspective of promoting more comprehensive criminal accountability, the challenge that awaits will be to transform these raw data into more structured information and then, ultimately, into admissible evidence. This process of gradual refinement can be conceptualized as a pyramid, with the mass of raw data at the base eventually being honed into useful analytical information up the pyramid.[5] Only the apex of the pyramid will be usable as evidence in court, but the bulk of the material collected remains vitally important for lead and background purposes as well as for other transitional justice processes of truth-telling, vetting/lustration, restitution, reparation, and institutional reform. Because far-reaching justice may be years—or even decades—in the making, it is imperative that evidence of crimes being committed now is amassed in real time and preserved for when the time is ripe for justice and accountability in Syria. In the short term, all this documentation is contributing to episodic cases that are beginning to materialize extraterritorially in domestic courts around the globe. Indeed, these national efforts have emerged as the most promising avenue for justice—the subject of the previous chapter of this volume.

This chapter surveys current documentation efforts devoted to Syria and the various types of information being generated, preserved, and analyzed. It then profiles a number of new organizations—from the multilateral to the most local—that have taken up the collection mantle, employing new technologies to amass and exploit these data in support of future justice processes, broadly defined. Given its centrality to any transitional justice response, the preservation of potential evidence has received extensive international support in the Syrian context given that it is an activity that can be pursued and capacitated pre-transition, while a conflict is ongoing and even without a clear path to justice. Indeed, it is crucial to collect such potential evidence as quickly as possible before it can be hidden, tampered with, or deliberately or inadvertently destroyed. Given the evolution of the conflict, and the degree to which territory has changed hands and reverted to regime control, certain sources of information that were available early in the conflict are no longer accessible. The imperative of launching a documentation strategy immediately once a conflict is underway, and maintaining a continuous process throughout, as best as possible, has emerged as a sound lesson learned from the Syrian conflict. Notwithstanding these groundbreaking efforts, there remains an acute risk that activists and others lose faith in the promise of accountability given the paucity of options to hold perpetrators accountable as proof of atrocities continues to mount.

[5] Keith Hiatt, Vice President of Human Rights, Benetech, Panel Discussion at Stanford University (Feb. 13, 2018).

"The Syrian Correspondent" © Comics4Syria

The Imperative of Documentation

The documentation of abuses such as those efforts underway in Syria serve a number of key imperatives when it comes to the system of international justice. In real time, these objectives include deterring abuses, encouraging defections, isolating bad actors, and mobilizing the international community to act. Beyond accountability, these documentation efforts are useful for a range of other purposes, including undergirding predictive analytics about the ebb and flow of a conflict, mapping the ever-changing alliances among armed groups, facilitating the delivery of humanitarian aid through contested regions, and tracking ceasefire compliance. Documentation by the Carter Center, for example, is not undertaken with accountability in mind; rather, it informs multi-track outreach and negotiations by enabling predictions about the evolution of the conflict. As a conflict wears on, prospective applications become more important, such as enabling trials and other transitional justice mechanisms and laying the groundwork for systemic reforms. Furthermore, documentation is important for posterity, to teach future generations about the causes and consequences of a conflict with an eye towards truth-telling and reconciliation. Finally, good documentation can help academics and others to write a more accurate history of the conflict in a way that will discourage revisionism.

Deterrence

Starting with the *a priori* goal of preventing further atrocities, there is no question that documentation efforts are often pursued with an eye towards deterring the perpetration of crimes, whether in the particular target forum or elsewhere in the future. The theory is that exposing criminal acts and laying the groundwork for future accountability will dissuade at least some would-be perpetrators from joining in the commission of abuses. Some deterrent effect may operate early in an unfolding situation, but the deterrence claim becomes less credible as atrocities mount and no justice response is forthcoming. All that said, it cannot be gainsaid that proving

deterrence is an inherently fraught exercise, even in well-established domestic criminal justice systems.[6]

Naming & Shaming

Documentation can lay the groundwork for a naming and shaming exercise by non-governmental organizations, multilateral bodies, and individual governments. Naming and shaming governments and armed groups accused of abusive practices is an essential tool deployed by many human rights organizations.[7] At times, and not without some controversy, organizations will go further and identify specific suspects by name when there exists credible, corroborated, and verifiable information that such individuals are responsible for atrocity crimes. In the transitional justice context, a handful of truth commissions—e.g., in El Salvador[8] and Liberia[9]—have also named names, some pursuant to a mandate that envisioned this function, others more spontaneously.[10] The Salvadoran truth commission, for example, determined that it could not merely identify responsible institutions but rather should establish responsibility by naming names:

> The Commission believes that responsibility for anything that happened during the period of the conflict could not and should not be laid at the door of the institution, but rather of those who ordered the procedures for operating in the way that members of the institution did and also of those who, having been in a position to prevent such procedures, were compromised by the degree of tolerance and permissiveness with which they acted from their positions of authority or leadership or by the fact that they covered up incidents which came to their knowledge or themselves gave the order which led to the action in question.[11]

Individuals involved with truth commissions indicate this practice served as a form of "public recognition," a "fundamental aspect of truth," and a "form of symbolic justice."[12] When doing so, truth commissions often, and appropriately, invite those to be named to respond to the evidence against them.

This is a human rights tool that can be more systematically adapted by states mid-conflict as a derivative of a human rights documentation program. Although never fully utilized in the Syrian context, likely out of concern that it would further alienate key interlocutors for any peace negotiations, naming and shaming can serve a number of purposes that might reinforce other

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[6] Raymond Paternoster, *How Much Do We Really Know about Criminal Deterrence?*, 100(3) J. CRIM. L. & CRIMINOLOGY 765 (2010).
[7] *See* Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT'L ORG. 689 (Fall 2008).
[8] FROM MADNESS TO HOPE: THE 12-YEAR WAR IN EL SALVADOR: REPORT OF THE COMMISSION ON TRUTH FOR EL SALVADOR, U.N. DOC. S/25500, ANNEX (Apr. 1, 1993).
[9] REPUBLIC OF LIBERIA TRUTH & RECONCILIATION COMMISSION, II CONSOLIDATED FINAL REPORT 349-52 (June 30, 2009).
[10] PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 121-22 (2d ed. 2011) (noting that different commissions had different mandates, but the issue was ever-controversial).
[11] FROM MADNESS TO HOPE, *supra* note 8, at 14. *See also id*. at 18 (setting forth formal mandate to "clarify and put an end to any indication of impunity on the part of officers of the armed forces, particularly in cases where respect for human rights is jeopardized.").
[12] Association for the Prevention of Torture, *Truth Commissions: Can they Prevent Further Violations?* at 7, https://www.apt.ch/content/files_res/truth_commissions_executive_summaries.pdf.

foreign policy objectives in a mass atrocity situation. Publicly associating identified perpetrators with abuses denies them the ability to enjoy the privilege of anonymity, individuates responsibility, and demonstrates that the world is watching and has possession of robust sources of information about the originators of abuse. It may also offer some solace to victims. Cracking the veneer of impunity by publicly identifying perpetrators provides some measure of accountability where other avenues are foreclosed. At a minimum, it signals a commitment to document abuses and eventually hold perpetrators responsible and bolsters "morally valuable international norms and laws"[13] in response to transgressions. There may be diplomatic benefits as well. Calling out perpetrators can build confidence in, or placate, an opposition movement that is anxious for multilateral support and international legitimacy. It can also damage the target's reputation externally, making it more difficult for other states to continue to support murderous regime.

Although this is more speculative, a system of naming names may even impose a deterrent effect on actors on the ground. Research suggests that naming and shaming campaigns do, under certain circumstances, reduce the commission of abuses.[14] Singling out perpetrators can isolate them internally and encourage defections among confederates who are not yet publicly identified and might be inspired to break ranks. Any naming and shaming program can be accompanied by public messaging praising defectors and tracking defection counts. For example, *Al Jazeera*, with support from Google Ideas (now Jigsaw), established a defection tracking system for Syria that showed the number of defections of cabinet members, members of parliament, generals, and colonels plateauing in June 2013.[15] To be sure, any defection strategy may be strongest early in a conflict, before everyone left standing has blood on their hands. Such a naming-and-shaming campaign may be less effective at inducing defections later in the conflict as regime insiders become entrenched and ideologically committed to the prevailing course of action, or are too terrified of the risk of retaliation (by the opposition or the regime) to consider bailing out. In Libya, by contrast, defections spiked after the passage U.N. Security Council Resolution 1970, although there are many variables at play including the beginning of a full-scale civil war, rising violations, an increased sense of international isolation.[16] Likewise, the program aimed at encouraging defections from the Lord's Resistance Army has been ongoing for years and continues to bear fruit. All told, naming perpetrators is a tool that is most easily deployed against a single bad actor. In situations in which where all sides have been accused of violations, the naming of names may lose some effect and—perversely—even normalize abuses.

The United States most famously engaged in a naming-and-shaming campaign in Iraq when it issued a deck of cards with those "most wanted."[17] Logistically, the naming of names by states could be done a number of additional ways, including through a public advocacy campaign or a quieter confrontation with relevant authorities or allies. States have access to multiple vectors

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[13] James Pattison, *The Ethics of Diplomatic Criticism: The Responsibility to Protect, Just War Theory and Presumptive Last Resort*, 21(4) EUR. J. INT'L RELATIONS 935, 940 (2015) (arguing that states have a moral duty to criticize other states and their agents in response to mass atrocities).
[14] Matthew Krain, J'accuse! *Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politicides?* 56(3) INT'L STUD. Q. 574 (2012).
[15] *See Tracking Syria's Defections*, AL JAZEERA (July 30, 2012).
[16] Ian Black, *Libya: Defections leave Muammar Gaddafi isolated in Tripoli Bolthole*, THE GUARDIAN, Feb. 23, 2011.
[17] Joel Christie, *Dead Hand: Deck of 52 Most-Wanted Iraqi Playing Cards given to Soldiers at the Start of the War Shows the Fall of Saddam 'The Ace of Spades' Hussein's Army*, Daily Mail, Oct. 18, 2014.

with which to disseminate such information, including psyops, social and old-fashioned media, online portals (such as the United States' humanrights.gov website), official spokespersons, etc. Fliers (akin to wanted posters) could be posted at borders, smuggled into the country through activists, and shared with allied countries where perpetrators are likely to flee. Individuals could also be identified in paid advertisements in newspapers or broadcast on local television stations. A government spokesperson could make a weekly designation as part of a normal press briefing or release an organogram showing the chain of command. A state taking the lead in developing lists of names could share information with allies to amplify the message.

Foreign governments could also partner with human rights organizations in this endeavor by selectively sharing their intelligence on particular perpetrators with NGOs undertaking similar investigations, allowing these groups to take the lead on exposing perpetrators or to confirm their own analysis. Or, governments could "bless" the findings of human rights organizations that themselves name names. For example, early in the Syrian conflict, Human Rights Watch issued an important and chilling report on custodial abuses in Syrian prisons that identified individual commanders of those facilities.[18] Governments with relevant information could verify the conclusions contained in such a report, thus magnifying the degree of censure towards individual perpetrators. This offers a way of putting solid foreign intelligence to work without going through the often cumbersome and internally controversial process of a full declassification. Working in collaboration or in parallel with NGOs could lessen the state's fingerprint on the process and respond to situations in which governments lack credibility with target audiences. NGOs, however, bear some risk of being sued for libel if they make accusations against an identifiable individual. By contrast, sovereign immunity generally protects governments from such retaliation.

States have no monopoly on naming and shaming. Civil society organizations can adopt this tactic in their own spheres in order to socially ostracize or condemn perpetrators. In Argentina, for example, the children of the disappeared—many of whom had been "given" to military families—working through a new organization, *Hijos e Hijas por la Identidad y la Justicia Contra el Olvido y el Silencio* (H.I.J.O.S.), created *Mesas de Escrache* ("working groups to make evident or visible") that identify perpetrators from the dirty war era. Their tactics include fliers with photographs of the perpetrator, street signs in the target's neighborhoods ("*In [500] metres – Rafael Jorge Videla – genocida – Cabildo 639*"), and marches in front of the perpetrators' homes. Performing the *Escrache* has been described as "a politics of memory and self-empowerment" and a form of social, if informal, justice.[19] This movement gradually wound up once Argentina's amnesty law was declared unconstitutional, which opened the door to renewed prosecutions.

A "do no harm" ethos should guide any naming-and-shaming program, which requires the development of a careful protocol and set of criteria to credibly name names on a case-by-case basis. The process is not dissimilar to the compilation of dossiers on individuals for the purpose of making sanctions designations. Information underlying the identification of responsible individuals must be reliable, verifiable, and corroborated through multiple sources to ensure maximum credibility, particularly if incomplete or contradictory information emerges. The Salvadoran truth commission for example established a two-source rule and only named names

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[18] OLE SOLVANG, ANNA NEISTAT & HUMAN RIGHTS WATCH, TORTURE ARCHIPELAGO: ARBITRARY ARRESTS, TORTURE, AND ENFORCED DISAPPEARANCES IN SYRIA'S UNDERGROUND PRISONS SINCE MARCH 2011 (July 2012).
[19] *See* Katja Seidel, *Practising Justice in Argentina: Social Condemnation, Legal Punishment, and the Local Articulations of Genocide*, in XXVII(3) J. FÜR ENTWICKLUNGSPOLITIK: BEYOND TRANSITIONAL JUSTICE 64, 72 (Stefan Khittel ed., 2011).

when "it was absolutely convinced by the evidence."[20] Ideally, any public pronouncement would be based on direct evidence and information gleaned from percipient witnesses, recognized experts, or trustworthy domestic or foreign intelligence. Once information is gathered, it is prudent to undertake a risk assessment analysis to consider the impact of going public on different stakeholders, including victims and witnesses, human intelligence sources, and the perpetrators or their families (who may be vulnerable to acts of retaliatory vigilantism). And, actors deploying this tool should remain ever vigilant against potential false accusations.

In any case, any public statement naming a putative perpetrator could include appropriate caveats, such as "reportedly" or "allegedly," and could simultaneously acknowledge the presumption of innocence. Moreover, such statements could be framed so as to not constitute a determination of guilt, but rather to indicate the existence of credible information linking the individual to criminal conduct as a direct perpetrator, an accomplice, a superior, or a participant in collective criminality and call for additional investigation and potential prosecution as a matter of public importance. Or individualized references could be more oblique. For example, a statement could indicate that a particular unit or battalion—headed by a particular commander—was reportedly present in a particular area where abuses occurred.

In terms of counter-arguments, there will inevitably be concerns raised that naming names outside of a formal judicial process violates the presumption of innocence and other due process rights by unfairly prejudging the guilt of those identified. However, many deterrence and accountability tools—including financial sanctions programs, commissions of inquiry, truth commissions, and immigration restrictions—involve identifying responsible individuals under standards of proof that fall well short of a judicial determination of criminal guilt. Indeed, criminal indictments are a form of naming names that are issued under a diminished standard of proof well in advance of the presentation of evidence meeting the penal law standard. Even in those systems in which there is a presumption against naming unindicted co-conspirators, this reticence can be overcome if for some reason the person cannot be prosecuted directly or if the public right to know is overwhelming. In any case, these fairness concerns can be managed with appropriate protocols, standards of proof, corroboration requirements, caveats, etc.

Under certain circumstances, releasing information about a particular perpetrator might risk revealing means and methods of intelligence gathering; this concern could be dealt with on a case-by-case basis to ensure that multiple sources of inculpatory information point to the same individual so that it is not necessary to rely upon a single source of intelligence. Classified atrocity reporting can also be appropriately "scrubbed" for public consumption to eliminate clues to the relevant agency's sources, means, and methods.[21] There is a very real concern that naming names will lead to violent vigilante acts against perpetrators themselves or even retribution against his or her family members. This risk exists even absent a naming and shaming program, however, since insiders and local actors will know those responsible. In any case, it may be difficult to retaliate against commanders in the armed forces, who are largely insulated.

Finally, there is a concern that identifying particular suspects will harden the resolve of regime elements and their loyalists, generating a form of counter-deterrence. At a certain point in the conflict, the top leadership will have largely made their choices and dug in. Naming and

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[20] Haynor, *supra* note 10, at 142-43.

[21] *See, e.g.*, Statement from Ambassador Nikki Haley on Atrocities Committed by the Assad Regime in Syria (May 15, 2017) (announcing release of declassified reporting on atrocities committed in Syria).

shaming them may have a greater impact on mid-level personnel, without whom a repressive regime cannot function. Such individuals may be ambivalent about the course of oppression; revealing the risk of staying on the fence may be what is needed to tip them toward the side of virtue. Of course, a campaign of naming and shaming cannot be expected to do all the work of deterrence, but it can be one among many techniques to weaken an oppressive regime. All told, the point is to signal that the international community is aware of who is responsible for abuses so as to remove the cloak of anonymity and signal the feasibility of a future accountability process.

Mobilize Action

Real-time documentation can also help to mobilize international actors with the capacity—and will—to intervene. Unimpeachable documentation can raise international awareness of atrocities, increase the political will to do *something* to stop ongoing harms, and make it harder to stonewall accountability. In January 2014, a number of media outlets circulated gruesome photographs that had been exfiltrated by a former military photographer from the Department of Forensic Evidence who worked in the 601 Military Hospital (a.k.a. Martyr Youssef Al Azama Hospital) and Tishreen Military Hospital in Damascus. The defector, code-named "Caesar" to protect his identity, had smuggled over 50,000 images depicting more than 11,000 victims out of the country on thumb drives and his phone—an extraordinary cache of government-generated proof of human rights abuses. Half of the photos depicted cadavers showing signs of torture, starvation, and mistreatment (the other half are likely battlefield deaths).[22] Caesar explained that he had been tasked with photographing the victims after their death, in part as an anti-corruption exercise in order to prevent guards from extorting the victims' families to secure a detainee's release. In many cases, falsified death certificates were issued indicating that the victim had died after their "heart and breathing stopped," factual statements implying natural causes such as respiratory or cardiac failure. The photos told another story and revealed horrific evidence of systematic starvation, mutilation, and death-by-torture on an industrial scale.

The Caesar photos helped to galvanize the international community, which had become stalemated over how to respond to the crisis in Syria. Indeed, France and Australia cited these files in in their explanations of vote in connection with France's thwarted draft ICC referral resolution. The U.S. Congress held hearings in which Caesar testified with protective measures to conceal his identity. The Caesar photos have been on display around the world: in the United Nations, at the European Parliament, in the U.S. Holocaust Memorial Museum (USHMM), at universities, and elsewhere in a tour organized by the Syria Emergency Task Force (SETF) and United for a Free Syria. Such displays respond to the behavioral psychology research on the "picture superiority effect," which teaches that humans respond to photos more viscerally than to text.[23]

Given the uncertainty around deterrence and the political realities blocking effective multilateral activity, the justifications for supporting rigorous documentation shift to future transitional justice efforts. It has been argued that human rights documentation should be considered a transitional justice mechanism in its own right on the theory that "writing atrocities is, in and of itself, a healing process, as it ensures that victimization is acknowledged, recorded,

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[22] PRIYANKA MOTAPARTHY, NADIM HOURY & HUMAN RIGHTS WATCH, IF THE DEAD COULD SPEAK: MASS DEATH AND TORTURE IN SYRIA'S PRISON FACILITIES (Dec. 16, 2015).
[23] *See* Margaret Anne Defeyter, Riccardo Russo & Pamela Louise McPartlin, *The Picture Superiority Effect in Recognition Memory: A Developmental Study Using the Respond Signal Procedure*, 24 COGNITIVE DEV'T 265 (2009).

and remembered."[24] Good documentation will also undergird any number of accountability, truth-telling, and restorative mechanisms, including trials, lustrations/vetting, reparation and restitution regimes, other forms of social rehabilitation, and institutional reform. Many kinds of documentation—including written and electronic documents, photographs and videos, witness statements, statistical analyses, and physical artifacts—can contribute to these various post-conflict interventions.

Systemic Reforms

Systematic documentation can also demonstrate the way in which a regime used violence to institutionalize repression and marginalize certain target populations. In the transitional or post-transition period, fostering this understanding can help to counteract nostalgic longings for an *ancien régime* or the emergence of revisionist narratives. It can also lay the groundwork for systemic structural reforms. This can include the repeal of discriminatory legislation, the dissolution of repressive security forces, the establishment of new standard operating procedures, the redistribution or return of land, and the lustration of individuals associated with abuses.

Educational Materials

Beyond formal accountability processes, documentation—and particularly victim narratives—can also be transformed into educational resources, media campaigns, and memorials to promote reconciliation, social cohesion, conflict prevention, and generally instill human rights principles within a post-conflict society. The International Coalition of Sites of Conscience works with grassroots and local organizations to undertake effective and multi-disciplinary memory and memorialization programs in the aftermath of conflict or repression. Certain such educational initiatives devoted to Syria are already underway. The quasi-governmental USHMM, for example, had on display scraps of fabric on which Syrian prisoners wrote their names in a mixture of rust and blood. These artifacts were smuggled out of a military intelligence prison by Mansour Al-Omari, a fellow detainee, in order to inform their families of their whereabouts. Omari was detained precisely because he had been keeping lists of disappeared political activists for the Violations Documentation Center. His ordeal is the subject of a film, *Syria's Disappeared: The Case Against Assad*, which also recounts the personal stories of two other activists who tried to document the commission of international crimes as well as the work of war crimes investigators with the Commission of International Justice & Accountability and Guernica 37 International Justice Chambers.

History Writing

Finally, the importance of preserving the historical record should not be understated. To be sure, investigators and lawyers are not historians, although many international courts will begin their opinions with a long discussion of the history predating the events in question.[25] However, creating an archive ensures that scholars will one day be able to write more accurate and detailed histories of the conflict. These accounts often persist long after any trials have concluded.

The Myriad Forms of Documentation

[24] *See* Aboueldahab, *supra* note 1, at 1.
[25] *See* Richard Wilson, WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS 22 (2011) (noting that historical testimony is often central to international trials).

Potential evidence can come in multiple forms. There is no question that witness testimony remains crucial to international justice processes. While compelling from an advocacy and accountability perspective, an investigation with an excessive focus on interviewing victims can raise concerns. For one, multiple interviews risks witness and survivor retraumatization. It can also lead to disappointment when there is an insufficient justice response. If witness testimony is used in court, written statements also open witnesses up to impeachment challenges on cross-examination if inconsistences or conflicting statements come to light,[26] even though there may be many reasons why discrepancies exist within a witness's account that do not diminish the veracity of the underlying testimony.[27] Finally, creating witness statements that fall into the wrong hands can put declarants at physical risk of retaliation in the absence of appropriate security protocols in terms of anonymization etc. Having a genuine and fully transparent informed consent protocol—which carefully explains the risks inherent to making a statement, how information will be used, and with whom it can be shared—is crucial to any such exercise. It is also necessary to avoid the pitfalls of "over-documentation," when witnesses and victims are interviewed again and again in environments with multiple collectors operating simultaneously. All told, a "do no harm" approach is warranted when it comes to engaging with victims, survivors, and witnesses.[28]

In today's ubiquitous digital environments, open-source information—defined as information that can be obtained without the necessity of a formal judicial warrant or the use of clandestine or potentially unlawful collection practices, such as hacking[29]—is progressively important. For one, it can lessen the dependence on witness testimony by offering corroborating evidence and eliminating the need to call multiple witnesses.[30] There are efforts afoot to render international trials less dependent on *viva voce* testimony, including through the use of probabilistic methods and other social science research tools.[31] This reflects the worrisome reality that witnesses are the soft underbelly of any criminal prosecution.[32] In particular, "a lone witness is a vulnerable witness."[33] In the Syrian context, videos of the government's response to peaceful protests or attacks on civilians and civilian objects have been captured by those witnessing these events.

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[26] *See* Priya Gopalan et al., *Proving Crimes of Sexual Violence*, *in* PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY 140 (Serge Brammertz & Michelle Jarvis eds. 2016).

[27] For a discussion of how trauma can affect the ability of survivors to recall and recount traumatic events, see Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies, and Errors of Recall in the Testimony of Asylum Seekers*, 13(3) INT'L J. REFUGEE L. 293 (July 2001).

[28] *See* Rob Grace & Claude Bruderlein, *On Monitoring, Reporting, and Fact-Finding Mechanisms*, 1(2) ESIL REFLECTIONS (July 15, 2012).

[29] U.S. Office of the Director of National Intelligence, Intelligence Community Directive No. 301, National Open Source Enterprise (Effective: July 11, 2006). It is distinct from other forms of intelligence, such as signals intercepts or human intelligence. *See* U.S. Office of the Director of National Intelligence, *What is Intelligence?* (outlining the six categories of intelligence).

[30] *See generally* Keith Hiatt, *Open Source Evidence on Trial*, 125 YALE L. J. F. 323 (2016) (discussing the promise and perils of open source investigations).

[31] *See* Anne-Marie de Brouwer, *Cases of Mass Sexual Violence Can be Proven without Direct Victim Testimony*, *in* CONTEMPORARY ISSUES FACING THE INTERNATIONAL CRIMINAL COURT 282 (Richard H. Steinberg ed., 2016); John Hagan, *The Use of Sample Survey Interviews as Evidence of Mass Rape*, *in* CONTEMPORARY ISSUES FACING THE INTERNATIONAL CRIMINAL COURT 295 (Richard H. Steinberg ed., 2016).

[32] The Kenyan cases before the ICC collapsed due to unprecedented witness tampering and intimidation. *See Why Kenyan Cases at the ICC Collapsed*, *by Bensouda*, JOURNALISTS FOR JUSTICE (July 13, 2016).

[33] Hiatt, *supra* note 30, at 325.

These alternative sources of evidence are not a panacea to the problem of witness vulnerability, however. For example, proving inhumane prison conditions or more intimate violence will likely remain dependent upon witness testimony. Unfortunately, witness protection programs remain embryonic in the international field. Although many individual states have developed such programs domestically, the international community has not done enough to create a reliable protection system in support of international justice efforts.[34] This is due in part to the decentralization of international justice institutions and the existence of still rudimentary transnational law enforcement arrangements. There is also an issue of practicality given the sheer expense of relocating witnesses and their families in light of the budgetary pressures and competing imperatives faced by international institutions. Even within the International Criminal Court (ICC), witness protection responsibilities are fragmented, which leads to gaps and confusion.[35]

In terms of criminal accountability, certain types of information will be more useful than others. When it comes to user-generated content, many citizen journalists and civil society organizations pay disproportionate attention to collecting "crime base" evidence—i.e., information tending to show the commission of international crimes—by photographing the graphic results of attacks and collecting moving accounts from witnesses and victims. For example, millions of videos purporting to show the targeting of civilians and civilian objects, the execution of captured combatants and perceived opponents, the use of chemical and other indiscriminate weapons, and further international offenses have been uploaded onto YouTube and other social media platforms since the Syrian conflict began.

The current obsession with "big data" finds expression in human rights documentation practices.[36] Groups focused on Syria have attempted to tally all civilian deaths[37] or collect information about the identity and location of all prisoners or clandestine detention centers.[38] To aid in this former effort, Every Casualty Worldwide has created a protocol on the practice and procedures for coding the casualties of armed violence. The American Schools of Oriental Research's Cultural Heritage Initiatives is a collaboration of scholars and institutions that are recording threats to cultural property in Syria and Iraq with U.S. government and other funding. Paradoxically, such atrocity figures tend to drop during extreme violence due to the death or incapacitation of witnesses and reporters.

Although these collection efforts are valuable, when it comes to legal accountability, it is equally—if not more—important to collect potential evidence that speaks to individual responsibility. It is thus crucial to search for, preserve, and authenticate linkage evidence—

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[34] *See* Karen Kramer, *Witness Protection as a Key Tool in Addressing Serious and Organized Crime* 11-12, http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P3-19.pdf (discussing challenges of witness protection faced by international courts and tribunals).

[35] *See* Markus Eikel, *Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice*, 23 CRIM. L. FORUM 97 (2012).

[36] *See, e.g.*, Sayaka Ri, et al., *Attacks on Healthcare Facilities as an Indicator of Violence against Civilians in Syria: An Exploratory Analysis of Open-Source Data*, 14(6) PLOS ONE (2019) (using open source-data on attacks on healthcare facilities to "add granularity to traditional indicators of violence (e.g., such as civilian casualties) to develop a more nuanced understanding of the warring tactics used").

[37] *See, e.g.*, Syrian Observatory for Human Rights, http://www.syriahr.com/en/. At least seven organizations are tracking fatalities in the conflict—the most of any conflict worldwide. *See* Irene Pavesi, *Tracking Conflict-Related Deaths: A Preliminary Overview of Monitoring Systems* 6 SMALL ARMS SURVEY (Feb. 2017).

[38] Human Rights Data Analysis Group, https://hrdag.org/syria/ (collecting data on torture in prison); Syrian Network for Human Rights, http://sn4hr.org/ (reporting on deaths, detentions, and disappearances).

evidence that connects the commission of a crime to a particular culprit or set of actors. Linkage evidence can help identify not only the direct perpetrator(s), but also his or her confederates, co-conspirators, superiors, subordinates, and enablers, all of who may be equally liable through doctrines of complicity, aiding and abetting, conspiracy, joint criminal enterprise, common plan, instigation, and superior responsibility, depending on the operative legal framework. Such evidence can take the form of documents, intercepts, or testimony (from witnesses, insiders, defectors, or experts) explicating the order of battle and the objectives of military operations; the functioning of a regime's political, military, police or paramilitary structures; the procurement and movement of arms; communication patterns and logistical support; and chains of command and command structures, such as the Syrian Central Crisis Management Cell. Several of the Syrian cases moving forward in domestic courts have relied heavily upon such insider declarations.[39]

Although often viewed as less vital or glamourous from a mandate perspective, any documentation effort should also seek to preserve the local press and public archives—from such as birth/death certificates, land registries, and personnel and payroll records of key institutions. As his victory began to look more assured, Assad started releasing death certificates of detainees who died in custody, indicating that they had perished of "natural causes." Such documents confirm that the decedents were last in Syrian government custody, although claimants will no doubt dispute the stated cause of death. These and other types of government files can be crucial for accountability purposes (e.g., for facilitating restitution and reparations), but also in resolving property disputes in the transition period, creating a defensible vetting/lustration program, identifying missing persons, and enabling the voluntary return and/or resettlement of the internally displaced and refugee populations. For example, close to half of the pre-war Syrian population is internally or externally displaced and may find it difficult to prove prior property ownership. Indeed, the allocation of land in Syria has been biased and politically-motivated for generations. More recently, President Assad passed legislation (Law No. 10 of 2018) that results in land expropriations and has destroyed real property records,[40] making it difficult for individuals who are outside the country to protect their property rights.[41]

Preserving mass grave sites—generally defined as a location where three or more victims of an extrajudicial killing are buried—against destruction or informal exhumations and undertaking forensic analyses of human remains are additional documentation efforts that will be crucial to any comprehensive transitional justice response. Mass graves are particularly vulnerable to destruction as they provide strong evidence of crimes against humanity and other international crimes. Assuming physical access can be secured, some of this work can be initiated pre-transition, such as in liberated areas. A number of specialized organizations now exist that are devoted to undertaking, and to training others to undertake, mass atrocity forensics.[42] Several—such as the Guatemalan Forensic Anthropology Foundation (FAFG) and the Argentine Forensic Anthropology Team (EAAF)—have their roots in the conflicts and formerly authoritarian regimes

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[39] *See* Decl. of "Ulysses", Cathleen Colvin v. Syrian Arab Republic, No. 1:16-cv-01423 (ABJ) (D.D.C. Mar. 22, 2018) (anonymous declaration of Syrian regime insider).

[40] *See* Deyaa Alrishdi & Rebecca Hamilton, *Paying Attention to Land Rights in Syria Negotiations*, JUST SECURITY (Apr. 12, 2018) (noting the importance of resolving housing, land and property rights in any post-conflict settlement); The Day After, *Papers on Decree No. 10/2018*, http://tda-sy.org/en/content/228/592/reports-&-research/research-papers-on-law-no-10.

[41] HUMAN RIGHTS WATCH, Q & A: SYRIA'S NEW PROPERTY LAW (May 29, 2018) (noting that the law will serve to punish anyone who has left the country during the war).

[42] *See* ADAM ROSENBLATT, DIGGING FOR THE DISAPPEARED (2015).

of the Southern Cone. Along with the International Commission on Mission Persons (ICMP), which manages a DNA identification system and specialized missing persons database, these organizations now work globally. They serve as expert witnesses, develop new tools and forensic instruments, and act as technical consultants during the exhumation of mass graves produced during political violence.

Sometimes focusing on the identification of missing persons, ensuring victims enjoy a proper burial, and bringing some measure of closure to family members offers a less contentious initiative for transitional governments that are wary of addressing past violence too vigorously.[43] Indeed, Additional Protocol I to the Geneva Convention makes this imperative.[44] Such activities may actually respond to the priorities of families, who often place a high value on the ability to undertake formal burial rites. Pursuing these forensic options allows progress to be made on rehabilitation while postponing more sensitive demands for retribution. In Sri Lanka, for example, the formation of an Office of Missing Persons was the first initiative to move forward from a package of mechanisms that the government ostensibly pledged to implement following an intense campaign at the U.N. Human Rights Council in Geneva (HRC).[45]

In Syria, the prospects of undertaking forensic work are limited at the moment, except in areas liberated from the Islamic State in Iraq and the Levant (ISIL) where activists are desperate for technical assistance.[46] Particularly in regime- and ISIL-controlled areas in Syria and Iraq, opposition forces and victim advocates have identified dozens of mass graves. A mapping conducted in 2016 identified over 70 such sites using interviews and satellite imagery. These gravesites contain the remains of the victims of multiple mass atrocities, including an August 2014 massacre of members of the Shaitat tribe in eastern Syria as well as individuals killed in Syrian custody, who are often buried *en masse* on military land.[47] In 2017, the U.S. government released intelligence indicating that the Assad regime had built a crematory outside of Damascus to dispose of the remains of summarily executed inmates.[48] Properly preserving these mass graves to avoid DNA contamination or the destruction of evidence has been difficult given that most organizations with the technical expertise do not have secure access.[49] NGOs have asked for assistance from the United States to preserve mass graves in order to enable independent experts to conduct forensics research. In part on the basis of forensic evidence from mass graves, Iraq has managed to prosecute some perpetrators for a massacre of upwards of 1,700 Shia army cadets billeted at Camp Speicher in Iraq, but there have been no parallel results in Syria so far.

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[43] *See* Mytili Bala, *Transitional Justice & The Right to Know: Investigating Sri Lanka's Mass Graves*, *in* TRANSITIONAL JUSTICE IN SRI LANKA: MOVING BEYOND PROMISES 253 (Bhavani Fonseka ed., 2017).

[44] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 33, June 8, 1977, 1125 U.N.T.S. 3.

[45] Report of the Office of the United Nations High Commissioner for Human Rights on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, at ¶¶ 72-73, U.N. Doc. No. A/HRC/30/61 (Sept. 16, 2015) (among other proposals, calling for the provision of international technical assistance in the forensic field (forensic anthropology and archaeology) to ensure proper preservation and investigation of mass graves and to help families trace the missing).

[46] HUMAN RIGHTS WATCH, SYRIA: MASS GRAVES IN FORMER ISIS AREAS (July 3, 2018), https://www.hrw.org/news/2018/07/03/syria-mass-graves-former-isis-areas.

[47] AMNESTY INTERNATIONAL, HUMAN SLAUGHTERHOUSE: MASS HANGINGS AND EXTERMINATION AT SAYDNAYA PRISON, SYRIA 28-30 (2017).

[48] Dina Fine Maron, *How Satellite Images Can Confirm Human Rights Abuses*, SCIENTIFIC AMERICAN, May 16, 2017.

[49] *See* Syria Justice & Accountability Centre, *The Importance of Protecting Mass Graves in Syria*, June 30, 2017.

For many forms of documentation to constitute formal evidence in a court of law, advocates will need be to authenticate even the most basic details of these atrocity artifacts and to satisfy chain-of-custody requirements. While documentation efforts are underway, operators must be cognizant of the prevailing evidentiary standards. These vary depending on the jurisdiction. Many common law courts are governed by strict admissibility rules that categorically exclude many forms of evidence, such as hearsay.[50] By contrast, many civil law systems (such as Syria) and international criminal courts take a more liberal approach to the introduction of evidence, admitting any informational sources that are relevant, but then according different degrees of weight based upon whether the material bears sufficient indicia of credibility. Other transitional justice mechanisms have more relaxed conventions around the introduction of evidence, since they do not necessarily lead to individualized punishments and may be more focused on storytelling and history writing. This variation requires documenters to undertake collections with an eye towards the admissibility rules of multiple potential jurisdictions, especially the most inflexible.

As an added complication, most courts will require prosecutors to disclose exculpatory information to defendants. So-called *Brady* obligations—as they are known under U.S. law—require prosecutors to disclose evidence favorable to an accused, including evidence that might negate an element of the charged offense, undermine the credibility of a witness, or reduce a potential sentence. These prosecutorial obligations exist within international criminal law as well.[51] Such disclosure rules are not necessarily binding on non-governmental organizations or citizen activists, however. That said, and from a practical perspective if not an ethical one, documentarians must be mindful in their collection pursuits of the disclosure and other evidentiary obligations of their anticipated end users. They should thus endeavor to collect to the highest possible standard to ensure the widest possible use of their collections.

All told, the documentation of international crimes will be a necessary, though not sufficient, step for any comprehensive transitional justice program. In the Syrian context, documentation efforts have proceeded on a number of fronts, even with no transition in sight. The multilateral, governmental, and non-governmental sectors have all produced institutional innovations whose work has been enhanced by the use of new technologies and techniques of documentation, as discussed in the sections that follow.

Mechanisms and Sources of Documentation Devoted to Syria

Documentation work can be initiated on multiple fronts across the international scene, including by multilateral and regional organizations, individual states, civil society actors with or without donor support, professional and citizen-journalists, and ordinary people. By now, Syria has been the subject of multiple fact-gathering exercises by internationally-mandated organizations. Besides a U.N. Commission of Inquiry devoted to Syria, an innovative new mechanism created by the U.N. General Assembly—the International, Impartial and Independent Mechanism (IIIM)—has been tasked with consolidating existing documentation with an eye towards supporting future criminal trials. A similar body is focused on assisting with domestic prosecutions of ISIL members in Iraq. The Syrian conflict has prompted the emergence of a new

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[50] *See generally* Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973) (comparing common and civil law evidentiary rules).
[51] *See, e.g.*, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised on the Status Conference on 10 June 2008, ¶¶ 59, 73 (June 13, 2008).

model of "privatized" investigations (in the sense of not being sanctioned by any sovereign entity rather than the sense of being profit-making) of captured regime and ISIL documents with a focus on linking horrific crimes to specific perpetrators. Within civil society, a broad array of Syrian groups are compiling and crowdsourcing information from various sources and using data visualization techniques to convey the horror of the conflict.

And yet, notwithstanding the emergence of a number of best practice protocols, these efforts are proceeding with little coordination, pursuant to different collection methodologies, without a clear sense of the end to which this information will be put or the evidentiary standards under which it will be evaluated, and—at times—at great risk to participants.[52] It remains to be seen whether these disparate documentation groups will be willing, and technologically able, to share their databases to create a truly universal evidentiary clearinghouse devoted to Syria.[53] All of these efforts are prompting, and benefiting from, innovations in human rights technology around data management, secure storage and communication, authentication, and digital forensics. This includes technologies to de-duplicate, code, and organize reams of data but also to make sense of such information at scale. The challenge will be to develop and/or deploy technological solutions to the myriad of problems posed by the sheer quantity of the documentation collected, described as an exercise of "looking for a needle in a pile of needles."[54] This section discusses many of these institutional and technological innovations in light of these emergent challenges.

Multilateral Documentation Efforts Devoted to Syria

Since the early 1990s, various subsidiary bodies of the United Nations—including the Secretary General, General Assembly, Security Council, High Commissioner for Human Rights, and Human Rights Council—have established fact-finding missions (FFMs), Panels of Experts (PoEs), and international commissions of inquiry (COIs) to investigate potential human rights violations and abuses around the world, including in the former Yugoslavia, in the Darfur region of Sudan, and now in the ongoing crisis in the Syrian Arab Republic. The difference between these various types of bodies is somewhat elusive. COIs generally include the appointment of three or more high profile "commissioners," who lead the effort with the support of professional staff and a Secretariat. The Office of the High Commissioner for Human Rights (OHCHR) often serves this function for bodies mandated by the Human Rights Council. FFMs tend to be composed of more technical personnel whereas a PoE often does not have an expansive support staff. Creating such a body to undertake documentation has become a common international response to atrocities. That said, there is no standardized threshold for the quantity or severity of violations that necessitates or generates a COI; mandates have ranged from investigating a single incident to monitoring ongoing governmental repression to tracking situations of full-scale armed conflict. Nor are such bodies governed by standard operating procedures or burdens of proof, although there are movements afoot to consolidate best practices in this regard.[55]

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[52] *See* Andras Vamos-Goldman, *The Importance of Professional Expertise in Gathering Evidence of Mass Atrocities*, JUST SECURITY (Oct. 27, 2017).
[53] *See* Josh Macey, Paul Strauch, Mitzi Steiner & Nathaniel Zelinsky, *A War Crimes "Wiki": The Need for an Open Database to Ensure Syrian Accountability*, YALE J. INT'L L. FORUM (Dec. 4, 2017) (arguing for the creation of a war crimes wiki to consolidate all evidence of war crimes compiled to date, which is siloed in different NGO archives).
[54] Hiatt, *supra* note 30.
[55] *See* Stephen Wilkinson, *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions*, Geneva Acad. of Int'l Humanitarian Law and Human Rights, available online at

COIs can be empowered to pursue a number of intersecting objectives: to document and report on human rights abuses and violations of international humanitarian and criminal law, to assess a state's capacity to appropriately respond to such violations, to endeavor to prevent abuses or mitigate their impact, to identify perpetrators, and to make recommendations aimed at promoting transitional justice and accountability.[56] More cynically, sometimes they are established or operate as a substitute for more robust accountability mechanisms, to forestall calls for justice, to further political agendas, or to muddy the evidentiary waters. For example, the International Independent Investigative Commission (IIIC) convened following the assassination of former Lebanese Prime Minister Rafiq Hariri came under criticism for being politically-motivated, relying upon biased sources, and utilizing weak investigative methodologies.[57]

Increasingly, COIs and other such bodies are considered waystations to more robust forms of criminal sanction[58] and are expected to contribute to accountability for violations and ensure that those responsible are brought to justice.[59] For example, the mandate for the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea states that the COI was to "investigate the systematic, widespread and grave violations of human rights in the Democratic People's Republic of Korea ... with a view to ensuring full accountability, in particular where these violations may amount to crimes against humanity."[60] This imperative of language of "full accountability" is also found in the mandates for the Fact-finding Mission to the Syrian Arab Republic and the Investigation Mission to Iraq, convened by the OHCHR in 2011 and 2014, respectively.[61] As such, they are being designed to be "interoperable" with both international and national accountability efforts.[62] Absent an assist from the Security Council, however, such bodies lack any judicial or coercive powers, so they cannot compel testimony or the submission of material evidence; nor can they operate without the consent of the target state. Rather, they must rely on the voluntary cooperation of states, witnesses, and those in possession of relevant information. Many have been denied access to the relevant conflict area, either by the government itself or due to security concerns.

That said, even where no tribunal is established, commissions of inquiry can serve other worthwhile purposes. At a minimum, they preserve the possibility of future accountability by protecting potential evidence from loss, degradation, or destruction, assuming they are empowered to hand over such evidence to prosecutorial authorities. They can also initiate analyses of the

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https://www.geneva-academy.ch/joomlatools-files/docman-files/Standards%20of%20Proof%20in%20Fact-Finding.pdf.

[56] *See* Larissa J. van den Herik, *An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law*, 13 CHINESE J. INT'L L. 507 (2014).

[57] *See* Melia Amal Bouhabib, *Power & Perception: The Special Tribunal for Lebanon*, 3 BERKELEY J. MIDDLE EASTERN & ISLAMIC L. 173, 178-85 (2010) (compiling criticism of the IIIC).

[58] *See generally* Micaela Frulli, *Fact-Finding or Paving the Road to Criminal Justice?: Some Reflections on United Nations Commissions of Inquiry*, 10(5) J. INT'L CRIM. JUST. 1323 (2012).

[59] *The UN Human Rights Council: Commissions of Inquiry Conference Brief*, Dec. 1, 2011, at 2.

[60] Situation of Human Rights in the Democratic People's Republic of Korea, U.N. Doc. A/HRC/RES/22/13, ¶ 5 (Apr. 9, 2013).

[61] *See, e.g.*, The Human Rights Situation in Iraq in Light of the Abuses Committed by the so-called Islamic State in Iraq and the Levant and Associated Groups, U.N. Doc. A/HRC/RES/S-22/1, ¶ 10 (Sept. 3, 2014).

[62] Rob Grace & Jill Coster Van Voorhout, *From Isolation to Interoperability: The Interaction of Monitoring, Reporting, and Fact-finding Missions and International Criminal Courts and Tribunals*, HARV. INST. GLOBAL JUSTICE, Working Paper (Dec. 4, 2014); David Mandel-Anthony, *Hardwiring Accountability for Mass Atrocities*, 11 DREXEL L. REV. 903 (2019).

information gathered with reference to the *chapeau* elements of international crimes as well as the responsibility of individual perpetrators. Beyond these contributions to prospective accountability processes, COIs can operate as a sort of roving truth commission, giving voice to victims, and elucidating patterns of violence and the structures of power that drove and sustained the conflict. In theory, they offer an impartial account of events and an external validation of abuses that might weed out misreporting and biases that can be present in the media, propaganda, and other partisan sources of information. In practice, however, empirical research suggests that their conclusions on contested events may be rejected by domestic supporters of a regime.[63] Finally, COIs can be designed to build a more united international coalition against a regime or persuade would-be spoilers to abandon their support for a government or armed group. States may find it increasingly difficult to resist more forceful multilateral responses in the face of clear and internationally-sanctioned evidence that an ally is committing crimes against humanity or other grave international offenses.

The Syrian Fact-Finding Mechanism

Turning to the Syrian context, and proceeding roughly chronologically, after the arrival of the Arab Spring in Syria provoked the regime crackdown, the U.N. Human Rights Council in April 2011 called upon the High Commissioner for Human Rights to "urgently dispatch a mission to the Syrian Arab Republic to investigate all alleged violations of international human rights law and to establish the facts and circumstances of such violations and of the crimes perpetrated, with a view to avoiding impunity and ensuring full accountability" and to report back to the next session of the Council.[64] Notwithstanding Terms of Reference calling upon the Syrian authorities to give the fifteen-member Fact Finding Mechanism (FFM) freedom of movement and access to sources of information and witnesses throughout Syria,[65] the FFM received virtually no cooperation from Syria when it came to access to the country (which is the case with many such bodies operating without the state's consent). Instead, the regime conveyed a series of *notes verbale* attesting to a number of reforms underway, complained of fabricated media reports and nefarious efforts to overthrow the regime, and responded in writing to questions posed by the FFM.[66] In September 2011, the FFM issued a report detailing the deterioration of the situation in Syria from the early protests through the commission of systematic disappearances, deprivations of liberty, murder, and torture.

The Syria Commission of Inquiry

As the situation moved from one marked by lethal attacks on unarmed protesters to the emergence of an organized armed opposition, the HRC upgraded its response by forming an International Independent Commission of Inquiry on Syria (COI) in August 2011. The latter has been renewed annually and continues to operate pursuant to a mandate

> to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may

[63] Shiri Krebs, *The Legalization of Truth in International Fact-Finding*, 18(1) CHICAGO J. INT'L L. UNBOUND (2017); Brendan Nyhan & Jason Reifler, *Displacing Misinformation About Events: An Experimental Test of Causal Corrections*, 2(1) J. EXPERIMENTAL POL. SCI. 81 (2015).
[64] U.N. Doc. A/HRC/S-16/1, ¶ 7 (Apr. 29, 2011).
[65] *See* OHCHR Fact-Finding Mission to Syria, *Terms of Reference*.
[66] Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic, U.N. Doc. No. A/HRC/18/53, at 3-4, 26-117 (Sept. 15, 2011) (indicating lack of response to requests for cooperation and reproducing *notes verbale*).

> amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable…[67]

The COI must be satisfied that it has "reasonable grounds to believe" an incident happened before making a finding.[68] When the COI was renewed in 2016, the HRC subtly enhanced its mandate to empower it to assist national prosecutions,[69] given that this is where cases are proceeding at the moment.[70]

The COI has had only minimal access to Syrian territory and was limited to closely supervised visits in Damascus and *environs*. As such, it has relied upon Skype calls into Syria and interviews with refugees, defectors, and other Syrians in the diaspora to conduct more penetrating and far-reaching inquiries. It also has reviewed secreted documents, social media posts, information from national authorities, satellite imagery, documentation from civil society organizations, and forensic and medical reports.[71] Not without controversy, the COI was somewhat hesitant to pursue all lines of inquiry. It will only accept first-hand information from direct witnesses and victims, which might hinder the ability to follow all potential leads.[72] That said, there were some indications that it was willing to accept second-hand information from the U.N. Supervisory Mission in Syria, UNSMIS, particularly with respect to May 25, 2012, El-Houleh massacre. The HRC authorized a special mission in June 2012 to "conduct a comprehensive, independent and unfettered special inquiry" on the massacre and "publicly identify those who appear responsible for these atrocities, and to preserve the evidence of crimes for possible future criminal prosecutions or a future justice process, with a view to hold to account those responsible."[73] The COI also allows for participant anonymity, which limits the ability to use these statements in a criminal process.

Since its inception, the COI has produced report after report—some broad-spectrum, some thematic, all harrowing—tracing the dramatic deterioration of the situation in Syria. In addition to describing the patterns of violence, the COI has provided a sealed list of the names of suspected perpetrators to the Office of the Prosecutor of the International Criminal Court and the U.N. High Commissioner for Human Rights. It continues to generate subsequent rosters of suspects. As

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[67] Situation of Human Rights in the Syrian Arab Republic, U.N. Doc. A/HRC/S-17/1, ¶ 13 (Aug. 22, 2011).

[68] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/37/72, 3 (Feb. 1, 2018) (setting forth methodology).

[69] The 2013 mandate authorized the COI to "identify those responsible *with a view of ensuring* that perpetrators … are held accountable." A/HRC/S-17/1, *supra* note 67, ¶ 13 (emphasis added). In 2016, the COI was empowered to "*support efforts to ensure* that perpetrators … are held accountable." Human Rights Council, The Human Rights Situation in the Syrian Arab Republic, U.N. Doc. A/HRC/RES/31/17, ¶ 4 (Apr. 8, 2016) (emphasis added).

[70] Human Rights Council, The Human Rights Situation in the Syrian Arab Republic, U.N. Doc. A/HRC/34/L.37, ¶ 2 (Mar. 20, 2017) (noting "the importance of the work of the Commission of Inquiry and the information it has collected in support of future accountability efforts").

[71] *See, e.g.*, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/21/50, at 11 (Aug. 10, 2012) (discussing satellite imagery of the El-Houleh massacre).

[72] *See* U.N. Human Rights Council, Independent International Commission of Inquiry on the Syrian Arab Republic, *About the Commission of Inquiry*, https://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/AboutCoI.aspx.

[73] Human Rights Council, The Deteriorating Situation of Human Rights in the Syrian Arab Republic, and the Recent Killings in El-Houleh, U.N. Doc. A/HRC/RES/S-19/1, ¶ 8 (June 4, 2012).

frustration with the Council mounted, members of the COI threatened to go public with its lists.[74] In one of its many reports, it noted:

> 140. The long-standing position of the Commission has been that its investigation methodology does not meet the normal requirements of due process, and consequently, alleged perpetrators of war crimes and crimes against humanity should not be named. After four years of intensive monitoring and the submission of four confidential lists of perpetrators, however, not to publish names at this juncture of the investigation would be to reinforce the impunity that the Commission was mandated to combat.
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> 141. The Commission deems that it should interpret its mandate in a way that is most conducive to the protection of the victims of the conflict and their right to the truth. It is the Commission's hope that putting alleged perpetrators on notice will serve to maximize the potential deterrent effect of the findings of the Commission and help to protect people at risk of abuse.[75]

So far, however, it has only shared these names with national prosecutorial authorities.

Since its inception, the COI has suffered from a bit of an identity crisis, with its staff segmenting themselves according to the two elements of its mandate: some have prioritized classic human rights documentation methods (with a focus on giving voice to victims and documenting the patterns of violence on a macro scale) whereas others have sought to pursue an inquiry more akin to a criminal investigation (with the aim of generating information that could inform indictments against individual perpetrators).[76] These two methodologies are not identical and are at times in tension with each other.[77] It is politically difficult to terminate such a body, and so the Syrian COI continues its work, slicing the information it has gathered in different ways and expanding its lens to cover elements of the crossover conflict in Iraq.[78] Although the COI remains functional, several commissioners have made noisy exits, including most recently Swiss Prosecutor Carla Del Ponte, who indicated upon her departure: "I am quitting this commission, which is not backed by any political will. … I have no power as long as the [UN] Security Council does nothing. There is no justice for Syria."[79]

The Chemical Weapons Investigatory Mechanisms

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[74] Somini Sengupta, *U.N. Panel Threatens to Name Those It Accuses of War Crimes in Syria*, N.Y. TIMES, Feb. 20, 2015.

[75] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/28/69 (Feb. 5, 2015).

[76] *See generally* David A. Kaye, *Human Rights Prosecutors? The United Nations High Commissioner for Human Rights, International Justice, and the Example of Syria* (U.C. Irvine School of Law Research Paper No. 2013-83), https://ssrn.com/abstract=2196550 (noting the different methodologies of human rights lawyers and international prosecutors).

[77] *See* Morten Bergsmo & William H. Willey, *Human Rights Professional and the Criminal Investigation and Prosecution of Core International Crimes*, *in* MANUAL ON HUMAN RIGHTS MONITORING: AN INTRODUCTION FOR HUMAN RIGHTS FIELD OFFICERS, Chap. 10 (Siri Skåre, Ingvild Burkey and Hege Mørk eds., 3d ed., 2008) *(3rd edn,* Norwegian Centre for Human Rights 2008).

[78] *See* The Independent Int'l Commission of Inquiry on the Syrian Arab Republic, *"They Came to Destroy": Isis Crimes Against the Yazidis*, U.N. Doc. A/HRC/32/CRP.2 (2016).

[79] Carla Del Ponte, *War Crimes Expert Quits UN Syria Inquiry*, BBC, Aug. 6, 2017.

Chemical weapons have been utilized in the Syrian war on a scale not seen since the Iran-Iraq War. Elements of the international community—including individual states, the United Nations, and the Organization for the Prohibition of Chemical Weapons (OPCW)—have launched several additional mandated entities in response to the utilization of chemical weapons in the Syrian battlespace.[80] The war-time use of all such substances is contrary to customary international law[81] but also to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction ("Chemical Weapons Convention"),[82] whose implementing body is the OPCW. Syria ratified this treaty on September 14, 2013, as part of a Russia-United States brokered deal to eliminate Syria's chemical weapons reserves.[83] Nonetheless, chemical weapons remained in use—the first confirmed use by a Chemical Weapons Convention signatory ever.

In 2014, the international community convened a FFM under the auspices of the OPCW,[84] but with blessings from the Security Council[85] and the grudging acquiescence of the Assad government. This entity has been tasked with an ongoing mandate to gather information about alleged chemical weapon use in Syria following the implementation of the Framework Agreement.[86] Although mission members were granted limited access to Syrian territory given the precarious security situation, they have been able to attend autopsies; collect bio-medical specimens; examine weapons fragments; interview medical professionals, victims, and witnesses; review open source information and satellite imagery; and collect soil and other environmental samples at or near sites where chemical weapon use was suspected. Among other incidents, the FFM confirmed, for example, the use of chlorine gas in various rebel-held areas in 2014; the use of sulfur mustard in Um-Housh (Aleppo Province) on September 16, 2016; and the aerial dissemination of the nerve agent sarin in rebel-held Khan Sheikhoun, Idlib Provence, on April 4, 2017. But, the Mission was not empowered to attribute responsibility for such incidents, and so its reports stop short of identifying which parties to the conflict orchestrated the attacks.

In the wake of new allegations that chemical weapons had been used in Syria in 2015, the Security Council tasked the Secretary-General and OPCW Director-General with creating an OPCW-United Nations Joint Investigative Mechanism (JIM). Resolution 2235 was unanimous, marking a rare display of unity in the Council when it comes to the situation in Syria.[87] The Council charged the JIM with identifying:

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[80] Those under the auspices of the OPCW are discussed here: https://www.opcw.org/media-centre/featured-topics/syria-and-opcw.

[81] INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL LAW STUDY, Rule 74 ("The use of chemical weapons is prohibited.").

[82] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 317.

[83] *See* Framework for Elimination of Syrian Chemical Weapons, Annex to the letter dated 19 September 2013 from the Permanent Representatives of the Russian Federation and the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. A/68/398 S/2013/565 (Sept. 24, 2013). This diplomatic achievement is discussed in chapter 3.

[84] *See* OPCW, Fact-Finding Mission, https://www.opcw.org/fact-finding-mission.

[85] S.C. Res. 2118, ¶¶ 7-8, U.N. Doc. S/RES/2118 (Sept. 27, 2013). *See, e.g.*, Executive Council, OPCW, *Reports of the OPCW Fact-Finding Mission in Syria*, EC-M-48/DEC.1 (Feb. 4, 2015).

[86] *See* OPCW, Summary Report of the Work of the OPCW Fact-Finding Mission in Syria Covering the Period from 3 to 31 May 2014, S/1191/2014, ¶ 1 (June 16, 2014).

[87] *See* S.C. Res. 2235, U.N. Doc. S/RES/2235 (Aug. 7, 2015).

> to the greatest extent feasible individuals, entities, groups, or governments who were perpetrators, organisers, sponsors or otherwise involved in the use of chemicals as weapons, including chlorine or any other toxic chemical…[88]

Because it enjoyed a Chapter VII provenance, the JIM had readier and expanded access to Syrian territory. Moreover, all states had U.N. Charter-based obligations to cooperate with the JIM in terms of information sharing and otherwise. Building upon the work of the OPCW FFM, the JIM identified "sufficient evidence" that multiple parties to the conflict have used chemical weapons upwards of 48 times. In its seventh and final report, for example, the JIM attributed responsibility for the use of sulfur-mustard gas in Um-Housh to ISIL and blamed the Syrian government for the sarin attack in Khan Sheikhoun, a conclusion that remained controversial. This attribution remained at the level of the party to the conflict rather than individual perpetrators.

The JIM marked one of the few initiatives that Russia allowed to move forward in the Security Council and a rare instance of multilateral cooperation. After the Security Council renewed the JIM once in 2016,[89] however, Russia vetoed two 2017 resolutions that would have extended its mandate for another year.[90] This brought the number of Russian vetoes in connection with Syria to ten since 2011, with four in 2017 alone. In withdrawing its support from this initiative, the Russian permanent representative claimed that the JIM was a "puppet" of the West that was drawing its conclusions without first-hand evidence.[91] It seems more likely, however, that Russia did not welcome the JIM's conclusions on Syrian regime responsibility.

The FFM and JIM had been working in parallel for several years. With the demise of the JIM, states parties to the OPCW in June 2018 voted to grant the OPCW itself the power to go beyond its technical mandate and attribute responsibility for chemical weapons attacks.[92] Incidentally, the British-led resolution within the OPCW came on the heels of the nerve agent attack on a former Russian spy and his daughter in England. As such, the OPW is also empowered to facilitate attribution of chemical weapons attacks worldwide. In Syria, this new Investigation & Identification Team (IIT) is focused on chemical weapon attacks confirmed by the FFM or left unaddressed by the JIM, as well as new incidents that had not received attention, such as the April 2018 attack in Douma involving chlorine.[93] In the face of a deadlock at the Security Council, these developments reflect a new trend of mandating institutions that would not normally contribute to international criminal justice efforts to do so. In this way, the classic verification function of the

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[88] *Id.* ¶ 5.

[89] S.C. Res. 2319, ¶ 1, U.N. Doc. S/RES/2319 (Nov. 17, 2016).

[90] *Security Council Fails to Renew Mandate of Joint Investigative Mechanism on Chemical Weapons Use in Syria, as Permanent Member Casts Veto*, U.N. Doc. SC/13040 (Oct. 24, 2017).

[91] *See Russia Vetoes U.S. Proposal To Extend UN Chemical-Weapons Inquiry In Syria*, RADIO FREE EUROPE, Nov. 17, 2017.

[92] OPCW, Decision Addressing the Threat from Chemical Weapons Use, C-SS-4/DEC.3, ¶ 10 (June 27, 2018) (deciding to put in place "arrangements to identify the perpetrators of the use of chemical weapons in the Syrian Arab Republic").

[93] Note by the Technical Secretariat, Interim Report of the OPCW Fact-Finding Mission in Syria Regarding the Incident of Alleged Use of Toxic Chemicals as a Weapon in Douma, Syria Arab Republic, on 7 April 2018, S/1645/2018 (July 6, 2018); *Syria War: What we Know about Douma 'Chemical Attack'*, BBC, July 10, 2018.

OPCW has been "operationalized" by virtue of its arrangement with the IIIM.[94] This evolution from a more technical role to a more political one remains controversial.[95]

Discrete Investigations

Another more discrete investigation was undertaken by a U.N. Board of Inquiry established by the U.N. Secretary-General. It was mandated to examine the incident involving the bombing of a U.N.-Syrian Arab Red Crescent relief operation heading to Urum al-Kubra, Syria, on September 19, 2016.[96] Several draft Security Council resolutions made mention of the Board. One, put forward by a number of states, urged all parties concerned to "cooperate fully with the Board and [underlined] the importance of completing the investigation without delay with a view to hold the perpetrators accountable."[97] However, these supportive remarks were met with tit-for-tat P-5 vetoes and so the Board's work never received formal blessing from the Council. The full report was not released, but an executive summary concluded that the convoy was destroyed by an air attack (which only the Coalition, Russia, or Syria could have mounted) and was most likely attributed to pro-government forces.[98]

The International, Impartial and Independent Mechanism

Prompted by paralysis at the Security Council, and eager to take the work of the COI a step further, the U.N. General Assembly stepped forward with a new quasi-prosecutorial initiative.[99] It created, by way of a resolution that did not enjoy consensus, an International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM).[100] The concept was first proposed by Liechtenstein and Qatar, in consultation with civil society organizations. In introducing the measure, Liechtenstein stated:

> The situation in Syria is the defining crisis of our time, both with respect to human suffering and to the inability of the Security Council to take effective action to address the unfolding humanitarian tragedy. Nothing illustrates the political paralysis in the Council more starkly than the repeated use of the veto in connection with moderate resolutions that pursue the primary goal of alleviating the suffering of the civilian population in the country. … Since the referral of the situation to the International Criminal Court was vetoed in the Council more than two years ago, there has been no serious effort in the Council to ensure accountability and end impunity. It is therefore imperative that the General Assembly steps in and enables

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[94] Matt Cannock, *International Justice Trends in Microcosm at the OPCW—Three Observations as States Adopt 'Attribution Mechanism,'* AMNESTY INTERNATIONAL (July 27, 2018).

[95] Mirko Sossai, *Identifying Perpetrators of Chemical Attacks in Syria*, 17 INT'L CRIM. L. J. 211, 218-19 (2019).

[96] Summary by the Secretary-General of the Report of the United Nations Headquarters Board of Inquiry into the Incident involving a Relief Operation to Urum al-Kubra, Syrian Arab Republic, on 19 September 2016, U.N. Doc. S/2016/1093, Annex (Dec. 21, 2016).

[97] Andorra et al.: draft resolution, U.N. Doc. S/2016/846, pmbl (Oct. 8, 2016); *see also* Russian Federation: draft resolution, U.N. Doc. S/2016/847, pmbl (Oct. 8, 2016).

[98] Summary by the Secretary-General of the Report of the United Nations Headquarters Board of Inquiry into the Incident Involving A Relief Operation to Urem al-Kubra, Syrian Arab Republic, on 19 September 2016, ¶¶ 27, 36, 37.

[99] The UNGA debates are available here: U.N. GAOR, 71st Sess., 66th plen. mtg., at 20, U.N. Doc. A/71/PV.66 (Dec. 21, 2016) [hereinafter *IIIM Explanations of Vote*].

[100] G.A. Res. 71/248, ¶ 4, U.N. Doc. A/Res/71/248 (Dec. 21, 2016). *See generally* Alex Whiting; *An Investigation Mechanism for Syria: The General Assembly Steps into the Breach*, 15(2) J. INT'L CRIM. JUSTICE 231 (May 1, 2017).

> the international community to at least take one decisive step forward in this respect: to prepare files that can serve as the basis for criminal proceedings in a court or tribunal that may in the future be able to exercise jurisdiction.[101]

The vote was 105 in favor, 15 against (Algeria, Belarus, Bolivia, Burundi, China, Cuba, Democratic People's Republic of Korea, Iran, Kyrgyzstan, Nicaragua, Russian Federation, South Sudan, Syrian Arab Republic, Venezuela, and Zimbabwe), and 52 abstentions.[102] The Human Rights Council welcomed the creation of the IIIM and encouraged states cooperation.[103]

The IIIM is meant to operate partially as a clearinghouse of information produced over the years by other entities—including the COI, civil society actors, and governments—but also as a proto-investigative team gathering its own information to fill gaps in the evidentiary record and prepare files for future prosecutions before whichever court—international, regional, hybrid, or domestic—may eventually assert jurisdiction. Specifically, the General Assembly empowered the IIIM to:

> collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.[104]

The IIIM's inaugural head, French jurist Catherine Marchi-Uhel, aims to be in a position to assist a "multiplication of judicial channels,"[105] also described as the "mystery of the ultimate forum."[106] In this incarnation, the IIIM has been described as a "prosecutor without a tribunal."[107] Although it can follow the evidence where it leads, the IIIM has some limitations on its ability to share its holdings with judicial processes that do not adhere to fair trial standards or that allow the death penalty, which might limit its ability to contribute to localized trials in the region. Specifically, the Terms of Reference state: "The Mechanism shall share its information only with those jurisdictions that respect international human rights law and standards, including the right to a fair trial, and where the application of the death penalty would not apply for the offences under consideration."[108]

Marking an enhancement of the work of the COI, the IIIM will collect information to a criminal law standard using investigative methodologies, with careful attention to preserving the chain of custody and ensuring the authenticity of the amassed materials. In this way, it sees itself as bridging the divide between traditional fact-finding mechanisms and criminal trials. As

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[101] PERMANENT MISSION OF THE PRINCIPALITY OF LIECHTENSTEIN TO THE UNITED NATION: STATEMENT BY H.E. AMBASSADOR CHRISTIAN WENAWESER (Dec. 9, 2016).
[102] IIIM Explanations of Vote, *supra* note 98, at 29-30.
[103] A/HRC/34/L.37, *supra* note 70, ¶ 40.
[104] A/Res/71/248, *supra* note 99, at ¶ 4.
[105] Frédéric Burnand, *Catherine Marchi-Uhel: A Strong Signal To Those Committing Crimes In Syria*, JUSTICEINFO.NET (Jan. 25, 2019).
[106] Mandel-Anthony, *supra* note 62, at 926.
[107] James Reinl, *Could Syria's 'Prosecutor without a Tribunal' Work?*, AL JAZEERA, May 31, 2017.
[108] Report of the Secretary-General, Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, U.N. Doc. No. A/71/755, Annex, ¶ 14 (Jan. 19, 2017).

indicated by its mandate and Terms of Reference, the IIIM will prioritize the collection of linkage evidence tending to connect individual perpetrators to the crimes committed under all modes of liability, rather than gathering ever more crime-base data. That said, it will also collect information that is both inculpatory and exculpatory.[109] The OPCW's IIT and the IIIM have signed a Memorandum of Understanding indicating their intent to collaborate.[110]

Although an international tribunal has proven to be a bridge too far when it comes to Syria, national prosecutorial authorities—and particularly their dedicated war crimes units such as the European Union's Judicial Cooperation Unit[111]—are already proving to be avid consumers of the IIIM's work. The IIIM has plugged into the European Genocide Network and other institutions focused on facilitating the greater integration of European penal processes. Indeed, the IIIM is poised to launch Joint Investigative Teams (JITs) with states, especially within the European Union. To be sure, prosecutors are not likely to adopt IIIM work product in whole cloth, but its analytical contributions will facilitate local efforts when suspects are within reach. In particular, the IIIM can undertake the sort of deep historical and cultural research that is necessary to launch a successful war crimes prosecution but that might be difficult for multiple national prosecutors to undertake. This would include gathering proof of the *chapeau* (or circumstantial) elements of war crimes and crimes against humanity, such as the existence of an armed conflict or a widespread and systematic attack against a civilian population.

From the start, Russia objected to this initiative as *ultra vires*, arguing that the U.N. Charter does not authorize the General Assembly to create anything akin to a prosecutorial body, particularly in the absence of Syrian consent. Not surprisingly, Syria echoed these remarks and also condemned the proposal as an infringement on its national sovereignty. Several states that are normally critical of the Security Council suddenly expressed concerns that the Assembly was encroaching upon the Council's mandate. Other states—including some that voted for the IIIM resolution—raised a number of disparate critiques. These include the lack of transparency in the process by which the resolution was drafted and tabled; confusion over the proposed terms of reference and specifically how the new mechanism would interact with the COI and the ICC; and the risk that a prosecution-oriented Mechanism might threaten efforts to negotiate peace among the warring parties. Also deemed problematic was the Mechanism's dependence, at least initially, on voluntary financial contributions (to the tune of $14 million *per annum*) in lieu of dedicated U.N. funding. In addition to forcing the Mechanism's staff to engage in constant fundraising, an excessive reliance on any one donor might undermine the IIIM's impartiality, as noted by several delegates during the debates. Finally, Argentina—which has been on the receiving end of universal jurisdiction prosecutions in Europe—argued that the IIIM should not support prosecutions on the basis of universal jurisdiction *in absentia*. Argentina argued that "the mechanism should not cooperate with national courts, which may attempt to exercise criminal jurisdiction without sufficient ties to alleged events" and "should not be instrumentalized to enable trial in absentia based on questionably claims regarding universal jurisdiction."

Unlike the COI, the IIIM's work will not necessarily be made public (although it will issue periodic reports). In the IIIM's reports to the General Assembly, Marchi-Uhel has outlined her

[109] *Id.* ¶ 12.
[110] OPCW, Progress on the Implementation of Decision C-SS-4/DEC.3 on Addressing the Threat from Chemical Weapon Use, EC-89/DG.29, ¶ 6 (Oct. 4, 2018).
[111] *See* Council Decision of 13 June 2002 setting up a European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, 2002/494/JHA; Eurojust, Genocide Network.

proposed methodology and investigative strategy, updated states on her progress, and identified both opportunities and challenges.[112] The IIIM has opened several casefiles, put a state-of-the-art case management system in place, expanded its holdings to over a million records, built cooperative relationships with a number of interlocutors, and responded to requests from more than a dozen national prosecutors.[113] To date, the Syrian government has not responded to the IIIM's overtures.

Although influential U.N. actors insist that the two bodies are complementary to each other, it may eventually become necessary to more formally deconflict the COI's and IIIM's activities and mandates. The COI was reluctant to share its information with NGOs, but it has entered into an information-sharing agreement with the IIIM given their shared U.N. provenance. In fact, the establishment of the IIIM may provide cover for an eventual winding down of the COI, That said, the IIIM will not fully duplicate the activities of the COI, which is devoted to public reporting of its findings.

Many civil society documentation groups have expressed support for the IIIM, although there was some initial criticism that they were not adequately consulted in the drafting of the Mechanism's Terms of Reference. Responding to these concerns, the IIIM and donor governments made efforts to increase communication with upstream civil society organizations. This resulted in the Mechanism initiating a contributor survey and signing a "protocol of cooperation"[114] in Lausanne, Switzerland, with more than twenty Syrian civil society organizations with an eye towards "outlin[ing] a set of overarching principles" to guide future institutional engagement and "ensure mutual understanding regarding opportunities for collaboration, for fulfilling common goals of ensuring justice, accountability, and redress for victims of war crimes committed in Syria."[115] The IIIM now meets regularly in Lausanne with Syrian civil society organizations with funding from the Dutch and the Swiss. To avoid the problems faced by the International Criminal Court, the IIIM has also generated an information governance strategy on data procurement and integrity in conversation with domestic war crimes units.[116] Not all documentation organizations are willing to share their information with the IIIM, or with any criminal investigators for that matter.

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[112] *See. e.g.*, Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, U.N. Doc. A/72/764 (Feb. 28, 2018); Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, U.N. Doc. A/73/295 (Aug. 3, 2018).

[113] *See* Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, U.N. Doc. A/73/741 (Feb. 13, 2019).

[114] Protocol of Cooperation between the International, Independent and Impartial Mechanism and Syrian Civil Society Organizations participating in the Lausanne Platform, https://iiim.un.org/wp-content/uploads/2018/04/Protocol_IIIM_-_Syrian_NGOs_English.pdf.

[115] Violations Documentation Center, *Syrian Civil Society Organisations Sign Protocol of Cooperation with IIIM* (Apr. 5, 2015), http://vdc-sy.net/syrian-civil-society-organisations-sign-protocol-cooperation-iiim/. *See also* SJAC, *Responding to Misconceptions Regarding the IIIM* (Aug. 2, 2017) (noting areas of cooperation between civil society groups and the IIIM and the ability of the IIIM to enter into agreements with outside sources).

[116] Catherine Marchi-Uhel, Head of the IIIM, *Accountability for the Most Serious Crimes Committed in Syria*, Stanford University (Feb. 12, 2018), https://handacenter.stanford.edu/events/accountability-most-serious-crimes-committed-syria [hereinafter *Marchi-Uhel Stanford Speech*].

The IIIM has indicated that its intention is not to try to vacuum up all documentation from all sources, which might overwhelm the IIIM but also threaten smaller documentation efforts whose holdings are akin to their intellectual property. Rather, it will endeavor to operate more as a hub between multiple stakeholders to index or catalogue what potential evidence is out there and cross-reference it to the information it gathers directly in a gap-filling role. Every piece of evidence will be given a unique alphanumeric identifier (a "hash"), which will allow anyone to locate it from the main catalog and identify the "cleanest" version of any particular image or video (e.g., the version devoid of logos, tampering, watermarks, etc.). Cryptographic hashing is like a digital pixel fingerprint that will reveal whether there have been any changes to, or corruption of, the information and metadata and also help establish the chain of custody. This cataloging and hashing system also reflects the fact that the IIIM might be overwhelmed and paralyzed if it did try to physically collect the entire corpus of available evidence.

The IIIM is working with the Connected Civil Society project of Benetech, a non-profit that helps to develop software solutions to shared social problems, and other technology experts to build a state-of-the art knowledge management system from scratch to house its collection and to apply machine learning to organize and analyze open source data generated from the Syrian conflict, particularly the thousands of hours of digital video footage. This initiative is inspired by the recognition that it will be impossible to manually analyze all 5 million YouTube Syrian videos, for example. One goal of this partnership is to deduplicate the millions of images and videos of the conflict through automated image matching and evaluation software and other forms of machine learning first developed to detect child pornography online.

Although the IIIM will study the research generated by other organizations, its principals plan to undertake their own analytical work and even issue proto-indictments. Developing conflict, cultural, and historical expertise (captured within white papers, chronologies, maps, charts, and other refined outputs) will enable the IIIM to support national and international prosecutions in ways that go beyond the sharing of raw evidence. National war crimes units may not have the capacity to develop such detailed conflict-specific resources, which will enhance their structural and targeted investigations.

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States have begun the process of funding the Mechanism, and there is a movement afoot—led by Liechtenstein—to ensure U.N.-assessed funding by 2020,[117] as originally contemplated.

[117] Human Rights Council, Situation of Human Rights in the Syrian Arab Republic, U.N. Doc. A/RES/72/191, ¶ 35 (Jan. 23, 2018) (calling upon the Secretary-General to "include the necessary funding for the Mechanism in his next budget proposal").

The European Union and the United States, for example, have provided both financial and diplomatic support to this new initiative. So far, however, some of the usual funders for justice initiatives have been less generous than expected, in part due to other pressing humanitarian commitments in Syria.[118] Civil society actors also organized a crowd-funding campaign for the Mechanism. It is hoped that national governments will be willing to share information with the IIIM (including potentially from their intelligence agencies), given its United Nations origins. Without a Security Council mandate, however, the IIIM will be dependent on voluntary cooperation in all aspects of its work. Syria has alleged that the IIIM cannot be independent in light of its dependence on voluntary contributions from states that have sponsored terrorism in Syria and Iraq.

Although this marks the first time the General Assembly has created such a body, U.N. member states have been involved in the past in consolidating norms around accountability and building justice institutions.[119] That said, the IIIM is significantly more operational and coercive than any COI previously created except perhaps the IIIC for Lebanon, which enjoyed a Security Council provenance. Nonetheless, it remains the case that "[o]nly the Security Council has the authority under the UN Charter to establish tribunals with compulsory legal authority over individuals or states" in light of Article 103 of the U.N. Charter.[120] The HRC recently adopted the IIIM model for Myanmar.[121]

United Nations Investigative Team to Promote Accountability for Da'esh/ISIL Crimes

The newest innovation in this space has been created in neighboring Iraq, although its work will have implications for Syria given ISIL's depredations in both countries. In August 2017, following the liberation of Mosul, the Government of Iraq requested assistance from the Security Council in ensuring accountability for international crimes committed by the Islamic State/Da'esh. The letter indicated a preference for criminal proceedings under Iraqi law out of respect for its national sovereignty.[122] The Security Council complied on the basis of a resolution drafted by the United Kingdom and asked the Secretary-General to establish an "Investigative Team" to:

> support domestic efforts to hold ISIL (Da'esh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Da'esh) in Iraq, to the highest possible standards … to ensure the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request…[123]

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[118] Teri Schultz, *EU States Pledge Aid Money for Syria, but Fail to Fund War Crimes Investigation*, DEUTSCHE WELLE, Apr. 5, 2017.

[119] *See* Beth Van Schaack, *The General Assembly & Accountability for International Crimes*, JUST SECURITY (Feb. 17, 2017).

[120] Whiting, *supra* note 99, at 232.

[121] Situation of Human Rights of Rohingya Muslims and other Minorities in Myanmar, U.N. Doc. A/HRC/RES/39/2, ¶ 22 (Oct. 3, 2018).

[122] Letter dated 14 August 2017 from the Chargé d'affaires a.i. of the Permanent Mission of Iraq to the United Nations addressed to the President of the Security Council, U.N. Doc. S/710/2017 (Aug. 16, 2017).

[123] S.C. Res. 2379, ¶ 2, U.N. Doc. S/Res/2379 (Sep. 21, 2017) (asking the Secretary-General to establish an "Investigative Team," headed by a Special Adviser, to: "support domestic efforts to hold ISIL (Da'esh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Da'esh) in Iraq, to the highest possible standards").

The United Nations Investigative Team to Promote Accountability for Da'esh/ISIL Crimes (UNITAD), as it has now been called, is headed by international criminal law expert Karim Asad Ahmad Khan QC. In keeping with the principle of positive complementarity, it will include Iraqi investigative judges and other criminal law experts "on an equal footing alongside international experts"[124] and offer opportunities for capacity building.

In some respects, UNITAD's mandate is more limited than the IIIM's; in other respects, it has fewer constraints on its ability to make its holdings useful. The resolution has a singular focus on crimes committed by ISIL, with no mandate to look into crimes associated with other actors, including governmental forces, at the federal or regional level (e.g., Kurdistan Regional forces); militia, such as the Popular Mobilization Forces; or international forces for that matter. The resolution suggests that while Iraqi domestic proceedings will be the *primary* recipient of UNITAD's work, it may also contribute to potential trials elsewhere. That said, Iraq will be in a position to dictate "any other uses" of the evidence generated "on a case by case basis."[125] The Terms of Reference of the Investigative Team mandate cooperation on the part of the relevant Iraqi authorities, whose justice deficits are legion[126] (although some derogations of fair trial rights might be allowed in an armed conflict situation).[127] To be sure, having Baghdad's consent will be crucial to the Investigative Team's ability to operate in the country. However, it comes at the expense of an impartial investigation that follows the evidence and has resulted in investigations that focus on a single armed group, albeit a particularly heinous one. Like the IIIM, UNITAD is ultimately only an investigative body; it has no prosecutorial powers or formal ability to level formal charges or influence the criminal justice process writ large. If the authorities in Iraq are unable to host genuine trials, and the authorities in Europe are unwilling to take back their nationals, there is a risk that UNITAD will find no ready outlet for its investigations.

U.N. Supervisory Mission in Syria

Notwithstanding these many multilateral mechanisms devoted to Syria, one additional option has not been fully employed. Peacekeeping missions are increasingly empowered to contribute to justice initiatives, including engaging in the documentation of abuses in their areas of operation. For example, the Democratic Republic of Congo's peacekeeping mission, MONUSCO, has a memorandum of understanding with the International Criminal Court enabling it to collect information, documents, and interviews in keeping with its Security Council mandate.[128] Peacekeeping missions are generally deployed with the consent of the host state, which has not been forthcoming when it comes to Syria. Besides a small unit that has been overseeing the Golan Heights since Israel's 1974 occupation, the only U.N. mission dedicated to the Syrian conflict, UNSMIS, was not granted any sort of documentation role at first.[129] It was,

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[124] *Id.* ¶ 5.
[125] *Id*. ("with the relevant Iraqi authorities as the primary intended recipient as specified in the Terms of Reference, and with any other uses to be determined in agreement with the Government of Iraq on a case by case basis.").
[126] Alice Wickens, *GCIJ's submission on Iraq*, GENEVA INTERNATIONAL CENTRE FOR JUSTICE (June 2017).
[127] Nehal Bhuta, *Joint Series on International Law and Armed Conflict: Fair Trial Guarantees in Armed Conflict*, EJIL: *Talk!* (Sept. 22, 2016).
[128] *See* S.C. Res. 1565, ¶ 5(g), U.N. Doc. S/RES/1565 (Oct. 1, 2004) (empowering the mission to investigate abuses to put an end to impunity).
[129] The United Nations has also had a small mission overseeing the Golan Heights since 1974 following Israel's occupation. *See* U.N. Disengagement Observer Force (UNDOF), Mandate, https://undof.unmissions.org/mandate; S.C. Res. 350, ¶ 3, U.N. Doc. S/RES/350 (May 31, 1974).

however, asked by the Council to investigate the May 2012 El-Houleh massacre; its report was never released publicly but seems to have informed the COI's special inquiry.[130]

So far, without the political will to pursue justice, these various bodies have proved to be an accountability dead-end when it comes to multilateral initiatives, although they have advanced some domestic accountability processes as discussed in chapter 7. Nor have they been effective at peeling Russian support from the Assad regime, particularly as Russian actors became more and more implicated in the violence. Rather, Russia has been impervious to such unassailable and overwhelming proof of the government's international crimes. All told, the full impact of these multilateral initiatives remains to be seen.

Documentation by Individual States

Individual states can launch their own documentation exercises to collect qualitatively different information than other fact-gathering entities (like COIs and human rights organizations). States have access to unique collection tools and disciplines, including intelligence assets and covert capabilities, and can draw upon diversified inter-agency expertise, such as law enforcement elements—who are adept at criminal investigatory techniques and individuating responsibility—and military analysts—who can undertake battlefield forensics, assemble a chain of command, and recreate an order of battle. In this way, any state-led study could be complementary to, but not duplicative of, the work of other fact-finding bodies. Individual states can leverage their bilateral relationships to negotiate better access to victims and defectors scattered around the globe. Lebanon, for example, has not always allowed NGOs easy access to refugees within its borders, many of whom are dispersed in urban areas rather than concentrated in traditional refugee camps; Turkey and Jordan have been more open to civil society investigations. As compared with classic human rights advocates, state actors may be more comfortable engaging with defectors and even insiders in an effort to understand the way a target regime functions. That said, any engagement with these latter populations risks interactions with perpetrators and may raise particular sensitivities with the host state. Jordan, for example, reportedly eventually restricted access to Syrian defectors, ostensibly for their own protection.

Satellite Imagery & Other Intelligence

For a long time, satellite and other forms of remote sensing imagery or geospatial data were sources of proof uniquely associated with governments' intelligence gathering, military planning, and other sovereign purposes. The utility of such information for international justice purposes first emerged with respect to the crimes committed in the former Yugoslavia. In a closed session of the U.N. Security Council, for example, the U.S. government endeavored to mobilize international action by displaying imagery demonstrating that Bosnian Serbs were likely digging and then attempting to conceal mass graves. It later shared such evidence with prosecutors before the International Criminal Tribunal for the Former Yugoslavia (ICTY),[131] which deemed such information admissible.[132] Similar imagery has been used to locate the estimated 9,000 people still missing from the conflicts borne of the dissolution of the former Yugoslavia in the 1990s, to

[130] Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/20/CRP.1 (June 26, 2012).
[131] Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Judgment, ¶¶ 222-238, 250-58 (Aug. 2, 2001) (discussing aerial images showing the creation of mass graves that were later disturbed).
[132] *See generally* Ana Cristina Núñez, *Admissibility of Remote Sensing Evidence Before International and Regional Tribunals*, AMNESTY INTERNATIONAL (2012) (noting that aerial images have been admitted by tribunals, but usually accompanied by conventional corroborating evidence).

support war crimes and crimes against humanity prosecutions before the ICC,[133] to document violations of international humanitarian law committed by Ethiopia during attacks on and the occupation of Eritrea in an arbitration between the two countries,[134] and to prove the destruction of villages in the conflict in Georgia. Before the ICC, the Prosecution in partnership with SITU Research created an interactive digital platform that combined geospatial information with historic satellite imagery and other site documentation showing the destruction of the mosques and mausoleums in question. Because al-Mahdi offered a guilty plea, the defense did not challenge the admissibility of any of this evidence.[135] Sharing such sensitive national intelligence data has a political dimension, and governments will not always be responsive to requests for such assistance if there are countervailing concerns, including the risk that intelligence gathering means and methods will be revealed or compromised.[136]

The United States and other states have, on occasion, declassified such information for diplomatic, strategic messaging, or other purposes. In the Syrian context, the Obama Administration posted satellite imagery of attacks on civilians on the now-defunct www.humanrights.gov, and Ambassador Robert Ford set up a dedicated Facebook page. The United States also released information showing chemical weapon use in Syria in connection with air strikes on the airfield from which the chemical weapon attack was thought to have been launched and declassified satellite imagery information showing that bodies are being burned in a crematorium to cover up mass killings in Syria. France also declassified intelligence on Syria gas attacks.

On the multilateral level, in 2003, the United Nations created the U.N. Operational Satellite Applications Programme (UNOSAT) as part of the U.N. Institute for Training and Research to help monitor humanitarian disasters and promote human rights and sustainable development. It has monitored the human suffering and damage wrought by the war in Syria, including Assad's claimed destruction of chemical weapons facilities, harm to civilians caused by airstrikes by the regime and outside powers, and damage to the civilian infrastructure.[137]

Empirical Research

In addition to conventional intelligence gathering, states can also conduct empirical studies into the nature and extent of the violence. Drawing on both qualitative and quantitative research methods (such as population-based survey instruments), such a study could seek to produce results that enjoy statistical significance; richer anecdotal portraits of victims or massacre events; a mapping of atrocity sites (including clandestine detention centers); or individual dossiers using classic penal investigative techniques. As an important precedent, the United States launched a

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[133] *See, e.g.,* Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15-171, Judgment and Sentence (Sept. 27, 2016).

[134] American Association for the Advancement of Science, Ethiopian Occupation of the Border Region of Eritrea Case Study Summary (2002), https://www.aaas.org/page/ethiopian-occupation-border-region-eritrea-case-study-summary.

[135] *See* http://icc-mali.situplatform.com/; Liz Stinson, *The Hague Convicts a Tomb-Destroying Extremist with Smart Design*, WIRED, Aug. 25, 2016.

[136] Ulric Shannon, *Blue Eyes: Surveillance Satellites and UN Peacekeeping*, *in* COMMERCIAL SATELLITE IMAGERY AND UNITED NATIONS PEACEKEEPING: A VIEW FROM ABOVE 179, 186 (James F. Keeley & Rob Huebert eds., 2004) (noting that the ICTY was "a passive consumer of satellite imagery" that relied "on whatever contribution of data western governments [were] prepared to make" and did not receive U.S. images taken during a 1995 Croatian bombing offensive or Serb mass murders in Brçko).

[137] *Syria's Suffering Revealed in Satellite Images*, BBC, Mar. 18, 2015 (displaying before-and-after UNITAR imagery of Homs, Deir Ezzor, and elsewhere).

field investigation in 2004 into the situation in Darfur, Sudan: the Darfur Atrocities Documentation Project (ADP).[138] The ADP was staffed by international investigators from the now defunct Coalition for International Justice tasked with undertaking semi-structured interviews with a random sampling of displaced Darfuris in neighboring Chad. (ADP investigators had no direct access in Darfur itself). Various non-governmental organizations (including the American Bar Association) and the State Department's Bureau of Intelligence and Research (INR) developed the survey instrument.[139] The Darfur study sought to determine specifically whether a genocide was underway, a finding that hinged on identifying the existence of genocidal intent—the decisive element of the crime of genocide—at either the individual or state policy level.

The ADP approached the question with a degree of analytical rigor missing from prior genocide determinations, including those emerging from elsewhere in the U.S. government and a COI launched by the Security Council. The survey results ultimately undergirded the Bush administration's announcement of the commission of genocide in Darfur—one of the first time a government formally accused another of attempting to eliminate a protected group in whole or in part. It was hoped that the genocide determination would "act as a spur to the international community to take immediate and forceful actions to respond to ongoing atrocities."[140] Undertaking the study also responded to very focused advocacy by the Christian evangelical community in the United States and student groups, such as STAND and the Save Darfur Coalition, which took a special interest in Darfur. Ultimately, the ICC indicted then-President Omar Al-Bashir of Sudan for genocide and other international crimes, although he remains at large. Besides support to the African Union Mission in Sudan (AMIS), the international community did not otherwise mobilize in any concrete way to stop the genocide underway. It remains to be seen whether the ADP will feature in any prosecution that goes forward before the ICC or elsewhere.

More recently, the U.S. government conducted a similar survey exercise with Rohingya Muslims who have fled Myanmar into neighboring Bangladesh.[141] Although the results of the survey have been posted online, so far no genocide determination has been forthcoming, although discussions are apparently underway.[142] These results coincide with the authorization by the ICC of a preliminary examination into the atrocities based upon Bangladesh's ratification of the Rome Statute.[143] The existence and results of other such empirical studies undertaken by the United States have not been publicly released.

Obviously, it would have been difficult for the majority of individual states to launch any investigative mission within Syria given the complications posed by physical access and security. The United States, for example, suspended diplomatic operations, relocated staff, and closed its

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[138] *See* Samuel Totten, *The US Investigation into the Darfur Crisis and the US Government's Determination of Genocide*, 1:1 GENOCIDE STUDIES & PREVENTION, AN INT'L J. 57 (2006). *See also* Rebecca Hamilton, *Inside Colin Powell's Decision to Declare Genocide in Darfur*, THE ATLANTIC, Aug. 17, 2011.
[139] GENOCIDE IN DARFUR: INVESTIGATING THE ATROCITIES IN THE SUDAN 241 (Samuel Totten & Eric Markusen eds., 2006) (reproducing survey instrument).
[140] Declassified Information Memo, Genocide and Darfur (June 25, 2004), https://cdn.theatlantic.com/static/mt/assets/international/Darfur%20genocide%20advice.pdf.
[141] U.S. State Department, *Documentation of Atrocities in Northern Rakhine State*, Aug. 2018, https://reliefweb.int/sites/reliefweb.int/files/resources/286307.pdf.
[142] *See* Beth Van Schaack, *Why What's Happening to the Rohingya is Genocide*, JUST SECURITY, Oct. 1, 2018.
[143] Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," Case No. ICC-RoC46(3)-01/18-37 (Sept. 6, 2018).

embassy in 2012 as the violence escalated. Even if a state were committed to researching violations remotely, any such inquiry would need to address a number of obstacles in order for it to be viable and effective. Negotiating access to neighboring states and refugee encampments might overtax already stretched diplomatic resources. Such a study would need to account for the impact of the conflict on neighboring countries upon which any investigation would be dependent. Over and above the refugee crisis on its borders, Turkey has been over-extended as the primary platform for the international community's activities in Syria and—as a matter of policy—only granted the UN's COI access to refugee camps. Jordan, by contrast, insisted on even less visible engagement. That said, the COI was able to operate remotely, using Skype and other mechanisms to collect information from inside the country, and so governments could presumably do the same.

Authentication of Information

In an interesting development, the government of Qatar through the British law firm Carter-Ruck commissioned a team of international criminal lawyers and investigators to confirm the authenticity and credibility of the photographs exfiltrated by Caesar, who had been tasked with photographing victims after their death.[144] The Carter-Ruck team undertook a digital forensic examination of the imagery to ensure that it had not been altered. Experts also examined the injuries portrayed in an effort to determine whether or not it could be determined if they were the result of physical assault, engagement in combat, or other forms of injury. The results suggested that at least 20% of the photographs depicted evidence of inflicted trauma—strangulation, electrocution, beating, tramline injuries, or burning—and 42% showed emaciation, suggesting the deceased were starved while in detention.[145] In an interview with *Foreign Affairs* magazine, President Assad rejected this study on the grounds that it had been funded by Qatar, which has supported the armed opposition, and the report was released days before peace talks scheduled for Geneva in an effort to influence those negotiations.[146] The U.S. Federal Bureau of Investigations' Digital Evidence Laboratory later undertook its own authenticity exercise of the Caesar files at the behest of the U.S. government in 2014-15 and agreed that the photographs were indeed genuine.[147] Human Rights Watch and Physicians for Human Rights reached similar conclusions.[148]

States may achieve a number of benefits by launching their own investigations, including establishing a direct and trusted source of information about what is happening on the ground. Having more accurate and complete insights into the commission of abuses can inform policy and allow states to adjust their diplomatic efforts and public stance toward the conflict and the parties involved. It can also enrich targeted sanctions regimes, sharpen public and strategic messaging about responsible units and individuals, serve as the basis for a naming and shaming campaign, enable states to populate immigration watch lists, and inform criminal indictments. Such an information gathering exercise would also provide a basis for ratcheting up the rhetoric about the extent and nature of crimes being committed and enhance the ability to build a united diplomatic front against an abhorrent regime or armed group. Finally, in addition to having foreign policy

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[144] *A Report into the Credibility of Certain Evidence with regard to Torture and Execution of Persons Incarcerated by the Current Syrian Regime*, http://i2.cdn.turner.com/cnn/2014/images/01/20/syria-board.of.inquiry.doha.jan.2014.18.1.version.x.to.print.pdf.
[145] *Id.*
[146] *Syria's President Speaks: A Conversation with Bashar al-Assad*, FOREIGN AFFAIRS, Mar./Apr. 2015.
[147] Stav Ziv, *Syria Torture Photos 'Depict Real People and Events': FBI Report*, NEWSWEEK, July 22, 2015.
[148] HUMAN RIGHTS WATCH, SYRIA: STORIES BEHIND PHOTOS OF KILLED DETAINEES (Dec. 16, 2015) (quoting researcher as saying "'We have meticulously verified dozens of stories, and we are confident the Caesar photographs present authentic—and damning—evidence of crimes against humanity in Syria.'").

relevance, such a study could respond to, and help shape, the attitudes of a nation's citizens toward a particular conflict. All that said, such exercises can be condemned or rejected as politicized if they originate in a state that is seen as favoring one side or another in the conflict.

Civil Society Documentation

The conflict in Syria has given rise to a veritable cottage industry of international and domestic groups undertaking human rights documentation and gathering user-generated content using different data collection and analysis method. These include in no particular order the Syrian Observatory for Human Rights, the Syrian Center for Legal Research and Studies, the Syrian Justice and Accountability Centre (SJAC), the Syrian Association of Missing and Conscience Detainees (SAFMCD), the Commission for International Justice & Accountability, the Syrian Violations Documentation Center (VDC), Airwars, Bell¿ngcat, the Damascus Center for Human Rights Studies, Syrians for Truth and Justice (STJ), the Syrian Archive, the Syrian Center for Statistics and Research, the Syrian Shuhada Martyr Database, Adalmaz: Justice for the Oppressed, and the Syrian Network for Human Rights (SNHR). In addition, the major human rights organizations—Human Rights Watch and Amnesty International—routinely partner with more local organizations to cover the conflict. HRW, for example, relies upon the statistics gathered by the SNHR in its excellent reporting on the Syrian conflict.

Some of these smaller organizations are primarily Syrian-run, whereas others were stood up by outsiders, often by persons with substantive expertise in other mass atrocity situations or in academic centers, such as I Am Syria. Likewise, some operate in exile, whereas others remain undercover in the country, at great personal risk to their members. The Violations Documentation Center in Syria, for instance, has staff in all governorates and most cities per its website. There is always the risk that documentation initiatives can become politicized, for example when groups focus on one set of perpetrators or push one narrative and seek to suppress others.[149] While many of these Syrian groups operate independently with no political affiliation, others are aligned with the opposition, including a coalition of such organizations, the TJ Coordinating Group. As a counterpart to the pro-Assad Syrian Electronic Army, the Hackers of the Syrian Revolution have defaced government websites and published the names and particulars of regime insiders. Coordination among these organizations remains a challenge, especially because all civil society groups are not necessarily on the same "side" of the conflict, which complicates cooperation. In addition, they are often in competition for the same funding.

Members of the international community have been instrumental in standing up and supporting (with seed and core funding) many members of this civil society community. The European Union, for example, has adopted a Union-wide policy of underwriting organizations that undertake open source and digital investigations.[150] The challenge to donors, including sovereign entities, is to capacitate such organizations without giving the appearance of influencing their work. In light of this risk, some organizations (such as the Syrian Archive) will generally not take government funding for fear of jeopardizing their independence. In addition, donors tend to fund individualized initiatives, rather than projects that prioritize coordination. This creates competition among organizations that could be working together toward shared ends.

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[149] *See generally,* Don A. Habibi, *Human Rights and Politicized Human Rights: A Utilitarian Critique*, 6 J. HUM. RTS. 3 (2007).
[150] *See* European Parliament, Addressing Human Rights Violations in the Context of War Crimes, and Crimes Against Humanity, Including Genocide, Doc. No. P8_TA(2017)0288, ¶47 (July 4, 2017).

In the Syria context, the United States helped to spur the establishment of the SJAC. The organization was conceptualized by the U.S. State Department after Secretary of State Hillary Rodham Clinton announced the creation of an accountability mechanism at the second meeting of the Friends of the Syrian People (FOSP) in Istanbul in April 2012.[151] The United States hosted a donors' conference in Rabat, Morocco, in September 2012 to raise multilateral funds and in-kind support for the effort. Another NGO, the International Research and Exchange Board (IREX), was chosen as implementing partner to launch the new Center. The SJAC received funding from the United States (through the Bureau of Democracy, Human Rights, and Labor (DRL)) as well as a number of other states. In addition to conducting its own documentation and promoting victim-centered justice, the SJAC also operated as a pass-through to fund additional worthy projects.

As originally conceptualized, the SJAC was to serve as an umbrella organization and clearinghouse of information generated by other sources. As it turned out, other documentation groups were reluctant to give up their information to a perceived "competitor," had made certain promises around confidentiality and informed consent that prevented such information sharing, or had security concerns about releasing their holdings. SJAC personnel also resisted this role, although the organization has many data source partners that share information on the basis of mutual understanding and cooperation. As a result, this coordination role has fallen to other institutions. The SJAC hopes to eventually use its documentation repository to help inform the design and creation of a whole range of transitional justice processes, including the identification of missing persons and property restitution.

For a period of time, SJAC helped fund the document extraction and analysis work of the Commission on International Justice and Accountability (CIJA).[152] CIJA is staffed by veterans of international courts and military intelligence units who are focused less on amassing information about the Syrian crime base and more on collecting linkage evidence to the highest criminal law standard to ensure its maximum utility.[153] In the words of its director, Bill Wiley, it starts "with the organization, not the incidents" and focuses on the 3 Cs: "the structure of command, control and communication."[154] It produces prosecution-ready files, proto-indictments, and evidentiary briefs on responsible individuals and units, particular crimes, and the structure and functioning of the Assad regime writ large. CIJA later turned its attention to collecting information about ISIL.

CIJA has trained a number of Syrian investigators who have succeeded in exfiltrating documentary evidence (including copies of government records, hard drives and SD cards, and mobile phones) from Syria by—among other means—following opposition forces into liberated areas and seizing regime records found in abandoned government buildings, such as police stations and prisons. Members of the opposition agreed not to destroy documents they encounter, but rather to allow investigators to first collect what they deem relevant. Seizing what amounts to found or

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[151] *See* U.S. Department of State, *Syria Justice & Accountability Center*, Fact Sheet (Feb. 20, 2013).

[152] *See generally* Melinda Rankin, *The Future of International Criminal Evidence in New Wars? The Evolution of the Commission for International Justice and Accountability (CIJA)*, 20(3) J. GENOCIDE RES. 392 (2018) (discussing origins and operations of CIJA) [hereinafter, *Rankin, The Future*].

[153] *See generally* Melinda Rankin, *Investigating Crimes against Humanity in Syria and Iraq: The Commission for International Justice and Accountability*, 9(4) GLOBAL RESPONSIBILITY TO PROTECT 395 (2017) (recounting history of CIJA).

[154] Marlise Simons, *Investigators in Syria Seek Paper Trails that Could Prove War Crimes*, N.Y. TIMES, Oct. 7, 2014.

abandoned documents in accessible or liberated territories also avoids the inevitable destruction, whether accidental or intentional, of important evidence of the commission of international crimes.

In addition to these hard copy collections, CIJA also takes witness statements to supplement the documentary record and captures open source information, particularly emanating from ISIL. CIJA lawyers prepare legal analyses and international criminal law briefs of relevance to the wars in Syria and Iraq to assist with national level prosecutions and help jump start accountability processes until there is an international or hybrid court capable of exercising jurisdiction. All documents are subjected to an information management process involving digital scanning using sophisticated OCR software, Bates-stamping, and extensive coding for ease of sorting and analysis. In what will become an interesting model for public-private partnership in this space, CIJA plans to convey its entire holdings to the IIIM once the databases can be integrated. In the absence of an ICC mandate, most of CIJA's work has focused on supporting domestic law enforcement and legal cases in Europe and the United States. For example, a CIJA investigator submitted an expert declaration detailing the regime's security operations against journalists in a case in a U.S. court under the Foreign Sovereign Immunities Act against the state of Syria and involving the death of a U.S. war correspondent, Maria Colvin.[155] CIJA documents have also appeared in numerous cases proceeding in European courts that were triggered by the work of Syrian human rights groups,[156] such as Syrian Centre for Media and Freedom of Expression and Syrian Center for Legal Research and Studies.

The CIJA model of "entrepreneurial justice"[157] is not without its detractors. As a point of some criticism, CIJA focuses primarily on regime and ISIL crimes because it maintains that it is dependent on members of the opposition in order to operate within Syria. Not being under any obligation to investigate all sides of the conflict, as a prosecutor ordinarily would be, CIJA has left the documentation of opposition crimes to other collectors on the theory that CIJA should do something even if they cannot do everything. There is also the question of to whom is CIJA—and other NGOs for that matter—accountable? An obvious answer is its donors, which tend to be sovereign entities that are reliant on CIJA to help identify, prosecute, exclude, or deport potential perpetrators in their midst. At times, states are motivated by a countering violent extremism (CVE) imperative as opposed to the human rights framework. In another point of departure from other NGOs, CIJA does not engage in advocacy, which is a principle activity of traditional human rights groups. Indeed, CIJA has been in stealth mode for years, even keeping the location of its European headquarters a secret for security reasons and relying on the occasional media exposé as the only public information about the organization in circulation. As compared to other civil society organizations, CIJA is less integrated within the Syrian NGO community, whose members see themselves as accountable to Syrian communities and victims. In addition, there is the problem of

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[155] Expert Report of Ewan Brown, *Cathleen Colvin et al., v. Syrian Arab Republic*, Case 1:16-cv-01423-ABJ (D.D.C. 2018).

[156] *See, e.g.,* Prosecutor v. Harun P., Oberlandesgerichte München [OLG München] [Higher State Court Munich] July 15, 2015, Urteil 7 St 7/14 (4), (Ger.) http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2015-N-13419.

[157] Michelle Burgis-Kasthala, *Entrepreneurial Justice: Syria, the Commission for International Justice & Accountability and the Renewal of International Criminal Justice*, 30 EUR. J. INT'L L. (forthcoming 2020) (defining entrepreneurial justice as "entail[ing] the identification of a gap or weakness in existing (usually public) accountability fora and the creation of a new organisation and/or approach that seeks to address (at least part of) this gap.").

the privatization of international criminal investigations given CIJA's lack of any formal sovereign or multilateral mandate.[158]

CIJA's methods also fall outside the comfort zone of other human rights actors engaged in documentation. CIJA personnel argue that their risk profile is more conducive to conducting this work in country as compared to traditional human rights organizations or to U.N. entities and member states that are beholden to the non-intervention norm. Although some observers would argue that it has essentially stolen sovereign documents, CIJA considers itself to be holding these in trust for the Syrian people.[159] Most established human rights organizations are squeamish about such methods and will not generally take custody of records without the state's consent. As compared with other human rights groups, CIJA is also more willing to speak with defectors and insiders, who may themselves have participated in abuses. It can be expected that defense counsel will challenge the legality of these collection processes (especially if done in breach of Syrian law) and the admissibility of the results when prosecutors seek to enter any documents into the record. That said, this is perhaps an argument better raised by Syria than any particular defendant whose rights will not necessarily have been violated during the collection process in a way that would trigger the exclusionary rule.[160] So far, domestic courts have admitted these files without incident.

At one point, DRL (the U.S. State Department's human rights bureau), decided that CIJA's funding should not be continued, not without some controversy. There was speculation that this decision was due in part to concerns about CIJA's methods and its principal focus on criminal accountability, but it also perhaps reflected a concession by the Obama Administration toward the Assad regime to lay the groundwork for a more united front against ISIL.[161] European states, which are benefiting from CIJA's holdings, continue to fund the organization. Later, the Office of Global Criminal Justice resumed funding CIJA out of funds appropriated by Congress to advance accountability.

Individuals working with many of these documentation centers are in grave personal danger at any given moment. For example, VDC began in June 2011 as a clandestine project of the Syrian Centre for Media and Freedom of Expression (SCM) to document instances of arbitrary detention, disappearances, summary execution, political arrests, the persecution of journalists, torture, and other abuses through a network of activists and researchers located around the country with an eye towards providing information for foreign media coverage and international organizations. It became an independent entity after the Syrian Intelligence raided the offices of the SCM in February 2012 and arrested 14 journalists and human rights lawyers, including Mazen Darwish, a well-known human rights defender. Darwish was finally released in 2015 after being

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[158] Canada, *Subcommittee on International Human Rights Committee*, 42nd Parliament (Nov. 22, 2016) (question by Cheryl Hardcastle) ("We do know in the international community that some people have criticized the privatizing of international criminal investigations."), https://openparliament.ca/committees/international-human-rights/42-1/33/william-wiley-1/?singlepage=1.

[159] In prior situations, particularly in the region, regime documents have been seized and never returned. *See, e.g.*, Bruce P. Montgomery, *Saddam Hussein's Records of Atrocity: Seizure, Removal, and Restitution*, 75 THE AMERICAN ARCHIVIST 326 (2012).

[160] *See* Natalia Krapiva, *The United Nations Mechanism on Syria: Will the Syrian Crimes Evidence Be Admissible in European Courts?*, 107 CAL. L. REV. 1101 (2019) (noting that evidence obtained in violation of law or through improper methods, including rights to privacy, may be deemed inadmissible within some European systems).

[161] Colum Lynch, *Exclusive: Washington Cuts Funds for Investigating Bashar al-Assad's War Crimes*, FOREIGN POLICY, Nov. 3, 2014.

charged with "publicizing terrorist acts."[162] Several prominent members of SCM remain missing. Like many documentation centers, VDC has contributed to cases in Europe involving events in Syria.[163] Darwish, for example, has filed a complaint in Germany against Syria's Air Force chief, Jamil Hassan, alleging his responsibility for the torture and sexual violence committed within Syria's detention centers. This led to the issuance of an arrest warrant against Hassan—the most senior regime official indicted to date. VDC has also helped to concretize the scale of the violence by providing datasets for statistical analysis by academics.[164]

NGOs working in country, such as those profiled above, have the advantage of sharing sources of proof with organizations and authorities that are not able to undertake direct collection exercises. A reliance upon intermediaries to prove international crimes is not without its challenges and drawbacks, however. In the early days of the ICC, the Office of the Prosecutor (OTP), for example, outsourced much of its investigative work to NGOs in the field. This over-reliance on intermediaries to source and liaise with witnesses gave rise to allegations that witnesses were being paid to give testimony or were otherwise unreliable.[165] As a result, the Court promulgated Guidelines for Intermediaries to help regulate the involvement of outside entities in its criminal investigations.[166] Intermediaries will be essential to accountability efforts given their proximity to crime scenes and ability to interact with victims. It is essential that they undertake their work with care so as not to jeopardize future accountability exercises.

The Efforts of Ordinary People

The ubiquity of the smartphone has enabled ordinary citizens to become human rights documentarians. Throughout the conflict, Syrians have uploaded millions of photographs and videos purporting to show the commission of international crimes. These efforts are often informal and conscience-driven. *The Raqqa Diaries* offer a poignant example. These began as a series of radio broadcasts from ISIL's *de facto* capital in Syria depicting the harsh reality of life within the would-be caliphate. The horror in Raqqa also inspired the creation of another NGO, Raqqa is Being Slaughtered Silently (RBSS)—that similarly documented the occupation of Raqqa and the depravity of ISIL through photographs and videos smuggled out of the country to advocates living in exile. At one point, RBSS—which is depicted in the film *City of Ghosts*—was virtually the only source of information about events transpiring in Raqqa.

Unfortunately, although such endeavors have an immediacy and authenticity to them, ordinary people are not well-versed in international criminal law doctrine or investigative strategies and so often record details of atrocities without capturing equally valuable linkage evidence (such as vehicles used in attacks or the directionality of shelling). NGOs are increasingly creating training materials to help citizen documentarians ensure that their photographs and videos achieve maximum utility in any criminal prosecution or transitional justice process.[167]

In addition to ordinary people wielding cell phones, defectors and insiders can be significant sources of information. Mention has already been made of the "Caesar" files—

[162] HUMAN RIGHTS WATCH, SYRIA: MAZEN DARWISH RELEASED (Aug. 17, 2015).
[163] *See* Trial International, *Make Way for Justice #4: Momentum Towards Accountability* (2018).
[164] Debarti Guha-Sapir et al., *Patterns of Civilian and Child Deaths Due to War-Related Violence in Syria: A Comparative Analysis from the Violation Documentation Center Dataset, 2011-2016*, THE LANCET, Dec. 6, 2017.
[165] *See* Caroline Buisman, *Delegating Investigations: Lessons to be Learned from the* Lubanga *Judgment*, 11(3) NORTHWESTERN J. INT'L HUM. RTS. 30 (2013).
[166] INT'L CRIMINAL COURT, CODE OF CONDUCT FOR INTERMEDIARIES (Mar. 2014).
[167] *See, e.g.*, WITNESS, VIDEO AS EVIDENCE FIELD GUIDE, https://vae.witness.org/video-as-evidencefield-guide/.

undoubtedly the most famous and consequential example of an ordinary person doing extraordinary documentation work. In many cases, the photographs were of sufficient resolution that they could be subjected to facial recognition software and the victims' cause of death inferred.[168] The Syrian Association for Missing and Conscience Detainees[169] originally posted the entire collection online so that people whose loved ones had disappeared could search for and identify the victims and potentially gain some closure.[170] This approach generated some controversy given the privacy rights of victims and the risk of traumatization to family members.[171] Other Syrian NGOs, such as the Syrian Network of Human Rights, notified the families if they were able to identify the victims.[172] The Caesar photos have inspired several legal cases around the world, as detailed in chapter 7. For example, a Spanish citizen recognized her brother among the trove of photographs and initiated a criminal investigation in Spain under that country's international crimes legislation. Nine officers in the intelligence and security services were named under seal.[173] The case ultimately failed on standing grounds.

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Like Caesar, the White Helmets—also known as the Syrian Civil Defense forces—have become inadvertent documentarians.[174] As neutral first responders, they often arrive in the immediate aftermath of an attack when physical evidence remains fresh and unmolested.[175] White

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[168] Syrian Network for Human Rights, *Analytical Study About the Leaked Pictures of Torture Victims in Syrian Military Hospitals: "The Photographed Holocaust"* 4-5 (Oct. 15, 2015) [hereinafter *SNHR Analytical Study*].
[169] The Syrian Association for Missing and Conscience Detainees, https://www.safmcd.com/.
[170] SNHR Analytical Study, *supra* note 167, at 4.
[171] SJAC, *The Publication of Victims' Photographs Online Jeopardizes Security and Accountability in Syria*, Mar. 26, 2015.
[172] SNHR Analytical Study, *supra* note 167, at 5.
[173] Adam Entous, *A Photo of her Brother's Corpse Popped up on her Phone. Now Syrian Officials could be put on Trial for War Crimes*, WASH. POST (Feb. 2, 2017) (discussing Spanish case).
[174] https://www.whitehelmets.org/en. Netflix produced a documentary, *The White Helmets*, about these rescue workers.
[175] *See* U.C. BERKELEY HUMAN RIGHTS CENTER, FIRST RESPONDERS: AN INTERNATIONAL WORKSHOP ON COLLECTING AND ANALYZING EVIDENCE OF INTERNATIONAL CRIMES (Sept. 2014).

Helmet volunteers have testified before the Security Council and in capitals,[176] and elsewhere and provided photographs and videos of the aftermath of attacks that have helped to shed light on chemical weapon use.[177] They have also described so-called "double taps," whereby the Syrian Air Force return minutes after an initial attack to target first responders.[178] The Syria Campaign, an advocacy group that works to humanize the conflict and keep it in the public consciousness, has accused Russia of spreading disinformation about humanitarian workers in order to cover up its complicity in war crimes in Syria.[179]

New Technology & Techniques in Human Rights Documentation & Analysis

New technologies and documentation techniques have revolutionized human rights documentation and reporting.[180] Indeed, the ICC has already issued an arrest warrant based upon information collected from social media platforms.[181] These new means of collection offer both opportunities and challenges when it comes to promoting accountability. While many organizations remain in "preservation" mode, others are increasingly using new software tools to help sift through and prioritize their holdings. The SJAC and the Syrian Archive, for example, hold over 3 million pieces of potential evidence between them. Only about a fraction of these have been analyzed, and many may be duplicates, irrelevant, unhelpful, or fakes. Indeed, the Syrian government has been accused of falsifying or manufacturing information.[182] Technologists at organizations like Benetech are working to develop tools to expedite and mechanize processes of collection, verification, prioritization, and analysis. This will enable NGOs to compare data and avoid duplication of efforts if they hold copies of the same material. Eventually, however, there can be no doubt that this digital triage will need to be followed by manual analysis by experts to maximize the utility of information gathered for the whole range of transitional justice processes.

As an example, the Syrian Archive began as an offshoot of the Tactical Technology Collective[183] with the simple goal of providing a safe information repository for people monitoring peaceful protests in Syria. It now works to support citizen documentarians through the use and dissemination of open source tools and replicable methodologies for collecting, authenticating, and preserving user-generated visual documentation.[184] It maintains public databases of information on a range of international crimes being committed in Syria, including chemical and cluster munition attacks, disappearances, and airstrikes. Each video is given a unique hash value or fingerprint to help with de-duplication, geo-location, and authentication.[185] The Archive is also

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[176] In an "Arria" formula briefing in June 2015 on the impact of barrel bombs, Raed Saleh of the White Helmets testified before the Security Council. *See* Raed Saleh, https://diary.thesyriacampaign.org/as-a-patriotic-syrian-i-never-imagined-i-would-do-this/.

[177] Pamela Falk, *U.N. Security Council to Meet over Alleged Chemical Attack in Syria*, CBS NEWS, Apr. 9, 2018.

[178] Saleh, *supra* note 175.

[179] The Syria Campaign, *Killing the Truth: How Russia is Fueling a Disinformation Campaign to Cover Up War Crimes in Syria*, http://thesyriacampaign.org/wp-content/uploads/2017/12/KillingtheTruth.pdf.

[180] Eric Reidy, *Technology Exposed Syrian War Crimes Over and Over. Was it for nothing?*, TechReview (Oct. 19, 2019).

[181] The arrest warrant of Mahmoud Mustafa Busayf in the Libyan situation involves videos of executions found on social media websites. *Prosecutor v. Al-Werfalli*, Case No. ICC-01-11-01/17-2, Public Warrant of Arrest, ¶¶ 11-22 (Aug. 15, 2017).

[182] *Regime Wages War of Documents on Syrians*, OPENDEMOCRACY, Apr. 1, 2017.

[183] TACTICAL TECHNOLOGY, https://tacticaltech.org/.

[184] Research Methodology—Syrian Archive, https://syrianarchive.org/en/tools_methods/methodology/.

[185] Forensic Protection, Douglas Carner, *Detecting and Preventing File Tampering*, http://forensicprotection.com/Education_Authenticate.html.

using machine learning with a purpose-built program developed by VFRAME to identify munitions.[186] In addition to supporting future transitional justice efforts, the Archive also aims to contribute to humanitarian response planning, legal compliance, the protection of civilians, and the creation of a digital memory of the conflict.[187] In the words of one of its founders, Hadi Al-Khatib, the Syrian Archive is making history in two senses: it is both doing something new and also preserving information about the conflict that can be used by journalists, historians, and lawyers in the future to understand the causes and consequences of the conflict.[188] The Archive has partnered with U.C. Berkeley's new Human Rights Investigations Lab and Amnesty International's Digital Verification Corps to harness student energy around the conflict and train the next generation of human rights advocates.[189]

Another emergent human rights technique involves the application of statistical methods to the enormous caches of data being produced by the eight-year Syrian conflict.[190] The OHCHR commissioned the San Francisco-based Human Rights and Data Analysis Group (HRDAG) to conduct a series of statistical analyses[191] of the killings in Syrian based upon aggregations of data from four other civil society organizations: the Syrian Center for Statistics and Research, the Syrian Violations Documentation Centre, the Syrian Network for Human Rights, and the Syrian Observatory for Human Rights (which declined to share data for 2014). To conduct this study, HRDAG—which has pioneered the statistical evaluation of human rights data—either scraped the websites of these organizations or received data directly from them.[192] HRDAG also included data received by the United Nations from the Syrian government, which covered the period from March 2011 to March 2012 (the government refused to provide data for 2013 or 2014).[193] By verifying, collating, and de-duplicating records from these various sources, HRDAG identified 191,368 unique casualties in the period in question, which only includes data where it was possible to identify the name of the victim coupled with the date and place of death.[194] HRDAG acknowledges that many deaths remained undocumented and that its conclusions suffer from selection and reporting biases as well as gaps in the documentary record.[195] Eventually, the OHCHR[196] and many other monitoring groups[197] stopped collecting casualty figures because they could not verify

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[186] VFRAME: Visual Forensics and Metadata Extraction, https://ahprojects.com/vframe/.

[187] https://syrianarchive.org/en/about.

[188] Hadi Al Khatib, Stanford University (Feb. 13, 2018).

[189] *See* Anna Banchik et al., *Chemical Strikes on Al-Lataminah* (Oct.-Dec. 2017) (analyzing open source visual content regarding attacks in March 2017).

[190] *See generally* Langford M. Fukuda-Parr S., *The Turn to Metrics*, 30 NORDIC J. HUM. RTS 222 (2012); T. LANDMAN & E. CARVALHO, MEASURING HUMAN RIGHTS (2010).

[191] Megan Price, Anita Gohdes & Patrick Ball, *Updated Statistical Analysis of Documentation of Killings in the Syrian Arab Republic* (Aug. 2014).

[192] *Id.* at 19.

[193] *Id*. at 1.

[194] *Id*. 85% were male; combatant status was not assessed for lack of information. *Id*. at 1-2.

[195] *Id*. at 6. *See generally* Meghan Price & Patrick Ball, *Big Data, Selection Bias, and the Statistical Patterns of Mortality in Conflict*, 34 SAIS REV. INT'L AFFAIRS 9, 10 (2014) (noting that in the human rights field, researchers must proceed with incomplete data).

[196] Abby Ohlheiser, *The U.N. Has Stopped Counting the Deaths in Syria*, THE ATLANTIC, Jan. 7, 2014.

[197] Megan Specia, *How Syria's Death Toll is Lost in the Fog of War*, N.Y. TIMES, Apr. 13, 2018. The last official count set the number of people killed at 400,000, but this preceded the siege of Aleppo and other major operations. *Id*. The Syrian Observatory puts the number at over 500,000. *Syrian Observatory Says War has Killed more than Half a Million*, REUTERS, Mar. 12, 2018.

sources of information (mainly NGOs in the region) used to produce its death toll estimates. Regardless, the casualty data—even if incomplete—tell a story of a humanitarian catastrophe.

Bell¿ngcat has undertaken sophisticated open-source investigations to confirm the existence of chemical weapon attacks, opine upon their origins, and counter disinformation campaigns blaming the opposition.[198] These reports often triangulate the information gathered by local documentation groups, such as the VDC and the SNHR, with that of other purveyors of information, such as the White Helmets or the Syrian American Medical Society, alongside YouTube videos and other anonymous sources.[199] These digital artifacts can help recreate events and identify perpetrators through geo-location, munitions and remnants analysis, and the analysis of cylinder remnants and vehicles. Human rights organizations have developed verification laboratories to help ensure the authenticity of citizen media documentation and certify the absence of manipulation or tampering.

Individuals in Syria who are collecting information are risking arrest and death, and a number of groups have lost members to these twin hazards.[200] Additional organizations have been established to help citizen documentarians operate as securely and effectively as possible, so that their efforts bear fruit and unavoidable risks are not undertaken in vain.[201] For example, *Videre est Credere* ("To See is To Believe") has created covert cameras that can be worn to capture human rights violations and corruption. Rather than simply disseminating this technology, *Videre* works closely with advocates to train them to use these tools safely and effectively.[202] Similarly, eyeWitness, which is affiliated with the International Bar Association, has created a smartphone application that helps users structure the gathering of evidence of atrocity crimes.[203] The app creates a digital fingerprint that renders the data uneditable. The information assembled using the app is automatically uploaded into a secure evidence vault, which creates a certifiable chain of custody. The platform also allows for verification and analysis by international lawyers with an eye towards its enhancing utility in accountability processes.[204] Physicians for Human Rights has created MediCapt, a similar mobile solution that helps convert a standardized medical intake form into potential forensic documentation to secure evidence of rape and other forms of sexual assault on an encrypted and high fidelity digital platform. A secure mobile camera facilitates the preservation of evidence of physical injuries, and a mapping feature tracks trends.[205] With all these

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[198] *See, e.g.*, Bell¿ngcat, *Chemical Weapons and Absurdity: The Disinformation Campaign Against the White Helmets* (Dec. 18, 2018).

[199] *See, e.g.*, Bell¿ngcat, *Open Source Survey of Alleged Chemical Attacks in Douma on 7th April 2018*, Apr. 11, 2018.

[200] International Media Support, *Human Rights Organizations Call on Syrian Government to Implement UN Resolution* (Nov. 20, 2014), https://www.mediasupport.org/human-rights-organisations-call-on-syrian-government-to-implement-the-un-resolution/ (discussing campaign for the release of human rights defenders detained for covering the war in Syria).

[201] *See* SalamaTech, https://en.salamatech.org/about-the-project/ (protecting Syrian civil society organizations' access to the internet).

[202] *See* David James Smith, *Videre: The Secretive Group on a Mission to Film Human-Rights Abuses*, WIRED, Aug. 29, 2013. Security First also provides comprehensive physical and digital security training to NGOs. https://secfirst.org/training.html. One of the co-founders also helped to found *Videre*.

[203] *See* Mark S. Ellis, *Shifting the Paradigm—Bringing to Justice Those Who Commit Human Rights Atrocities*, 47 CASE W. RES. J. INT'L L. 265 (2015) (discussing the app's origins).

[204] EYE WITNESS PROJECT, http://www.eyewitnessproject.org/.

[205] Physicians for Human Rights, *PHR's Mobile App MediCapt Puts Cutting Edge Technology in the Service of Preventing Sexual Violence*, https://phr.org/issues/sexual-violence/medicapt-innovation-2/.

tools, it is hoped that much of this evidence will be considered self-authenticating such that the source will not need to testify (let alone be identified).[206]

Witness is another capacity-building organization that trains human rights defenders to use video effectively to expose injustices and maximize the potential for their footage to be used in a court of law. Witness's Media Lab curates stories developed from this footage to raise awareness of human rights crises.[207] The Institute for International Criminal Investigations (IICI) trains investigators in the best practices of such investigations with an eye towards doing no harm.[208] IICI will be launching a new program in Syria in partnership with the Center for Justice & Accountability, a human rights organization, with money from the U.S. State Department. Because of the high security risks, many of these organizations have not tried or been able to operate systematically in Syria.

The escalating privatization of satellites and the increased availability of other forms of remote sensing (such as unmanned or remotely-piloted aircraft/drones)[209] means that governments no longer have a monopoly on such investigative tools and sources of proof.[210] Indeed, the largest suppliers of satellite imagery are now private entities. In an early initiative, George Clooney and John Prendergast—working through the Not on Our Watch and Enough Project nonprofits and with DigitalGlobe, a major satellite imaging company—launched the Satellite Sentinel Project in 2010 order to track troop build-ups, looting and razed villages, blockaded humanitarian aid, and other atrocities in Sudan, South Sudan, and elsewhere in Central Africa for detection, deterrence, and documentation purposes.[211] The project was eventually shuttered, however, when its deterrence impact could not be ensured and it became clear that the international community was not going to respond to such revelations.[212]

Other human rights organizations are attempting to salvage the utility of satellite imagery for human rights purposes in Syria and elsewhere, although this potentiality has not been fully tapped.[213] For example, Amnesty International has forged a partnership with the Geospatial Technologies and Human Rights Project of the American Association for the Advancement of Science (AAAS) and the Standby Volunteer Task Force Satellite Team (SBTF), an online volunteer community established in 2010 at the International Conference of Crisis Mapping to

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[206] Hamilton, *supra* note 2, at 55; *id*. at 45 ("'There is a valid legal argument to make that the app itself *is* the witness'") (quoting Wendy Betts, Program Director, eyeWitness to Atrocities).

[207] Witness: See it, Film It, Change It, https://witness.org/our-work/.

[208] INSTITUTE FOR INTERNATIONAL CRIMINAL INVESTIGATIONS, https://iici.global/.

[209] Monica Grady, *Private Companies are Launching a New Space Race—Here's What to Expect*, THE CONVERSATION, Oct. 3, 2017.

[210] James Walker, *Remote Sensing and Mass Graves Detection 101*, MEDIUM (Feb. 27, 2017); Ben Yunmo Wang, Nathanial A. Raymond, Gabrielle Gould and Isaac Baker, *Problems from Hell, Solution in the Heavens?: Identifying Obstacles and Opportunities for Employing Geospatial Technologies to Document and Mitigate Mass Atrocities*, 2(4) STABILITY: INT'L J. SECURITY & DEV'T 1 (2013) (exploring "operational feasibility, data reliability, and legal admissibility" of satellite imagery in international criminal law).

[211] SATELLITE SENTINEL PROJECT, http://www.satsentinel.org/documenting-the-crisis. *See* Yunmo, *supra* note 209, at 3; Ian Daly, *Can You Spot the Human-Rights Abuses Here?*, WIRED, Mar. 19, 2013 (featuring the initiative).

[212] Interview, John Prendergast, Stanford University, Mar. 1, 2017. *See also* MAROUF HASIAN, JR., FORENSIC RHETORICS AND SATELLITE SURVEILLANCE: THE VISUALIZATION OF WAR 110 (2016) (discussing critiques and defenses of the Satellite Sentinel Project).

[213] HUMAN RIGHTS WATCH, BURMA: NEW WAVE OF DESTRUCTION IN ROHINGYA VILLAGES (Nov. 21, 2016) (discussing surveillance imagery of Rakhine State showing 820 destroyed structures in ethnic Rohingya villages); HUMAN RIGHTS WATCH, SYRIA: NEW SATELLITE IMAGES SHOW HOMS SHELLING (Mar. 2, 2012) (discussing evidence of the bombardment of the Baba Amr neighborhood of Homs).

provide dedicated live mapping support to organizations in the humanitarian and human rights space, including in Syria.[214] Using high-resolution imagery from DigitalGlobe, this team has employed crowd-tasking to document the presence of regime forces and armored vehicles in civilian areas and identify the commission of potential war crimes, such as the destruction of civilian objects[215] in Aleppo and elsewhere through before-and-after damage assessment images.[216] The project depends largely on volunteers who are recruited through the Tomnod micro-tasking platform, which invites volunteers to solve real-world problems using satellite imagery, and trained in live crisis mapping. This reliance upon volunteers raises reliability concerns, although their work is vetted by an imagery expert before being published.[217] According to a recent report from OpenGlobalRights, what determines the admissibility of satellite imagery in human rights litigation is the ability of a human witness to testify credibly about what the images depict.[218]

Hindering such efforts is the "resolution gap" that continues to exist between the what is available for civilian purposes versus for government intelligence agencies. The U.S. National Oceanic and Atmospheric Administration (NOAA) handles the licensing of commercial remote sensing. On national security grounds, there are limitations on the production of high-resolution imagery (the limit was lowered to .25m in 2014) as well as other types of imagery (hyperspectral and infra-red). In addition, there are "shutter controls", whereby the U.S. government reserves the right to exclusively purchase images over certain geographic areas, such as active combat zones.[219]

Beyond the tech realm, human rights investigations have become increasingly interdisciplinary, borrowing from tools and techniques developed in other contexts. Forensic Architecture (FA), a multidisciplinary collective of investigators based at the University of London, has employed architectural rendering software to create groundbreaking computer models of potential crime scenes. These can shed light on the circumstances of particular armed attacks on civilians and civilian objects and, where necessary or possible, identify the perpetrators. For example, FA has recreated the sites of chemical attacks and created a three-dimensional rendition of Saydnaya prison where detainees have credibly alleged they were tortured.[220] In addition, FA examined the destruction of the Sayidina Omar Ibn Al-Khattab Mosque in Al-Jinah, Syria, which was hit by U.S. airstrikes on March 16, 2017. The United States originally denied having caused multiple civilian casualties and insisted that the venue was a community hall where regional

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[214] STANDBY TASK FORCE, http://www.standbytaskforce.org/. *Combining Crowdsourced Satellite Imagery Analysis with Crisis Reporting: An Update on Syria* (Sept. 21, 2011), http://www.standbytaskforce.org/2011/09/21/combining-crowdsourced-satellite-imagery-analysis-with-crisis-reporting-an-update-on-syria/.

[215] *Satellite Imagery Analysis for Urban Conflict Documentation: Aleppo, Syria*, AAAS, June 27, 2017.

[216] *Combining Crowdsourced Satellite Imagery Analysis with Crisis Reporting: An Update on Syria*, IREVOLUTIONS, Sept. 19, 2011. *See also* AMNESTY INTERNATIONAL, DECODE DARFUR, https://decoders.amnesty.org/projects/decode-darfur#about (discussing project in which 28,000 volunteers analyzed 326,000 square kilometers of satellite imagery to identify attacks on remote villages).

[217] Neal Ungerleider, *The Syrian War Crowdsourcing Experiment*, FAST COMPANY, Sept. 21, 2011.

[218] Theresa Harris et al., *Geospatial Evidence in International Human Rights Litigation: Technical and Legal Considerations* (2018) (report prepared under the auspices of the AAAS Scientific Responsibility, Human Rights and Law Program), https://www.aaas.org/resources/geospatial-evidence-international-human-rights-litigation-technical-and-legal.

[219] *See* James A. Vedda, *Updating National Policy on Commercial Remote Sensing* (2017).

[220] Michael Kimmelman, *Forensics Helps Widen Architecture's Mission*, N.Y. TIMES, Apr. 6, 2018.

members of Al Qaida were meeting on the night in question.[221] Based on a reconstruction of the building prior to the attack and other data, FA concluded that the building was clearly a mosque being used for religious purposes and that 38 civilians were killed.[222] Following these civil society investigations, the United States admitted that the strike had hit part of a "mosque complex" and that "a more deliberative pre-strike analysis should have identified that the target was part of a religious compound,"[223] but continued to argue that appropriate precautions were undertaken.[224] The Syrian COI disagreed and determined that although munitions designed to inflict minimal casualties were employed, the United States still "failed to take all feasible precautions to avoid or minimize incidental loss of civilian life, injury to civilians and damage to civilian objects, in violation of international humanitarian law."[225] This conclusion has its detractors, with one set of commentators arguing that the COI applied the wrong legal standard—and had inadequate information—to credibly evaluate the effects of the attack.[226] They cite the Rendulic rule in this regard, which dictates that the legality of wartime attacks should not be judged by their results but by what the commander reasonably knew at the time the attack was launched.[227]

Crowdsourcing, as occurred with the Caesar photos, offers another way to aggregate data of relevance to accountability. Adalmaz is crowdsourcing photographs of fighters to identify anonymous perpetrators and generate leads for law enforcement.[228] The Humanitarian Tracker has been crowdsourcing and live mapping the Syrian conflict since April 2011.[229] In an effort to consolidate eye witness accounts and leverage the work of citizen reporters, it accepts anonymous reports—via email, Twitter, phone, the website, and other encrypted means—which are tagged and catalogued by type of attack. These contributions are then cross-referenced with media reports and other validation sources where possible using data mining tools.[230] Only a small percentage of submissions are published, given limited resources for de-duplication and verification. The site is built upon the crowdmap technology first developed by Ushahidi to track post-election violence in Kenya.[231] The Humanitarian Tracker has remained focused on the conduct of regime forces, rather than other participants in the conflict. Crowdsourcing offers an option for real-time (or close to real-time) information gathering in constrained collection environments.[232] Data visualization

[221] *Al-Jinah Mosque*, Forensic Architecture, http://www.forensic-architecture.org/case/al-jinah-mosque/.
[222] FA worked in conjunction with Bell¿ngcat and Human Rights Watch in this investigation. *See* Bell¿ngcat, *The Al-Jinah Mosque Complex Bombing—New Information and Timeline* (Apr. 18, 2017); HUMAN RIGHTS WATCH, ATTACK ON THE OMAR IBN AL-KHATTAB MOSQUE: US AUTHORITIES' FAILURE TO TAKE ADEQUATE PRECAUTIONS (Apr. 18, 2017).
[223] *Transcript of Pentagon's Al Jinah Investigation Media Briefing*, AIRWARS (June 27, 2017).
[224] Barbara Starr, *Pentagon Investigation: US Hit Mosque Complex in Syria*, CNN, May 5, 2017.
[225] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. No. A/HRC/36/55, ¶¶ 52-61 (Aug. 8, 2017).
[226] Shane Reeves & Ward Narramore, *The UNHRC Commission of Inquiry on Syria Misapplies the Law of Armed Conflict*, LAWFARE (Sept. 15, 2017). *But see* Adil Ahmad Haque, *A Careless Attack on the UN's Commission of Inquiry on Syria*, JUST SECURITY (Sept. 21, 2017) (defending the COI's conclusions).
[227] *See generally* Brian J. Bill, *The Rendulic 'Rule': Military Necessity, Commander's Knowledge, and Methods of Warfare*, 12 Y.B. INT'L HUMANITARIAN L. 119 (2009).
[228] Adalmaz, https://justicefortheoppressed.org/#gallery-1.
[229] *See* Syria Tracker—Crowdmap, https://syriatracker.crowdmap.com/. Humanitarian Tracker empowers citizens to support humanitarian causes by using technological innovations. *See* Lorenzo Franceschi-Bicchierai, *How Data Scientists are Uncovering War Crimes in Syria*, MASHABLE (Aug. 8, 2014).
[230] *Id*.
[231] Taha Kass-Hunt, et al., *Syria Tracker: Crowdsourcing Crisis Information*, LINKED IN (Jan. 5, 2012).
[232] *See generally* The Engine Room, Benetech & Amnesty International, *How to Navigate Digital Data for Human Rights Research*, BENETECH (June 2016).

tools allow information to be disaggregated along desired characteristics (such as the age and sex of victims or cause of death) and conveyed to multiple audiences, including the general public and policy-makers, in compelling and accessible ways.[233]

To be sure, there are limitations to crowdsourcing. Coverage bias is a particular concern: large events generally receive extensive coverage whereas incidents with few victims may be neglected or even invisible. If the violence takes different forms depending on the identity of the perpetrator or victim—for example, a terrorist attack may involve multiple victims whereas a campaign of ethnic cleansing may target households one at a time—the data that is collected and visualized will be inaccurate and may mislead users about the patterns of violence. The biggest concern is often missing data, which can dramatically distort perceptions of the conflict and, in turn, lead to poor policymaking or biased responses.

Digital data is both potent and fragile. The ubiquity of digital evidence of crimes committed in Syria has given rise to some controversy when private platforms, such as Facebook and Twitter, remove videos that show the commission of atrocities on the theory that such posts run counter to their terms of use or community standards.[234] At times, these take-downs are based upon a machine-learning video recognition algorithm rather than human decision-making and without reference to the information's potential evidentiary value.[235] Even ISIL propaganda footage and pledge videos, which absolutely should be removed from public social media platforms, have value from an accountability perspective, as these sources often contain criminal admissions; clues to the organization's structure, *modus operandi*, and chain of command; and images of logos and other insignia. In the Syrian context, these take-down policies have negatively affected the work of the Syrian Archive, Bell¿ngcat, and other documentation groups.[236]

To be sure, digital data never fully disappears and can often be reconstituted. However, it becomes inaccessible to members of the public when an intermediary blocks its public availability or fails to appropriately archive it. If it is possible to extract the metadata from a video or photograph before it disappears, a user can go back to the original source (assuming they still have it) or petition the platform to return or retain it on the grounds that it is human rights evidence. Social media platforms are still struggling to find the right balance between compliance with national policies that demand the immediate removal of material that may contribute to radicalization and the imperative not to eliminate potential evidence of the commission of international crimes. Getting such decisions reversed or regaining access to removed content is time-consuming and difficult to navigate, especially from a war zone.[237] There is no question that this process needs to be expedited and implemented in a way that does not undermine the potential evidentiary value of even the most odious digital material.

Conclusion

This chapter is premised on the observation that Syria has become the most documented conflict in human history. In past conflicts, amassing evidence was often the major challenge to preparing cases. When it comes to Syria, the problem is in many respects the reverse: there is too

[233] Katharina Rall, etc. al., *Data Visualization for Human Rights Advocacy*, 8(2) J. HUM. RIGHTS PRACTICE 171 (2016).
[234] Malachy Browne, *YouTube Removes Videos Showing Atrocities in Syria*, N.Y. TIMES, Aug. 22, 2017.
[235] Rosen, *supra* note 3; Avi Asher-Schapiro, *YouTube and Facebook are Removing Evidence of Atrocities, Jeopardizing Cases against War Criminals*, THE INTERCEPT (Nov. 2, 2017).
[236] *Salvaging Online Videos as Proof of War Crimes in Syria*, THE OBSERVERS (Feb. 2, 2018).
[237] Ingrid Burrington, *Could Facebook of Tried for Human-Rights Abuses?*, THE ATLANTIC, Dec. 20, 2017.

much documentation, which can overwhelm advocates who must sift through everything for material capable of inculpating a particular perpetrator and for the "best evidence" of any particular recorded incident. Even with all these documentation efforts underway, we still only have what two statisticians call "snapshots of violence," given the difficulty of gaining access to a complete record of the conflict and all its consequences.[238] Nonetheless, the trends and regime patterns are clear. When the Syrian conflict ends—which it must at some point—the documentation exists to undergird a comprehensive set of transitional justice processes if there is political will to undertake such an endeavor. In the meantime, this information is being used in a number of domestic legal proceedings being held around the world. Many documentation groups, however, have been at this for eight years and are losing faith in the possibility of more comprehensive justice.[239]

[238] Price & Ball, *supra* note 194, at 10.
[239] Cristina Roca, *Long Read: How the Syrian War Changed How War Crimes Are Documented*, NEWS DEEPLY, June 1, 2017.

9

Transitional Justice Without Transition: The International Community's Efforts in Syria

Lest we forget—Lest we forget![1]

The concept of transitional justice refers to the range of measures—judicial and non-judicial, formal and informal, retributive and reconciliatory—that may be employed by societies in response to a legacy of authoritarianism or mass violence following a period of political transition.[2] Most of the work around building a transitional justice response has historically occurred during the final phases of a conflict or in the post-conflict period, when the guns have fallen silent (although they may not always be fully holstered). The situation in Syria, by contrast, presents an interesting experiment at attempts by the international community to lay the groundwork for a credible transitional justice process pre-transition, while the conflict continued to rage. Indeed, many of these efforts carried with them the potential to facilitate or hasten the desired transition. Ever hopeful, the drafters of the Geneva Communiqué of June 30, 2012, one of the blueprints for a political settlement in Syria, affirmed that transitional justice should be an integral part of any transition.[3] These objectives were similarly central to the United States' policy vis-à-vis the conflict in Syria. Working primarily through the State Department and the U.S. Agency for International Development (USAID),[4] the United States deployed strategic messaging and multilateral engagement coupled with dedicated assistance programs to support a range of accountability and transitional justice projects focused on Syria.[5] Other donor states followed suit.[6]

These internationally-led projects reflected a number of overarching foreign policy priorities including the desire to send a clear message that perpetrators of international crimes, regardless of affiliation, would be held to account; provoke defections and deter further abuses; and begin to socialize the value of pursuing a holistic and inclusive transitional justice program, particularly when it comes to marginalized segments of society, victim groups that may have been singled out for special abuse, and other key Syrian stakeholders. These lines of effort were initiated with the goal of enabling a peaceful democratic transition, establishing future stability, and encouraging social cohesion among the myriad Syrian communities torn asunder by the conflict. Many of these initiatives did not depend upon Syrian consent or a multilateral consensus and so could be pursued notwithstanding President Bashar al-Assad's unapologetic intransigence and the

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[1] Rudyard Kipling, *Recessional* (1897), *available at* https://www.poetryfoundation.org/poems/46780/recessional. A version of this chapter appears in THE SYRIAN WAR: BETWEEN JUSTICE AND POLITICAL REALITY (Hilly Moodrick-Even Khen et al., eds. 2019 (forthcoming)).

[2] *See generally* Paul Van Zyl, *Promoting Transitional Justice in Post-Conflict Societies*, *in* Security Governance in Post-Conflict Peacebuilding 209 (Alan Bryden & Heiner Hänggi eds., 2005).

[3] Final communiqué of the Action Group for Syria, U.N. Doc. A/66/865-S/2012/522, annex (June 30, 2012) ("There also needs to be a comprehensive package for transitional justice, including compensation or rehabilitation for victims of the present conflict, steps towards national reconciliation and forgiveness.").

[4] *See* Beth Van Schaack, *US Policy on Transitional Justice*, JUST SECURITY (June 29, 2016) (identifying State/USAID policy papers on the United States' approach to transitional justice); Department of State, *Transitional Justice Overview* (May 16, 2016), https://www.state.gov/j/gcj/transitional/257566.htm.

[5] Marie Soueid, *The Time to Address Transitional Justice in Syria is Now*, Center for Victims of Torture (May 3, 2017).

[6] *See, e.g.*, United Kingdom, Foreign & Commonwealth Office, *Syria—Country of Concern*.

Russian Federation's propensity to veto any even mildly coercive measures proposed within the Security Council.

This effort at pre-transition transitional justice has been fraught with challenges, uncertainty, and some controversy.[7] For one, many transitional justice practitioners argue that any transitional justice program must develop organically from within the affected society itself, with international involvement largely limited to the provision of technical assistance and funding rather than the imposition of a fully-formed agenda. It has been difficult, however, to ensure that any course of action is Syrian-led when it is unclear which Syrians will be in a position to lead such a process. In addition, secure access to the country has been largely foreclosed, so most work had to be done on the periphery—in refugee camps and neighboring countries, within the diaspora, and with Syrians courageous enough to brave a border crossing. Furthermore, many of these projects were conceptualized and initiated in an era when Assad appeared to be operating from a position of growing weakness, suggesting that the war might be coming to a close. These wartime endeavors became infinitely more complicated with the subsequent metastasis of the conflict following the emergence of the Islamic State in Iraq and the Levant (ISIL) on the battlefield and the involvement of Western superpowers who are at once allies (against ISIL) and adversaries (vis-à-vis the regime). The field of transitional justice developed with rebel groups and civil wars in mind; rarely have practitioners applied their tools to more unconventional armed organizations, such as terrorist organizations or organized criminal groups. More thinking needs to be done on how traditional transitional justice mechanisms might be adapted, if at all, to such actors.[8] Prospects for a fulsome transitional justice process appear even dimmer now, as it becomes increasingly apparent that Assad will remain in power in some capacity, at least in the immediate future.

Notwithstanding the pre-transition work that has been achieved to date, much will remain to be done once the war is at a close, bearing in mind that wars do not necessarily end abruptly, sporadic hostilities may continue even after "peace" is formally declared, and divided societies often see "conflict" as an exacerbated episode in a long history of violence.[9] What can be achieved from the perspective of transitional justice will depend on the composition of the next Syrian regime and the role of Assad, who has become a symbol of sectarian repression and is unlikely to countenance robust justice or truth-telling processes. Whether Assad will be open to making a genuine commitment to reconciliation and the rehabilitation of victims remains to be seen. In a twist on the idea of "victor's justice," a transitional justice program can also solidify a dictatorial regime and promote selective narratives, as has been seen in Rwanda, Bangladesh, and elsewhere. With Assad still in the picture, the most enduring legacy of the international community's pre-transition transitional justice enterprise will likely prove to be twofold. First, the international community has invested heavily in groups engaged in the documentation of abuses with an eye towards preserving a cache of evidence that can be tapped into once accountability mechanisms and other transitional justice processes go forward. Second is the creation of a cadre of Syrian practitioners with enhanced skills in managing the challenges and promises of transitional justice.

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[7] *See* Paul Seils, *Towards a Transitional Justice Strategy for Syria*, ICTJ Briefing (Sept. 2013) ("Unless the minimum levels of political commitment and openness are demonstrated, along with sufficient degrees of security…, detailed policy planning and implementation is perhaps best deferred.").

[8] Cale Salih et al., *The Limits of Punishment Transitional Justice and Violent Extremism*, Institute for Integrated Transitions (May 2018).

[9] *See* Graham Brown, Arnim Langer & Frances Stewart, *A Typology of Post-Conflict Environments*, Centre for Research on Peace and Development (Sept. 2011) (identifying "peace milestones" to mark the cessation of conflict).

It will be for these actors to decide what is feasible and what is desirable and whether and how to involve the international community to achieve the desired balance between the two.

This chapter engages these issues in three parts. It first provides a brief history of the field of transitional justice with an emphasis on the increasing "internationalization" of the field. It then surveys the emerging empirical literature evaluating the impact of various transitional justice interventions and their ability to prevent a recurrence of political violence and rebuild fractured societies. It closes with a discussion of the various lines of effort pursued by the international community and civil society groups in Syria in order to lay the groundwork for a genuine transitional justice process once the conflict is over. This chapter focuses on more restorative transitional justice mechanisms; previous chapters have discussed the various models that were contemplated to promote criminal accountability. With Assad still in power at the end of the conflict, there may be limited opportunities for international engagement in this regard. Syrians across the political spectrum will have to determine for themselves whether the field of transitional justice has anything to offer as they work to rebuild their society and the body politic.

The Field of Transitional Justice

The goals animating the field of transitional justice are as varied as they are ambitious: they encompass promoting accountability for gross and systematic violations of human rights, preventing a recurrence of such violations, rebuilding social cohesion, rehabilitating victims, and restoring trust in formerly abusive institutions. Transitional justice practitioners draw from a stylized toolkit of mechanisms that respond, in various measure, to these objectives and that are susceptible to localization and syncretic adaptation.[10] These include trials (both civil and criminal); truth commissions, which focus on understanding the causes and consequences of violence and offering victims an opportunity to bear witness;[11] the vetting of perpetrators from positions of trust and power (a.k.a. lustration); reparations devoted to the rehabilitation of victims; the memorialization of suffering and survival; and systemic legal and institutional reform. These different interventions can be layered and sequenced in different ways such that they complement, or complicate, each other.[12]

In addition to addressing the immediate violence, modern efforts at transitional justice often aim to respond to the root causes of conflict, which in some cases may extend as far back as the colonial or post-colonial period. This includes surfacing communal grievances asserted by marginalized segments of society with respect to the perceived or actual unequal allocation of resources and public goods.[13] For example, although inspired by the 2007-8 post-election violence, the Kenyan Truth, Justice and Reconciliation Commission (TJRC) had a mandate to examine the allocation of property and political violence dating back to the post-colonial period.[14] Many

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[10] *See* Paige Arthur, *How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUMAN RIGHTS Q. 321-67 (2009).

[11] *See generally* PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS (2d ed. 2011).

[12] Conor Hartnett, *The Relationship between Truth-Seeking and Prosecution*, International Centre for Ethnic Studies 8 (2016) (presenting three models of interaction between truth commissions and criminal trials).

[13] *See* M. CHERIF BASSIOUNI, THE CHICAGO PRINCIPLES ON POST-CONFLICT JUSTICE (2007) (Principle 9: "States shall engage in institutional reform to support the rule of law, restore public trust, promote fundamental rights, and support good governance.").

[14] *See* Sec. 5, The Truth, Justice and Reconciliation Commission Act, No. 6 (2008), Kenya Gazette Notice No. 8737 (Kenya). *See generally* RONALD C. SLYE, THE KENYAN TJRC: AN OUTSIDER'S VIEW FROM THE INSIDE (2018) (discussing elements of the TJRC).

transitional justice programs will also encompass a transformative agenda of institutional reform dedicated to aligning security and justice institutions with democratic and human rights principles. Such far-reaching institutional reforms may go beyond conventional transitional justice approaches and merge with peacebuilding, development, or poverty-reduction agendas aimed at instantiating the rule of law and redressing persistent economic exclusion and inequality.[15] Together with other expressions of remorse by the state, these reforms can serve as guarantees of non-recurrence, which are considered crucial to realizing the transformative potential of transitional justice.[16] Collectively, these measures are designed to address the myriad impacts of authoritarianism and conflict in a way that facilitates a transition to a sustainable peace.

Notwithstanding this common menu of options, every post-conflict society has its own unique manifestations of violence, history of grievances, cultural traditions, and political realities. As a result of this contextual heterogeneity, bespoke solutions are inevitable and "isomorphic mimicry" is not recommended.[17] We now recognize that different approaches might be warranted depending on whether the society is emerging from an armed conflict (whether international or domestic), a history of authoritarianism or repressive rule, cruelty at the hands of non-state actors, or cycles of grassroots sectarian violence. Similarly, the level of institutional and economic development will have implications for the transitional state's ability to assign legal responsibility, deliver reparations, and implement meaningful reform.[18] Indeed, transitional justice works differently in weakly institutionalized post-conflict settings than in post-authoritarian contexts where the problem is often an executive whose power is too centralized and pervasive.[19] In these former settings, experts recommend integrating transitional justice measures within broader institution-building efforts. It may also be valuable to explore the use of local and customary dispute resolution measures that encompass restorative processes and offer opportunities for pragmatic bargaining;[20] address the fate of the disappeared and their loved ones left behind to facilitate closure and enable the resolution of inheritance and personal status disputes; and untangle alliances between the military and the political realm.[21]

Furthermore, transitional justice practitioners have learned that they are playing a long game; transitions take many year to unfold, and transitional justice responses will need to follow suit. Indeed, in many societies, transitional justice has become inter-generational, with the children and grandchildren of victims and survivors pushing for transitional justice responses in the face of

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[15] *See* Wendy Lambourne, *Transitional Justice and Peacebuilding After Mass Violence*, 3 INT'L J. TRANSITIONAL JUST. 28 (2009); TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS (Pablo de Greiff & Roger Duthie eds., 2009).

[16] Clara Sandoval, *Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition, in* JUSTICE MOSAICS: HOW CONTEXT SHAPES TRANSITIONAL JUSTICE IN FRACTURED SOCIETIES 166, 170 (Roger Duthie & Paul Seils eds., 2017).

[17] Human Rights Council, Rep. of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Thirty-Sixth Session, transmitted by Secretariat, U.N. Doc. A/HRC/36/50, ¶ 33 (Aug. 21, 2017) (considering the implementation of transitional justice in weakly-institutionalized post-conflict settings).

[18] International Center for Transitional Justice, *Justice in Context: Paradigms of State and Conflict* (2019).

[19] A/HRC/36/50, *supra* note 17, ¶ 29.

[20] *See* Susanne Schmeidl, *The Quest for Transitional Justice in Afghanistan: Exploring the Untapped Potential of Customary Justice*, 27 J. FÜR ENTWICKLUNGSPOLITIK 43 (2011).

[21] A/HRC/36/50, *supra* note 17, ¶ 60.

impunity, enforced amnesia, and gaps in the evidentiary record and their own personal histories.[22] In Spain, for example, there was no formal acknowledgment of the crimes of the Franco era; rather a thick line was drawn and the society moved forward.[23] Only now are segments of the country revisiting this choice—attesting to the fragility of an imposed silence.[24]

A Short History of Transitional Justice

Although tracing its roots to the post-World War I and II periods, transitional justice emerged as a distinct field of study and policymaking in the 1980s when formerly authoritarian states began to transition to democracy and improvised ways to address their lived history of human rights abuse, political repression, ethnic persecution, authoritarianism, and mass violence.[25] While the end of the Cold War heralded a wave of transitions around the globe, the epicenter of this movement emerged in Latin America where societies in Central and South America began to openly engage with a legacy of violence by instituting a range of transitional mechanisms, most notably amnesties and truth commissions. In Eastern Europe—where repression was less overtly violent and more bureaucratic in nature—societies experimented with lustrations and other transparency initiatives, such as opening the files of the security services.

In many of these contexts, the prosecution of those deemed responsible for the commission of international or domestic crimes was foreclosed, either legally—due to the existence of an amnesty or other "full-stop" law[26]—or as a practical matter—because responsible individuals retained enough political or military power to jeopardize the transition if legal accountability was pursued too vigorously.[27] The Salvadoran amnesty law, which was eventually declared unconstitutional, is instructive. Article 1 stipulated that "[a]bsolute, full and unconditional amnesty shall be granted to all persons, whether nationals or aliens, who participated in any manner in committing political crimes, related common crimes or common crimes carried out by at least 20 persons, prior to January 1, 1992."[28] In the face of such blockages, actors developed an array of institutional innovations, including truth and reconciliation commissions and lustration programs, that fell short of criminal accountability but still responded to some of the felt needs of victims for

[22] Katja Seidel, *Practising Justice in Argentina: Social Condemnation, Legal Punishment, and the Local Articulations of Genocide*, 27 J. FÜR ENTWICKLUNGSPOLITIK 64 (2011).
[23] *See* Rafael Escudero, *Road to Impunity: The Absence of Transitional Justice Programs in Spain*, 36(1) HUM. RTS. Q. 123 (2014).
[24] *See Asociatión para la Recuperación de la Memoria Histórica*, http://memoriahistorica.org.es/ (exhuming mass graves, developing an archive of victims dating from the Franco era, and filing suits before the U.N. Working Group on Enforced Disappearances).
[25] *See generally* Neil J. Kritz, *Where We Are and How We Got Here: An Overview of Developments in the Search for Justice and Reconciliation*, *in* The Legacy of Abuse: Confronting the Past, Facing the Future (Alice Henkin ed., 2002); Ruti Teitel, *Transitional Justice Genealogy*, 166 HARV. HUM. RTS. J. 69 (2003).
[26] *Ley de Punto Final*, Law No. 23,492 of 12 December 1986 (Arg.). This Full Stop Law set a deadline for the initiation of new prosecutions. When hundreds of cases were initiated, the legislature passed a Due Obedience Law that granted amnesty to members of the military except the top leaders. *Ley de Obediencia Debida*, Law No. 23,521 of June 7, 1987 (Arg.). Both decrees were repealed, although without retroactive effect; they were later declared unconstitutional. AMNESTY INTERNATIONAL, ARGENTINA: THE FULL STOP AND DUE OBEDIENCE LAWS AND INTERNATIONAL LAW (Apr. 2003).
[27] José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, 13 HAMLINE L. REV. 623, 644 (1990) (discussing the political realities that may constrain the full implementation of transitional justice principles).
[28] *See, e.g.*, General Amnesty Law for the Consolidation of Peace, Legislative Decree 486, Mar. 20, 1993 (El Sal.). This decree extended an earlier and more limited amnesty that excluded those involved in serious human rights violations.

redress and reform. At the time, these measures were often seen as a second-best alternative to a more robust retributive response. Today, we recognize not only the inherent limitations of the system of criminal justice when it comes to the rehabilitation of survivors and the repair of societies but also that these alternative responses can have value in and of themselves.[29] So, while the transitional justice field originally produced a menu of archetypal mechanisms that seemed to require states to choose between competing options—either amnesty or accountability; justice or peace; truth or reconciliation—in contemporary transitions, the various interventions can be layered, coordinated, and sequenced in ways that reflect what is politically and fiscally feasible at the time to achieve the optimal balance between peace, justice, and reconciliation.[30] In this way, the attitude of "forgive and forget" and the demand for "no peace without justice" are increasingly being reconciled in modern transitional justice efforts.[31]

The Internationalization of Transitional Justice

Many transitional justice institutions have emerged from the bottom-up, as survivor and victim groups demanded some acknowledgement of their experience with violence. Others were the result of negotiations involving transitional governmental and nongovernmental actors forging a grand political compromise to end hostilities and embrace peace.[32] In the early days of the field, outsiders played a more limited role in helping to design and implement these measures. No longer. The international community—including the United Nations,[33] treaty and regional bodies,[34] individual donor states,[35] non-governmental organizations, and transnational norm entrepreneurs—increasingly play a role in cajoling, funding, advising, and leading states in transition to implement some form of transitional justice in order to entrench democratic values and a hard-won peace.[36] In this way, the field of transitional justice has become progressively internationalized and technocratic, although tensions between national and international actors have been a characteristic of the field since its inception.

[29] *See generally* Eric Brahm, *Uncovering the Truth: Examining Truth Commission Success and Impact*, 8 INT'L STUD. PERSPECTIVES 16 (2007) (discussing potential contributions of truth commissions to transitioning states).
[30] *See* Kathryn Sikkink & Carrie Booth Walling, *The Impact of Human Rights Trials in Latin America*, 44 J. PEACE RES. 427, 435 (2007) (noting that transitional justice policymaking used to be presented in "dichotomous terms" which belies the degree of evolution that occurs over time); Laurel Fletcher, Harvey M. Weinstein & Jamie Rowen, *Context, Timing, and the Dynamics of Transitional Justice: A Historical Perspective*, 31 HUM. RTS. Q. 163 (2009).
[31] *See* Mark Osiel, *Choosing Among Alternative Responses to Mass Atrocity: Between the Individual and the Collectivity*, ETHICS & INTERNATIONAL AFFAIRS (Sept. 2015).
[32] *See* RUTI G. TEITEL, TRANSITIONAL JUSTICE 213 (2000) (noting that transitional justice involves "a pragmatic balancing of ideal justice with political realism that instantiates a symbolic rule of law capable of constructing liberalizing change.").
[33] U.N. Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (Mar. 2010).
[34] *See* Par Engstrom, *Brazilian Post-Transitional Justice and the Inter-American Human Rights System*, Latin American Centre Seminar Series St Antony's College, Oxford (Feb. 14, 2014).
[35] *See generally* ANNIE R. BIRD, U.S. FOREIGN POLICY ON TRANSITIONAL JUSTICE (2015) (noting how transitional justice became instantiated as a core diplomatic tool of the United States); ZACHARY KAUFMAN, UNITED STATES LAW AND POLICY ON TRANSITIONAL JUSTICE: PRINCIPLES, POLITICS, AND PRAGMATICS (2016) (presenting the U.S. role in the development and dissemination of a range of transitional justice mechanisms).
[36] *See* Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence on his Global Study on Transitional Justice, ¶ 90, U.N. Doc. A/HRC/46/50/Add.1 (Aug. 7, 2017) (calling on the international community to support transitional justice efforts) [hereinafter *Global Study*].

Under the banner of promoting the rule of law, various elements of the United Nations have embraced the transitional justice imperative,[37] leading to some concerns about the need for increased harmonization of the various agencies involved. Among the key multilateral developments is the articulation in 2005 by the U.N. General Assembly of a set of Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[38] In 2011, the U.N. Human Rights Council added a Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence to its suite of Special Procedures.[39] The inaugural Special Rapporteur, Pablo de Greiff, issued a series of detailed reports devoted to providing conceptual clarity around each of the four components of his mandate.[40] The Security Council regularly calls upon states to implement a comprehensive transitional justice program[41] and to comply with their obligations to end impunity for serious violations of international law in order to prevent future violations and contribute to a sustainable peace.[42] In February 2020, it hosted a dedicated, and extended, debate on transitional justice under its peacebuilding agenda item.[43]

In terms of the United Nations' long-term agenda, actors devoted to implementing Sustainable Development Goal (SDG) #16 on Peace, Justice, and Strong Institutions as part of the 2030 Agenda Commitment to Peaceful, Just, and Inclusive Societies are focused on exploring the kind of justice people seek, the theoretical and empirical case for increasing access to justice, and what strategies and tools will work to achieve unfettered access.[44] Within the SDG framework, the International Center for Transitional Justice (ICTJ) is leading a Working Group on Transitional Justice as part of an International Task Force on Justice is examining approaches to increasing access to justice specifically in post-conflict and post-repression contexts, exploring the way in which the legacies of such violations hinder progress toward peace and development, and addressing the contribution of transitional justice to the rule of law, inclusive institutions, the prevention of violent conflict, and economic equality and exclusion.

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[37] *See, e.g.*, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General*, U.N. Doc. S/2004/616 (Aug. 23, 2004); *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2011/634 (Oct. 12, 2011) (taking stock of the progress made in implementing the recommendations from the 2004 report).

[38] G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005). *See also* Comm'n on Hum. Rts., Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

[39] Hum. Rts. Council, Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, U.N. Doc. A/HRC/RES/18/7 (Oct. 12, 2011).

[40] *See, e.g.*, Hum. Rts. Council, Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Twenty-fourth session, U.N. Doc. A/HRC/24/42 (Aug. 28, 2013) (discussing the right to truth and challenges faced by truth commissions); Human Rights Council, Rep. of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Thirtieth Session, U.N. Doc. A/HRC/30/42 (Sept. 7, 2015) (discussing a framework for designing state guarantees of non-recurrence) [hereinafter *Report on Non-Recurrence*].

[41] *See, e.g.*, S.C. Res. 2062, ¶ 10, U.N. Doc. S/RES/2062 (July 26, 2012) (encouraging Côte d'Ivoire to adopt "concrete measures to promote justice and reconciliation at all levels and on all sides" and to adopt "a broad-based and comprehensive" program of transitional justice).

[42] Security Council, Statement by the President of the Security Council, U.N. Doc. S/PRST/2012/1 (Jan. 19, 2012).

[43] U.N. SCOR, 75th sess., 8723rd mtg., U.N. Doc. S/PV.8723 (Feb. 13, 2020).

[44] David Tolbert, *The Role of Transitional Justice in Countries Emerging from Conflict*, IMPAKTER (May 18, 2018).

Beyond the United Nations, the international donor community is increasingly coordinated when it comes to programing and funding transitional justice priorities,[45] although it has not yet adopted the kind of synchronization seen in sector-wide approaches (SWAps) in the public health and international development realms. The World Bank has also expressed support for the proposition that transitional justice can create an enabling environment to promote development and security given the recognition that repeated cycles of violence seriously undermine the development agenda. According to the World Bank, a strengthening of "legitimate institutions and governance" to provide justice is "crucial to break cycles of violence."[46]

The United States has gradually enhanced its transitional justice portfolio in terms of available policy tools, in-house expertise, and its ability to provide technical and financial assistance.[47] In 2017, for example, the U.S. Congress passed the Syrian War Crimes Accountability Act of 2017 with strong bipartisan and near-unanimous support.[48] The Act, which is embedded within the annual must-pass National Defense Authorization Act (NDAA), mandated the Department of State to conduct a study on the feasibility and desirability of potential transitional justice mechanisms for Syria; to brief Congress on the commission of atrocity crimes in Syria and the United States' responses thereto; and to support entities pursuing transitional justice for Syria, including criminal investigations by civil society entities and in third party states.[49] This work is to be undertaken by, *inter alia*, the Office of Global Criminal Justice in the State Department.[50] The legislation expresses a distinct preference for criminal accountability among the range of transitional justice measures, including a potential hybrid tribunal.

A number of legal and political advancements have contributed to this "internationalization" of transitional justice. First, legalism plays a progressively important role in the field, with international law providing both a normative framework but also increasingly firm obligations governing exercises of transitional justice. In particular, many societies have undertaken binding legal obligations by virtue of their ratification of a range of human rights and international criminal law treaties that contain express and implicit duties to prosecute breaches, provide due process and judicial protection to victims, reject blanket amnesties, respect and ensure the right to truth, and repair harm.[51] During periods of transition, transitional justice offers a concrete set of policy options to advance these entitlements on behalf of rights holders. An additional consequence of these positive law obligations is that certain transitional justice choices have been rendered justiciable, and may be invalidated through exercises of judicial review before

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[45] *See, e.g.*, U.N. Development Programme, *Complementarity and Transitional Justice: Synthesis of Key Emerging Issues for Development* (Nov. 16, 2012) (discussing the use of basket funds for transitional justice programming in Burundi, Guatemala, and Colombia).
[46] WORLD BANK, WORLD DEVELOPMENT REPORT 2011: CONFLICT, SECURITY AND DEVELOPMENT, at 2 (2011).
[47] Dep't of State, Office of Global Criminal Justice, Transitional Justice Policy Paper Series, https://www.state.gov/key-topics-office-of-global-criminal-justice/#papers.
[48] Syrian War Crimes Accountability Act of 2017, S. 905, 115th Cong. pmbl. (2017).
[49] *See* John S. McCain National Defense Authorization Act ("NDAA") for Fiscal Year 2019, Pub L. No. 115-232, § 1232, 132 Stat. 1636 (2018), codified at 22 U.S.C. § 8791 note. The Trump Administration was apparently late in submitting these reports. Zachary D. Kaufman, *Legislating Atrocity Prevention*, 57 HARV. J. LEGIS. 163, 204 (2020).
[50] *See* Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. (forthcoming 2020) (discussing Congressional efforts to deploy process controls to dictate agency structure, operations, and decision-making).
[51] *See, e.g.*, Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment arts. 5-7, Dec. 10, 1984, 1465 U.N.T.S. 85.

domestic[52] or supranational courts.[53] For example, El Salvador's Constitutional Court ruled that the amnesty law that had been put in place at the end of the civil war was unconstitutional and in violation of international law because it infringed victims' rights to judicial protection and reparations.[54] Among the human rights bodies, the Inter-American Court has been at the vanguard in this regard.[55] In connection with systemic violence against women in Ciudad Juarez, the Inter-American Court confirmed that states have a duty to provide justice to victims. When it comes to reparations and guarantees of non-repetition, it held:

> Bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State … the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable.[56]

Given these precedents, confronting a legacy of past abuse is no longer something that can be fully negotiated away. To be sure, this turn to legalism is not always cheered, in part because it constrains creativity and compromise.[57] In response to these concerns, advocates are increasingly calling for more interdisciplinary approaches.[58]

Second, and relatedly, the increased acceptance of the exercise of extraterritorial jurisdiction, including the principle of universal jurisdiction, means that transitional justice choices do not remain within the exclusive competence of the territorial state. Efforts to promote accountability abroad, for example under principles of universal jurisdiction, can inspire a transitional state to revisit prior transitional justice decisions, leading to greater accountability over time.[59] Chile offers a prime example. Known colloquially as the "Pinochet Effect," a movement to bring the former dictator to justice in courts in Europe reawakened domestic constituencies and inspired the country to initiate its own criminal trials of dirty war perpetrators.[60] Similarly, in Liberia, criminal, civil, and immigration trials in foreign courts—galvanized in part by transnational victims' groups—have begun to foster a more robust debate internally about the need

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[52] Naomi Roht-Arriaza, *El Salvador's Constitutional Court Invalidates Amnesty Law*, DUE PROCESS OF LAW FOUNDATION (July 22, 2016).
[53] *See, e.g.*, Sidabras & Džiautas v. Lithuania, App. Nos. 55480/00 & 59330/00, Eur. Ct. H.R., 42 Eur. H.R. Rep. 104 (July 27, 2004) (invalidating Lithuanian lustration laws).
[54] *Sala de lo Constitucional de la Corte Suprema de Justicia, Inconstitucionalidad,* 44-2013/145-2013, San Salvador, July 13, 2016.
[55] *See* Jorge Contesse, *Contestations and Deference in the Inter-American Human Rights System*, 79 LAW & CONTEMP. PROB. 123, 135-37 (2016) (discussing IACHR's amnesty jurisprudence).
[56] Gonzalez et al. ("Cotton Field") v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Nov. 16, 2009).
[57] INSTITUTE FOR INTEGRATED TRANSITIONS, RETHINKING PEACE AND JUSTICE (2019), https://www.ifit-transitions.org/resources/publications/major-publications-briefings/rethinking-peace-and-justice.
[58] Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34(4) J. L. & SOCIETY 411 (2007).
[59] *See* KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (2011).
[60] NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS (2005).

to address the brutal violence perpetuated during the country's extended civil wars and re-enlivened prospects for the establishment of a hybrid tribunal.[61]

Third, even in highly repressive states, courageous and sophisticated civil society organizations now form part of a global epistemic community devoted to fostering human rights and accountability in the wake of abuses. These groups—with support and funding from their multinational counterparts—can make credible demands on transitioning states to translate ideals into action. They can also serve as conduits to bring new ideas and external expertise into domestic processes. At the dawn of the field, transitioning states were left to improvise, with little guidance, coordination, or outside support. Today, national actors can benefit from the lessons learned from other societies that have lived through similar experiences. These groups are densely networked and so can share strategies and legal and institutional templates. There is now a growing recognition that the challenges faced by transitioning societies are not necessarily unique or without precedent, and history offers various models that can provide inspiration for local adaptation.

A fourth factor influencing the internationalization of transitional justice processes is that those transitional states that genuinely want to promote peace and stability may find value in welcoming, or at least accepting, international involvement in their transitional justice processes. At base, such contributions bring expertise and resources to transitional justice exercises. Such engagement can also signal legitimacy and provide assurances to vulnerable communities or groups associated with the perpetrators that they will be heard and will not be subjected to a vengeful exercise of victor's justice. The inclusion of international actors in transitional justice institutions can also help to insulate transitional justice actors from domestic political interference and keep a process on track. At the same time, too much international engagement risks undermining local agency, generating backlash, and creating legitimacy deficits. When it comes to Syria, one experienced practitioner has warned: "[t]he biggest mistake for the international community in the short term would be to impose or be seen as imposing a model that does not have the backing of a legitimate, nationally owned process."[62]

Looking Both Backwards and Forwards

The concept of transitional justice originally emerged as a retrospective exercise aimed at helping war-torn societies address a history of violence or repression through truth-telling, accountability, and multiple forms of reparation and rehabilitation. At the same time, inherent to the field is the prospective goal of instantiating peace and preventing a return to the policies or practices of the past through processes of (de)legitimation, reform, and empowerment.[63] Among other articulations, the U.N. Human Rights Council has noted that when designing transitional justice strategies, the specific context of each situation must be taken into account with a view to preventing "the recurrence of crises and future violations of human rights."[64] While some transitional justice mechanisms—such as guarantees of non-recurrence—are expressly devoted to

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[61] *See* Civitas Maxima, *Quest for Justice Campaign Liberia* (2018); *Rodney D. Sieh & Henry Karmo, Liberia: Despite President Weah's Ambivalence, War Crimes Court Almost a Done Deal*, FRONT PAGE AFRICA (Oct 3, 2019).
[62] Seils, *supra* note 7, at 4.
[63] Valérie Arnould, *Transitional Justice and Democracy in Uganda: Between Impetus and Instrumentalisation*, 9 J. E. AFR. STUD. 354, 354 (2015).
[64] Hum. Rts. Council, Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, pmbl, U.N. Doc. A/HRC/27/L.4 (Sept. 19, 2014).

prevention, all include a preventative component. So, prosecutions and vetting aim to punish and incapacitate perpetrators but also to create a system of specific and general deterrence, counteract the corrosive effect of impunity, remove those responsible for breaches from positions of power and authority, and neutralize potential spoilers.[65] In addition to their punitive effects, it is hypothesized that these more retributive mechanisms build peace by diffusing and socializing norms,[66] dispelling notions of collective guilt by individuating responsibility for atrocities,[67] and satiating impulses toward private vengeance by providing acknowledgement that rights were violated and offering a formal process of accountability.[68]

When it comes to more restorative mechanisms, truth-telling exercises—such as truth and reconciliation commissions—compile the details of past crimes and offer victims a chance to bear witness. They also identify prior pathways to violence that might re-emerge, prevent revisionist histories or a general amnesia from taking root, document the causes and consequences of violence, signal an official determination to avoid the recurrence of violations, and offer concrete and aspirational proposals for reform. Their preventative impact often hinges on the willingness of the state to heed these recommendations, whether binding or not, and whether the truth commission mobilizes civil society actors in the service of peace.[69] Reparations seek to repair survivors while imposing tangible costs on the commission of violence and repression (especially if paid directly by perpetrators). They also respond to the legitimate grievances of victims and their communities that might fester if left unaddressed. Memorialization provides a way to honor victims and survivors. Efforts at institutional reform are expressly forward-looking. Reforms can dismantle mechanisms of repression and violence, place checks on powerful state actors, restore faith in governmental systems, and build a more inclusive and fair system for the future.[70]

The importance of prevention finds expression in the Transitional Justice Special Rapporteur's title, which includes the concept of guarantees of non-recurrence—perhaps the least tangible but most forward-looking element of his mandate. These offers must be more than mere rhetorical devices or empty promises; rather, they should be actionable "objects[s] of policymaking" that will benefit all individuals within the state's jurisdiction, not merely the discrete victims of a previous era.[71] The Special Rapporteur's multidimensional framework suggests three main spheres of intervention. First, official state institutions are encouraged to ratify relevant treaties; undertake justice and security sector reforms; amend security legislation and constitutional provisions; repeal or remove discriminatory regulatory provisions; incorporate a bill of rights; train government personnel and human rights defenders; establish monitoring bodies and independent ombudspersons; strengthen judicial independence to insulate judges from interference

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[65] Stephen John Stedman, *Spoiler Problems in Peace Processes*, 22(2) INT'L SEC. 5, 5 (1997) (noting that a potent threat to post-conflict societies "comes from spoilers—leaders and parties who believe that peace emerging from negotiations threatens their power, worldview, and interests, and use violence to undermine attempts to achieve it.").
[66] Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 INT'L STUD. Q. 939-63 (2010).
[67] James Meernik, Angela Nichols & Kimi L. King, *The Impact of International Tribunals and Domestic Trials on Peace and Human Rights After Civil War*, 11 INT'L STUD. PERSP. 309, 312 (2010).
[68] Hugo Van der Merwe, *Delivering Justice During Transition: Research Challenges, in* ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH 115, 122 (Hugo Van Der Merwe et al. eds., 2009).
[69] Omur Bakiner, *Truth Commission Impact: An Assessment of How Commissions Influence Politics and Society*, 8 INT'L J. TRANSITIONAL JUST. 6 (2013) (comparing the direct political impact of commissions through the implementation of recommendations and indirect political impact through civil society mobilization).
[70] Bassiouni, *supra* note 13.
[71] Report on Non-Recurrence, *supra* note 40, ¶ 22.

and corruption; place the military and security forces under civilian control; disarm and disband armed groups; and ensure all citizens enjoy a legal identity and security of person.[72] Next, the preventative capacity of civil society actors (including NGOs, trade unions, and religious organizations) should be enhanced, including through the reversal of "closing space" phenomena,[73] the promotion of the rights to speech and assembly, and the creation of educational and training opportunities.[74] Finally, the populace should be engaged and inspired to exercise empathy towards victims within the educational, artistic, and cultural spheres; archives should be opened so people can know the truth of what happened; and victims should be provided with trauma counseling and psychosocial support.[75]

The Value of Transitional Justice

The international community's motivation for encouraging transitional justice processes in Syria and elsewhere is partially inspired by a resolute belief in the deontological value of such exercises. At the same time, this international involvement also reflects a growing recognition, premised on emerging empirical research discussed below, that promoting a broad range of accountability and transitional justice measures leads to better outcomes (from the perspective of long-term stability and democracy) than if issues of accountability and reconciliation are left unaddressed. Indeed, it has been demonstrated time and again that the failure to address past conflict, and its underlying grievances, can perpetuate cycles of violence with destabilizing effects at the domestic, regional, and international levels.[76]

The Empirical Challenges of "Proving" the Impact of Transitional Justice Interventions

The entire human rights field is increasingly being subjected to empirical methodologies in an effort to more accurately measure compliance;[77] assess human rights law's impact on other desirable outcomes, such as peace, economic growth, the establishment of the rule of law, and the spread of democratic values; and prove—or refute—long-standing claims of efficacy and causation.[78] Scholars caution, however, that "the very strengths of quantification—simplification and abstraction in applying a single measurable definition across different contexts—are its Achilles heel,"[79] because an obsession with empirical proof may miss important nuances, overly simplify complex processes, or fail to reflect cultural values and sensitivities. Although metrics

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[72] *Id*. ¶¶ 1-76.
[73] *See* THOMAS CAROTHERS & SASKIA BRECHENMACHER, CLOSING SPACE: DEMOCRACY & HUMAN RIGHTS UNDER FIRE (2014) (recounting efforts by governments to erect legal, fiscal, and logistical barriers to the ability of human rights organizations to operate transnationally and to work with external actors).
[74] Report on Non-Recurrence, *supra* note 40, ¶¶ 79-91.
[75] *Id*. ¶¶ 92-102.
[76] U.N. Secretary-General, *Uniting Our Strengths: Enhancing United Nations Support for the Rule of Law,* U.N. Doc. A/61/636-S/2006/980 (Dec. 14, 2006).
[77] AnnJanette Rosga & Margaret L. Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27 BERKELEY J. INT'L L. 253-315 (2009).
[78] OHCHR, *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, U.N. Doc. HRI/MC/2008/3 (2008).
[79] Malcolm Langford & Sakiko Fukuda-Parr, *The Turn to Metrics*, 30 NORDIC J. HUM. RTS. 222, 232 (2012).

are seductive, they can only do so much when it comes to complex social phenomena and complicated causal pathways.[80] In short, not everything that counts can be counted.[81]

For many years the transitional justice field produced a robust but frequently contested theoretical literature undergirded by strong normative convictions but untested by rigorous social science research.[82] Debate over the utility of trials and amnesties in periods of transition appeared frequently in the dueling fields of international law and international relations, with much literature in the former discipline bemoaning the overweening impact of politics on law and much literature in the latter insisting that peace should always, and politics will always, be prioritized over justice. So-called "rationalists" contend that prosecutions will exacerbate conflict and sharpen grievances[83] whereas "norms theorists" insist that trials can contribute to deterrence and that justice is an essential component of peace and reconciliation.[84] For every theory of how transitional justice mechanisms contribute to peace and justice, however, there are opposing speculations that they actually raise tensions, derail peace negotiations, and create martyrs, or that other factors are at play when conflicts subside and formerly warring groups revert to peaceful coexistence.[85] During the first wave of scholarship, the debate had ossified and become almost ritualistic.

Transitional justice scholars have recently, however, begun to apply empirical and statistical methods to the transitional justice field to test these orthodoxies. This methodological evolution has been facilitated by the fact that a number of transitions around the globe have been underway for enough time to support longitudinal research on the sequencing and impact of transitional justice interventions.[86] Indeed, in Latin America, some states are still tweaking their policies decades after their formal transition.[87] In this regard, the modern research contradicts earlier claims that trials had to happen in the immediate transition period or they would not happen at all.[88] Furthermore, international and domestic human rights prosecutions have increased dramatically since the mid-1990s, heralding a veritable "revolution in accountability"[89] and

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[80] *See generally* TODD LANDMAN & EDZIA CARVALHO, MEASURING HUMAN RIGHTS (2010) (discussing empirical methodologies).

[81] This quote has been attributed to Albert Einstein, but probably should be credited to sociologist William Bruce Cameron. *See* WILLIAM BRUCE CAMERON, INFORMAL SOCIOLOGY: A CASUAL INTRODUCTION TO SOCIOLOGICAL THINKING 13 (1963).

[82] Oskar N.T. Thoms et al, *State-level Effects of Transitional Justice: What Do We Know?*", 4 INT'L J. TRANSITIONAL JUST. 1, 27-28 (2010).

[83] *See, e.g.*, Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SEC. 5, 5 (2004) (warning that pushing for prosecutions pays "insufficient attention to political realities").

[84] *See, e.g.*, Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95(1) AM. J. INT'L L. 7 (2001).

[85] *See* Geoff Dancy & Eric Wiebelhaus-Brahm, *Justice and the Peace: A Time-Sensitive Empirical Evaluation* 4 (Mar. 1, 2011) (presented at the Ann. Meeting of the Int'l Studies Ass'n) (collecting arguments that "the stabilizing effect of transitional justice is a result of wishful thinking, principled logics of appropriateness, or legal romanticism.") [hereinafter *Dancy & Wiebelhaus-Brahm, Empirical Evaluation*].

[86] Sikkink & Walling, *supra* note 30, at 428 (focusing on Latin American since these countries were "early innovators of human rights trials as well as truth commissions. … Since more time has passed, we can more fully assess the effect of these transitional justice mechanisms on future human rights practices, democratic consolidation, and conflict than in any other region.").

[87] *See also id.* at 433.

[88] *See* SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY 228 (1991) ("In new democratic regimes, justice comes quickly or it does not come at all.").

[89] *See* CHANDRA LEKHA SRIRAM, GLOBALIZING JUSTICE FOR MASS ATROCITIES: A REVOLUTION IN ACCOUNTABILITY (2005).

providing a larger pool of case studies.[90] Although there are competing conceptions of how to measure the value of any intervention, this new research aspires to evaluate both the performance of various transitional justice mechanisms (in terms of their ability to meet established benchmarks) as well as their impact on the societies in question (in terms of determining the effects and causal power of an intervention).

To be sure, it is relatively easy to measure more immediate and concrete outcomes of transitional justice processes, such as: How many cases were filed or testimonies recorded? Were trials conducted fairly and impartially? Were reparations provided? Did violence or tensions resume? How many victims were able to participate in the process and did they report they were satisfied with the process? However, assessing the long-term impact of a transitional justice program, judging its "success" in instantiating democracy or peace, and measuring whether all its varied goals have been achieved pose acute challenges.[91] Transitional justice processes are multidimensional and cross-sectional. Articulated goals—truth, justice, and reconciliation—are by their nature amorphous and tricky to measure. Proving deterrence in particular is an inherently fraught exercise, even in well-established domestic criminal justice systems, and requires the conceptualization of counterfactuals that cannot be tested.[92] In any case, processes of deterrence may operate differently in atrocity situations.[93] This is particularly so when it comes to those who order offenses, leaders who are susceptible to prosecution under principles of command responsibility, and the rank-and-file.[94]

Furthermore, the architects of transitional justice interventions often aspire to catalyze more ambitious processes of social change and to alter the society's trajectory of political development. These macro goals involve complex, unpredictable, and nonlinear processes that are embedded within larger social and political systems that are themselves beset with confounding variables. The full impact of various interventions may take years, or even decades, to play out, and firm conclusions on causality remain elusive.[95] Furthermore, there is the perennial problem of endogeneity and simultaneity: the emergence of certain transitional justice mechanisms, such as reparations or even prosecutions, can be a *consequence* rather than a *cause* of the consolidation of peace and democracy. Even if a positive correlation emerges between a transitional justice response, such as criminal trials, and conflict termination or the instantiation of peace, other factors

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[90] *See* Kathryn Sikkink & Hun Joon Kim, *The Justice Cascade: The Origins and Effectiveness of Prosecutions for Human Rights Violations*, 9 ANN. REV. L. & SOC. SCI. 269 (2013); Sikkink & Walling, *supra* note 30, at 430-31 (graphing prosecutions over time from 1979).

[91] Kirsten Ainley et al., *Transitional Justice in Sierra Leone: Theory, History and Evaluation*, *in* EVALUATING TRANSITIONAL JUSTICE: ACCOUNTABILITY AND PEACEBUILDING IN POST-CONFLICT SIERRA LEONE 1, 6 (2015).

[92] *See* Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. CRIM. LAW & CRIMINOLOGY 765 (2010).

[93] Kate Cronin-Furman, *Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity*, 1 INT'L J. TRANSITIONAL JUSTICE 434, 439-40 (2013) (discussing whether the proverbial "rational actor" exists in atrocity situations and if atrocities can be understood as part of a rational strategy under certain conditions); Macartan Humphreys & Jeremy Weinstein, *Handling and Manhandling Civilians during Civil War*, 100(3) AM. POL. SCI. REV. 429 (2010) (arguing that internal dynamics rather than other factors dictate a group's propensity to abuse civilians in armed conflicts).

[94] Cronin-Furman, *supra* note 93, at 447, 453 (arguing that commanders with an adequately high risk of prosecution are most likely to be deterred by the prospects of an international prosecution).

[95] Colleen Duggan, *Editorial Note*, *Transitional Justice on Trial—Evaluating its Impact*, 4 INT'L J. TRANSITIONAL JUST. 315, 321 (2010).

could be increasing the likelihood of all these phenomena.[96] Because demonstrated correlations remain rather weak, other variables—such as the length, nature, and severity of the conflict or post-conflict regime and polity characteristics—may be more important to peace duration than particular post-conflict transitional justice decisions.[97] Finally, principled evaluations are difficult because transitional justice interventions are almost always the result of fraught political compromises and concessions, and yet they are often measured against unattainable ideals.[98]

There are additional challenges posed by cross-national research in light of the wildly different contexts in which transitional justice mechanisms have been utilized. Given this variation, the field more readily lends itself to ethnographic and thick description approaches or small-N regional analyses.[99] That said, some scholars have begun to undertake large-N studies premised on data drawn from the dozens of countries that have undergone political transitions since the 1970s and 1980s.[100] Aiding this approach is the relatively recent emergence of several comprehensive datasets on conflict dynamics, amnesty laws, and the global deployment of transitional justice mechanisms. These data enable the testing of assumptions and hypotheses around transitional justice on a large number of transitional states. For example, the Transitional Justice Database Project includes over 900 instances when 120 states implemented one or more transitional justice mechanisms (trials, truth commissions, amnesties, reparations, and lustrations) since 1970.[101] Through empirical research on societies that have experienced several decades of change since their transition away from authoritarianism and war, scholars have only just begun to confirm, or refute, some of the claims articulated in the theoretical literature.

A few additional notes of caution before diving into the literature. First, there is an ever-present risk of bias in this work given that "scholarship, advocacy, and practice" often reside under one roof, creating a potential "feedback loop" that masks adverse outcomes and excludes critical perspectives.[102] In this regard, scholars recommend the adoption of "methodological eclecticism" and Bayesian thinking to avoid the overreliance on any single approach.[103] In addition, not all scholars are relying upon precisely the same universe of case studies, definitions of various mechanisms, or dependent variables.[104] This heterogeneity may account for some of the diverging

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[96] Tove Grete Lie et al., *Post-Conflict Justice and Sustainable Peace* (World Bank, Policy Research Working Paper No. 4191, 2007), at 9.

[97] *Id*. at 16-17. *See also* Dancy & Wiebelhaus-Brahm, *Empirical Evaluation*, *supra* note 85, at 8-10 (discussing the difficulties of controlling for alternative explanations); *id*. at 28 (concluding that "strong autocracies and strong democracies are at lower risk of conflict resumption.").

[98] Duggan, *supra* note 95, at 321; Sikkink, *supra* note 59, at 25 ("The very magnetism of the ideals that gave impetus to the [justice] cascade also sets it up for failure, when measured against those ideals. Justice … is one of those powerful concepts that in practice always falls short of our ideals.").

[99] David Backer, *Cross-National Comparative Analysis*, *in* ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH 23-72 (Hugo Van Der Merwe et al. eds., 2009).

[100] Elin Skaar et al., *Analytical Framework, in* TRANSITIONAL JUSTICE IN LATIN AMERICA: THE UNEVEN ROAD FROM IMPUNITY TOWARDS ACCOUNTABILITY 25, 26 (2016).

[101] *See* Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, *Transitional Justice in the World, 1970-2007: Insights from a New Dataset*, 47(6) J. PEACE RES. 803 (2010). Geoff Dancy and colleagues have created a truth commission database as well. *See* Geoff Dancy, Hunjoon Kim & Eric Wiebelhaus-Brahm, *The Turn to Truth: Trends in Truth Commission Experimentation*, 9(1) J. HUM. RTS. 45 (2010).

[102] Duggan, *supra* note 95, at 317.

[103] Hugo dan der Merwe, Victoria Baxter & Audrey R. Chapman, *Introduction*, *in* ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH 1, 9 (Hugo Van Der Merwe et al. eds., 2009).

[104] For example, when it comes to criminal accountability, some studies track post-conflict trials while others focus on judicial proceedings mid-conflict; some count the entire process of prosecution whereas others count only guilty

conclusions in the literature.[105] Furthermore, given the highly contextual nature of post-conflict or post-repression societies, policymakers should be cautious about using aggregate findings when focused on impressionistic conclusions drawn from a single case. Indeed, the literature reveals that individual case studies and cross-national studies often yield contradictory findings. As a result of all these concerns, the empirical transitional justice literature remains somewhat tentative and modest when it comes to causal claims.[106]

What the Research Shows

Notwithstanding these difficulties of empirical proof, some trends are emerging that should inform policy prescriptions and funding priorities within the international community and transitioning states such as Syria. Most importantly: multiple studies have demonstrated that impunity is a reliable predictor of future violence. Indeed, a history of prior unaddressed atrocity crimes and habituation to impunity appear as structural risk factors in all atrocities prevention checklists and early warning systems.[107] The majority of studies show that societies that host at least some post-conflict human rights trials enjoy more durable periods of peace than countries that choose impunity, even if prosecutions are coupled with other transitional justice interventions, such as a truth commission.[108] For example, Lie et al. rely on the largescale Civil War and Transitional Justice database produced by Binningsbø et al.[109] and the Uppsala-PRIO armed conflict database to measure the impact of transitional justice interventions (including transitional justice abstentions such as amnesties and exile) on conflict and peace duration. They conclude that the nature of conflict termination (with military victories leading to more durable peace than negotiated settlements) is the most important determinate of peace duration,[110] but the various transitional justice mechanisms standing alone and in combination are also significant. Of all the potential interventions studied, trials (even if limited, one-sided, and unfair) are most correlated with peace duration, particularly in democracies.[111] Payne et al. agree that the type of conflict (secessionist versus civil wars) and the type of conflict cessation (a military victory versus a negotiated conclusion) are highly relevant to the instantiation of peace, with the latter two variables

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verdicts; some look at all trial proceedings others focus on "human rights trials," variously defined. *See* Sikkink, *supra* note 59, at 136-37 (discussing different coding methodologies).

[105] *See* Geoff Dancy & Eric Wiebelhaus-Brahm, *The Impact of Criminal Prosecutions During Intrastate Conflict*, 55(1) J. PEACE RES. 47, 48 (2018) (discussing study design variation) [hereinafter *Dancy & Wiebelhaus-Brahm, Intrastate Conflict*].

[106] *See* Oskar N.T. Thoms, James Ron, and Roland Paris, *The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners*, Centre for International Policy Studies Working Paper, at 4, 12 (Apr. 2008) (noting that few studies at the time articulated strong conclusions about the effects of transitional justice across multiple cases).

[107] Lawrence Woocher, *Developing a Strategy, Methods and Tools for Genocide Early Warning*, prepared for the Office of the Special Adviser to the UN Secretary-General on the Prevention of Genocide (Sept. 2006); Barbara Harff, *Assessing Risks of Genocide and Politicide*, *in* PEACE AND CONFLICT (Monty G. Marshall & Ted Robert Gurr eds., 2005).

[108] *See, e.g.,* Sikkink, *supra* note 59, at 148-56 (examining the correlation between trials in Latin American and the instantiation of democracy, peace, human rights, and the rule of law); Geoff Dancy et al., *Behind Bars and Bargains: New Findings on Transitional Justice in Emerging Democracies*, 63(1) INT'L STUD. Q. 99 (2019). *But see* Meernik et al., *supra* note 67, at 321 (finding that neither international tribunals nor human rights trials appear to exercise a significant impact on peace or human rights in post-conflict states, but may offer other salutary benefits).

[109] *See* Helga Malmin Binningsbø, et al., *Armed Conflict and Post-Conflict Justice, 1946-2006: A Dataset*, 49 J. PEACE RESEARCH 731 (2012).

[110] Lie et al., *supra* note 96 at 9, 14.

[111] Lie et al., *supra* note 96, at 14, 16.

making it more likely that conflict will reoccur.[112] Other studies find that negotiated settlements that result in power-sharing arrangements are more durable.[113] These negotiated settlements tend to produce more fulsome transitional justice responses (although amnesties are most likely to follow government victories).[114]

Sikkink & Walling similarly surveyed 17 Latin American countries that have hosted trials as part of a transitional justice response and found human rights improvements in 14 of them many years later. They determined that countries with more cumulative prosecutions proved to be less repressive according to the Political Terror Scale (PTS) than countries that did not hold trials and countries that held fewer trials.[115] Countries with both a truth commission and trials fared the best. They hypothesize that these results can be traced both to the material punishment meted out by courts and to normative pressures exerted by trials, which tend to be highly salient in post-conflict periods. In no case did trials exacerbate or extend conflict in any of the countries studied.[116] This result challenges outmoded theoretical literature that trials extend conflicts by discouraging bargaining between embattled parties or impeding peace processes.[117] Skeptics nonetheless counter that trials—particularly before international bodies—tend to monopolize international attention and resources, undermining more restorative transitional justice responses.[118] A more nuanced (and paradoxical) view is that trials, including those at an international court such as the ICC, might both prolong conflicts—by eliminating the option of exile—and also deter atrocities by signaling to leaders that safe exile is not an option.[119]

The results of research by Dancy & Wiebelhaus-Brahm similarly attests to the value of post-conflict trials. They demonstrate that for every trial year in a transitional state, the risk of conflict recurrence decreases by about 10%.[120] This suggests that "populations become increasingly accustomed to trials as they continue rather than becoming increasingly restive."[121] They have also compiled a large-N cross-national dataset that includes instances of criminal trials (in domestic, foreign, or international courts involving conflict-related charges) of both non-state actors and state agents to test whether criminal prosecutions of armed combatants convened in the midst of violent interstate conflict help to bring about the end of fighting. They conclude that (1) trials of rebels are associated with a higher probability of conflict termination (on the theory that trials compel the opposition to discontinue fighting); (2) trials of state agents are weakly associated with conflict persistence (on the theory that such trials signal a lack of resolve on the part of the

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[112] Leigh Payne et al., *Conflict Prevention and Guarantees of Non-Recurrence* 17 (World Bank, Working Paper, May 1, 2017).
[113] *See, e.g.*, Caroline Hartzell & Matthew Hoddie, *Institutionalizing Peace: Power Sharing and Post-Civil War Conflict Management*, 47 AM. J. POL. SCI. 318 (Apr. 2003).
[114] Dancy & Wiebelhaus-Brahm, *Empirical Evaluation*, *supra* note 85, at 22.
[115] Sikkink & Walling, *supra* note 30, at 437.
[116] *Id*. at 440.
[117] *See, e.g.*, Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?,* 84 WASH. U. L. REV. 777 (2006).
[118] Sarah Nouwen & Wouter Werner, *Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity*, 13 J. INT'L CRIM. JUST. 157-76 (2014).
[119] Daniel Krcmaric, *The ICC's Pursuit of International Justice Creates Difficult Tradeoffs Between Ending Ongoing Conflicts and Deterring Future Atrocities*, ICC FORUM, http://iccforum.com/performance (last visited June 19, 2018); Daniel Krcmaric, *Should I Stay or Should I Go? Leaders, Exile, and the Dilemmas of International Justice*, 62(2) AM. J. POL. SCI. 486 (2018) (tracing patterns of exile and noting that culpable leaders are less likely to seek exile than in the past).
[120] Dancy & Wiebelhaus-Brahm, *Empirical Evaluation*, *supra* note 85, at 28.
[121] *Id*. at 30.

government, which emboldens the rebels); and (3) international trials are weakly associated with conflict termination (on the theory that the international community tends to focus on intractable conflicts and judicial interventions may serve as a "shock" to frozen conflict conditions).[122] In no cases do trials prolong conflict.[123] Subsequent abuses also decrease with the capture, trial, and incarceration of rebel group leaders,[124] which offers "a legitimate form of leadership decapitation."[125] Dancy & Wiebelhaus-Brahm conclude that "retributive modes of justice are more effective for resolving conflict, whereas truth-telling and legal immunity are more likely to exacerbate tensions" over time.[126]

In the same vein, Payne et al. find that the trials of low- to mid-level perpetrators are statistically-correlated with conflict nonrecurrence.[127] The rate of recurrence actually decreases by approximately 70% when such trials are held.[128] Conversely, trials of high-ranking actors is associated with the recurrence of conflict,[129] perhaps because such trials are seen as an attack on the group such individuals represent, which exacerbates conflict.[130] There is no statistically-significant relationship between the establishment of national human rights institutions (such as ombuds offices) or non-prosecutorial transitional justice mechanisms (truth commissions and amnesties) and the resumption of conflict (although the authors do not examine the impact of reparations, vetting, or corporate complicity for lack of comprehensive data).[131] As such, this study concludes that negotiating parties have some flexibility in initiating a range of non-penal transitional justice processes without jeopardizing the prospects for peace.[132] Similarly, even studies that did not find that trials enhanced human rights practices or the instantiation of peace concluded that trials did not exert negative effects either.[133]

In subsequent research, Dancy et al. conclude that trials provide some deterrent effect: societies that undertake trials manifest fewer violations of physical integrity than societies that do

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[122] Dancy & Wiebelhaus-Brahm, *Intrastate Conflict*, *supra* note 105, at 48, 52-53. Indeed, the existence of "security trials" (trials against rebels by the state) produces the same change in probability of conflict termination as the presence of a U.N. peacekeeping operation (14%). *Id*. at 56.
[123] *Id*. at 56, 59-60.
[124] Michael Broache, *The International Criminal Court and Atrocities in DRC: A Case Study of the RCD-Goma (Nkunda Faction)/CNDP/M23 Rebel Group* (Sept. 1, 2014) (showing that violence diminished upon the surrender of the head of M23), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2434703; Kirssa Cline Ryckman, *Lasting Peace or Temporary Calm? Rebel Group Decapitation and Civil War Outcomes*, CONFLICT MANAGEMENT AND PEACE SCIENCE (2017); Michael Tiernay, *Killing Kony: Leadership Change and Civil War Termination*, 59(2) J. CONFLICT RESOLUTION 175 (2013); Jenna Jordan, *When Heads Roll: Assessing the Effectiveness of Leadership Decapitation*, 18(4) SECURITY STUDIES (Dec. 2009).
[125] Dancy & Wiebelhaus-Brahm, *Intrastate Conflict*, *supra* note 105, at 51.
[126] Dancy & Wiebelhaus-Brahm, *Empirical Evaluation*, *supra* note 85, at 28.
[127] Payne, *supra* note 112, at 17. A similar effect is seen with the promulgation of new constitutions, particularly when produced during participatory processes. The inclusion of human rights protections within these constitutions does not impact the rate of conflict recurrence; however, these provisions may accomplish other goals. *Id*. at 17-18.
[128] Payne, *supra* note 112, at 19.
[129] *Id*.
[130] *Id*. at 23. *See also* Chris Mahoney, *International Criminal Justice Case Selection Independence: An ICJ Barometer*, FICHL Policy Brief Series No. 58, at 1 (2016) ("a criminal process that disproportionately targets one party or its leadership comparative to another group deepens conflict drivers such as ethno-regional, political, or other societal schisms.").
[131] Payne, *supra* note 112, at 19-20, 22.
[132] *Id*. at 20.
[133] Meernik et al., *supra* note 67, at 327.

not.[134] At the same time, they note that amnesties can enhance improvements in civil and political rights, "which support open democratic competition."[135] They measure these human rights outcomes using the CIRI Human Rights Database, which offers an assessment of the protection of "physical integrity rights," which encompasses acts of extrajudicial killing, torture, disappearances, and arbitrary detention, as well as the panoply of civil and political rights. They hypothesize that conflicting policies can co-exist agonistically—generating positive aspects in an environment marked by some political conflict.[136]

Sometimes events in one country have an impact on the transitional justice landscape in another. Escribà-Folch & Wright look at the effect of trials on neighboring dictatorships. They show that "personalist dictatorships" are less likely to democratize when their *neighbors* prosecute human rights abusers.[137] This does not hold true in other dictatorships, however, where they find little evidence to suggest that neighbors' prosecutions deter democratic transitions. They hypothesize that the ability of elites to protect their interests post-transition is a strong predictor of whether trials in neighboring countries will be perceived as threatening.[138] Most of the studies canvassed above look at criminal trials rather than civil suits, which also offer an opportunity for victim empowerment, particularly when criminal proceedings are foreclosed for some reason, such as a *de jure* amnesty or a *de facto* lack of political will.

In today's transitions, trials are often accompanied by other transitional justice interventions. Lie et al. did not record increases in peace duration where the "whole package" of transitional justice mechanisms are employed.[139] By contrast, Olsen et al. have coined the concept of a "justice balance" and conclude that truth commissions are more likely to achieve their goals when accompanied by amnesties or criminal trials.[140] Their theory is that truth commissions promote "a balance between stability and accountability," provide a middle ground between appeasement and justice, and enhance the human rights-promoting qualities of other interventions.[141] Amnesties in particular can help to calm those who might be prosecuted and thus enable other mechanisms to function. In fact, their research challenges conventional wisdom because it suggests that truth commissions deployed in isolation actually have a negative impact on human rights in the aggregate as measured by two major human rights indices: the CIRI Database and the Political Terror Scale.[142]

Perhaps paradoxically, the combination of transitional justice mechanisms that is most associated with improvements in indicators of democracy and human rights compliance was trials

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[134] Dancy et al., *supra* note 101, at 9-10.
[135] *Id*. at 10.
[136] *Id*.
[137] Abel Escribà-Folch & Joseph Wright, *Human Rights Prosecutions and Autocratic Survival*, 69(2) INT'L ORG. 343 (2015).
[138] *Id*. at 347.
[139] Lie et al., *supra* note 96, at 14.
[140] Tricia D. Olsen et al., *When Truth Commissions Improve Human Rights*, 4 INT'L J. TRANSITIONAL JUST. 457, 469 (2010). *See also* Seils, *supra* note 7, at 5 ("all of these measures, taken together, offer more than the sum of their parts").
[141] Tricia D. Olson et al., *The Justice Balance: When Transitional Justice Improves Human Rights and Democracy*, 32(4) HUM. RTS. Q. 980 (2010).
[142] *Id*. at 462-3; *see also* ERIC WIEBELHAUS-BRAHM, TRUTH COMMISSIONS AND TRANSITIONAL SOCIETIES: THE IMPACT ON HUMAN RIGHTS AND DEMOCRACY (2010) (citing preliminary findings that the establishment of a truth commission has only a marginal effect on subsequent democratic practice and may actually be associated with increases in human rights violations).

plus amnesties or trials, amnesties, and truth commissions in tandem.[143] Societies that implement some combination of these options are more likely to show improvements in human rights than societies that implement none of them.[144] Consistent with Olsen et al.'s conclusions, Dancy & Wiebelhaus-Brahm have also found that truth commissions standing alone are associated with conflict resumption, especially if they operate for extended periods of time.[145] The theory is that truth commissions offer lower levels of human rights protection, may generate resentment among those who yearn for more robust responses, and embolden spoilers.[146] In a separate study, however, Brahm tracked the implementation of truth commission recommendations and determined that while truth commissions can discredit unaccountable institutions, set a reform agenda, and channel international pressure, they do not necessarily have an impact—positive or negative—on processes of democratization.[147] The effect of non-retributive mechanisms (truth commissions and reparations) on peace duration is stronger in democracies than in the general sample; scholars hypothesize that this is due to a greater focus on the victim in such contexts.[148]

Although such statistical correlations may counsel against the establishment of a truth commission, others are quick to note that even if they do not necessarily promote, or are not correlated with, conflict non-recurrence, truth commissions may contribute to the "quality of peace"[149] and enhance other worthy goals, such as fulfilling victims' right to truth, enhancing survivors' dignity through staging testimonial processes, producing official historical narratives, and spurring reforms.[150] For example, Rodolfo Mattarollo—who was part of the U.N. Mission in Sierra Leone (UNAMSIL)—has observed that:

> In countries where they have had the greatest impact, truth commission reports, and especially their conclusions and recommendations, have acted as a kind of foundation stone, signalling a society's decision to turn over a new page in its history. In fact, an important characteristic of truth commissions ... has been their clear desire to break with the past.[151]

It should be noted that the studies mentioned above take a binary approach to coding the existence of a truth commission (or other intervention)—either the mechanism was utilized or it was not. They do not, for example, disaggregate truth commissions by particular attributes, institutional strengths, or perceptions of legitimacy.[152] The value of truth commissions may hinge on whether the truth commission's recommendations are implemented, which is also not recorded in these studies.[153] Botha took a different approach by coding truth commissions according to their strengths and weaknesses with reference to their resources, thoroughness of investigations,

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[143] Olsen et al., *supra* note 140, at 464. *See also* TRICIA D. OLSEN, LEIGH A. PAYNE, AND ANDREW G. REITER, TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY 159 (2010).
[144] Olsen et al., *supra* note 135, 463.
[145] Dancy & Wiebelhaus-Brahm, *Empirical Evaluation*, *supra* note 85, at 28 (finding that for every year a truth commission operates, the survival time for peace decreases by 10%).
[146] *Id*. at 31.
[147] Thoms, *supra* note 100, at 41 (citing Eric Brahm, *Truth and Consequences: The Impact of Truth Commissions in Transitional Societies* (Ph.D. Diss., University of Colorado at Boulder (2006)).
[148] Dancy & Wiebelhaus-Brahm, *Empirical Evaluation*, *supra* note 85, at 18.
[149] *See* Johan Galtung, *Peace, Positive and Negative*, ENCYCLOPEDIA OF PEACE PSYCH. (Daniel J. Christie ed. 2011).
[150] Payne, *supra* note 112, at 22; Olsen et al., *supra* note 140, at 475.
[151] Association for the Prevention of Torture, *Truth Commissions: Can they Prevent Further Violations?*, at 31.
[152] Olsen et al., *supra* note 140, at 466-67.
[153] Dancy & Wiebelhaus-Brahm, *Empirical Evaluation*, *supra* note 85, at 33.

perceived credibility, etc.[154] She found that strong truth commissions are associated with sustained decreases in the reporting of government repression and public protests, although she acknowledges that both factors (the strength of the truth commission and the reduction in protests) could be caused by a third variable, such as the quality of the political bargain reached between adversaries.[155]

Putting their legality to the side, amnesty laws feature prominently in many early transitional justice efforts because of their presumed potential to lure parties to the bargaining table; remove the threat of prosecution; encourage defections; and enable power-sharing arrangements to be put in place.[156] These assumptions have been challenged by empirical research that concludes that amnesties appear to reduce peace duration, especially in democracies.[157] One study, for example, shows that for every additional amnesty that a country has enacted, the risk of conflict recurrence actually *increases* by 11%.[158] Reiter has found that amnesties granted in the context of internal armed conflicts have no demonstrable impact on sustaining peace or security, although they do entice combatants to demobilize and can help initiate negotiations and secure agreements.[159] Reiter reveals that the timing of amnesties matters: those put in place post-conflict as part of a carefully negotiated peace agreement are better correlated with a sustained peace than self-amnesties or amnesties extended by a government during a conflict, which are often perceived as unreliable political gestures.[160] Indeed, Assad has implemented several amnesty decrees over the years in an effort to entice back individuals who had refused compulsory military service and induce rebels to hand in their weapons and surrender.[161] These did not necessarily have the desired effect, in part due to the hostility and distrust felt towards him within the opposition.

Research also reveals a distinction between amnesty and exile with the former having a "strong positive effect on peace failure in post-conflict democratic societies, while exile still appears to prolong peace."[162] Amnesties enacted by non-democratic governments appear to be less credible and may send a signal of weakness.[163] All that said, these studies have generally coded amnesties dichotomously and have not made distinctions between amnesties for political prisoners, rebels laying down arms, perpetrators of grave international crimes, or leaders versus the rank-and-file. Indeed, there is a high degree of heterogeneity around amnesty laws when it comes to their scope, their democratic legitimacy, and their application.[164] Taken together, these modern

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[154] BELINDA MEGAN BOTHA, TRUTH COMMISSIONS AND THEIR CONSEQUENCES FOR THE LEGITIMACY of Nascent Democracies 102 (Ph.D. dissertation, Univ. of Houston, 1998).
[155] *Id*. at 149-153.
[156] Indeed, several studies have concluded that amnesties are the most common transitional justice response. Andrew G. Reiter, *Examining the Use of Amnesties and Pardons as a Response to Internal Armed Conflict*, 47 ISR. L. REV. 133, 134 n.6, 137-38 (2014).
[157] Lie et al., *supra* note 96, at 16.
[158] Dancy & Wiebelhaus-Brahm, *Empirical Evaluation*, *supra* note 85, at 27-8.
[159] Reiter, *supra* note 150, at 146.
[160] *Id*. at 146-47.
[161] *See, e.g.*, Legislative Decree No. 15, 23 (Arabic); *Syria: Amnesty for Rebels Extended*, GLOBAL LEGAL MONITOR (Oct. 31, 2016).
[162] Lie et al., *supra* note 96, at 15.
[163] Dancy & Wiebelhaus-Brahm, *Empirical Evaluation*, *supra* note 85, at 32.
[164] *See* Ronald Slye, *The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law*, VA. J. INT'L L. 173 (2002).

studies contradict earlier untested hypotheses suggesting that trials would do little to deter violence but that amnesties promote peace.[165]

Many transitional justice interventions tend to privilege victims' civil and political rights to the exclusion of economic and social rights, even though breaches of these entitlements feature prominently in victims' identification of the sources of tension pre-conflict.[166] Reparations—whether individual or collective, material or symbolic—respond to these concerns, and are often demanded by, and promised to, victims during a transitional period. The final report of the truth and reconciliation commission of Sierra Leone perceptively noted that:

> Truth-telling without reparations could be perceived by the victims as an incomplete process in which they revealed their pain and suffering without any mechanism in place to deal with the consequences of that pain or to substantially alter the material circumstances of their lives. In that regard, the Commission concurs with the view expressed with the South African Truth and Reconciliation commission that without adequate reparation and rehabilitation measures, there can be no healing or reconciliation.[167]

Studies of survivors in post-conflict Bosnia-Herzegovina and Croatia reported valuing social reconstruction—aiming for a society characterized by a high degree of tolerance, peaceful co-existence, and a collective identity that transcends communal differences—as much as formal justice mechanisms.[168] The architects of truth commissions devoted to Kenya, East Timor, and Tunisia have attempted to incorporate these economic and social concerns into their mandates.[169]

Despite their importance to victims, the actual implementation of reparations programs has generated deep dissatisfaction. For example, the South African Truth and Reconciliation Commission (TRC) has been criticized for over-promising and under-delivering on reparations, resulting to litigation by victims' groups to enforce promises that the state would tackle entrenched inequality post-apartheid.[170] In other scenarios, victims perceive asymmetries with demobilization, disarmament, and reintegration (DDR) programs, which tend to receive international funding and disproportionately benefit ex-combatants.[171] In Sierra Leone, for example, DDR programs allowed ex-combatants to establish monopolies in certain trades to the detriment of their victims.[172] Although the international community has disbursed vast expenditures on DDR programs over the years, it has been reluctant to fund reparations programs directly, particularly when they involve simple wealth transfers. That said, some funding has been provided under a peacebuilding or

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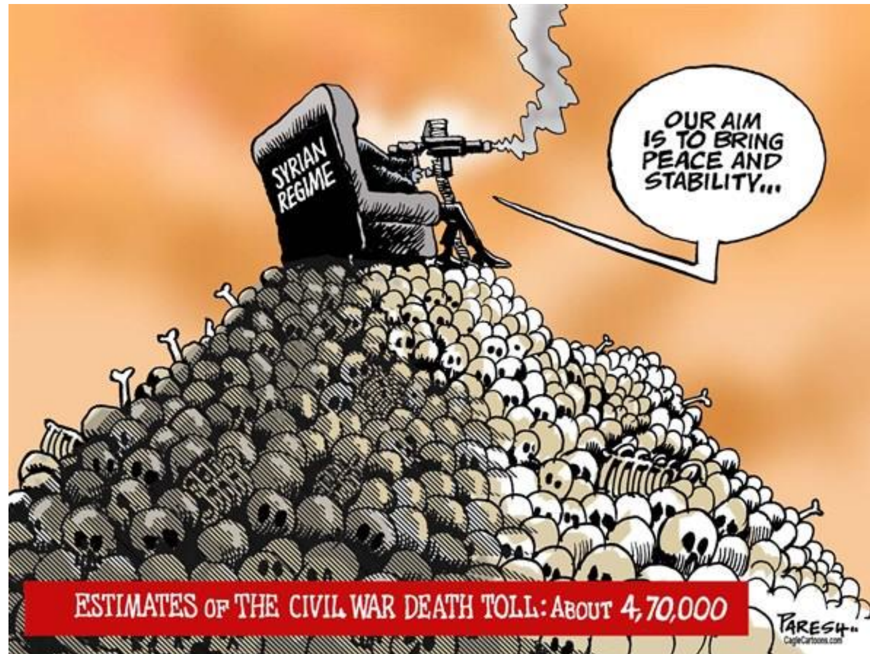
[165] Snyder & Vinjamuri, *supra* note 83, at 6 (arguing that "[a]mnesties, in contrast, have been highly effective in curbing abuses").
[166] Paige Arthur, *How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321 (2009); Sandoval, *supra* note 16, at 167.
[167] WITNESS TO TRUTH: THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF SIERRA LEONE, Volume II, ¶ 41 (Nov. 2004).
[168] Mirkos Biro et al., *Attitudes Toward Justice and Social Reconstruction in Bosnia and Herzegovina and Croatia*, *in* MY ENEMY, MY NEIGHBOR: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 183 (Eric Stover & Harvey Weinstein eds., 2004).
[169] Sandoval, *supra* note 16, at 174.
[170] Narnia Bohler-Muller, *Reparations for Apartheid-Era Human Rights Abuses: The Ongoing Struggle of Khulumani Support Group*, 1 SPECULUM JURIS 1 (2013).
[171] *See* DISARMING THE PAST: TRANSITIONAL JUSTICE AND EX-COMBATANTS (Anna Cutter Patel et al. eds., 2009).
[172] *See* Kirsten Ainley, *Evaluating the Success of Transitional Justice in Sierra Leone and Beyond*, *in* EVALUATING TRANSITIONAL JUSTICE: ACCOUNTABILITY AND PEACEBUILDING IN POST-CONFLICT SIERRA LEONE 241 (2015).

development framework. In Sierra Leone, for example, the U.N. Peacebuilding Fund funded the Sierra Leone reparations program recommended by the country's TRC.[173] This latter approach, however, has raised concerns because it does not address the specific harms experienced by victims and often involves the provision of social services that governments should be providing to its citizenry as a matter of course.



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The research has only just begun to explore which transitional justice policy interventions—reparations, social acknowledgement, political empowerment, punishment, or apologies—facilitate or inhibit the elusive processes of achieving forgiveness, reconciliation, and peaceful coexistence in post-conflict contexts.[174] Indeed, many victims will report that reconciliation or forgiveness may be undesirable or even impossible,[175] especially when there is no consensus around the events of the past and no admission of responsibility or repentance on the part of perpetrators.[176] Policy interventions aimed at promoting forgiveness are controversial because they may be counter-productive if foisted on victims, who alone possess the ability to forgive those who have harmed them. If unaccompanied by processes of institutional reform aimed at rectifying underlying power relationships or inequalities, programs aimed at fostering forgiveness can result in little more than a compromised political accommodation or *modus vivendi*

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[173] INTERNATIONAL ORGANIZATION FOR MIGRATION, SUPPORT TO THE IMPLEMENTATION OF THE SIERRA LEONE REPARATIONS PROGRAMME. IOM provided programmatic and fiduciary oversight to the scheme, which included cash grants, vocational training, emergency medical assistance, and symbolic measures. *Id.* at 1.

[174] Roman David & Susan Y. P. Choi, *Forgiveness and Transitional Justice in the Czech Republic*, 50(3) J. CONFLICT RESOLUTION 339, 341 (2006).

[175] Laurel E. Fletcher& Harvey M. Weinstein, *Transitional Justice and the "Plight" of Victimhood*, *in* RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE (Cheryl Lawther et al. eds, 2017); Lesley McEvoy, et al., *Reconciliation as a "Dirty Word": Conflict, Community Relations and Education in Northern Ireland*, 60(1) INT'L AFF. 81 (2006).

[176] *But see* Jeremy Watkins, *Unilateral Forgiveness and the Task of Reconciliation*, 21(1) RES PUBLICA 19 (2015) (arguing that forgiveness can contribute to civic reconciliation even in the absence of a shared account of the past).

that further entrenches power hierarchies or marginalizes victims, particularly those who refuse to go along with a program of forced reconciliation.[177] They may also foster recidivism.[178]

Forgiveness can be defined as the abandonment of feelings of vengeance and offers the potential to "renew civic relationships between victims and perpetrators" and prevent conflicts from escalating or recurring.[179] David & Choi posit that fostering genuine forgiveness requires multiple approaches: empowering victims individually, socially and politically (through restitution, compensation, psychosocial rehabilitation, and institutional reform); downgrading perpetrators through punitive measures and apologies; and restoring the status balance between the two groups.[180] To test these hypotheses, David & Choi surveyed former political prisoners in the Czech Republic on a range of transitional justice questions devoted to forgiveness. They found that apologies, measures of social and individual empowerment, punishment, and political enfranchisement had the strongest effect on promoting forgiveness; these impacts were blunted where respondents had experienced prolonged imprisonment or torture.[181] The theory is that victims who continue to suffer the economic and health consequences of mistreatment find it harder to forgive and put aside prior disagreements; on the flip side, social empowerment facilitates forgiveness. Likewise, their data suggest that the punishment of perpetrators and apologies facilitate forgiveness, because they signify a recognition of wrongdoing and a willingness to address it. All that said, the frequency of church attendance turned out to be the strongest predictor of forgiveness among their particular pool of respondents.[182]

In conclusion, a number of lessons can be learned from this research as well as "successful" transitional justice case studies. First is the importance of implementing a broad-based transitional justice program that includes elements of accountability, truth-telling, reparations, memorialization, and forward-looking reforms. These mechanisms can be layered or sequenced, depending on the political circumstances and the availability of resources. Second, and relatedly, it has proven helpful to enact an omnibus transitional justice law to create the legal and political framework for transitional justice mechanisms to operate and to ensure governmental buy-in. Third, although it is important for any transitional justice program to enjoy domestic legitimacy, incorporating international elements in the process helps to insulate transitional justice actors from political interference and keep a process on track. Fourth, all successful transitions contemplate some form of criminal accountability, even if it is only exemplary cases that ultimately move forward. Fifth, a strong victims' organization or community can consolidate and advance victims' preferences while offering a counterweight to sources of resistance. And sixth, transitional justice programs that generate unrealistic or unmet expectations, particularly around reparations, are unstable.

Pre-Transition Transitional Justice Lines of Effort in Syria

Turning to the Syrian context, the international community invested in a number of pre-transition transitional justice lines of effort, both unilaterally and multilaterally. Although individual states and norm entrepreneurs put forth proposals addressed to promoting criminal accountability within and beyond the ICC, these never achieved adequate momentum to generate

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[177] David & Choi, *supra* note 174, at 340-41.
[178] Watkins, *supra* note 170, at 27.
[179] David & Choi, *supra* note 174, 340.
[180] *Id*. at 342.
[181] *Id*. at 358.
[182] *Id*. at 363.

tangible progress, as discussed in previous chapters. This chapter focuses on the restorative end of the transitional justice spectrum, efforts that met the same fate.

For many years, the United Nations and individual states laid emphasis on the documentation of abuses "on all sides," including by leveraging tools available through the U.N. Human Rights Council and then the U.N. General Assembly. Beyond this documentation work, states and non-governmental organizations (NGOs) also surveyed and trained Syrian actors to prepare them for undertaking a program of transitional justice if a transition were ever to begin. The international community took steps to foster other pre-transition transitional justice interventions, including the establishment of programs dedicated to the psycho-social rehabilitation of survivors, the consolidation of victims' groups, and laying the groundwork for truth-telling exercises. Other proto-accountability exercises included naming and shaming the regime and individual perpetrators, although this was not pursued to the full extent possible in Syria. This individuation of responsibility could undergird in criminal trials as well as a lustration regime if one were ever undertaken (although with Assad likely remaining in power, the opportunities for this sort of vetting will be limited).

The remainder of this chapter highlights some of these interventions. It remains unclear whether this international engagement will have a lasting impact within Syria once it starts the arduous process of rebuilding itself post-conflict. To be sure, much depends on how the conflict gets resolved on the ground and whether the international community will condition reconstruction assistance on taking steps towards justice—an outcome that remains unsettled at the time this book goes to press.

Training, Outreach & Research

The imperative of Syrian ownership in determining transitional justice paths and priorities emerged as a frequent refrain in international discussions about the crisis. Indeed, this language became boilerplate in multilateral resolutions.[183] Actors within the international community did not, however, have a clear understanding of Syrians' varied preferences, needs, and capacity to undertake a fulsome process that would advance the complete range of transitional justice objectives, including criminal accountability and the vetting of potential perpetrators, the restitution and rehabilitation of victims, and institutional/legal reform. In particular, the potential for a transitional government to hold fair trials was unknown and largely unknowable, given a lack of understanding about the Syrian legal framework, which had historically been eclipsed by an Emergency Law in place since the Ba'athist coup of 1963 until it was rescinded in 2011 by Decree 161. Indeed, the international community had very little faith in the state of the Syrian judicial system given the relative unavailability of legislation and jurisprudence in English, the authoritarian nature of the judicial system under the Assad regime, and historical due process deficits.[184]

Identifying, convening, surveying, and training Syrian actors—ordinary Syrians as well as technocrats, incipient governance officials, representatives from historically marginalized groups, and potential future policymakers from legal, opposition, and activist backgrounds—emerged as a

[183] *See, e.g.*, G.A. Res. 66/253, ¶ 7, U.N. Doc. A/RES/66/253 (Feb. 21, 2012) (calling for "an inclusive Syrian led political process, conducted in an environment free from violence, fear, intimidation and extremism and aimed at effectively addressing legitimate aspirations and concerns of the people of the Syrian Arab Republic.").

[184] *See* Human Rights Watch, *Syria, Events of 2004*, WORLD REPORT 2005 (cataloging a long record of "grossly unfair trials" in Syria).

pre-transition activity undertaken to varying degrees by the international community to prepare for an eventual transition. In the spirit of empowering Syrian ownership of transitional justice processes, the international community convened or funded various international conferences dedicated to exploring transitional justice themes. To provide the necessary technical expertise, donor states regularly worked through civil society organizations (so-called "implementing partners") with a mandate for promoting peace and justice. The European Commission, the United Kingdom Foreign and Commonwealth Office (FCO), the Italian Ministry of Foreign Affairs, and the Open Society Foundation, for example, have funded transitional justice work in Syria by No Peace Without Justice (NPWJ). This outsourcing enables donors to catalyze the work in a way that is more cost effective, and that enjoys greater local legitimacy, than deploying government personnel directly in country. These conferences aimed to encourage Syrian legal experts and local leaders to begin to conceptualize an integrated transitional justice strategy and anticipate future legal reforms and institution-building exercises that would be imperative, or advisable, in any transition period.[185] Individuals were encouraged to evaluate existing transitional justice mechanisms and archetypes with an eye towards their adaptation to the Syrian context and the development of bespoke alternative models. Organizers of these events often invited civil society and governmental actors from other transitional and post-transition states—such as Guatemala, Cambodia, and Bosnia-Herzegovina[186]—in order to create opportunities for these experts to share their history of transitional justice with their Syrian counterparts. In 2005, for example, the International Center for Transitional Justice (ICTJ) helped develop a Documentation Affinity Group of human rights documentation centers from around the world to discuss ways to address shared transitional justice challenges.

Coming from a repressive prosecutorial culture, surveyed Syrians often defaulted to criminal accountability until introduced to the full suite of transitional justice tools. As such, many of these gatherings undertook a holistic approach to transitional justice and reconciliation by advocating for transitional justice processes beyond criminal prosecutions. Multilateral trainings explored ways to address the root causes of the conflict; the reform of institutions; the vetting of individuals undeserving of holding positions of power and importance in a new democratic order; processes of individual and collective restitution, including the return of property and looted assets; and memorializations. When it comes to lustration, the De-Ba'athification of Iraq emerged as a potent object lesson of how a process of vetting can be manipulated for political purposes and deprive a transitional state of bureaucratic expertise.[187] Because many donor states are wary of being perceived as promoting impunity, inadequate attention is often paid in such convenings to thinking about ways to craft a principled, conditional, and "legitimate" amnesty law that does not necessarily entrench blanket impunity.[188] This unwillingness to think creatively about amnesties

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[185] The Carter Center, for example, identified a number of constitutional and legislative reforms that would be desirable to bring Syrian law into compliance with international norms. *See* THE CARTER CENTER, SYRIA'S TRANSITION: GOVERNANCE AND CONSTITUTIONAL OPTIONS UNDER U.N. SECURITY COUNCIL RESOLUTION 2254 (June 2016).
[186] *See* Women's International League for Peace & Freedom, *Women Organising for Change in Syria and Bosnia* (2014).
[187] Miranda Sissons & Abdulrazzaq Al-Saiedi, *A Bitter Legacy: Lessons of De-Baathification in Iraq*, International Center for Transitional Justice (Mar. 4, 2013).
[188] *See* Louise Malinder, *Can Amnesties and International Justice Be Reconciled?*, 1 INT'L J. TRANSITIONAL JUST. 208 (2007) (arguing that international courts should recognize amnesties enjoying some democratic approval to promote peace and reconciliation if accompanied by mechanisms to fulfil victims' rights); Slye, *supra* note 164 (deriving principles to evaluate the legitimacy of amnesty laws).

is unfortunate given that there will inevitably be impulses to provide amnesty as an inducement to bring leaders to the negotiating table.[189] There are a number of ways that amnesty laws can be designed so as to contribute to, or complement, accountability mechanisms.[190]

Two important entities emerged in this space. The first is the Syrian Expert House, an initiative implemented by the Center for Political and Strategic Studies (SCPSS) under the leadership of Radwan Ziadeh, a longtime human rights leader and member of the Syrian opposition in exile who was appointed by the interim opposition government to head the Syrian Commission on Transitional Justice.[191] In consultation with the U.S. State Department and funded largely by Canada, SCPSS and the Syria Expert House hosted a conference in 2012 that brought together key Syrian opposition figures to create a Syria Transition Roadmap. This outcome document recommended a whole panoply of post-transition reforms addressed to political structures, the constitution, and the economy as well as sophisticated proposals dedicated to transitional justice. Institutionally, the Roadmap advocated the immediate creation of an Association for the Defense of the Victims of the Syrian Revolution and a National Preparatory Committee for Transitional Justice. It envisioned the eventual convening of a National Commission for Transitional Justice to manage all transitional justice activities post-transition.[192]

The second organization that emerged to pursue this work is The Day After Project (TDA). Designed to engage in transition planning with funding from the U.S.-Middle East Partnership Initiative (MEPI), TDA was first convened by the U.S. Institute of Peace and the German Institute for International and Security Affairs in 2012.[193] The imperative of transitional justice formed one pillar of its work, which envisioned the implementation of a range of retributive and more restorative measures over a notional two-year timeframe post-transition. A Special Criminal Court within the Syrian judiciary to prosecute senior regime officials formed a key component of its transitional justice blueprint. The report also advocated conditional amnesties for lower-level figures and targeted lustrations. In its guidelines, the report called for the inclusion of foreign expertise, "when needed, with full respect of [sic] Syrian sovereignty."[194] Although the organizers convened Syrians as part of this process and eventually spun off an independent organization, TDA was criticized as being too Western, which helped galvanize the SCPSS effort.[195]

The international community also convened sessions focused more intently on advancing fair, credible, and even-handed criminal trials to respond to the pervasive wartime criminality. These included trainings devoted to a number of practical and technical topics, such as best practices for undertaking rigorous human rights and criminal law investigations; collecting and archiving potential evidence to preserve the chain of custody; analyzing documentation to prove violations of human rights and international humanitarian law; and building the chain of command. This work mainly engaged networks of Syrian lawyers and judges that exist throughout Syria and in neighboring countries with expertise on the Syrian judiciary, penal law framework, evidentiary rules, and criminal procedure. Individuals were drawn from revolutionary courts in liberated areas and alternate bar associations, such as the Free Syrian Lawyers Aggregation, the Free Syrian

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[189] *See generally* Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (2009).
[190] *See* Transitional Justice Institute—University of Ulster, *The Belfast Guidelines on Amnesty and Accountability*.
[191] *See* Suzanne Nossel, *The Gross Misconduct of Radwan Ziadeh's Asylum Denial*, FOREIGN POLICY, July 25, 2017.
[192] SCPSS & Syria Expert House, *Syria Transition Roadmap* 141-155 (2013).
[193] USIP, The Day After Project, https://www.usip.org/publications/day-after-project.
[194] The Day After, *Transitional Justice*, http://tda-sy.org/en/.
[195] *See* USIP, *Evaluation of the United States Institute of Peace Support to the Day After Project* (July 2004).

Lawyers Association (FSLA), and the Council of the Free Syrian Judges—organizations composed mainly of judges and lawyers who had defected or were operating in liberated areas. They formed an International Legal Assistance Consortium funded by the Swedish International Development Agency (SIDA). The U.S.-founded and -funded Documentation Center of Cambodia (DC-Cam), which preceded the United Nations' establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC), offers an interesting model in this regard. For several years, DC-Cam hosted training sessions of jurists, police, journalists, law students, and other government personnel. The curriculum was focused on international criminal law, human rights law, and trial practice, with an emphasis on building the expertise necessary to stage an accounting for crimes committed during the Khmer Rouge era. Many of DC-Cam's former participants are now staffing the organs ECCC, including chambers, the prosecutors' office, the victims' unit, the defense, and the registry.

Bringing indigenous legal expertise to bear on a future transitional justice program enabled the candid evaluation of the state of the Syrian judicial system pre-revolution and the identification of areas in which legal reform may be advisable. Such an exercise may enhance future prosecutions of both ordinary and conflict-related crimes. In many transitional states, there may be a need to draft discrete pieces of legislation to facilitate a robust transitional justice program. This would include laws that incorporate international or other relevant categories of crimes (such as financial crimes) and forms of responsibility into the penal code; enable the appointment of international personnel within the various components of the judicial branch as staff or dedicated experts; revise certain defenses or evidentiary rules; and amend the civil code or administrative law to allow for the payment of reparations or restitution.[196] It was envisaged that participants in these pre-transition gatherings would undertake drafting exercises to prepare notional decree laws (or at least the building blocks of such legislation), and even shadow indictments. Such gatherings of legal experts can also occasion a discussion about the demands of international human rights norms devoted to due process protections and the administration of the death penalty. Some of this work was undertaken in the Syrian context, but it is unclear if the right actors were engaged or if any outputs will actually be influential if there are ever openings for legislative reform.

Gleaning Attitudes Towards Transitional Justice

In addition to these training opportunities, states and civil society organizations also commissioned social scientists to glean micro-level data on Syrian attitudes toward justice and accountability.[197] Although human rights work has traditionally been premised on qualitative case-based research, human rights advocates are becoming increasingly adept at using quantitative methods, including population-based surveys and statistical modeling.[198] The Berkeley Human Rights Center and other academics have undertaken a number of such population-based surveys in the past to gather empirical data on citizens' expectations and hopes around transitional

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[196] *See* Global Study, *supra* note 36, ¶ 64 (discussing the utility of administrative programs to respond to multiple cases expeditiously); SYRIA JUSTICE & ACCOUNTABILITY CENTRE, RETURN IS A DREAM: OPTIONS FOR POST-CONFLICT RESTITUTION OF PROPERTY IN SYRIA (Sept. 2018), https://syriaaccountability.org/library/return-is-a-dream-options-for-post-conflict-property-restitution-in-syria/.

[197] David Backer & Anupam Kulkarni, *Humanizing Transitional Justice: Reflections on the Role of Survey Research in Studying Violent Conflict and its Aftermath*, 1(4) TRANSITIONAL JUST. REV. 197 (2016) (discussing trend towards survey research in transitioning states).

[198] *See generally* Roman David, *What We Know About Transitional Justice: Survey and Experimental Evidence*, 38 POL. PSYCHOL. (Feb. 2017).

justice.[199] Many of these surveys have been administered after-the-fact to gauge a population's satisfaction with a transitional justice process already undertaken; others have been produced pre-transition or prior to a key accountability exercise.[200] These population-based studies can be especially useful in the pre-implementation stage, as they help scholars, practitioners, and policymakers identify baseline attitudes before a transition and then track changing perceptions at different points across a society's overall transitional justice trajectory.[201]

In 2013, the Syria Justice & Accountability Center (SJAC) commissioned a qualitative survey of Syrians, including regime supporters and opponents, although it only undertook 46 interviews.[202] The report found that people were deeply apprehensive about rising sectarianism and the likelihood that the country could ever heal. They had high expectations for justice and fostering coexistence among Syria's various ethnic groups, but weak knowledge about other transitional justice options, such as truth commissions.[203] Respondents were not attracted to the idea of a hybrid court, preferring instead trials in Syrian courts and before Syrian judges even while they expressed concern that the courts had been compromised by politics and corruption. International involvement was equated with "meddling."[204]

Participants did not view peace and justice as antagonistic or mutually exclusive: they expressed support for a negotiated settlement, even as they uniformly called for legal accountability for the commission of international crimes. Indeed, participants saw "institutionalized accountability" as an alternative to vigilantism and expressed deep concern about the potential for a "culture of revenge" to set in.[205] The prospect of the populace choosing to "forgive and forget" was not foreseen among those surveyed.[206] Compensation was appealing for strictly economic losses, although it was not seen as a viable substitute for those who had lost loved ones; participants insisted that only true legal accountability would deliver redress in these circumstances. People also supported the idea of civic education, to inform their compatriots about what transitional justice had to offer.[207]

The Day After Project conducted a larger survey in 2014 of attitudes towards transitional justice, reconciliation, and human rights involving over a thousand participants in mostly opposition-controlled areas.[208] Even when made aware of the range of transitional justice options, Syrians were often at odds about which mechanisms were worth prioritizing. A large majority of respondents, regardless of ethnic background, valued justice in the form of fair trials, the avoidance

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[199] *See, e.g.*, *When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Northern Uganda* (Dec. 2007); Patrick Vinck & Phuong Pham, *Searching for Lasting Peace: Population-Based Survey on Perceptions and Attitudes about Peace, Security and Justice in Eastern Democratic Republic of the Congo*, Harvard Humanitarian Initiative (July 2014).

[200] *See generally* Jonathan Hall et al., *Exposure to Violence and Attitudes Towards Transitional Justice*, 39(2) POL. PSYCHOL. 345 (Apr. 2018) (arguing that a community's attitudes towards transitional justice are related to the nature of the violence experienced as well as the social interdependence between victims and perpetrators).

[201] *See* Neil Kritz, *Policy Implications of Empirical Research on Transitional Justice, in* ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH 13 (Hugo Van Der Merwe et al. eds., 2009).

[202] Craig Charney & Christine Quirk, "*He Who Did Wrong Should be Accountable": Syrian Perspectives on Transitional Justice* (Jan. 2014).

[203] *Id*. at 47.

[204] *Id*. at 44.

[205] *Id*. at 2, 36.

[206] *Id*. at 38.

[207] *Id*. at 70.

[208] The Day After, *Pilot Survey on Transitional Justice* (Dec. 2014).

of impunity, and a rejection of any type of amnesty.[209] In terms of mechanisms to deliver justice, they generally rejected "traditional courts," although many expressed a preference for national courts above hybrid or international ones.[210] They also deemed apologies to be inadequate, and different groups ranked reform and restitution differently, although both were deemed "very important."[211] There was some interest in including events prior to March 2011 in any prosecutorial program[212] and strong support for a truth commission or national dialogue in the form of "listening sessions."[213] Many participants expressed a need to reform or disband certain agencies and organizations, including the security forces, Air Force Intelligence, and the Ba'ath Party.[214]

Outside of Syria, the Center for Statistics and Research surveyed Syrian refugees and migrants in Germany on various transitional justice approaches.[215] An overwhelming 72% indicated that they preferred ensuring the "accountability of criminals" over compensation for victims, and 88% rejected a policy of national reconciliation.[216] Almost no one saw a role for Assad in a post-war era.[217] The results of all these inquiries remain available if Syrian policy-makers are ever in a position to pursue a transitional justice program. Their utility is hampered, however, by the fact that they focused on individuals who were in opposition areas or had fled the country, so will not accurately reflect the preferences of regime supporters.

Promoting Psychosocial Rehabilitation

Armed conflicts and crimes against humanity produce profound and multi-faceted consequences within the implicated societies. In addition to physical injury and death, individual victims, their families, and their communities may all experience multiple and debilitating forms of emotional suffering. As de Greiff has written:

> the pain and suffering endured in the violation itself is merely the beginning of sequelae that frequently include a deep sense of uncertainty and a debilitating and in some cases incapacitating sense of fear. The reason lies in the fact that serious human rights violations shatter normative expectations fundamental to our sense of agency in the world.[218]

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[209] *Id*. at 13, 24-25.
[210] *Id*. at 15. Not surprisingly, perhaps, Kurdish respondents and women preferred international mechanisms. *Id*. at 16-18.
[211] *Id*. at 14-15.
[212] *Id*. at 21
[213] *Id*. at 26.
[214] *Id*. at 23.
[215] The Center for Civil Society and Democracy, under the leadership of Rajaa Al-Talli, also led two different surveys in 2012-13 of Syrians inside Syria and had broad scope of participation. *See* Syrian Center for Statistics and Research, *Return to Syria?* (Apr. 11, 2018) (compiling results of study on why individuals fled Syria, their plans for returning, and their attitudes about transitional justice and the resolution of the conflict).
[216] *Id*. at 9.
[217] *Id*. at 11-12.
[218] Pablo de Greiff, *Transitional Justice, Security, and Development*, World Development Report 2011, Background Paper 8 (Oct. 29, 2010).

The consequent harm can rise to the level of diagnosable mental health illnesses, from post-traumatic stress disorder (PTSD) to anxiety and depression.[219] Co-morbidity—the simultaneous presence of two disease states in an individual—is common within victim populations.[220] Sequential traumatization—the accumulation of traumatic events—occurs when individuals are subjected to the myriad of stressors that often accompany conflict, including the loss of loved ones and social networks; displacement, expulsion, and exile; poverty and economic instability; and the disintegration of a generation of life plans.[221] Enforced disappearances have proven to be particularly damaging psychologically as family members vacillate between hope and despair. These ambiguous losses generate greater anxiety and traumatic grief than confirmed losses.[222] These forms of psychological harm are, in turn, associated with a broad spectrum of inter-related social problems (such as substance abuse and domestic violence) if not appropriately addressed.[223] Research indicates that trauma can be intergenerational as well in that the children of traumatized parents show heightened psychopathologies.[224] The impact of trauma on human psychology shows remarkable consistency across cultures.[225] Given the acute needs of victims, the World Health Organization has urged the international community to provide support to repair the psychological damage of war, conflict, and natural disasters.[226]

Often overlooked is the fact that participating in human rights abuses can also exert a negative psychological impact on perpetrators. The concept of moral injury describes the adverse impact on soldiers and others of being personally involved in an experience that violates core values and principles.[227] Moral injury involves a cluster of symptoms that are similar to PTSD but also reflect a spiritual component linked to the sanctity of life.[228] Fewer transitional justice programs have endeavored to address this moral injury, although some do include opportunities for perpetrators to "pay their dues" in order to be re-absorbed into society. In Timor-Leste, for example, perpetrators of less serious crimes were able to enter into agreements (which were filed in court) to undertake community service as part of community reconciliation procedures.[229]

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[219] *See generally* CAMBODIA'S HIDDEN SCARS: TRAUMA PSYCHOLOGY AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (Beth Van Schaack & Daryn Reicherter eds., 2d ed. 2016) (describing long-term impact of violence during the Khmer Rouge era).

[220] *See* Creamer, M., Burgess, P., & McFarlane, A. C. (2001), *Post-traumatic Stress Disorder: Findings from the Australian National Survey of Mental Health and Well-being*, 31(7) PSYCHOL. MED. 1237 (finding that major depression, dysthymia (chronic but less severe depression), bipolar disorder, generalized anxiety disorder, panic disorder, agoraphobia, social phobia, and obsessive-compulsive disorder have all been linked to PTSD).

[221] *See* HANS KEILSON, SEQUENTIAL TRAUMATIZATION IN CHILDREN (1992).

[222] Steve Powell et al., *Missing or Killed: The Differential Effect on Mental Health in Women in Bosnia and Herzegovina of the Confirmed or Unconfirmed Loss of their Husbands*, 15 EUROP. PSYCH. 185 (2010); Carina Heeke, *When Hope and Grief Intersect: Rates and Risks of Prolonged Grief Disorder Among Bereaved Individuals and Relatives of Disappeared Persons in Colombia*, 173 J. AFFECTIVE DISORDERS 59 (2015).

[223] Yael Danieli, *Assessing Trauma Across Cultures from a Multigenerational Perspective*, *in* CROSS-CULTURAL ASSESSMENT OF PSYCHOLOGICAL TRAUMA AND PTSD 65 (John P. Wilson & Catherine So-kum Tang eds., 2007).

[224] *See* Mallory E. Bowers & Rachel Yehuda, *Intergenerational Transmission of Stress in Humans*, 41(1) NEUROPSYCHOPHARMACOLOGY 232 (2016).

[225] *See* Daryn Reicherter & Alexandra Aylward, *The Impact of War and Genocide on Psychiatry and Social Psychology*, *in* HIDDEN SCARS, *supra* note 219, at 14 (recounting comparative research in post-conflict states); Inger Agger, *Healing the Mind: Healing after Mass Atrocity in Cambodia*, 52 TRANSCULTURAL PSYCHIATRY 543 (2015).

[226] WHO, *Resolution on Health Action in Crises and Disasters*, Res. A58/6 (Apr. 15, 2005).

[227] *See* WAR AND MORAL INJURY: A READER (Robert Emmet Meagher & Douglas A. Pryer eds., 2018).

[228] Michael D. Matthews, *Moral Injury: Toxic Leadership, Maleficent Organizations, and Psychological Distress*, PSYCHOL. TODAY (Mar. 10, 2018).

[229] Geoffrey Gunn & Reyko Huang, *Reconciliation as State-building in East Timor*, 11 LUSOTOPIE 19, 32 (2004).

Although it will be impossible to reach all individuals in need while a conflict is ongoing, it is feasible to begin to provide some victims of human rights abuses with appropriate psychological and psychiatric interventions in the pre-transition phase. This assistance can be provided within refugee camps, diaspora populations, and civilian safe havens (if they exist) and also remotely with victims who remain in-country through the use of new communications platforms, such as Facetime and Skype. The international community can help identify, fund, and disseminate culturally-appropriate resources to provide psychosocial support services and treatment in addition to responding to other humanitarian needs of refugees and internally-displaced citizens who have had their lives destroyed. Indeed, the emergent field of "trauma first aid," originally developed by the National Center for Post-Traumatic Stress Disorder (NC-PTSD), is premised on the idea that immediate psychological interventions following a traumatic event can help to forestall the development of future psychological distress and disorder while also fostering resilience and adaptive functioning.[230] At the same time, a single session debriefing in the immediate aftermath of a traumatic event may actually increase the risk of PTSD and depression.[231] Such efforts can be undertaken first and foremost through a collective and community-based approach, building on parochial networks, indigenous leaders, victims' organizations, and families. Local NGOs and civil society groups can be trained in how to recognize who is suffering from extreme distress and is in need of further professional psychiatric and psychological treatment. Eventually, this work can be consolidated post-transition in collaboration with the National Ministry of Health, if one exists and is operational.

In Syria, almost half a million individuals have died[232] and over half the population (more than 10 million people) is internally or externally displaced.[233] Countless more have been physically maimed and psychologically traumatized. Thousands of people live in besieged areas.[234] Surveys of Syrian refugees reveal high levels of psychological distress.[235] It will be critical to address this harm in a comprehensive and culturally-appropriate way once the fighting has subsided.[236] For now, the international community has provided some mental health services in refugee camps and other areas where the displaced have congregated. The human rights bureau in the U.S. State Department hosted a donor conference to fund the Syria Survivors of Torture Initiative with the Syria Justice & Accountability Centre.[237] The frontline countries in the refugee crisis, however, are overtaxed on a number of fronts and cannot meet the acute demand, particularly given the unique needs of children and victims of sexual violence (both male and female) and the high degree of stigma associated with mental illness.[238] Lawyers have used humanitarian parole proceedings to bring traumatized individuals to countries where they can

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[230] *See* Jonathan I. Bisson & Catrin Lewis, *Systematic Review of Psychological First Aid* (July 31, 2009).
[231] Suzanne C. Rose et al., *Psychological Debriefing for Preventing Post Traumatic Stress Disorder (PTSD)*, COCHRANE DATABASE OF SYSTEMATIC REVIEWS (Apr. 22, 2002).
[232] The Syrian Center for Policy Research put the number at 470,000 at the beginning of 2016.
[233] UN High Commissioner for Refugees, *Syria Emergency*, http://www.unhcr.org/en-us/syria-emergency.html.
[234] HUMAN RIGHTS WATCH, WORLD REPORT: SYRIA (2018).
[235] Khaldoun I. Marwa, *Psychological Sequels of Syrian Conflict*, 19(2) J. PSYCHIATRY 355 (2016).
[236] *See* Sahr MuhhammedAlly, *Assisting Syrian War Victims*, HUFFPOST (OCT. 16, 2013) (arguing for the creation of a Victims Assistance Program for Syria that would encompass psycho-social and medical services in addition to financial assistance).
[237] U.S. State Department, Press Release, *Donor Conference for the Syria Justice and Accountability Center and the Syria Survivors of Torture Initiative* (Oct. 6, 2016).
[238] Cherisse Davis & Amy Wanninger, International Medical Corps, *Mental Health and Psychosocial Support Considerations for Syrian Refugees in Turkey: Sources of Distress, Coping Mechanisms, and Access to Support* 11-12 (Jan. 2017).

receive the treatment they need, but this is a time-consuming process that is difficult to scale. Moreover, the emphasis on PTSD and addressing immediate reactions to the trauma of war and displacement means that work on longer-term rehabilitation and recovery may be neglected.[239]

Although treatment is essential, it must be accepted that some human rights victims may never be fully healed in a clinical sense—surviving atrocity may be an experience to be endured, not a trauma to be cured.[240] That said, the concept of post-traumatic growth (PTG)—which manifests itself in "an increased appreciation of life in general, more meaningful interpersonal relationships, an increased sense of personal strength, changed priorities, and a richer existential and spiritual life"—offers cause for hope.[241]

Fostering Solidarity Among Victims

In the pre-transition phase, the international community can also help to catalyze the formation of victims' associations as sources of support and solidarity.[242] Although many human rights documentation organizations regularly engage with victims, they do not necessarily represent the interests, or respond to the innumerable needs, of all those affected by the conflict. Broadly representative victims organizations can augment victims' political power and improve victims' ability to advocate on their own behalf with the international community around a whole range of issues, including humanitarian assistance needs, peace negotiations, transitional justice, and restitution and reparations—all in keeping with the "nothing about us without us" theory of human rights advocacy.[243] Membership organizations can also mobilize natural leaders and provide partners for human rights organizations operating on a global scale, such as Human Rights Watch or Amnesty International. When it comes to designing a future transitional justice program, victims' organizations offer a forum for victims to develop consensus positions on key decisions, articulate and advance their transitional justice interests and preferences with a more powerful and unified voice, and undertake more effective diplomatic engagement with the international community and the media to ensure that victims' perspectives are a part of any multilateral conversations about political transitions and transitional justice. In the event of a consolidated transition, such organizations can play a role in advocating for victim-centered reforms to address the core grievances that motivated the uprising in the first place as well as in keeping a process moving forward.

The development of such an inclusive association also offers opportunities for empowering victims by connecting them to others with common experiences so they can share their stories of harm as well as strategies for survival and rehabilitation. They also create vectors to crowd-source information and facilitate mass communication among victims using traditional and social media. Associations can record and preserve victims' testimony for posterity, including for future justice, restitution/rehabilitation, and truth-telling efforts. All this work can build solidarity among

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[239] Hussam Jefee-Bahloul et al. *Mental Health in the Syrian Crisis: Beyond Immediate Relief*, 386(10003) THE LANCET 1531 (2015).

[240] Lawrence L. Langer, *The Alarmed Vision: Social Suffering and Holocaust Atrocity*, 125 DAEDALUS 47, 58 (1006).

[241] *See* Richard G. Tedeschi & Lawrence G. Calhoun, *Posttraumatic Growth: Conceptual Foundations and Empirical Evidence*, 15(1) PSYCH. INQUIRY 1, 1 (2004) (defining PTG as "the experience of positive change that occurs as a result of the struggle with highly challenging life crises.").

[242] *See* Global Study, *supra* note 36, ¶ 27 (expressing the potential for transitional justice processes to help "victims occupy a space in the public sphere").

[243] *See generally* JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT USE: DISABILITY OPPRESSION AND EMPOWERMENT (2000).

victims—across genders, ethnic and religious groups, and regions—in a way that has the potential to lay the groundwork for future reconciliation and relational transformation. If a number of disparate local organizations already exist, catalyzing a more broad-based coalition can also serve as a mechanism for connecting existing organizations and offering them an elevated platform for their work. If such local groups do not exist, a larger membership organization can foster neighborhood support groups and more community-level associations. Such organizations can also provide an immediate and long-term outlet for psycho-social and medical rehabilitation as needed as well as the dissemination of reparations, if available.

An example of what a highly effective victims' organization can achieve can be seen in Chad. The Chadian Association for the Promotion and Defense of Human Rights and the Association for Victims of Crimes of the Hissène Habré Regime represented many victims of arbitrary detention and torture under the administration of ex-Chadian President Hissène Habré.[244] As soon as Habré was deposed, these groups formed a transnational coalition with Human Rights Watch and others and began collecting evidence of Habré's crimes, engaging policymakers and diplomats, and exerting domestic and international pressure to build political will for his prosecution.[245] For 25 years, they pursued legal redress on behalf of the thousands of Habré's victims in what has been described as "one of the world's most patient and tenacious campaigns for justice."[246] This involved creative advocacy and litigation in domestic courts (in Chad, Senegal, and Belgium); a regional court (the Economic Community of West African States Court of Justice);[247] a treaty body (the U.N. Committee Against Torture); and an international court (the International Court of Justice).[248] When Habré was finally brought to trial, it was before the Extraordinary African Chambers, a bespoke hybrid institution established in Senegal by the African Union with support from other donor states.[249] As one commentator put it, this was an striking case of "victims' justice."[250]

The U.S. Holocaust Memorial Museum's Ferencz International Justice Initiative (FIJI) is working to replicate the Chadian model with victims from a number of contemporary conflicts. FIJI is convening Justice Advisory Groups to connect experts with local justice actors to enable them to build, and sustain, the political will around transitional justice initiatives. In Syria, the international community has helped to build civil society organizations focused on victims, but no overarching victims organization dedicated to Syria has emerged. This is understandable given the many millions of victims, whose individual experiences have varied widely.

Truth Telling

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[244] Marie Gibert, *Trial in Senegal of former Chadian President is a Victory for Civil Society*, THE CONVERSATION (July 20, 2015).

[245] *See* Reed Brody, *Victims Bring a Dictator to Justice*, BREAD FOR THE WORLD 19 (June 2017).

[246] Geoffrey York, *Former Dictator of Chad Arrested on Allegations of 40,000 Murders*, GLOBE & MAIL (June 30, 2013).

[247] Hissène Habré v. République du Sénégal, ECW/CCJ/JUD/06/10, Judgment, Court of Justice of the Economic Community of West African States, ¶¶ 58-61 (Nov. 18, 2010).

[248] Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, I.C.J. 430 (Jul. 20).

[249] *See generally* Sarah Williams, *The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?*, 11(5) J. INT'L CRIM. JUSTICE 1139 (2013) (detailing history).

[250] Peter Fabricus, *Now to Make this Extraordinary Court, Ordinary*, INSTITUTE FOR SECURITY STUDIES (Feb. 11, 2016).

Many transitional justice programs involve a truth-telling component in the form of a truth commission (sometimes also denominated a truth and reconciliation commission), commission of inquiry, missing persons commissions, or related body.[251] These institutions serve multiple goals, including the compilation of a definitive account of the conflict or repression, which might limit future deniability; "sense-making" in terms of understanding the structural dimensions, patterns, and practices of violence and telling the story of what happened; victim-tracing and giving survivors a forum in which to bear witness; and offering proposals for reform to ensure non-repetition.[252] Given that transitional states are beset by diverging narratives of what happened and who was at fault, a truth commission staffed by experts and public figures of unimpeachable character can serve as a bulwark—though not necessarily an impenetrable one—against the emergence of revisionist histories of violence. Truth commission vary considerably when it comes to mandate, procedures, their ability to subpoena participation or refer matters for potential investigation and prosecution, and output.[253] A few truth commissions have identified perpetrators by name, a practice that remains controversial.[254] Many have generated blueprints for reform and reparation (although implementation has been mixed). They also respond to an emerging "right to truth" enjoyed by victims.[255] Several human rights institutions have recognized such a right, including the Inter-American Court of Human Rights[256] and the European Court of Human Rights.[257] It also appears in the International Convention for the Protection of All Persons from Enforced Disappearance.[258] The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa highlight that the right to an effective remedy includes "access to the factual information concerning the violations."[259]

In the past, truth commissions have always been established post-transition, often as a substitute for, or precursor to, criminal accountability. And, most truth commissions have operated with official approval from the state, which carries a measure of legitimacy but also a recognition

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[251] *See* OHCHR, COMMISSIONS OF INQUIRY AND FACT-FINDING MISSIONS ON INTERNATIONAL HUMAN RIGHTS LAW AND HUMANITARIAN LAW: GUIDANCE AND PRACTICE, HR/PUB/14/7 (2015).

[252] Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, 20 L. & SOC. INQUIRY 79 (1995).

[253] *See generally* PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS (2d ed. 2011) (providing a comparative analysis of multiple truth commissions). The U.S. Institute of Peace has compiled a digital library of truth commission reports and other data.

[254] For a discussion of due process standards application to truth commissions, see MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS (2006).

[255] *See* Human Rights Council Resolution 2005/66, Right to the Truth, ¶ 1 (Apr. 20, 2005) (recognizing "the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights"); Sam Szoke-Burke, *Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies*, 33 BERKELEY J. INT'L L. 526 (2015).

[256] Inter-Amer. Comm'n H.R., Annual Report 1985-86, AS Doc. No. OEA/Ser.L/V/II.68, Doc. 8 rev.1 (Sept. 26, 1986), p. 193.

[257] El-Masri v. The Former Yugoslav Republic of Macedonia, Appl. No. 39630/09, Judgment, ¶ 191 (Dec. 13, 2012).

[258] International Convention on for the Protection of All Persons from Enforced Disappearance art. 24(2), G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Dec. 20, 2006) ("Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.").

[259] African Union, The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, Principle C(b)(3) (2003).

that harms were done in the name of the sovereign.[260] Theoretically, however, a truth commission could begin to function pre-transition and extraterritorially with an eye towards continuing to work in country once conditions allow. Such a commission could focus on tracking missing persons or evaluating the legality of individual detentions.[261] The challenge would be to ensure that its members are broadly representative and perceived as legitimate envoys, so the commission could credibly contribute to post-conflict reconciliation processes without being perceived as a tool to condemn only one side or a civil society effort without formal sanction.[262]

When it comes to Syria, the U.S. State Department's Bureau of Conflict and Stabilization Operations (CSO) funded a three-day workshop in Gaziantep, Turkey in 2013 with civil society activists who envisioned standing up a truth commission in their hometowns. Although both the Syria Transition Roadmap[263] and The Day After Project[264] contemplated that Syria might one day convene a truth commission following the war, no concrete steps have been taken in this regard separate and apart from the many NGO and multilateral documentation efforts underway. Given the degree of documentation in existence, any future commission might focus its attention on issues of reconciliation and repair, assuming a future Syrian administration is a credible partner when it comes to these imperatives. If the national political climate remains intensively polarized, however, a government truth commission is likely to ratify the outcome of the conflict without generating a genuine national dialogue or contributing to national reconciliation.

Post-Transition

The situation in Syria demonstrates that—to a point—there are a range of initiatives that members of the international community can undertake—multilaterally and individually—to prepare for, or even potentially to hasten, an eventual transition. Although many worthy proposals were not pursued, these various lines of effort have laid some groundwork for the instantiation of a transitional justice program in Syria's post-transition period. In the immediate transition phase, and assuming Assad remains in power in some capacity, it is likely that violence will be ongoing and the government in place may lack legitimacy or nationwide control. There may be limited possibilities for the international community to engage on transitional justice issues with emergent governmental structures, given the longstanding hostility towards Assad and the lack of effective levers with his regime. This will necessitate a focus on civil society and local actors at first. It is hoped that these interlocutors will have the knowledge and expertise to begin a public dialogue

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[260] *See* Freeman, *supra* note 253, at 18 (defining truth commission as a creature of the state). Some truth commissions have, however, been established in the nongovernmental sector, such as Paraguay's *Projecto Nunca Mas*, which was sponsored by the Committee of Churches. *See* TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Volume 1) 258 (Neil Kritz ed., 2004) (discussing nongovernmental truth-telling projects).

[261] *See* Haxie Meyers-Belkin, *After the IS group in Syria: Helping Families Trace Loved Ones who have Disappeared*, FRANCE24, May 16, 2019 (discussing effort to get anti-ISIL coalition to focus on missing persons and mass graves).

[262] Starting with the Russell Tribunal in 1967, which considered war crimes alleged to have been committed during the Vietnam War, a number of "people's tribunals" with no formal authority have been established over the years, usually in the face of extreme impunity. Richard Falk, *People's Tribunals, and the Roots of Civil Society Justice*, OPENSECURITY (May 12, 2015).

[263] Syria Transition Roadmap, *supra* note 192, at 144. The Roadmap actually envisaged the creation of several commissions of inquiry to focus on the commission of different international crimes (e.g., extrajudicial killings and torture cases). *Id.*

[264] The Day After Project recommended a discrete commission to address pre-war oppression as well. *See supra* note 193.

about a range of accountability and transitional justice options. In this process, political actors will need to take the time to build a credible and consultative process while also managing expectations. These consultative deliberations may exert a short-term effect of deterring violence—and especially acts of retribution—and a medium-term objective of conceptualizing and implementing systematic justice processes, including truth-telling and memorialization, at the national and community levels. Psycho-social rehabilitative work—to include services to victims of torture as well as support for refugees and the internally displaced—should be initiated as soon as possible. Likewise, the international community can deploy forensic assistance to preserve and exhume mass graves in what will likely be a chaotic postwar environment.

Because Assad is emerging triumphant, any form of domestic criminal accountability for all sides is likely a bridge too far; indeed, the risk is that Assad will implement his own form of victor's justice. That said, if Assad is at all committed to the ideal of reconciliation—which remains speculative at best—he might be persuaded to convene a truth commission to provide a forum in which to air the grievances that inspired the revolution back in 2011; generate a national understanding of the patterns of violence; investigate the fate of the disappeared; and offer opportunities for confession, bearing witness, and forgiveness. Memorials to the victims might also be erected. These gestures can operate as a confidence-building measure and signal to refugees and others that he is committed to working to restore Syria's ethnic and religious mosaic. Such an institution could go a long way towards responding to the Geneva Communiqué's call for a National Dialogue and "a comprehensive package for transitional justice, including compensation or rehabilitation for victims of the present conflict, steps towards national reconciliation and forgiveness" [265]—measures implicitly mandated by Security Council Resolution 2254, which endorsed the Communiqué and set forth a roadmap for a political transition.[266] However, Assad's current retributive approach to returning Syrian refugees—the majority of whom were associated with the opposition in some way—suggests that he is not likely to undertake any sort of sincere process, even if bribed to do so with reconstruction funding and other inducements.[267] Absent assurances of his genuineness, such efforts will backfire. Were Assad to stage a one-sided charade aimed at reinforcing his narrative of the war, it would do further damage to the prospects for peace.

If prosecutions are ever undertaken in Syria, the international community should help establish standards and guidelines so that relevant authorities will be prepared to review the files of the network of detention centers with an eye towards immediately releasing political detainees, rebels who did nothing more than fight, protesters, and other individuals unfairly arrested by the Assad regime. It may also be possible to help to shape an appropriate amnesty strategy in keeping with international humanitarian law for members of the Free Syrian Army and other rebels,[268] with a view toward creating incentives for combatants who are not associated with abuses to disarm and return to civilian life.[269] For example, as part of its historical peace deal, Colombia passed an

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[265] *See* Final Communiqué of the Action Group for Syria, U.N. Doc A/66/865-S/2012/522, annex (July 6, 2012).
[266] S.C. Res., ¶ 1, U.N. Doc. S/RES/2254 (Dec. 18, 2015).
[267] Louisa Loveluck, *Assad Urged Syrian Refugees to Come Home. Many are being Welcomed with Arrest and Interrogation*, WASH. POST, June 2, 2019.
[268] Protocol II to the Geneva Conventions calls upon states to "endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained" at the end of hostilities. Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts art. 6(5), June 8, 1977, 1125 U.N.T.S. 609.
[269] *Colombia Approves Amnesty Deal for Thousands of FARC Rebels*, THE GUARDIAN, Dec. 28, 2016.

amnesty law aimed at encouraging the demobilization of members of the Revolutionary Armed Forces of Colombia (FARC). It does not apply to serious crimes, such as murder or sexual violence, and contains truth-telling and reparative elements. At the same time, the international community will need to stand ready to recommend against granting amnesty for those who have committed international crimes,[270] and the idea of any amnesty for residual ISIL fighters will not be well received. To the extent that a partial amnesty or conditional amnesty is being considered, the international community can work with the committee responsible for this task to identify clear criteria for allocating amnesties or pardons and craft appropriate conditionalities, such as community service, truth-telling, guarantees of non-repetition, or apology. In addition, international experts can convey lessons learned and provide technical assistance on developing processes for vetting members of the transitional and new regional governmental bodies, emerging police forces and militias, and the rump security sector.

In order to address the root cause of the conflict, it will be necessary to focus on the reform of institutions at a minimum, although peacebuilding and conflict transformation—*vice* resolution—are multifaceted processes.[271] The international community should thus support long-term policies and programs that address systemic inequity and injustice over and above the outcomes achieved by traditional truth commission or prosecutorial methods aimed at addressing war-time violence in the immediate period. Influential states and donors should also be prepared to provide support to appropriate Syrian civil society and media organizations to manage the expectations of the public in terms of what various transitional justice mechanisms can achieve, including the limitations of formal judicial redress and reparations.[272] Proceeding without addressing these expectations could undermine the credibility of the new justice system and create dissatisfaction, which may lead to discontent and even more violence.

Finally, if Assad remains in power, as is now expected, all of this work may have been for naught, unless he can be convinced of the need to undertake a genuine process of reckoning with the past in order to instantiate a more peaceful and inclusive future. This seems unlikely at the moment. And so, as other transitional states have revealed, transitional justice in Syria may become an inter-generational enterprise. It will thus fall to the Syrian youth to determine whether the field has anything to offer as they build their own future.

[270] *See OHCHR, Rule-of-Law Tools for Post-Conflict States: Amnesties* (2009), *available at* https://www.ohchr.org/Documents/Publications/Amnesties_en.pdf.
[271] *See* JOHN PAUL LEDERACH, THE LITTLE BOOK OF CONFLICT TRANSFORMATION: CLEAR ARTICULATION OF THE GUIDING PRINCIPLES BY A PIONEER IN THE FIELD (2003) (making a distinction between conflict resolution and conflict transformation). *See also Conflict Transformation: Three Lenses in One Frame*, 14 NEW ROUTES (2009).
[272] *See* Lisa J. Laplante & Kelly Phenicie, *Mediating Post-Conflict Dialogue: The Media's Role in Transitional Justice Processes*, 93 MARQ. L. REV. 251 (2009) (arguing that "media coverage of transitional justice processes, and the dialogue that ensues, can promote or hinder national reconciliation in post-conflict settings.").

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Conclusion

As this book goes to press, the international community continues its calls for accountability for the war crimes and crimes against humanity being committed in Syria. Indeed, pursuing justice remains one of the central pillars of many states' strategies towards Syria. And yet, despite years of rhetoric, Syrians have seen no more than glimmers of justice and only in courts far from home. This is not the only point of failure, of course. The complete list of objectives to be achieved in Syria is a long one even as the means to achieve such ambitious ends are scaled back.[1] Also still on the international community's expanding wish list are a durable ceasefire, a political transition in keeping with the Geneva Communiqué and Security Council Resolution 2254, preventing the regrouping and resurgence of ISIL, inhibiting the use or dissemination of weapons of mass destruction, returning foreign fighters to their states of origin or otherwise arranging for their lawful security detention or prosecution, and eliminating Iran's influence in the country.[2] So, justice is not the only objective that has proven to be elusive.

The Syrian conflict shines an unflattering light on our system of international criminal justice—an understatement if there ever was one. Practitioners of international law have struggled to assert the relevance of their craft as the conflict unfolded and then raged on, leading many to lament the retreat of the rule of law in Syria (and elsewhere). This entrenched impunity undermines not only our efforts to instantiate accountability for violations of international law, but also the very prospects for a durable rules-based international system. It is tempting to conclude that our multilateral institutions do not have the capacity to address tragedies like Syria. However, the fault is not necessarily in the institutions themselves, but with those who have the power to act. The law exists, as does a cadre of professionals with the necessary skills and a ready set of justice models; what is lacking is the ability to achieve a political consensus on a path forward, or a willingness to proceed without such a consensus, with respect to situations like Syria, where there has been no regime change, where atrocities are ongoing, and—most importantly—where the great powers find themselves at odds with each other. This longstanding weakness in our system of international justice is made all the more pronounced by the situation in Syria.

All told, this story of the international community's engagement with international justice around the Syria crisis illuminates the enduring tension between states' stated aspirations to end impunity for the worst international crimes and their reticence to actually impose accountability when it runs counter to their own idiosyncratic interests or might create a precedent that would later redound to states' detriment. (Conditions that prevailed, it should be recalled, following WWII and yet the Nuremberg and Tokyo tribunals proceeded). Although the international community has made measurable progress towards the establishment of a global system of international justice, geopolitics remain a powerful and often countervailing force.

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[1] Brett McGurk, *Hard Truths in Syria*, FOREIGN AFFAIRS (May/June 2019).

[2] Amb. James Jeffrey, Special Representative for Syria Engagement & Special Envoy for the Global Coalition to Defeat ISIL, Media Roundtable, U.S. Dep't State, Global Public Affairs (June 27, 2019), https://translations.state.gov/2019/06/27/special-representative-for-syria-engagement-special-envoy-for-the-global-coalition-to-defeat-isil/.

Notwithstanding these perceived limitations, survivors continue to demand justice—they have faith in its possibility and deserve our continued efforts.

All that said, there are lessons to be learned for future conflicts and some developments that inspire hope. Several Rubicons have been crossed—such as the non-consensual provision of humanitarian assistance—which give members of the international community greater flexibility and liberty to deal with such crises in the future. From the perspective of international justice, several key developments suggest themselves. First, it is clear that we have plenty of positive international law when it comes to imposing criminal accountability for the commission of atrocity crimes, including the elements of crimes, prosecutable forms of responsibility, and universal due process standards. To be sure, a number of crimes being committed in the war in Syria have not been fully flushed out in jurisprudence, including the deployment of chemical munitions and other indiscriminate weapon systems, the destruction of cultural property, human trafficking as a crime against humanity, and the use of starvation as a weapon of war. And, more work can be done conceptualizing the economic and environmental determinates of international crimes and pinning down the complicity standard that applies when states assist other states or non-state actors that themselves commit abuses. These developments in the law will have to wait. But, in general, the international *jus puniendi* has evolved into a mature corpus of international law.[3]

Second, there is no question the failures of the Security Council when it comes to Syria have eroded our faith in the U.N. system of collective security. With Russia readily wielding its veto in defense of Assad, the Council has been unable to invoke Chapter VII and deploy its strongest accountability tools: the creation of an *ad hoc* tribunal or even an investigative mechanism with teeth, the referral of the situation to the International Criminal Court, or the imposition of targeted sanctions on responsible individuals. That said, in the face of dysfunction in the Council chamber, states have turned to other multilateral fora, such as the Organisation for the Prohibition of Chemical Weapons, and have been able to overcome collective action challenges in the General Assembly to make progress towards accountability. This has come, most notably, in the form of a new multilateral investigative team—the International, Impartial and Independent Mechanism—which is collecting, collating, and analyzing evidence of international crimes for any national, regional, or international proceedings that materialize. The Council's paralysis has also galvanized the Security Council reform movement, although results remain disappointing given that most proposals would require an amendment to the U.N. Charter or at least a genuine commitment on the part of the P-5 to course correct.

Many states and advocates decried the failure of the French-led effort to refer the situation in Syria to the International Criminal Court; it is not clear, however, that the ICC offers the best solution to the imperative of justice in Syria given the sheer magnitude of the criminality on display and limitations in the Court's subject matter jurisdiction over war crimes committed in non-international armed conflicts. In addition, the shortcomings of prior Security Council referrals are legion. Besides the obvious problems associated with the Council exercising political control over the Court in violation of the *trias politica*, detractors point to controversial textual elements in the resolutions that were deemed essential to achieve consensus (such as the provision effectively granting immunity to personnel from non-member states); the failure of the Council to provide any meaningful follow up to effectuate its referrals (particularly when it comes to the arrest of

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[3] Beth Van Schaack, *Atrocity Crimes Litigation: 2008 Year-In-Review*, 7 NW. J. HUM. RTS. 170, 175 (2009) (noting that the rate of innovation in international criminal law has slowed considerably).

suspects); and the fact that such referrals amount to an unfunded mandate.[4] Indeed, Security Council referrals have been described by Court insiders as a "poisoned chalice."[5] Furthermore, the limitations of the ICC are becoming increasingly apparent as cases fail and resources become even more thinly spread.

A core theme of this book is that these blockages within the Security Council, while regrettable, have generated some salutary side effects. For one, the paralysis in New York has spurred creative thinking around novel jurisdictional theories to utilize whatever jurisdictional pathways are available within the ICC and elsewhere. They have also inspired intrepid justice entrepreneurs to experiment with principles of institutional design that are extending the state-of-the-art in important ways. Indeed, a number of new legal theories and tribunal blueprints are now available to states if the political will to move forward—regionally or internationally—ever materializes for Syria, but also for other atrocity situations that will inevitably emerge.

Another bright spot on an otherwise bleak horizon: the international community has invested heavily in documentation efforts—a necessary, but not sufficient condition, for justice. These initiatives include the creation of a dedicated community of civil society documentarians and war crimes investigators. In addition, more robust private sector efforts have emerged, as exemplified by the Commission on International Justice & Accountability (CIJA), which is acting as a force multiplier for national prosecutorial units and civil plaintiffs. While there are benefits to privatizing this expertise and making it available to any willing prosecutorial team, there are obvious ethical and practical concerns, not the least of which is the need to ensure that any information produced is deemed admissible in a court of law notwithstanding its unprecedented provenance. So far, it seems courts are admitting this information with little difficulty. Civil society organizations in partnership with the private sector have also produced new technological solutions—including electronic archives, media verification and de-duplication techniques, and standardized collection protocols—to enhance international crimes investigations in this new digital information environment. These efforts will help ensure that actionable evidence exists if, and when, a court with jurisdiction emerges.

Finally, the war in Syria has re-enlivened the principle of universal jurisdiction alongside other extraterritorial jurisdictional principles, rendering domestic courts the situs of the most aggressive and creative accountability exercises. Indeed, Europe is increasingly united when it comes to advancing the project of international justice and coordinating the investigation of perpetrators found within the European *espace juridique*.[6] A number of juridical innovations have facilitated this trend towards the empowerment of domestic courts, including the incorporation of international criminal law and expansive jurisdictional principles into national penal codes, the establishment of specialized—and globally networked—war crimes units, and the creation of increasingly frictionless systems of mutual legal assistance. On the ground, the fact that a fourth of the Syrian pre-war population has fled the country means that perpetrators, victims, and witnesses are on the move and often find themselves in close proximity to each other in their states

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[4] Louise Arbour, *The Relationship between the ICC and the UN Security Council*, 20(2) GLOBAL GOVERNANCE (2014).

[5] Sarah Nimigan, *Carrots, Sticks, and the ICC: Prospects for Cooperation? Part 1*, INTLAWGRRLS (Dec. 9, 2018) (recounting the remarks of Phakiso Mochochoko (Head of the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor of the ICC)).

[6] Ralphe Wilde, *The 'Legal Space' or 'Espace Juridique' of the European Convention on Human Rights: Is it Relevant to Extraterritorial State Action?*, 5 EUR. HUM. RTS. L. REV. 115 (2005).

of refuge. With no international forum capable of exercising plenary jurisdiction, domestic courts have stepped up to fill the jurisdictional void. The enforcement of international criminal law is now more decentralized, but also more coordinated, than ever. And so, like flowing water, justice finds its outlets wherever it can.

As a final takeaway, this book suggests the need to move on criminal accountability early in conflicts as soon as war crimes and crimes against humanity are threatened or begin to materialize. International actors remain too timid about demanding, and planning for, justice, which takes a back seat to other initiatives when atrocities are already well underway. The arguments against seeking justice early on—that it will complicate peace negotiations and cause perpetrators to dig in rather than compromise—are well-rehearsed but worn-out and not necessarily borne out by new empirical research. Indeed, even without justice in Syria, political negotiations went nowhere, perpetrators did not moderate their behavior, and the deaths and displacements mounted. Everything that has been tried to date—the fervent condemnation of atrocities, the careful documentation of crimes, the repeated calls for accountability—have failed to bring an end to atrocities. This suggests that the next time a country descends into violence, it might be time for the international community to give robust accountability a try.

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Summary

This thesis situates the war in Syria within the actual and imagined system of international criminal justice. It explores the legal impediments and diplomatic challenges that have led to the fatal trinity that is Syria: the massive commission of international crimes that are subject to detailed investigations and documentation but whose perpetrators have enjoyed virtually complete impunity. Given this tragic state of affairs, the project tracks a number of accountability solutions and openings being explored within multilateral gatherings and by civil society actors, including innovations of institutional design; the renewed utility of a range of domestic jurisdictional principles (including the revival of universal jurisdiction in Europe); the emergence of creative investigative and documentation techniques, technologies, and organizations; and the rejection of state consent as a precondition for the exercise of jurisdiction. Structured around a matrix of accountability presented in the thesis's introduction, the text explores options at the international and domestic levels to pursue justice—criminal and civil—against individual perpetrators as well as the sovereign state of Syria. Engaging both law and policy around international justice, the text offers a set of justice blueprints, within and without the International Criminal Court (ICC). It also considers the utility, propriety, and practicality of pursuing a transitional justice program without a genuine political transition. All told, the project attempts to capture results of the creative energy radiating from members of the international community intent on advancing the accountability norm in Syria even in the face of geopolitical blockages within the United Nations. In so doing, it presents the range of juridical measures that are available to the international community to respond to the crisis, if only the political will existed.

The thesis begins with a brief history of the conflict—first from the headlines (Chapter 1) and then from the perspective of the Security Council chamber (Chapter 2). These chapters trace the international community's response to the conflict with an emphasis on condemnations of human rights violations and abuses; attempts to impose ceasefires and expand humanitarian access; the use of force and the Responsibility to Protect; efforts toward a political transition; the preoccupation of the international community with counter-terrorism and countering violent extremism; neutralizing Syria's chemical weapons; futile efforts to impose U.N. sanctions; and—most relevant to this volume—promoting accountability, including a French-led effort to refer the situation in Syria to the ICC. The paralysis in the Council sets the scene for the chapters that follow, which recount efforts to promote accountability elsewhere within the U.N. system, within regional arrangements, and at the domestic level.

Chapter 3 begins the thesis's journey through the accountability matrix with the ICC with a discussion of "Prospects for Justice before the International Criminal Court." Although Russia and China vetoed the referral resolution, thus preventing the Court from exercising its plenary jurisdiction over events in Syria, there are still some options for invoking the Court's nationality and territorial jurisdiction. Given the proliferation of foreign fighters hailing from around the globe, including ICC member states, the Syrian conflict offers the potential to activate the Court's nationality jurisdiction. In addition, the spill-over effects of the war implicate the territories of ICC states parties, and states where the ICC is already active, in the region and beyond. Finally, there are theoretical arguments that the Security Council could refer "the situation involving ISIL" to the Court, which could encompass either the organization itself, untethered from any territorial space, or the transboundary statelet that once encompassed ISIL's self-proclaimed caliphate.

Although many advocates and diplomats assumed that the ICC was designed to adjudicate crimes committed in Syria, the chapter closes with some notes of caution as to why the ICC may not be the ideal forum, even assuming a Council referral were forthcoming.

Given the limited availability of the ICC when it comes to the crimes being committed in Syria, Chapter 4, "A Menu of Models: Options for an *Ad Hoc* Tribunal for Syria," presents other legal theories and practical modalities for creating an international or hybrid tribunal. It pulls together novel arguments drawn from the Nuremberg precedent, previous multilateral justice institutions, proposals that envision U.N. member states pooling their domestic jurisdictional competencies, and the theoretical literature. The chapter argues that many of these models offer a better option for the situation in Syria than the ICC given the extent of the international crimes being committed and limitations within the ICC's subject matter (especially with respect to war crimes committed in non-international armed conflicts) and personal jurisdiction.

Following this discussion of the options for invoking the ICC or creating a new international institution to address the crimes in Syria, the next chapter explores the potential posed by domestic courts. Chapter 5, "National Courts Step Up: Syrian Cases Proceeding in Domestic Courts," demonstrates the way in which classic principles of domestic criminal jurisdiction—territoriality, effects, nationality (active and passive), protective, and universal jurisdiction—could all be, and are all being, activated to address the presence of perpetrators and victims who find themselves outside the Syrian battlespace. This chapter offers a taxonomy of the criminal cases proceeding to date in domestic courts around the world, some involving the state's own nationals, some involving perpetrators found within the territorial state, and some proceeding in various ways while the defendant is still *in absentia*. While compiling a number of novel observations about this collection of cases, the chapter also acknowledges their inherent limitations, in general and when it comes to Syria in particular. Rounding out the matrix of accountability, chapter 6 queries explores the value of exploring non-penal accountability mechanisms—"Civil Suits: The Utility of State Responsibility and the Law of Tort"—to address the prevailing impunity in Syria. When it comes to state responsibility, this chapter explores untried options for invoking the International Court of Justice as well as a groundbreaking suit in a U.S. court against the sovereign state of Syria under the Foreign Sovereign Immunity Act.

The penultimate chapter moves from this matrix of accountability to the new evidentiary landscape for atrocity crimes litigation. Chapter 7, entitled "Innovations in International Criminal Law Documentation Methodologies and Institutions," focuses on the new sources, techniques, technologies, and organizations that have given rise to an unprecedented cache of potential evidence of international crimes in Syria, making it the most documented crime base in human history. The Syrian conflict coincided with the explosion of social media and digital technologies that render ordinary people capable of capturing the commission of international crimes on their cell phones. This surfeit of potential evidence has created both opportunities and challenges to accountability. This chapter surveys the various multilateral, national, and civil society efforts underway with an eye towards capturing new technological developments, analytical outputs, and public-private partnerships. This chapter is premised on the observation that when the Syrian conflict ends—which it must at some point—the documentation exists to undergird a comprehensive set of transitional justice processes if there is political will to undertake such an endeavour.

The final substantive chapter, "Transitional Justice Without Transition: The International Community's Efforts in Syria," addresses the question of whether and how transitional justice can

be pursued pre-transition, while a conflict continues to rage. Chapter 8 begins with an historical discussion of the way in which the field of transitional justice has internationalized, in part due to its perceived utility in instantiating peace and human rights values following a period of violence or repression. The chapter then surveys the most recent research testing these claims, which has been made possible by the development of a number of new databases gleaned from states in transition. The chapter then describes the range of initiatives launched by the international community to lay the groundwork for a genuine transitional justice process within Syria, including training Syrian advocates, surveying Syrian communities to understand their knowledge of and preferences around transitional justice, promoting psychosocial rehabilitation and solidarity among victims, and preparing for truth-telling exercises and institutional reform measures. The conclusion of this chapter suggests ways in which the international community could still promote some form of transitional justice as part of the reconstruction process, even if Assad remains in power, which is seeming increasingly likely.

The thesis's conclusion offers a number of over-arching observations about the prospects of justice for Syria and highlights a few bright spots on an otherwise rather bleak landscape. These grounds for cautious optimism include the fact that we now have a robust and comprehensive international *jus puniendi* of international crimes, even if we lack sufficient institutions in which to apply it. Although the failures of the Security Council have eroded our faith in the post-World War II system of collective security, other multilateral, regional, and domestic institutions have—to a certain extent—stepped in to fill the breach. This multilateral paralysis has thus spurred creative thinking about new jurisdictional theories, generated multiple and varied institutional models, and re-enlivened the principle of universal jurisdiction after a period of decline. While these proposals have yet to bear fruit, it is now clear that they suffer from no legal impediments; all that is needed is the political will and resources to bring them to fruition. The enhanced sophistication of international crimes documentation ensures that future transitional justice efforts will have the evidence needed to hold those most responsible for abuses to account. All of these developments are the work of an epistemic community of justice entrepreneurs—representing multilateral institutions, sovereign nations, and the global civil society—who refuse to take "no" for an answer.

Samenvatting (Dutch Summary)

Voorstellen Van Justitie Voor Syrië: Water Vindt Altijd Haar Manier

Dit proefschrift plaatst de oorlog in Syrië binnen het ware en ingebeelde systeem van internationaal strafrecht. Het verkent de juridische obstakels en diplomatieke uitdagingen die geleid hebben tot de fatale drie-eenheid van Syrië: de massale hoeveelheid internationale misdrijven die gedetailleerd zijn onderzocht en gedocumenteerd, maar waarvan de daders tot nu toe vrijwel volledige straffeloosheid hebben genoten. Met het oog op deze tragische stand van zaken volgt het project verschillende trajecten met betrekking tot de verantwoording voor deze misdrijven die binnen multilaterale bijeenkomsten en door het maatschappelijk middenveld worden onderzocht. Onder deze oplossing vallen bijvoorbeeld innovaties op het gebied van institutioneel ontwerp; het hernieuwde gebruik van een reeks van nationale rechtsmachtsprincipes, waaronder de opleving van universele rechtsmacht in Europa; de opkomst van creatieve onderzoeks- en documentatietechnieken, technologieën en organisaties; en de verwerping van het concept van instemming van de staat als randvoorwaarde voor het uitoefenen van rechtsmacht.

Aan de hand van een gestructureerde verantwoordingsmatrix onderzoekt de tekst de mogelijkheden om op (inter)nationaal niveau gerechtigheid op het gebied van strafrecht en civiel recht na te streven tegen de individuele misdadigers en de Syrische staat. Met behulp van het recht en beleid rond internationale gerechtigheid biedt de tekst een aantal initiatieven met en zonder het Internationaal Strafhof (International Criminal Court, ISH). Hierbij wijdt het ook aandacht aan de vraag of het zinvol, gepast, en haalbaar is om het proces van overgangsjustitie te ondernemen in de afwezigheid van een bijhorende politieke transitie.

Al met al tracht het project om de resultaten te verzamelen van de gebundelde creatieve krachten van leden van de internationale gemeenschap om de verantwoordelijkheidsnorm in Syrië te bevorderen, ondanks de geopolitieke tegenwerking binnen de Verenigde Naties die zij daarbij ondervinden. Het proefschrift presenteert hierbij een aantal juridische maatregelen die de internationale gemeenschap tot haar beschikking heeft om op de crisis te reageren, als de politieke wil er was geweest.

Het proefschrift begint met een kort overzicht van het conflict—eerst bekeken vanuit grote lijnen (hoofdstuk 1), daarna vanuit het perspectief van de VN Veiligheidsraad (hoofdstuk 2). Deze hoofdstukken traceren de reactie van de internationale gemeenschap op het conflict, met een nadruk op de veroordelingen van mensenrechtenschendingen; pogingen tot het opleggen van een staakt-het-vuren en tot uitbreiding van de toegang tot humanitaire hulp; het gebruik van geweld en het beginsel van de *Responsibility to Protect*; pogingen tot een politieke transitie; het bekommeren van de internationale gemeenschap over de bestrijding van terrorisme en extremisme; het neutraliseren van de chemische wapens van Syrië; vergeefse pogingen om VN-sancties op te leggen; en, het meest relevante onderdeel, om de rechtsaansprakelijkheid te bevorderen, waaronder een Franse poging om de situatie in Syrië naar het ISH te verwijzen. De verlamming van de Veiligheidsraad in deze kwestie zet de toon voor de volgende hoofdstukken, waarin pogingen elders binnen de VN, regionale groeperingen, of op nationaal niveau om aan te zetten tot verantwoording worden beschreven.

In hoofdstuk 3 begint het proefschrift met de reis door de aansprakelijkheidsmatrix met het ICC, met een discussie over "Vooruitzichten voor rechtvaardigheid bij het Internationaal Strafhof." Hoewel zowel Rusland als China een veto indienden tegen de resolutie over een doorverwijzing naar het ISH, waardoor het hof geen rechtsmacht kon uitoefenen over de gebeurtenissen in Syrië, staan er nog steeds enkele mogelijkheden open om rechtsmacht op grond van het nationaliteits- en territorialiteitsbeginsel van het Strafhof in te roepen. Gezien de wereldwijde verspreiding van buitenlandse strijders, waaronder ook die van VN-leden, biedt het Syrische conflict de mogelijkheid om het nationaliteitsbeginsel in te roepen. Bovendien heeft de oorlog in Syrië overloopeffecten op het grondgebied van lidstaten van het ISH, waaronder staten waar het ISH binnen en buiten de regio reeds actief is. Ten slotte zijn er theoretische argumenten die ervoor spreken dat de Veiligheidsraad "de ISIL situatie" naar het Strafhof zou kunnen verwijzen op grond van de groepering zelf, los van enige territorialiteit, of op grond van de kleine grensoverschrijdende staat die ooit bestond uit het door ISIL zelfuitgeroepen kalifaat. Hoewel veel juristen en diplomaten ervan uitgingen dat het Strafhof bedoeld was om recht te spreken over misdaden zoals die die in Syrië zijn gepleegd, sluit het hoofdstuk af met enkele waarschuwingen waarom het Strafhof niet het ideale forum zou zijn om gerechtigheid te bewerkstelligen, ook als een doorverwijzing van de Veiligheidsraad in het verschiet ligt.

Gezien de gelimiteerde opties van het ISH waar het de misdaden betreft die in Syrië zijn gepleegd, behandelt hoofdstuk 4, "Een menu van modellen: Mogelijkheden voor een *Ad Hoc* Tribunaal voor Syrië", andere rechtstheorieën en praktische methodes om een internationaal of hybride tribunaal te creëren. Het voegt op vernieuwende wijze argumenten samen van het Neurenbergtribunaal, eerdere multilaterale rechtsinstituties, voorstellen die de samenvoeging van nationale jurisdicties van VN lidstaten voor ogen hebben, en de rechtstheoretische literatuur. Het hoofdstuk beargumenteert dat veel van deze modellen een betere oplossing bieden voor de situatie in Syrië dan het ISH, gezien de omvang van de internationale misdaden die gepleegd zijn en de beperkingen van het ICC, met name met betrekking tot rechtsmacht over oorlogsmisdaden die gepleegd worden in niet- internationale gewapende conflicten, en persoonlijke rechtsbevoegdheid.

Volgend op de discussie omtrent de mogelijkheden om ofwel het ISH in te schakelen, of om een nieuw internationaal instituut te creëren om de misdaden in Syrië aan te pakken, onderzoekt het volgende hoofdstuk het potentieel van de nationale rechtsmacht. Hoofdstuk 5, "Nationale rechtbanken doen hun best: Syrische rechtszaken in de nationale rechtbank", laat zien hoe klassieke beginselen van de strafrechtelijke bevoegdheid van de nationale rechter - territorialiteit, effecten, (actieve en passieve) nationaliteit, beschermende, en universele rechtsmacht - allemaal kunnen worden ingeschakeld (en die in de praktijk ook daadwerkelijk worden ingeschakeld) om de aanwezigheid van daders en slachtoffers buiten het Syrische conflictgebied te adresseren. Dit hoofdstuk biedt een taxonomie van de strafzaken die tot nu wereldwijd in nationale rechtbanken hebben plaatsgevonden, waarvan sommige rechtszaken worden gehouden tegen eigen staatsburgers, anderen tegen daders die zich binnen het territorium van de staat bevinden, of tot slot vervolging die plaatsvindt in de afwezigheid van de aangeklaagde. Terwijl dit hoofdstuk meerdere nieuwe observaties over deze verzameling rechtszaken biedt, erkent het ook de inherente beperkingen van deze rechtsgangen, met een bijzondere focus op deze beperkingen gezien vanuit het oogpunt van de oorlog in Syrië.

Om de aansprakelijkheidsmatrix af te ronden onderzoekt hoofdstuk 6 het nut van niet-bestraffende aansprakelijkheidsmechanismes—"Civiele rechtszaken: Het nut van staatsaansprakelijkheid en het recht inzake onrechtmatige daad"—om de heersende straffeloosheid

in Syrië aan te kaarten. Waar het de staatsaansprakelijkheid betreft, onderzoekt dit hoofdstuk nog niet eerder onderzochte mogelijkheden, zoals het inschakelen van het Internationaal Gerechtshof en een baanbrekende rechtszaak in een Amerikaanse rechtbank tegen de soevereine staat Syrië onder de *Foreign Sovereign Immunities Act*.

Het voorlaatste hoofdstuk verplaatst zich vanuit deze aansprakelijkheidsmatrix naar het nieuwe bewijskrachtige landschap van het procesrecht van de ergste internationale misdaden. Hoofdstuk 7, getiteld "Innovaties in internationaal strafrechtelijke documentatiemethodologieën en instituties", focust op de nieuwe bronnen, technieken, technologieën en organisaties die voor een ongekende hoeveelheid van potentieel bewijs van internationale misdaden in Syrië hebben gezorgd, waardoor het de meest gedocumenteerde misdaaddatabank is in de geschiedenis van de mensheid. Het Syrische conflict viel samen met de explosie van sociale media en digitale technologieën die het voor gewone mensen mogelijk maakte om gepleegde internationale misdrijven op hun mobiele telefoons op te slaan. Deze toename van potentieel bewijs heeft zowel mogelijkheden als uitdagingen voor aansprakelijkheid gecreëerd. Dit hoofdstuk onderzoekt de verschillende multilaterale, nationale, en maatschappelijke pogingen daartoe, met de nadruk op het vastleggen van nieuwe technologische ontwikkelingen, analytische resultaten en publiek-private samenwerkingen. Het hoofdstuk baseert zich op de observatie dat wanneer het Syrische conflict eindigt—wat uiteindelijk zal gebeuren—er documentatie bestaat die een sterke basis vormt voor de overgangsjustitie, mocht de politieke wil daartoe bestaan.

Het laatste substantiële hoofdstuk, "Transitioneel recht zonder overgang: De inspanningen van de internationale gemeenschap in Syrië", behandelt de vraag of en in hoeverre overgangsjustitie behaald kan worden terwijl een conflict nog woedt. Hoofdstuk 8 begint met een historisch overzicht van de manier waarop het veld van overgangsjustitie is geïnternationaliseerd, deels door het veronderstelde nut van het bekrachtigen van de waarden van vrede en mensenrechten na een periode van geweld of onderdrukking. Het hoofdstuk analyseert vervolgens het meest recente onderzoek waarin deze beweringen worden getest, dat mogelijk gemaakt is door de ontwikkeling van meerdere nieuwe databases die opgedaan zijn in landen in transitie. Vervolgens beschrijft het hoofdstuk de reeks aan initiatieven die zijn gelanceerd door de internationale gemeenschap om het grondwerk voor een daadwerkelijk transitioneel rechtsproces binnen Syrië te creëren, waaronder de training van Syrische advocaten, het in kaart brengen van de kennis van en voorkeur omtrent overgangsjustitie binnen Syrische gemeenschappen, het bevorderen van psychosociale rehabilitatie en solidariteit tussen slachtoffers, en voorbereiding voor trainingen in waarheidsvertelling en het hervormen van nationale instituties. De conclusie van dit hoofdstuk stelt manieren voor waarop de internationale gemeenschap nog steeds een vorm van overgangsjustitie als deel van het wederopbouwproces kan bevorderen, zelfs als Assad de macht behoudt, wat steeds waarschijnlijker lijkt.

De conclusie van het proefschrift biedt verschillende overkoepelende observaties over de juridische vooruitzichten voor gerechtigheid in Syrië en markeert uit een anders behoorlijk grauw landschap toch een aantal lichtpunten. Eén van de redenen voor dit voorzichtig optimisme is dat er nu een robuuste en begrijpelijke internationale *jus puniendi* van internationale misdaden bestaat, zelfs al zijn er onvoldoende instituties waarin het toegepast kan worden. Hoewel het falen van de VN Veiligheidsraad ons vertrouwen in een naoorlogs systeem van collectieve beveiliging heeft afgezwakt, zijn er andere multilaterale, regionale en nationale instituties die tot op zekere hoogte deze gaten in het systeem hebben weten te vullen. Deze multilaterale verlamming spoorde immers wel aan tot nieuwe creatieve rechtstheorieën en verschillende institutionele modellen en zorgde

ervoor dat het beginsel van universele rechtsmacht na een periode van afzwakking nieuw leven werd ingeblazen. Hoewel deze voorstellen nog niet tot resultaten hebben geleid, is het nu duidelijk dat er geen juridische belemmeringen zijn en dat alleen de politieke wil en middelen ontbreken om ze tot stand te brengen. De toegenomen verfijning van de documentatie van internationale misdaden zorgt ervoor dat het benodigde bewijs aanwezig is om toekomstige pogingen om de ergste misdadigers tot verantwoording te roepen te ondersteunen. Al deze ontwikkelingen zijn het werk van een epistemische gemeenschap van ondernemers in gerechtigheid—die multilaterale instellingen, soevereine staten en de globale gemeenschap vertegenwoordigen—die een “nee” weigeren te accepteren als antwoord.

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Curriculum Vitae

Elizabeth Van Schaack (Baltimore, MD, USA 1968) studied Human Biology (with a specialization in women and public policy) at Stanford University (*phi beta kappa*), graduating in 1991 with a B.A. She then attended Yale Law School, graduating with a J.D. in 1997) with a specialization in public international law and human rights. In 2017, she started her PhD research as an external PhD candidate at Leiden Law School of Leiden University under the supervision of Prof. Carsten Stahn. She is the Leah Kaplan Visiting Professor in Human Rights at Stanford Law School where she teaches in the areas of international human rights, international criminal law, and human trafficking, among other subjects, and has been directing the Human Rights & Conflict Resolution Clinic. Prior to returning to academia, she served as Deputy to the Ambassador-at-Large for War Crimes Issues in the Office of Global Criminal Justice of the U.S. Department of State. Van Schaack has also been in private practice at Morrison & Foerster LLP and was Acting Executive Director and Staff Attorney with The Center for Justice & Accountability (CJA), a non-profit law firm in San Francisco dedicated to the representation of victims of torture and other grave human rights abuses in U.S., international, and foreign tribunals. She was also a law clerk with the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia.