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Imagining justice for Syria : water always finds its way

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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 Ukraine⁹ 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

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)

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 Prospero, *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 Corman 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 fight¹⁷—have flocked to the overlapping conflict zones in the Levant.¹⁸ At a high mark, it was estimated that

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

& *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 Alexandra 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

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

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 ICC’s 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

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_Iraq_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, *Background: 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 admissibility⁵⁷ 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

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

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 Statute⁷² (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

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

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 commentator¹⁰⁰—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 course 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

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.

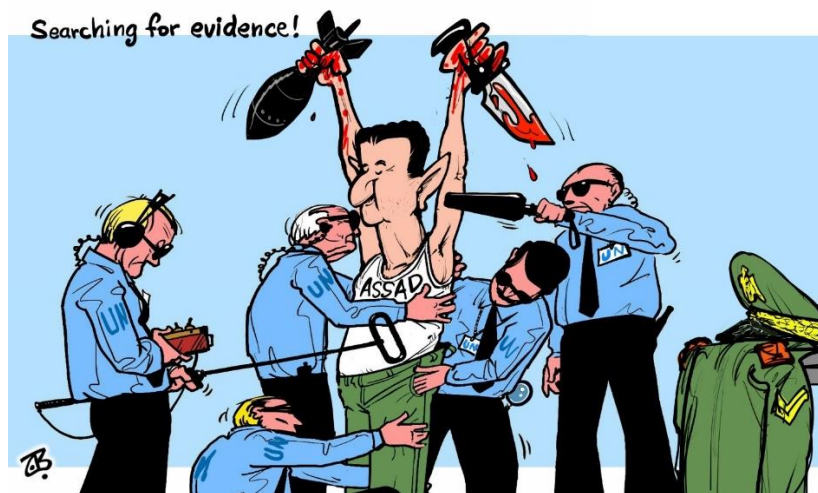
¹⁰³ See Kate Vigneswaran & Sam Zarifi, *A Pathway to Accountability for Syria? The Broader Implications of the ICC’s Findings on Jurisdiction over Cross-Border Crimes*, OPINIO JURIS (Sept. 19, 2018); Kevin Jon Heller, *The ICC and the Deportation of Civilians from Syria to Jordan*, OPINIO JURIS (Mar.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

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, pmb1, ¶ 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 Lightning, 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 pmb1.

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 *fiils* 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

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 Mustafa Busayf Al-Werfalli, Warrant of Arrest, ICC-01/11-01/17-2 (Aug. 15, 2017); Prosecutor v. Mahmoud Mustafa 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 *files*, 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, pmb1, 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 flux¹⁴⁸ 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

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 Northern [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

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—withstanding 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 irresolvable 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

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

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 *filis* 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

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.