Imagining justice for Syria : water always finds its way

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A Menu of Models: Options for an *Ad Hoc* Tribunal for Syria

There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance.[1]

At present, there is no international court with jurisdiction over events in Syria. As such, there is no multilateral judicial forum that is empowered to pronounce upon the injustice or illegality of the warring parties' conduct in Syria. This seemingly unyielding impunity undermines the integrity of the effort to build an international order based upon the rule of law and a global architecture dedicated to atrocities prevention and response. Although recourse to the International Criminal Court is largely foreclosed for reasons discussed in chapter 4, the fact that there has been little justice for Syria is not the fault of the ICC or its architects. Indeed, it is perhaps unrealistic to expect that the P-5 would put politics aside and allow the Security Council to refer every worthy situation to the Court.[2] The fault rather resides in part with the international community and its failure to meaningfully consider other ideas—some tried and true, others more inventive—that exist for bringing justice to Syria. This chapter identifies some of the justice innovations that could have been, and perhaps still could be, pursued even in the face of Russia's veto and Syria's intransigence, but if only the political will existed elsewhere within the international community. Indeed, many of these models offer a better option for the situation in Syria than the ICC given the extent of the international crimes being committed. In a desired, but increasingly unlikely, contingency, any tribunal could be subsequently accepted by a new Syrian regime and integrated into its domestic legal framework if a genuine transition ever occurs.

It was originally hoped that the establishment of the ICC as a permanent judicial institution with potentially global reach would obviate the need to establish additional *ad hoc* tribunals in connection with particular conflicts. This presumption has proven to be misguided. It is increasingly recognized that the ICC cannot be expected to prosecute all, or even a substantial percentage, of the atrocities ravaging our planet either because of jurisdictional gaps, the unwillingness of the Security Council to refer atrocity situations—such as Syria—to the Court, or basic resource constraints. Indeed, given the duration, scale, complexity, and nature of the Syrian conflict, there is no way that the ICC could take the lead on handling the administration of justice at the international level, even if the principle of complementarity were fully functioning. Although the Court is now operating at peak capacity, its jurisdiction remains incomplete and its resources limited. Furthermore, the Court is plagued by challenges to its legitimacy, erratic state cooperation, and persistent perceptions of inefficacy and inefficiency. Given this confluence of realities, there is an enduring need for the international community to create, enable, and support additional accountability mechanisms. Such institutions are needed to respond to the commission of international crimes when the political will for an ICC referral is lacking, the ICC is inappropriate or foreclosed for whatever reason, only a fraction of the abuses or perpetrators in question are before the Court, or the situation is one—like Syria—that deserves a focused accountability

[1] BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARDS WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS 1 (1980).
[2] Correspondence with Mark Kersten, Dec. 22, 2018.

mechanism. *Ad hoc* tribunals dedicated to particular situation countries thus remain a viable and valuable mechanism for increasing the prospects for justice.

Putting politics and practicality to the side, the international community could have established, and could still establish, an *ad hoc* tribunal dedicated to Syria, with or without the Security Council. There are a number of different modalities by which such a tribunal could be established, although models that have been successful thus far provide little solid precedent given the current dynamics within the international community. The Security Council is an obvious place to start. However, in light of entrenched blockages within the Council and animosity among the P-5, any multilateral prosecutions would need to be initiated through alternative means. Other available avenues include action by the General Assembly or the League of Arab States, or building an institution akin to the Nuremberg Tribunal by way of an international agreement among supportive and specially-affected states. The latter institution could be conceptualized as a membership organization operating on the basis of a pooled repository of states' individual jurisdictional competencies, or it could enjoy an independent international legal personality exercising a form of universalist international jurisdiction working on behalf of a subset of the international community. These proposals enjoy some precedent in international law, but run up against legal arguments—which remain controversial—about the propriety of prosecuting potential perpetrators without the nationality state's consent.[3]

Such an institution could remain fully international or contemplate the inclusion of a range of hybrid elements to integrate Syrian legal precepts and talent.[4] Indeed, the trend in international justice institutions has been towards hybrid models following the Security Council's establishment of the two original international tribunals for the former Yugoslavia and Rwanda, which were almost purely international when it comes to personnel, subject matter jurisdiction, and institutional design. This inclination towards hybridity can be seen in the newest such bodies in operation, under construction, or in contemplation: the Kosovo Specialist Chambers and Prosecutor in The Hague;[5] the Central African Republic's Special Criminal Court (SCC), which has been stood up in Bangui;[6] and the proposed hybrid courts for the Democratic Republic of the Congo, South Sudan, and Liberia, which still exist exclusively on paper. All these hybrid models envision the involvement of the territorial state, which would require the existence of genuine interlocutors within the Syrian government. But, it is possible to envision other forms of hybridity involving Syrian actors, such as the Free Syrian Lawyers group, who are unconnected to the state. That said, identifying willing partners within Syria's fractious political environment is an undeniable challenge to pursuing any measure of hybridity, particularly at this stage in the conflict. Furthermore, these institutions have generally been contemplated after the events in question, rather than mid-conflict.

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[3] *See* David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L. J. 47, 65 (2001) ("The U.S. legal position was that customary international law does not yet entitle a state … to delegate to a treaty-based International Criminal Court its own domestic authority to bring to justice individuals who commit crimes on its sovereign territory or otherwise under the principle of universal jurisdiction, without first obtaining the consent of the individual's state of nationality either through ratification of the Rome Treaty or by special consent").

[4] *See generally* Beth Van Schaack, *The Building Blocks of Hybrid Justice*, 44 DENVER J. OF INT'L L. & POL'Y 169 (2016) (outlining various models and the multiple ways in which justice can be hybridized).

[5] The Kosovo Specialist Chambers and Prosecutor's Office form part of the judicial system of Kosovo but are staffed by international judges, prosecutors, and administrators. *See* https://www.scp-ks.org/en.

[6] Tessa Alleblas, *Special Criminal Court for CAR: A New Opportunity for Accountability?*, THE HAGUE INSTITUTE FOR GLOBAL JUSTICE (Nov. 28, 2016).

If the international community had committed itself to such a project early in the conflict, work could have resulted in the establishment of a fully-functioning tribunal. In the alternative, the international community could have created the shell of a legal framework that would later be handed over to a new government in a turnkey arrangement (e.g., by way of an international agreement or the enactment of national legislation) whereby Syrian constituencies would play central roles and ultimately take ownership of the process. This latter eventuality, however, assumes a genuine transition or at least a post-war government that is willing to consider an international crimes accountability program. As the conflict appears increasingly asymmetrical, with the opposition in desperate retreat or trapped in a frozen conflict in de-escalation zones under Turkish supervision, any justice model requiring a measure of Syrian government consent or commitment seems impossible.

Such a mechanism would have to be created and operate consistently with international law to ensure its legitimacy and inoculate it against proper challenges by defense counsel to its jurisdiction and procedural fairness. Presumably, any defendant prosecuted before an international tribunal that does not enjoy the Security Council's backing would immediately challenge its legality under a range of theories. These would likely include human rights protections requiring that tribunals be "established by law"[7] and the U.N. Charter's provisions giving executive primacy to the Security Council. In so doing, defendants would be following in the footsteps of the first defendant before the International Criminal Tribunal for the former Yugoslavia (ICTY), Duško Tadić, who was unsuccessful in this approach.[8] Pursuant to the principle of *compétence sur la compétence*, considered an inherent component of the judicial function, international and hybrid tribunals regularly consider the legality of their own founding, although none has, to date, declared itself to be unlawful or *ultra vires* and shut itself down.[9]

This chapter focuses on several options for the exercise of international or quasi-international jurisdiction beyond the ICC. Models include the establishment of an *ad hoc* international tribunal, a regional or multilateral tribunal involving pooled jurisdictional capabilities, and an international court exercising a form of international jurisdiction. Any of these models could be hybridized with Syrian elements. Multiple proposals for establishing such a tribunal were floated and were considered, to varying degrees, by members of the international community, both before and after the failed ICC referral effort. None has gathered sufficient traction to date. Most, however, remain viable if the collective political will emerges and the articulated commitment to justice prevails.

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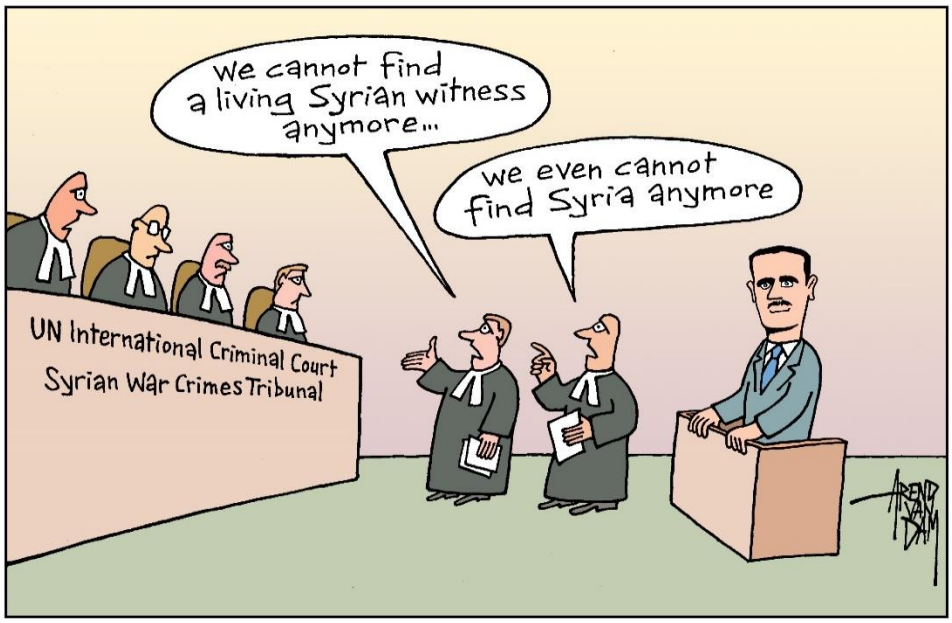
[7] International Covenant on Civil and Political Rights art. 14, 999 U.N.T.S. 171 (1976) ("In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."). *See Castillo Petruzzi et al. v. Peru* Judgment, Inter-Am. Ct. H.R. (ser. C) No. 52, (May 30, 1999) (holding that defendants are entitled to procedures previously established by law).

[8] *Prosecutor v. Duško Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995). *See also* Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Decision on Jurisdiction (June 18, 1997); Virginia Morris, *International Decisions, Prosecutor v. Kanyabashi, Decision on Jurisdiction, Case No. ICTR-96-15-T (June 18, 1997)*, 92 AM. J. INT'L L. 66 (1998) (discussing similar challenge before the ICTR).

[9] *See* Michael Vagias, *Useful in Theory, Useless in Practice? The Right of the Accused to Challenge the Jurisdiction of International Criminal Courts and Tribunals* (unpublished manuscript).



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Action Within the United Nations Security Council

The most obvious way to establish an *ad hoc* tribunal for Syria is through the Security Council, the progenitor of the ICTY[10] and the International Criminal Tribunals for Rwanda (ICTR)[11] by way of U.N. Charter Articles 29 (allowing the Council to create subsidiary bodies)[12] and 41 (allowing the Council to implement non-forcible coercive measures).[13] At the moment, this route is not available for the same reasons that the ICC referral effort has failed: since the Syrian conflict first appeared on the Council's agenda, Russia has been unwilling to allow most forms of coercive action contemplated against President Assad, as detailed in chapter 3. Furthermore, given Russia's active involvement in the conflict since 2015—on the ground and in the air—there is a clear self-interest in avoiding any accountability for Syria.[14] As such, it is unlikely that Russia would countenance the establishment of an *ad hoc* tribunal with the kind of open-ended personal jurisdiction that characterized past tribunals and allowed them to prosecute all sides of a conflict.[15]

[10] S.C. Res. 827, ¶ 7, U.N. Doc. S/RES/827 (May 25, 1993).
[11] S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).
[12] Article 29 reads: "The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions." U.N. Charter art. 29.
[13] Article 41 reads: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." U.N. Charter art. 41.
[14] The U.N. Commission of Inquiry, for example, has linked a Russian plane to airstrikes on a market in Atarib that killed and injured dozens of civilians. *See* Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. Doc. A/HRC/37/72, ¶¶ 77-78 (Feb. 1, 2018).
[15] For example, the ICTY was empowered to "prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." *See* Article 1, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, as amended (Sept. 2009). NATO's 1998 intervention in Kosovo fell within this formulation, although the Prosecutor never moved forward with an investigation of these

The Council might, however, coalesce around a tribunal dedicated to prosecuting members of only one party to the conflict: the Islamic State in the Levant (ISIL),[16] which has been deemed a threat to international peace and security.[17] The Kurdish-backed administration in northern Syria is looking for ways to establish a tribunal within and without the Council and has advanced this proposal, in part to deal with the thousands of ISIL fighters it has in custody.[18] The model envisioned would base the tribunal in territory currently under control of the Syrian Democratic Forces, although locating the court in the territory of a neighboring state would put it on firmer footing.[19] Enabling ISIL trials in an extraterritorial venue might find favor with two sets of states: those that have suffered ISIL attacks but are wary of seeking the extradition of responsible individuals and those that produced a high number of ISIL recruits but fear the prospect of taking back their nationals, who are deemed a security threat.[20]

Any such institution inspired by the situation in Syria could easily address crimes committed in both Syria and Iraq given the high degree of conflict spillover and the mobility of potential defendants across their shared border.[21] Indeed, and as discussed in chapter 8, the Council established a multilateral investigative team—dubbed the U.N. Investigative Team to Promote Accountability for Da'esh/ISIL Crimes (UNITAD)—that is starting to investigate ISIL crimes in Iraq with an eye towards enhancing domestic Iraqi prosecutions (as difficult as this may be given the endemic due process deficits and the prevalence of the death penalty there).[22] This effort could be upgraded into a full-fledged tribunal, although such a move would likely be opposed by the government of Iraq. Were this to occur, the investigative team could then be folded into an office of the prosecutor as was done with respect to the Special Tribunal for Lebanon (STL).[23]

As a source of controversy, UNITAD's singular focus on the crimes committed by ISIL—as heinous and deserving of censure as they are—overlooks crimes committed by other armed groups involved in the conflict,[24] prioritizes terrorism crimes over crimes against humanity, and

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events. *See* Anne-Sophie Massa, *NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate; An Abusive Exercise of Prosecutorial Discretion*, 24 BERKELEY J. INT'L L. 610 (2006). The ICTR's Statute was similar, but in the end, and due to Rwandan intransigence, the Rwanda Tribunal only prosecuted Hutu individuals accused of harming Tutsis and moderate Hutus. Rory Carroll, *Genocide Tribunal 'Ignoring Tutsi Crimes*,' THE GUARDIAN, Jan. 12, 2005.

[16] *See* Ulrich Haxthausen, *The Opportunities and Impediments to Holding ISIS Accountable for International Crimes and the Crime of Terrorism Committed in Iraq and Syria* 87 (June 19, 2019) (unpublished LLM thesis, Copenhagen University) (on file with the author) ("The crimes committed by ISIS in Iraq are sufficiently heinous to warrant a singular prosecutorial focus.").

[17] S.C. Res. 2249, ¶ pmbl, U.N. Doc. S/RES/2249 (Nov. 20, 2015).

[18] *Islamic State Group: Syria's Kurds Call for International Tribunal,* BBC NEWS, Mar. 26, 2019; *Could Foreign Daesh Suspects be Tried in Northeast Syria?*, ARAB NEWS, July 16, 2019.

[19] Helen Maguire & Khalil Hamlo, *Syria's Kurdish Forces Call for UN Tribunal for Foreign IS Fighters*, DPA-INTERNATIONAL (Feb. 18, 2019).

[20] Tim Lister, et al., *ISIS Goes Global: 143 Attacks in 29 Countries have Killed 2,042*, CNN, Feb. 12, 2018.

[21] *See* C.M.J. Ryngaert & D.W. Hora Siccama, *Justice for Sexual Crimes Committed by IS: Exploring Accountability and Compliance Mechanisms* 6, Report for the European Parliament, Committee on Legal Affairs (2016) (noting that an *ad hoc* tribunal could have transborder jurisdiction); Andrew Solis, *'Only [ ] Can Judge: Analyzing Which Courts Have Jurisdiction over ISIS*, 40 S. ILLINOIS UNIV. L.J. 69, 81-82 (2015).

[22] S.C. Res. 2379, § 2, U.N. Doc. S/RES/2379 (Sept. 21, 2017).

[23] Cécile Aptel, *Some Innovations in the Statute of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUSTICE 1107, 1112 (2007) (noting that a prior commission of inquiry essentially became the Office of the Prosecutor of the STL).

[24] Zachary Kaufman, *New UN Team Investigating ISIS Atrocities Raises Questions About Justice in Iraq and Beyond*, JUST SECURITY (Sept. 28, 2017).

amounts to a bill of attainder and a form of selective—even victors'—justice.[25] All this, however, was the price to be paid to secure Iraq's consent to this initiative.[26] An ISIL tribunal could assert jurisdiction over ISIL members anywhere they acted, either within the overlapping conflicts in Syria and Iraq or farther afield. Because ISIL undertakes a formal induction process,[27] it would be possible to confirm ISIL membership through documents seized from the organization by journalists,[28] criminal investigators, and civil society organizations.[29] Such a limited tribunal, while feasible, would be blind to the many depredations attributable to the Assad regime (as well as to the opposition and other actors for that matter). This would do little to satisfy victims' calls for comprehensive justice. It might also delay the establishment of more inclusive proceedings rather than setting the stage for them.

Even if the blockages within the Council were to miraculously resolve themselves and the political will to prosecute crimes committed in Syria were to materialize, the Council would likely be reluctant to launch a new stand-alone tribunal. Following the establishment of the ICTR, a strain of tribunal fatigue set in within the Council, inspired in part by the high costs of the ICTY and ICTR which, as subsidiary bodies of the Council, were funded out of U.N.-assessed contributions.[30] China, in particular, made it plain that it would not support the establishment of yet another *ad hoc* tribunal (although it was not alone in its reservations).[31] As such, even were it to become newly harmonious, the Council would still be more likely to bless an effort that came into fruition through other means, as it has done in the past with the STL, for example.

There is one additional Security Council option to mention, even though its utility in the Syrian context is limited. The Security Council helped to animate hybrid judicial processes in Kosovo and Timor-Leste, which emerged out of comprehensive U.N. transitional administrations. This was made possible by the fact that both Kosovo and Timor-Leste were, as a matter of international law, new "state-like" entities at the time of the United Nations' intervention. In Kosovo, the Security Council invoked Chapter VII to establish the U.N. Mission in Kosovo ("UNMIK"), a transitional administration charged with overseeing the development of self-governing institutions pending the determination of Kosovo's future status.[32] The Special Representative of the Secretary-General subsequently issued a directive convening criminal panels with a majority of international judges to adjudicate war crimes trials and other politically-sensitive cases, even though this was not expressly in his mandate.[33] The European Union Rule of Law

[25] I am grateful for Ingrid Elliot for this observation. *See* United States v. Brown, 381 U.S. 437 (1965) (finding a statute that made it a crime for members of an executive board of a labor organization to belong to the Communist Party to be an unconstitutional bill of attainder).
[26] *See* Beth Van Schaack, *The Iraq Investigation Team and Prospects for Justice for the Yazidi Genocide*, 16 J. INT'L CRIM. JUST. 113, 119 (2018) ("Although having Baghdad's consent will be crucial to the [investigative team's] ability to operate in the country, it comes at the expense of an impartial investigation that follows the evidence rather than one targeting a single armed group, no matter how heinous.") (citations removed).
[27] Wissam Abdallah, *What it Takes to join the Islamic State*, AL-MONITOR, Aug. 6, 2015.
[28] Rukmini Callimach, *The ISIS Files*, N.Y. TIMES, Apr. 4, 2018.
[29] Marlise Simons, *Investigators in Syria Seek Paper Trails that Could Prove War Crimes*, N.Y. TIMES, Oct. 7, 2014.
[30] General Assembly, Committee on Contributions, Tribunals, http://www.un.org/en/ga/contributions/tribunals.shtml. The United Nations continues to fund the International Residual Mechanism for Criminal Tribunals. *See* S.C. Res. 1966, ¶ 1, U.N. Doc. S/RES/1966 (Dec. 22, 2010).
[31] WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 425 (6th ed. 2011).
[32] S.C. Res. 1244, ¶ 10, U.N. Doc. S/RES/1244 (June 10, 1999).
[33] UNMIK Reg. 2000/64, § 1.1 (Dec. 15, 2000).

Mission in Kosovo (EULEX) continues to provide judges for select cases within the Kosovo justice system.[34]

In Timor-Leste, the Council deployed the U.N. Transitional Administration in East Timor ("UNTAET"), a peacekeeping operation organized to exercise Timorese legislative and executive authority, including the administration of justice, during the fledgling country's transition to self-government.[35] UNTAET established a system of Special Panels for Serious Crimes within the Dili District Court with exclusive and universal jurisdiction over serious criminal offenses, including genocide, war crimes, crimes against humanity, murder, sexual offenses, and torture.[36] UNTAET administrators appointed a mix of international and Timorese judges, with the former making up a majority of each panel.[37] This Regulation also incorporated the international crimes of genocide, war crimes, and crimes against humanity into Timorese law. In 2000, UNTAET created a Serious Crimes Unit, which was eventually housed in the public prosecutor's office, and a Defence Lawyers Unit, both of which were dominated by international staff.[38] Notwithstanding the United Nations' post-conflict management endeavors in Timor-Leste and Kosovo, the United Nations has not subsequently assumed such a comprehensive administrative role elsewhere. It is unlikely to do so for Syria.[39] So this route to justice is not a promising one.

In the persistent exercise of its veto of virtually any coercive measures involving Syria, Russia effectively foreclosed potential justice activity before the Security Council. It is worth revisiting, however, whether there may have been a time when Russia would have been willing to countenance interim steps towards accountability in Syria, before the current dynamic of Russian obduracy had fully set in within the Council and before Russia became directly involved in the conflict.[40] There may have been other proposals that could have made their way successfully through the Council, such as a resolution ordering the Assad government to "consent" to an *ad hoc* tribunal established by the General Assembly or the League of Arab States—an indirect route reminiscent of the STL's origins, as discussed below. To be sure, it seems unlikely that Russia would permit even this degree of coercive action against its Syrian ally, especially after being pushed to exercise its veto again and again in the Syrian context. That said, exploring interim steps earlier in the conflict may have allowed Russia a face-saving route out of its current corner and an opportunity to express support for accountability in a less confrontational manner. China, however, may not have followed Russia's lead in any such exercise. Although its own direct interests in Syria are minimal, China's resistance to such efforts is primarily ideological, based upon its firm fealty to the principles of state consent and non-intervention. Furthermore, many European states remained fixated on the ICC, so would not necessarily have thrown their weight behind an *ad hoc* tribunal. Given all the barriers to action within the Council identified above, it is necessary to look elsewhere within the U.N. organization to animate a new justice institution to ensure some measure of accountability for the crimes committed in Syria.

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[34] Report of the Secretary-General on the United Nations Interim Mission in Kosovo, U.N. Doc. S/2018/76, 11 (Jan. 31, 2018).
[35] S.C. Res. 1272, ¶ 1, U.N. Doc. S/RES/1272 (Oct. 25, 1999).
[36] *See* Caitlin Reiger & Marieke Wierda, *The Serious Crime Process in Timor-Leste: In Retrospect*, INT'L CTR. FOR TRANSITIONAL JUSTICE 8 (Mar. 2006).
[37] UNTAET Reg. No. 2000/15, U.N. Doc. UNTAET/REG/2000/15, at ¶ 22.1, ¶ 23.1 (June 6, 2000).
[38] UNTAET Reg. No. 2000/11, U.N. Doc. UNTAET/REG/2000/11, at ¶ 9.5 (Mar. 6, 2000).
[39] DANIEL JACOB, JUSTICE AND FOREIGN RULE: ON INTERNATIONAL TRANSITIONAL ADMINISTRATION (2014).
[40] *See Russia Backs Future Syria War Crimes Probe*, AL JAZEERA, Apr. 12, 2013; Mark Kersten, *Searching in Vain: Perfect Justice in Syria*, JUSTICE IN CONFLICT, Nov. 10, 2013.

Agreement With The United Nations

Although the ICTY and ICTR owe their provenance to the Security Council, subsequent *ad hoc* tribunals—bearing various indicia of hybridity—in Sierra Leone and Cambodia were created by way of an agreement between the United Nations and the target state, often with a nudge from the Council. Towards the end of the brutal civil war in Sierra Leone, the Security Council requested that the U.N. Secretary-General negotiate an agreement with the Government of Sierra Leone to create what became the Special Court for Sierra Leone ("SCSL").[41] By virtue of the agreement in question,[42] the SCSL was conceived as a stand-alone international tribunal, fully separate from the domestic legal order.[43] By contrast, though the Extraordinary Chambers in the Courts of Cambodia ("ECCC") have their origins in a similar bilateral treaty between Cambodia and the United Nations, the final result was a domestic tribunal with pervasive international elements, including the incorporation of international criminal law, the provision of technical assistance and staff provided through the United Nations Assistance to the Khmer Rouge Trial ("UNAKRT"), and a complex (and not to be repeated) dual staffing structure.[44] This treaty was the work of the U.N. Secretary-General and General Assembly, who at times found themselves at odds with each other on the best path forward.[45]

This bilateral treaty route is not presently an option for Syria given that the Assad regime would never consent to such an enterprise. Although many states acknowledged the Syrian National Council (SNC) and then the National Coalition for Syrian Revolutionary and Opposition Forces (SOC) as "a", and then "the", legitimate representatives of the Syrian people,[46] these organizations never cohered sufficiently to offer a genuine interlocutor for a justice agenda.[47] Without a credible and united Syrian opposition—enjoying the recognition of the international community as the legitimate representative of the Syrian people and exercising some measure of consolidated control over liberated areas—it is difficult to identify an alternative Syrian entity that could offer its consent to such an exercise. As such, any *ad hoc* tribunal dedicated to Syria would have to be created without Syrian consent, at least in the immediate term. Some options suggest themselves.

Action by the General Assembly

The General Assembly has a long history of establishing commissions of inquiry and other fact-finding bodies, most recently (but not exclusively) by way of the Human Rights Council, itself

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[41] S.C. Res. 1315, ¶ 1, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

[42] Agreement Between the United Nations and The Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Sierra Leone-U.N. Jan. 16, 2002, 2178 U.N.T.S. 137 [hereinafter *SCSL Statute*].

[43] Prosecutor v. Morris Kallon et al., Case No. SCSL–2004–15–AR72(E), Decision on Constitutionality and Lack of Jurisdiction, ¶¶ 49-52 (Mar. 13, 2004).

[44] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Cambodia-UN, June 6, 2003, 2329 U.N.T.S. 117.

[45] *See* Peter J. Hammer & Tara Urs, *The Elusive Face of Cambodian Justice*, *in* BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 27-29 (Jaya Ramji & Beth Van Schaack eds., 2005) (discussing of the many twists and turns of these negotiations).

[46] *See* Stefan Talmon, *Recognition of Opposition Groups as the Legitimate Representative of a People*, 12(2) CHINESE J. INT'L L. 219 (2013).

[47] Members of the opposition did form a Syrian Commission on Transitional Justice headed by Dr. Radwan Ziadeh. *Ziadeh Named Head of Syrian Commission on Transitional Justice*, Syrian Center for Political and Strategic Studies, http://scpss.org/en/?p=1326.

a subsidiary body of the General Assembly.[48] The Assembly has also been intimately involved in the creation of prior *ad hoc* tribunals, as discussed, but always with the participation and consent of the target state.[49] Nonetheless, there has been speculation that a super-majority of the Assembly could circumvent the Security Council's paralysis and create an *ad hoc* tribunal devoted to the Syrian conflict.[50] Overcoming perennial collective action obstacles in the Assembly would be aided by the fact that Russia finds itself increasingly isolated there in light of its steadfast support for the Assad regime and other objectionable behavior.[51] In addition, the General Assembly is progressively more willing to urge Security Council action and to criticize the P-5 for its failures on the accountability front when there is broad support for it among member states.[52] Although creating such a would-be tribunal would break new ground, it is within the realm of the possible.

This avenue to justice has been proposed with greater frequency for a number of situations beset by the commission of international crimes. These include circumstances that fall outside the Security Council's accepted jurisdiction (e.g., accountability for historical crimes committed during the Khmer Rouge era in Cambodia)[53] or that have triggered resistance on the part of one or another member the P-5 (such as violence in Gaza[54] and North Korea,[55] or the 2014 downing of Malaysian Airlines Flight MH17).[56] Indeed, the U.N. Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (DPRK) recently recommended this route in light of the widespread and systematic crimes against humanity in North Korea, although it offered little in the way of concrete details for how this might be effectuated. In support, it cited the international community's Responsibility to Protect and the likelihood that China would veto any coercive action by the Council directed toward North Korea, its important, but at times exasperating, trading partner.[57]

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[48] *See* Office of the United Nations High Commissioner for Human Rights (OHCHR), International Commissions of Inquiry, Commissions on Human Rights, Fact-Finding Missions and other Investigations, https://www.ohchr.org/EN/HRBodies/HRC/Pages/COIs.aspx. The Commission of Inquiry on the Reported Massacres in Mozambique was established directly by the General Assembly. G.A. Res. 3114, ¶ 1, U.N. Doc. A/RES/3114 (XXVIII) (Dec. 12, 1973).

[49] *See* Beth Van Schaack, *The General Assembly & Accountability for International Crimes*, JUST SECURITY (Feb. 27, 2017).

[50] For example, Kenneth Roth, Executive Director of Human Rights Watch, advocated this approach for Syria. Kenneth Roth (@KenRoth), TWITTER, https://twitter.com/KenRoth/status/468323433135505408.

[51] Ariel Cohen, *Moscow's Veto of MH17 Tribunal: A Blunder of Potentially Huge Proportions*, ATLANTIC COUNCIL (Aug. 5, 2015).

[52] *See* Michael Ramsden & Tomas Hamilton, *Uniting Against Impunity: The UN General Assembly as a Catalyst for Action at the ICC*, 66 INT'L & COMP. L. Q. 893, 896 (2017) (noting examples of the General Assembly urging action before the Council).

[53] Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, U.N. Doc. A/53/850, ¶ 146 (Mar. 16, 1999) (suggesting that the General Assembly could create a tribunal under its Chapter IV recommendatory powers).

[54] Report of the United Nations Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, ¶ 1971 (Sept. 25, 2009) ("The General Assembly may consider whether additional action within its powers is required in the interests of justice, including under its resolution 377 (V) on uniting for peace"). *See* Afua Hirsch, *Israel May Face Court Ruling on Legality of Gaza Conflict*, THE GUARDIAN, Jan. 13, 2009.

[55] HUMAN RIGHTS WATCH, NORTH KOREA: UN SHOULD ACT ON ATROCITIES REPORT (Feb. 17, 2014).

[56] Thomas Escritt, *After Russian U.N. Veto, Countries Seek Court for Flight MH17 Prosecutions*, REUTERS, July 30, 2015. The working theory is that the plane was hit by a Russian-made missile wielded by Russian-backed Ukrainian separatists. *MH17 Missile Owned by Russian Brigade, Investigators Say*, BBC, May 24, 2018.

[57] Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, U.N. Doc. A/HRC/25/CRP.1, ¶¶ 1200-01 (Feb. 7, 2014).

The U.N. Charter offers no immediately obvious mandate for such action by the Assembly.[58] When faced with a threat to international peace and security, the Council's powers are much more plenary, coercive (vis-à-vis the target entity), and mandatory (vis-à-vis member states) than the General Assembly's.[59] Dedicated articles empower the Assembly to "discuss" any matter within the scope of the Charter, "make recommendations" to members of the United Nations or the Security Council regarding such matters (but without legislative effect), and "initiate studies" to promote international cooperation.[60] Article 13 in particular empowers the Assembly to "assist[] in the realization of human rights and fundamental freedoms for all without distinction."[61] The Assembly lacks an equivalent to the Council's Article 41 inviting it to implement measures in situations under its consideration. Indeed, Article 12 indicates that while the Security Council is "exercising … the functions assigned to it" with respect to "any dispute or situation," the General Assembly is to refrain from acting, absent a request from the Security Council.[62]

Subsequent state practice, however, has significantly weakened the command of this textual division of labor. In this regard, the International Court of Justice (ICJ) has noted that

> there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security. … The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12.[63]

In any case, the recurrence of the veto arguably implies that the Council is not, in fact, exercising its assigned functions (assuming, of course, that these include justice and accountability). As such, that the Council has had Syria on its agenda for years is no immediate bar to the General Assembly acting, as has been seen with the establishment of the International, Impartial and Independent Mechanism for Syria (IIIM). Indeed, Syria and South Africa raised Article 12 during the deliberations around the establishment of the IIIM. The Chair determined that Article 12, as currently interpreted by the Office of Legal Affairs and the ICJ, did not preclude consideration of the proposal. Syria did not formally challenge the ruling, although its delegate was fuming and accused the lawyers of "cheating."[64]

In addition, although the General Assembly has been empowered with a recommendatory role only, it has over the years issued resolutions that have been treated as definitive by other U.N. organs and external actors, particularly when pariah states are involved or there is a firm international consensus around a course of conduct. These include resolutions containing within

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[58] *See* Derek Jinks, *Does the U.N. General Assembly have the Authority to Establish an International Criminal Tribunal for Syria?*, JUST SECURITY (May 22, 2014) (arguing that the legal support for such a proposal is minimal).
[59] *Tadić*, *supra* note 8, at ¶ 31.
[60] *See* U.N. Charter arts. 10-11, 13-14.
[61] U.N. Charter art. 13.
[62] *Id*. at art. 12.
[63] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶¶ 27-28 (July 9).
[64] *See* U.N. GAOR, 71st Sess., 66th plen. mtg., at 21-29, U.N. Doc. A/71/PV.66 (Dec. 21, 2016) (setting forth colloquy).

them determinations of territorial claims[65] and statehood,[66] enunciating norms,[67] articulating the scope and applicability of treaties,[68] ending South Africa's mandate over Namibia,[69] or identifying the legal effects of state action.[70] Particularly germane, the ICC Prosecutor considered the General Assembly's resolution on Palestinian statehood to be determinative of the question of Palestine's ability to ratify the Rome Statute.[71] The acceptance of such pronouncements and their external effects imply that the Assembly enjoys latent powers that go beyond the merely recommendatory. It remains uncertain how far these powers extend, however.

The most enabling U.N. Charter provision is found in Article 22, which envisions the General Assembly establishing "subsidiary organs deemed necessary for the performance of its functions."[72] On the strength of this provision, the General Assembly stood up an internal administrative tribunal to adjudicate U.N. employment claims. In an Advisory Opinion seeking guidance on whether the tribunal was capable of binding the U.N. Organization, the ICJ determined that the General Assembly had created a judicial entity as opposed to a merely advisory body.[73] The ICJ noted that this was the case even though "the General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ."[74] While the ICJ found no express authorization in the Charter for the Assembly to create such a tribunal, it indicated that the power was conferred by necessary implication given that there was an obvious need to resolve internal organizational matters, such as disputes between staff members and the United Nations.[75] This was particularly so given presumed jurisdictional immunities enjoyed by the Organization in

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[65] G.A. Res. 63/307/, ¶ 1, U.N. Doc. A/RES/63/307 (Sept. 30, 2009) (affirming that South Ossetia is part of Georgia); Situation in Georgia, Request for an Authorization Pursuant to Article 15, Doc. No. ICC-01/15/4/Corr2 (Nov. 17, 2015) (authorizing an investigation into crimes committed within South Ossetia on the basis of Georgia's ICC membership). *See* Ramsden & Hamilton, *supra* note 52, at 904-5 (citing additional examples).

[66] *See* G.A. Res. 3067 (XXVIII), ¶ 7, U.N. Doc. A/RES/3067 (Nov. 16, 1973) (directing the Secretary-General to invite Guinea-Bissau and Viet Nam to participate in a treaty conference); G.A. Res. 67/19, ¶ 2, U.N. Doc. A/RES/67/19 (Dec. 4, 2012) (according Palestine "non-member observer State status in the United Nations"). *See also* Ramsden & Hamilton, *supra* note 52, at 903 n.67 (citing statehood resolutions); *id*. at 910-11 (citing voluntary sanctions).

[67] *See* Marko D. Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUROP. J. INT'L L. 879, 896 (2005).

[68] *See* G.A. Res. 70/88, ¶ 1, U.N. Doc. A/RES/70/88 (Dec. 9, 2015) (noting that the Geneva Conventions are applicable in the Occupied Palestinian Territories).

[69] G.A. Res. 2145, ¶ 4, U.N. Doc. A/RES/2145 (Oct. 27, 1966) ("Decides that the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa is therefore terminated, that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations").

[70] G.A. Res. 68/262, ¶ 6, U.N. Doc. A/RES/68/262 (Mar. 27, 2014) (calling upon states not to recognize the attempted annexation of Crimea by Russia).

[71] *See The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine*, ICC-OTP-20150116-PR1083 (Jan. 16, 2015).

[72] U.N. Charter art. 22.

[73] *See Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion,* 1954 I.C.J. Rep. 47, 53 (July 13) ("the Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions.").

[74] *Id*. at 56.

[75] *Id*. at 56-57. *See also* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, 182 (April 11) ("Under international law, the [U.N.] Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.").

national courts and the preoccupation of the United Nations with the promotion of "freedom and justice"—principles that should extend to its own staff.[76]

In confirming the legality of the tribunal, the ICJ noted that the Assembly was not delegating one of its own functions[77] but rather selecting the modality of a tribunal to exercise an inherent power under the Charter to regulate staff relations.[78] In other words, Article 22 enables the General Assembly to exercise pre-existing authorities through organizational means of its choosing. The ICTY invoked similar reasoning when Tadić challenged the ability of the Security Council—which has not been expressly granted any adjudicative powers by the Charter either—to establish a war crimes tribunal by way of Chapter VII. The Appeals Chamber thus concluded: "The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia."[79]

The Assembly could presumably create a judicial body devoted to Syria as a subsidiary organ into which the IIIM could be folded. Obviously, the administrative tribunal precedent is an imperfect analogy to a criminal tribunal dedicated to adjudicating crimes committed within the territory of a member state, particularly a non-consenting one. The argument that such a body would be authorized "by necessary implication" is quite a stretch when compared to the in-house labor tribunal blessed by the ICJ. Increasingly, however, the role of the United Nations in promoting human rights and justice has taken on greater prominence and urgency within the U.N. system. Besides the express Charter reference to human rights (*inter alia*) in Article 13, this burgeoning emphasis is demonstrated by the Responsibility to Protect doctrine;[80] the 2005 World Summit Outcome Document;[81] the Secretary-General's "Human Rights up Front"[82] action plan; the expanding operations of the Third Committee, which is devoted to humanitarian affairs and human rights; soft and hard law obligations aimed at ending impunity;[83] and Sustainable Development Goal #16, which strives to improve access to justice for the world's people.[84] In addition, at a 2012 High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, heads of state and government committed themselves to

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[76] *Id*. at 57. Article 105(1) of the U.N. Charter indicates that "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." U.N. Charter art. 105.

[77] *BRUNO SIMMA, ET AL., THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 427 (2nd ed. 2002) (arguing that the Assembly cannot create a body exercising powers it does not itself enjoy).

[78] *Effect of Awards*, *supra* note 73, at 61.

[79] *Tadić*, *supra* note 8, ¶ 38.

[80] *See* U.N. Office on Genocide Prevention and the Responsibility to Protect, http://www.un.org/en/genocideprevention/.

[81] G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

[82] Ekkehard Strauss, *The UN Secretary-General's Human Rights Up Front Initiative and the Prevention of Genocide: Impact, Potential, Limitations*, 11 GENOCIDE STUDIES & PREVENTION 48 (2018). The Human Rights Up Front initiative is an internal action plan to introduce cultural and operational changes within the United Nations to enable early action in the face of potential atrocities.

[83] *See, e.g.*, S.C. Res. 2150, ¶ 1, U.N. Doc. S/RES/2150 (Apr. 16, 2014) (calling on all states to take measures to prevent and respond to atrocity crimes).

[84] Sustainable Development Goals Knowledge Platform, *Sustainable Development Goal 16*, https://sustainabledevelopment.un.org/sdg16.

> ensuring that impunity is not tolerated for genocide, war crimes, crimes against humanity and for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law.[85]

Collectively, these initiatives elevate human rights and justice among the purposes and principles of the United Nations.[86] The General Assembly's increased activity around human rights—as crucial "functions" of the body—might justify innovative action in the service of justice to respond to the twin phenomena of widespread violations of international law in Syria and Security Council political paralysis.[87]

An additional modality for General Assembly action may be found in the extraordinary Uniting For Peace Resolution,[88] which provides that in urgent situations in which the Security Council has failed to act to maintain international peace and security due to the exercise of the veto by one of the P-5, the Assembly shall consider the matter immediately.[89] The heart of the Resolution states:

> if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.[90]

Resolution 377 contemplates "possibilities of observation which would ascertain the facts and expose aggressors; for the existence of armed forces which could be used collectively; and for the possibility of timely recommendation by the General Assembly to Members of the United Nations for collective action."[91] The Assembly can consider the matter in an emergency special session (ESS), which can be called through a procedural vote of the Council (which cannot be blocked by

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[85] G.A. Res. 67/1, ¶ 22, U.N. Doc. A/RES/67/1 (Nov. 30, 2012).

[86] U.N. Charter art. 1(3) (identifying the promotion and encouragement of "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" as fundamental purposes of the organization).

[87] Thus, "when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization." Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. Rep. 151, 168 (July 20).

[88] G.A. Res. 377A, U.N. Doc. A/RES/377A (Nov. 3, 1950). The "Uniting for Peace" resolution was adopted by member states (52 votes in favor, 5 against, and 2 abstentions) at the initiative of the United States in the early months of the Korean War. It laid the groundwork for U.N. operations in Korea—arguably the most robust application of the Uniting for Peace resolution yet. *See* Christina Binder, *Uniting For Peace Resolution (1950)*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (May 2017).

[89] *See* Michael Ramsden, *"Uniting for Peace" in the Age of International Justice*, 42 YALE J. INT'L L. ONLINE 1 (2016) (suggesting the utility of Resolution 377 in establishing justice mechanisms).

[90] A/RES/377A, *supra* note 88, ¶ 1.

[91] *Id*. at pmbl.

the veto but must garner nine votes to pass) or at the request of a majority of U.N. members.[92] That said, because the General Assembly now meets year-round, there is no need to call an ESS anymore except for symbolic reasons.[93] The theory is that action under the Uniting for Peace resolution does not encroach on the Council's exclusive power to impose coercive measures under Chapter VII, because the Assembly still only makes recommendations to member states.[94] Whether or not such a General Assembly resolution offers a legal justification to act or would preclude wrongfulness on the part of states that implement its recommendations remains an open legal question.[95]

The Uniting for Peace resolution has been invoked a number of times by members of the Security Council (to outflank a member wielding its veto) or increasingly by other member states (to bypass the Security Council altogether and promote issues of common concern).[96] In total, ten ESSs have been called over the years,[97] the most recent of which involves the resumption of the 10th Emergency Session and U.S. President Donald Trump's decision to move the U.S. embassy to Jerusalem.[98] Previous quasi-coercive actions pursuant to the Uniting for Peace resolution have resulted in the General Assembly calling on member states to impose so-called "voluntary sanctions" on South Africa for its acts of aggression in and occupation of Namibia and to provide military assistance to freedom fighters;[99] establishing a commission of inquiry to consider foreign intervention in Hungary;[100] referring a matter to the ICJ (on the legal consequences of Israel's construction of a wall in Occupied Palestinian Territory);[101] and establishing, sustaining, or financing peacekeeping forces (albeit with the erstwhile consent of the territorial state).[102] Some

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[92] *See* Parliamentarians for Global Action, *The PGA Handbook: A Practical Guide to the United Nations General Assembly* 14-15 (2011).
[93] *See* Larry D. Johnson, *"Uniting for Peace": Does It Still Serve Any Useful Purpose?*, AJIL UNBOUND (July 15, 2014).
[94] *Id.*
[95] Stefan Talmon, *The Legalizing and Legitimating Function of UN General Assembly Resolutions*, 108 AJIL UNBOUND 123 (July 18, 2014).
[96] *See* Security Council Report, *Security Council Deadlocks and Uniting for Peace: An Abridged History* (Oct. 2013). *See generally* Dominik Zaum, *The Security Council, the General Assembly, and War: The Uniting for Peace Resolution*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, 154 (Vaughan Lowe et al. eds., 2008) (recounting origins and General Assembly practice).
[97] General Assembly, Emergency Special Sessions, http://www.un.org/en/ga/sessions/emergency.shtml. *See also* Resolutions adopted by the General Assembly—Emergency Special Sessions, http://research.un.org/en/docs/ga/quick/emergency.
[98] *UN General Assembly Votes to Condemn Trump's Jerusalem Recognition*, MIDDLE EAST MONITOR (Dec. 21, 2016).
[99] G.A. Res. ES-8/2, ¶¶ 4, 12, U.N. Doc. A/RES/ES-8/2, Question of Namibia (Sept. 14, 1981) (condemning South Africa's illegal occupation in Namibia and calling on the Security Council to act). The General Assembly has also recommended voluntary sanctions against South Africa without invoking the Uniting for Peace resolution. *See* G.A. Res. 41/35 A, ¶ 13, U.N. Doc. A/RES/41/35 A (Nov. 10, 1986) (requesting all states to expand sanctions against South Africa). *See also* G.A. Res. 2107 (XX), ¶ 7, U.N. Doc. No. A/RES/2107 (Dec. 21, 1965) (calling on states to impose sanctions on Portugal).
[100] *See* G.A. Res. 1004 (ES-II), ¶¶ 1, 2, 4, U.N. Doc. A/RES/1004 (ES-II) (Nov. 4, 1956) (calling on the Soviet Union to desist its interventions in Hungary and requesting the Secretary-General to investigate the situation).
[101] *See* G.A. Res. ES-10/14, U.N. Doc. A/RES/ES-10/14 (Dec. 12, 2003); Press Release, *General Assembly Adopts Text Requesting International Court of Justice to Issue Advisory Opinion on West Bank Separation Wall*, GA/10216 (Dec. 8, 2003). This ESS was convened by Qatar.
[102] A United Nations Middle East Emergency Force (UNEF) and United Nations Operation in the Congo (ONUC) were both created or sustained by way of the Uniting for Peace Resolution. In both cases, an ESS was called by a Security Council member in the face of the then-Soviet Union's veto. *See* G.A. Res. 1000, ¶ 1, U.N. Doc.

of these initiatives piggybacked off prior engagement by the Council, which could not pursue further action.[103] One of these was the U.N. Operation in the Congo (UNOC), which the General Assembly confirmed was the only legitimate international presence in the Congo.[104] In an Advisory Opinion, the ICJ determined that the creation and funding of a peacekeeping force by the General Assembly was not *ultra vires* since it furthered the purposes of the United Nations; in its estimation, to rule otherwise would leave the Organization "impotent in the face of an emergency situation."[105] The United Kingdom also considered invoking the United for Peace resolution to seek a legal basis for NATO's operation in Kosovo in 1998. It ultimately determined, however, that the Assembly was unlikely to bless the intervention without the target state's consent.[106]

In recent years, Resolution 377 has begun to be invoked in connection with justice deadlocks within the Council. For example, the Human Rights Council's Commission of Inquiry (COI) dedicated to the DPRK recommended recourse to the resolution in the event that action through the Security Council remained blocked. The DPRK COI, which was tasked with identifying means by which responsible individuals could be rendered accountable for their criminal conduct, thus recommended that the Assembly invoke its "residual powers" under the Uniting for Peace resolution and the "combined sovereign powers of all individual Member States to try perpetrators of crimes against humanity on the basis of the principle of universal jurisdiction."[107] Even the League of Arab States has noted the potential relevance of the Uniting for Peace resolution to promote accountability, albeit in connection with the perennially polarizing Israel-Palestine conflict and Palestine's *ad hoc* acceptance of ICC jurisdiction.[108] In all of these cases, the breaches in question are of *erga omnes* obligations and involve pariah states or divisive situations, which strengthens plenary action by the Assembly. Besides these efforts above, the Assembly has never been formally called upon to unite for peace to establish a judicial or quasi-judicial body,[109] no less a criminal tribunal. When it came to Syria, concerned states—with Canada in the lead—and civil society actors did attempt to invoke this concept on humanitarian grounds around the time of the Aleppo siege.[110] This effort fizzled as attention shifted to the IIIM proposal.

Any such action by the Assembly would have to enjoy a high degree of consensus; Article 18 of the U.N. Charter indicates when "important questions"—deemed to include those involving international peace and security—are at issue, Assembly recommendations require the support of

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A/RES/1000 (Nov. 5, 1956) (establishing UNEF); G.A. Res. 1474 (ES-IV), ¶¶ 2, 5, U.N. Doc. A/RES/1474 (ES-IV) (Sept. 20, 1960) (requesting the Secretary-General to enable ONUC to assist the Congo in the restoration of law and order and calling upon states to refrain from intervention in the Congo). In both cases, and against the wishes of the Soviet Union, the General Assembly apportioned the expenses between member states.

[103] Ramsden & Hamilton, *supra* note 52, at 912.

[104] *See* A/RES/1474, *supra* note 102.

[105] Certain Expenses, *supra* note 87, at 167.

[106] Zaum, *supra* note 96, at 165-66.

[107] DPRK COI Report, *supra* note 57, at ¶ 1201.

[108] League of Arab States, Report of the Independent Fact-Finding Committee on Gaza: No Safe Place, ¶ 610 (Apr. 30, 2009) (recommending that the Arab League "request the General Assembly to endorse Palestine's declaration under Article 12(3) of the Rome Statute in a meeting convened under the Tenth Emergency Special Session").

[109] *But see* Michael Ramsden, *Uniting for MH17*, 7 ASIAN J. INT'L L. 337 (2017) (arguing that the General Assembly could create a tribunal under Resolution 377).

[110] *See* HUMAN RIGHTS WATCH, UNITING FOR PEACE IN SYRIA: GLOBAL CIVIL SOCIETY APPEAL TO UN MEMBER STATES (Dec. 1, 2016); Melissa Kent, *Canada Leads New Push on Syria Crisis at UN as 'Frustration' over Security Council Deadlock Grows*, CBC (Oct. 13, 2016).

a two-thirds majority of members present and voting (which works out to 129 states if attendance is perfect).[111] The Assad regime has earned widespread condemnation, and there was a high degree of cross-regional support shown for the IIIM. Indeed, the resolution to establish the IIIM only garnered 15 "no" votes from a mostly rogue's gallery of states.[112] That said, fifty-two states abstained. As such, this two-thirds threshold, if required, could be within reach with appropriate advocacy.

Ideally, any General Assembly tribunal would be funded from U.N.-assessed contributions, which are within the ambit of General Assembly to allocate. If the IIIM is any guide, however, funding would likely come from voluntary contributions by supportive member states, at least at first. It goes without saying that this is an imperfect way to fund a justice institution, but one that has been used extensively for previous hybrid tribunals that do not enjoy Security Council provenance.[113] In these other institutions, donor fatigue has threatened institutional sustainability and required exhaustive efforts in outreach to ensure adequate funding.[114] To the extent that a host state is willing to take on the institutional costs, this would lessen the amount of external fundraising that would be necessary. Any agreement establishing such a tribunal should include concrete funding commitments and other guarantees of support (such as in-kind donations and seconded personnel, etc.).

Although the General Assembly could undertake this project, the imagined tribunal would likely lack the compulsory powers with which a subsidiary body of the Security Council could be imbued and could only operate on the basis of voluntary state cooperation. As such, any pronouncement by the envisioned court would not be automatically binding on member states absent an upgrade by the Security Council acting under Chapter VII.[115] That said, there would be nothing stopping member states from voluntarily cooperating with or otherwise assisting with the work of such an institution. So, the putative tribunal could build upon the IIIM's efforts gathering and preserving evidence by inviting witness testimony, issuing shadow indictments, holding hearings, and even potentially issuing notional or advisory decisions. It could recommend that national authorities detain or indict particular individuals or extradite them to willing judicial fora. Indeed, it could even conceivably commence full-scale prosecutions and issue notional judgments. Without having the ability to detain suspects, these proceedings would likely proceed *in absentia* unless the defendants were in the custody of a willing state.[116] These latter pronouncements would

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[111] U.N. Charter art. 18(2) ("Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting."). *See also* U.N. Functions and Powers of the General Assembly, http://www.un.org/ga/about/background.shtml. According to Rule 86 of the Rules of the General Assembly, "members present and voting" are defined as "members casting an affirmative or negative vote," which excludes states that abstain or that do not otherwise participate. Rules of Procedure of the General Assembly U.N. Doc. A/520/Rev.18 (Feb. 21, 2017).

[112] The following states voted no: Algeria, Belarus, Bolivia (Plurinational State of), Burundi, China, Cuba, Democratic People's Republic of Korea, Iran (Islamic Republic of), Kyrgyzstan, Nicaragua, Russian Federation, South Sudan, Syrian Arab Republic, Venezuela (Bolivarian Republic of), and Zimbabwe. *See* U.N. GAOR, 71st Sess., 66th plen. mtg., at 30, U.N. Doc. A/71/PV.66 (Dec. 21, 2016) (setting forth the voting record).

[113] *See* Rupert Skilbeck, *Funding Justice: The Price of War Crimes Trials*, 15(3) HUM. RTS BRIEF 6 (2008).

[114] Stuart K. Ford, *How Leadership in International Criminal Law is Shifting from the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts*, 55 ST. LOUIS U. L. J. 953 (2011).

[115] *See* Öberg, *supra* note 67 (discussing limited areas where General Assembly resolutions are binding, e.g., budgetary matters, UN membership, etc.).

[116] International law does not prohibit *in absentia* proceedings so long as certain procedural protections are in place. *See* Eduardo Demeterio Crespo & Ágata María Sanz Hermida, In Absentia *Proceedings in the Framework of a*

not necessarily have the force of international law, but they could be subsequently ratified by national courts. States with concurrent jurisdiction over the events in question could offer to undertake the process of transforming the tribunal's recommended judgment and sentence into an enforceable legal instrument that could be executed by obliging states, akin to the summary proceedings national courts employ to confirm arbitral awards.[117] The General Assembly could tap into its plenary status to help coordinate such efforts under Article 11(1) of the U.N. Charter.[118]

The proposed tribunal could later have its work "ratified" by the Council if the geopolitical winds shift course, a sequencing that has occurred in other contexts. For example, during the brutal Liberian civil war, the Economic Community of West African States (ECOWAS) fielded a peacekeeping force—the Economic Community Cease-Fire Monitoring Group (ECOMOG)—which intervened in Liberia without Security Council approval.[119] Later, the Council passed several resolutions effectively blessing the intervention.[120] The Special Tribunal for Lebanon offers another interesting precedent in this regard.[121] The Council did not formerly create the STL, but it inspired its creation by other U.N. bodies. Specifically, Security Council Resolution 1664 called for the United Nations and Lebanon to negotiate an agreement to bring an international tribunal into fruition.[122] Once finalized, the agreement was never ratified by Lebanon due to intense domestic opposition among some political factions. In light of this political deadlock, supporters within the Lebanese government asked the United Nations for assistance in operationalizing the tribunal.[123] To this end, the Security Council issued Resolution 1757, which brought the bilateral agreement and the proposed STL Statute into force by way of Chapter VII, effectively bypassing the domestic constitutional order.[124] As it turned out, activating the STL proved to be a lighter political lift than creating it *ab initio* within the Council. In the same way, if

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Human Rights-Oriented Criminal Law, *in* PERSONAL PARTICIPATION IN CRIMINAL PROCEEDINGS 559 (Serena Quattrocolo & Stefano Ruggeri eds. 2019).

[117] *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, TIAS No. 6997.

[118] U.N. Charter art. 11(1) ("The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security … and may make recommendations with regard to such principles to the Members or to the Security Council or to both.").

[119] *See* Human Rights Watch, Waging War to Keep the Peace: *The ECOMOG Intervention and Human Rights* (June 1993), https://www.hrw.org/reports/1993/liberia/.

[120] *See* S.C. Res. 788, pmbl, U.N. Doc. S/RES/788 (Nov. 19, 1992) ("Welcoming the continued commitment of the Economic Community of West African States (ECOWAS) to and the efforts towards a peaceful resolution of the Liberian conflict"); S.C. Res. 813, ¶ 2, U.N. Doc. S/RES/813 (Mar. 26, 1993) (commending "ECOWAS for its efforts to restore peace, security and stability in Liberia").

[121] Global Policy Forum, *Special Tribunal for Lebanon*, https://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts/special-tribunal-for-lebanon.html (discussing Syria's role in inspiring the creation of the STL). Notwithstanding the fact that the STL is effectively targeting Syrian involvement in Lebanese affairs, Russia continues to generally support the STL. *See Russia Reiterates Support to STL, Lashes Out on 'Politicizing' Tribunal*, NAHARNET NEWSDESK, Oct. 19, 2011, http://www.naharnet.com/stories/en/18000; Ministry of Foreign Affairs of the Russian Federation, On the Special Tribunal for Lebanon (July 1, 2011), http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/201334.

[122] S.C. Res. 1664, ¶ 1, U.N. Doc. S/RES/1664 (Mar. 29, 2006).

[123] Jamal Saidi, *Lebanon's Siniora Asks U.N to Set Up Hariri Court*, REUTERS, May 14, 2007, http://www.reuters.com/article/worldNews/idUSL1420555620070514.

[124] S.C. Res. 1757, ¶ 1, U.N. Doc. S/RES/1757 (May 30, 2007). *See* Van Schaack, *supra* note 4, at 113-15 (recounting process).

the Assembly were to proceed, the Council could subsequently bless the entire institution or render individual decisions binding by later adoption.[125]

With the establishment of the IIIM, the General Assembly has moved at least partway down this path. This mechanism is an important "stop-gap measure" to procure and secure evidence until a court can exercise jurisdiction.[126] The IIIM could conceivably be "upgraded" by the General Assembly, or even by the Security Council, to a stand-alone *ad hoc* court. In the alternative, the IIIM could eventually be inserted into a tribunal framework if one is ever established through whatever means.

The Arab League

Besides Western states, which have consistently broadcast unfocused calls for accountability or supported an ICC referral, the Arab League issued more consequential resolutions against the Assad regime. After an initial period in which the Arab League gave space for President Assad's calls for a "national dialogue" to resonate, the League eventually soured on the regime. In an unprecedented move, it suspended Syria's membership on November 12, 2011.[127] It later supported the imposition of peacekeepers in Syria,[128] imposed sanctions,[129] called for accountability,[130] and advocated other forms of coercive action—all drawing the ire of Syria. To date, however, this regional rhetoric around accountability has not translated into concrete institution building. In any case, relations in the region are normalizing and it appears that the League is ready to readmit Syria.[131] Prior to and even after this apparent *rapprochement*, there is nothing preventing the League from establishing a regional tribunal. Regional courts have the potential to exert greater influence given their geopolitical proximity to the events in question, the economic interdependence of neighboring states, and their ability to respond more nimbly to unfolding events.[132]

The most recent, though still somewhat oblique, precedent for this route is the tribunal established to prosecute Hissène Habré for crimes committed while he was President of

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[125] Cambodia Group of Experts Report, *supra* note 52, at ¶ 145 ("even if a court were created under Chapter VI, the Council could nonetheless decide to make individual decisions under Chapter VII on specific issues where the consent of the States concerned was not forthcoming, and enforce them accordingly."). *See, e.g.*, S.C. Res. 748, ¶ 1, U.N. Doc. S/RES/748 (Mar. 31, 1992) (upgrading Security Council Resolution 731 and rendering it binding on Libya).

[126] DPRK COI Report, *supra* note 57, at ¶ 1200 (advocating a similar structure dedicated to North Korea).

[127] *See* T. Metzger, *The Arab League's Role in the Syrian Civil War*, *6*(07) *INQUIRIES JOURNAL/STUDENT PULSE* (2014).

[128] *See* Matthias Vanhullebusch, *The Arab League and Military Operations: Prospects and Challenges in Syria*, 22 INT'L PEACEKEEPING 151 (2015).

[129] Neil MacFarquahar & Nada Bakri, *Isolating Syria: Arab League Imposes Broad Sanctions*, N.Y. TIMES (Nov. 27, 2011).

[130] In July 2012, the Arab League floated a draft resolution in the General Assembly condemning the violation of international criminal law on all sides and calling for accountability. *See* UN Report, *Arab League Draft Resolution on Syria in the General Assembly* (July 27, 2012), http://un-report.blogspot.com/2012/07/arab-league-draft-resolution-on-syria.html (stressing "again the importance of ensuring accountability and the need to end impunity and hold to account those responsible for human rights violations, including those violations that may amount to crimes against humanity").

[131] Bethan McKernan & Martin Chulov, *Arab League Set to Readmit Syria Eight years after Expulsion*, THE GUARDIAN, Dec. 26, 2018.

[132] *See generally* Firew Kebede Tiba, *Regional International Criminal Courts: An Idea Whose Time Has Come?*, 17 CARDOZO J. CONFLICT RESOL. 521 (2016).

Chad: the Extraordinary African Chambers (EAC) in Senegal.[133] The EAC owe their provenance to a 2012 agreement between the African Union (A.U.) and Senegal, where Habré had sought safe haven.[134] In entering into this arrangement, the African Union asked Senegal to prosecute Hissène Habré "on behalf of Africa."[135] The EAC demonstrate the flexibility of the hybrid court model.[136] Established under Senegalese law and within Senegal's judiciary, the Chambers are comprised of a mix of Senegalese and Pan-African judges. The United States, the European Union, the African Union, and a number of individual states supported the effort financially, which was a bargain at under $10 million.[137] The EAC operated with the acquiescence—if diffident—of Chad but not its formal consent. The EAC were largely devoted to prosecuting Habré, although indictments were issued against five other associated individuals who remain at large.[138] These latter defendants have no contacts at all with Senegal, other than Habré's presence there; as such, the EAC exercised an internationalized form of universal jurisdiction.[139] Given the A.U.'s involvement, the EAC has operationalized one of the core tenets of the A.U. Constitutive Act: a rejection of impunity.[140]

Relatedly, the Kosovo Specialist Chambers (KSC) also provide precedent for regional accountability efforts. The Specialist Chambers and Specialist Prosecutor's Office emerged from the Special Investigative Task Force (SITF) created and funded by the European Union. Ultimately, however, it took domestic legislation within Kosovo to establish the Chambers.[141] The KSC limits Kosovar participation (except as parties and witnesses) and also have the benefit of Security Council Resolution 1244 and its progeny, which largely render participation and cooperation mandatory.[142] Although technically part of the Kosovar judiciary, the KSC sit extraterritorially in The Hague for security reasons and to hinder political interference in their work.

Finally, still on the drawing board is the proposed African Court of Justice and Human Rights ("ACJHR").[143] Like the ICC, it will be the product of a multilateral treaty, albeit a regional one. By way of background, the African Charter on Human and Peoples' Rights (also known as

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[133] Statute of the Extraordinary African Chambers, https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers.

[134] Agreement Between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System, 52 I.L.M.1024 (2017). *See Hissène Habré: Senegal and AU Agree on Special Tribunal*, BBC, Aug. 23, 2012.

[135] African Union, Assembly/AU/Dec.127 (VII), Doc.Assembly/AU/3 (VII) (2006).

[136] *See* Mark Kersten & Kirsten Ainley, *Hybridization – A Spectrum of Creative Possibilities* (unpublished manuscript on file with the author).

[137] Human Rights Watch, *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal* (May 3, 2016), https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal#22 (listing funders).

[138] Thijs B. Bouwknegt, *Chad—Dakar: Habré Trial is Litmus Test for Pan-African Justice*, AFRICAN ARGUMENTS (June 1, 2015), http://africanarguments.org/2015/06/01/chad-dakar-habre-trial-is-litmus-test-for-pan-african-justice-by-thijs-b-bouwknegt/.

[139] Celeste Hicks, *Is Habré's Landmark Conviction a New Model for International Justice?*, WORLD POLITICS REVIEW (June 6, 2016).

[140] Afr. Union, Constitutive Act of the African Union, AU Assembly, 36th sess., art. 4(o) (July 11, 2000) [hereinafter AU Constitutive Act].

[141] *See* Law on Specialist Chambers and Specialist Prosecutor's Office, 05/L-053 (Aug. 3, 2015) (Kos.).

[142] S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

[143] *See generally* Chacha Bhoke Murungu, *Towards a Criminal Chamber in the African Court of Justice and Human Rights*, 9 J. INT'L CRIM. JUSTICE 1067 (2011); Max du Plessis & Nicole Fritz, *A (New) New Regional International Criminal Court for Africa?*, ILAWYER (Oct. 1, 2014) (discussing initiative).

the Banjul Charter),[144] the continent's omnibus human rights treaty, gave rise to the African Commission on Human and Peoples' Rights, a body analogous to the Inter-American Commission on Human Rights (but with weaker enforcement powers) that is dedicated to enforcing the Banjul Charter within AU member states. A 1998 Protocol to the Charter led to the creation of the African Court on Human and Peoples' Rights ("ACHPR") in 2004.[145] The Court (which can hear claims against those states parties that have accepted its jurisdiction) entertains petitions submitted by states parties, African intergovernmental organizations, NGOs, and individual citizens concerning the interpretation and application of the Banjul Charter or any other human rights treaty that has been ratified by the state concerned.[146] Meanwhile, the Constitutive Act of the AU[147] envisioned the creation of the African Court of Justice ("ACJ"), a forum to resolve disputes between AU member states that is roughly analogous to the European Court of Justice. Although the ACJ's Protocol entered into force, the Court itself did not come into existence because an intervening Protocol approved by the AU in 2008 envisioned that the ACJ would be merged with the ACHPR to create a bicameral African Court of Justice and Human Rights.[148]

In 2009, while this institution was awaiting activation, the AU Assembly of Heads of State and Government began considering the possibility of expanding the jurisdiction of the not-yet-formed African Court of Justice and Human Rights to include a third chamber with the power to assert penal jurisdiction over individuals accused of having committed international crimes, such as war crimes and crimes against humanity, and a number of transnational crimes, such as trafficking and corruption (among others).[149] This effort was motivated in part by animosity among some African leaders towards the ICC but it also reflects a genuine effort to expand African justice institutions. Some proposed crimes do not enjoy universal jurisdiction under international law, although they are frequently prosecuted pursuant to the protective principle of jurisdiction. Discussions, drafting, and negotiations ensued, and in 2012, a Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights was finalized (with the one contentious crime bracketed).[150] The Protocol awaits the necessary ratifications to enter into force.[151] If this occurs, the ACJHR will be a regional criminal court with the power to exercise jurisdiction over individuals so long as certain preconditions are met. These track the bases of domestic jurisdiction discussed in chapter 6: that the territorial state, the state of nationality of the accused, or the state of nationality of the victim have ratified the Protocol. In addition, the proposed court will have jurisdiction over "[e]xtraterritorial acts by non-nationals that threaten a vital interest of that State."[152] The proposed court shares many features with the ICC, including trigger mechanisms, a prosecutor able to act *proprio motu* with the approval of a pre-trial chamber, and a

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[144] *See generally* African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 26363.
[145] OAU, Protocol to the African Court on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (1998).
[146] *Id.* at arts. 3, 5.
[147] AU Constitutive Act, *supra* note 140.
[148] Afr. Union, *Protocol on the Statute of the African Court of Justice and Human Rights*, Annex. (July 1, 2008).
[149] Afr. Union Assembly/AU/Dec. 213(XII), *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction–Doc. Assembly/AU/3(XII)*, 12th Sess. (Feb. 1-3, 2009).
[150] Afr. Union Specialized Technical Comm. on Just. and Legal Aff., *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, Exp/Min/IV/Rev.7 (May 15, 2012).
[151] Other regional courts have also contemplated adding criminal jurisdiction. *See* Chimp Reports, *East African Court to Hear "Crimes Against Humanity"* (Apr. 29, 2013), https://chimpreports.com/9681-east-african-court-to-hear-crimes-against-humanity/ (discussing agreement to extend the jurisdiction of the East African Court to cover crimes against humanity).
[152] ACJHR Protocol, *supra* note 145, at art. 46E.

complementarity regime.[153] Like the ICC, it will assert jurisdiction over the nationals of non-African Union states if they commit crimes within Africa.

Finally, a third regional model can be found in the hybrid arrangement under consideration for South Sudan, which has its roots in the Agreement for the Resolution of the Conflict in South Sudan (ARCSS).[154] Chapter V of the agreement is devoted to transitional justice and envisions the creation of the Hybrid Court for South Sudan (HCSS) by the African Union Commission (with other transitional justice mechanisms to be established by the government).[155] The judges are to be prominent African principals, from outside of South Sudan,[156] lending a regional flavor to the Court and minimizing "perceptions that the hybrid court is an imperialist or Western imposition."[157] Indeed, the African Union Executive Council described the HCSS as an "African-led and African-owned legal mechanism."[158] Per the terms of the agreement, the African Union could theoretically create the proposed tribunal without the involvement or support of the current Government of South Sudan, although it would be difficult for the HCSS to operate without some cooperation from the government.[159] So far, however, the AU has refrained from doing so, although memoranda of understanding have been exchanged with the government.[160]

A Tribunal By Way Of A Multilateral Agreement

As another alternative, a group of concerned states (*e.g.*, regional states, Arab League member states, NATO members, and/or other pro-accountability states) could conceivably conclude an agreement among themselves to establish an *ad hoc* international tribunal with the necessary jurisdiction. At least two potential models present themselves: one involves the pooling of individual jurisdictional competencies and the other involves creating an ICC-like institution that can invoke a form of international jurisdiction reserved for the core international crimes. The underlying premise of either version would be that the international crimes at issue are of concern to all members of the international community and thus can be prosecuted individually or collectively so long as international fair trial protections are afforded to defendants.

Starting with the first model of pooled jurisdiction, many multilateral treaties (and, arguably, customary international law) permit, and in some cases mandate, individual states to prosecute international crimes in their national courts, as discussed more fully in chapter 6.[161] None of these treaties requires Syrian government consent to any domestic prosecution. Founding states could thus utilize their treaty-making powers to "pool" their individual jurisdictional powers

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[153] *Id*. at arts. 46F-46H.
[154] Agreement for the Resolution of the Conflict in South Sudan, Aug. 17, 2005 (Addis Ababa), *available at* https://unmiss.unmissions.org/sites/default/files/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf.
[155] *Id*. at 40, 42.
[156] *Id*. at 43 ("3.3.2. A majority of judges on all panels, whether trial or appellate, shall be composed of judges from African states other than the Republic of South Sudan.").
[157] Elise Keppler, *Innovations in Hybrid Justice: Comparative Opportunities and Challenges of the Central African Republic's Special Criminal Court and the Proposed Hybrid Court for South Sudan*, *in* HYBRID JUSTICE 28 (Kirsten Ainley & Mark Kersten eds., forthcoming 2020) (unpublished manuscript on file with the author).
[158] AU Executive Council, Decision on the Supplementary Budget for the 2017 Financial Year, AU Doc. EX.CL/Dec.940 (XXX), at 1 (Jan. 27, 2017).
[159] *Id*. at 22.
[160] *Id*. at 24.
[161] *See* Diane F. Orentlicher, *'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency*, 1 J. INT'L CRIM. JUSTICE 20 (2007).

to create a multilateral institution exercising delegated jurisdiction. As such, in the words of the Nuremberg Tribunal, a group of states could join together to do collectively what any one state could do individually: "[t]he Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any of them might have done singly."[162] The resulting jurisdiction could be conceptualized as a form of delegated jurisdiction, whereby each treaty signatory essentially delegates its existing domestic jurisdictional competencies to a multilateral institution. This scheme would enable states to share the burden of prosecuting international crimes committed in Syria since 2011 (or before for that matter), avoid duplication of efforts, and be more strategic about which cases to pursue. The resulting "jigsaw" court would gain "the jurisdiction of the sum of its parts rather than the lowest common denominators."[163] The more states that agree to cooperate, the more effective the court would be when it comes to securing suspects and evidence and to avoiding duplicative efforts.

In terms of the basis of jurisdiction being exercised by of such a tribunal, the principle of universal jurisdiction—which empowers all states to prosecute individuals accused of the commission of international crimes regardless of any nexus to the prosecuting state—is available to any state that is so inclined to move forward with the prosecution of individuals responsible for the commission of war crimes and crimes against humanity. As such, the tribunal could be conceptualized as a transnational universal jurisdiction institution, with precedent in the Extraordinary African Chambers in Senegal. Nonetheless, some states remain squeamish about advancing the universal jurisdiction norm, perhaps all the more so in a new collective form.[164] There is an obvious utility to identifying directly-affected states that could exercise domestic jurisdiction on the basis of other, less contentious grounds, such as the effects or protective jurisdiction principles. Indeed, any of the bases of domestic jurisdiction might be pooled in this way.[165] With this model, the date on which the relevant jurisdictional competencies became actionable might be relevant when it comes to adherence to the principle of legality, particularly given that the incorporation of universal jurisdiction domestically is ramping up around the globe. That said, some articulations of the *ex post facto* prohibition are concerned more with the creation of new crimes or stiffer penalties after the conduct in question has been committed and not the recognition of new fora or forms of jurisdiction over conduct already recognized to be criminal.[166] Furthermore, the human rights treaties indicate that that there is no prohibited retroactivity if the conduct in question was criminal under international law at the time the defendant acted, even if it was not penalized under domestic law.[167]

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[162] Judgment of 1 October 1946, *in* 22 TRIAL OF THE MAJOR GERMAN WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 461.

[163] Correspondence with Ingrid Elliot, Dec. 30, 2018.

[164] *See generally* Beth Van Schaack, *Crimes Against Humanity: Repairing Title 18's Blind Spots*, *in* ARCS OF GLOBAL JUSTICE 341 (Diane Amann & Margaret DeGuzman eds., 2018) (noting U.S. interagency debates over the enactment of a crimes against humanity statute enabling the United States to exercise "present in" jurisdiction).

[165] *See* Beth Van Schaack, *Alternative Jurisdictional Bases for a Hybrid Tribunal for Syria*, JUST SECURITY (May 29, 2014).

[166] *See* Calder v. Bull, 3 U.S. 386 (1798); Landgraf v. USI Film Products, 511 U.S. 244, 274 (1994) ("Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'") (citations removed).

[167] ICCPR, *supra* note 7, at art. 15(2) ("Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.").

This delegation argument has been advanced to explain the nature of the jurisdiction exercised by the ICC, which can assert jurisdiction over crimes committed on the territory of states parties and by their nationals anywhere in the world.[168] This theory, however, offers an imperfect explanation for the ICC (and potentially for the proposed Syrian endeavor as well). When it comes to the former, some states that have ratified the Rome Statute cannot yet exercise domestic jurisdiction over ICC crimes (or could not do so at the time they ratified the treaty) and so they would not be able to "delegate" such a power to the Court pursuant to the old maxim *nemo dat quod non habet* (one cannot delegate a power that one does not have). At the same time, it could be argued that states are delegating a latent jurisdictional authority to exercise jurisdiction over ICC crimes—one that they inherently enjoy by virtue of international law but (for whatever reason) have chosen not to exercise domestically.[169] Indeed, it is settled that "the Court does not have to establish the existence of matching legislation at the national level before its jurisdiction can be exercised in a particular case."[170] These considerations suggest that a strict delegation theory does not explain the ICC's jurisdiction or any analogous Syrian proposal.

A second model underlying this multilateral treaty idea is predicated on the observation that international law creates individual criminal responsibility for, and supports the exercise of universal and other forms of jurisdiction over, perpetrators of the core international crimes. In other words, individual criminal responsibility for these crimes is grounded in a precept of *international* law, as opposed to any specific articulation or principle of *domestic* law.[171] As such, the core international crimes are amenable to a form of international jurisdiction that does not depend on an exercise of delegation or consent by any particular state.[172]

Applying this conceptualization to the ICC, the "act of accession to the [Rome] Statute merely activates the power of the ICC to exercise a jurisdiction grounded in international law"[173] over the territories or nationals of the ratifying state. In the words of one noted commentator, "[t]his theory posits that the normative justification of punishment is independent of the will of the respective sovereign."[174] Indeed, at the time the ICC was being conceptualized, a leading proposal

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[168] *See* Michael A. Newton, *How the ICC Threatens Treaty Norms*, 49 VAND. J. TRANSNAT'L L. 371 (2016).

[169] *See* Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, *in* I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 583, 587 (Antonio Cassese et al. eds., 2002) ("all states may exercise universal criminal jurisdiction. … Contracting Parties of the Statute can confer through ratification this right on the new institution").

[170] Rod Rastan, *The Jurisdictional Scope of Situations Before the International Criminal Court*, 23 CRIM. L. F. 1, 20 (2012).

[171] The ICC OTP seemed to embrace this argument in a filing before a Pre-Trial Chamber when it noted the many multilateral treaty regimes devoted to international crimes that allow states to prosecute the nationals of states that are not parties to those treaties. The brief states: "such crimes attract universal opprobrium and thus demand repression by each of the members of the international community on behalf of the whole." Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17 ICC-02/17-7-Conf-Exp, Public Redacted Version of "Request for Authorisation of an Investigation Pursuant to Article 15", ¶ 45 (Nov. 20, 2017).

[172] *See* Yuval Shany, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yaël Ronen*, 8 J. INT'L CRIM. JUST. 329, 331–33 (2010) (comparing the universalist and delegation theories of international courts).

[173] *See* Carsten Stahn, *Response: The ICC, Pre-Existing Jurisdiction Treaty Regimes, and the Limits of* the Nemo Dat Quod Non Habet *Doctrine—a Reply to Michael Newton*, 49 VAND. J. TRANSNAT'L L. 443, 448 (2016). *See also id*. at 447 (arguing that ICC jurisdiction is "not derived from the territorial or national jurisdiction of a specific state, but grounded in a broader entitlement of states and the international legal community under international law.") (citations removed).

[174] Stahn, *supra* note 173, at 447-48.

originating from Germany would have granted the ICC jurisdiction over any perpetrator acting anywhere in the world, regardless of whether the territorial or nationality state had ratified the treaty.[175] This proposal hinged on the fact that all international crimes are subject to universal jurisdiction such that states could endow the ICC with jurisdiction without the necessity of satisfying any additional jurisdictional preconditions or requirements.[176] The German scheme fell away as part of a grand compromise involving multiple, and often unrelated, moving pieces in an effort to achieve maximum consensus, not because states determined it was not legally available to them. Applying this theory to our hypothetical *ad hoc* tribunal, even states that do not choose to exercise their ability to prosecute international crimes at all, or to prosecute such crimes when they are committed extraterritorially by a non-national, could in theory join a multilateral treaty creating a court exercising comprehensive international jurisdiction over international crimes.

To be sure, the theory that the ICC's jurisdiction is inherently international in nature—based upon the nature of the crimes in question rather than a form of delegated domestic jurisdiction—is not without its detractors. As two commentators have argued: "There is no international law doctrine that would support either the existence or the manufacture of some generalized, inchoate prosecutorial and judicial right in the international community at large, separate and apart from that enjoyed by individual states."[177] As a softer critique, just because the entire international community agrees on the criminality of certain conduct does not mean it accepts the validity of supra-national penal enforcement, including against the nationals of non-consenting states. These critiques find expression in the academic literature, but they have not been taken up by any court. Indeed, the ICC Appeals Chamber essentially adopted a theory of international jurisdiction in the context of Jordan's non-cooperation appeal.[178]

Proceeding on the theory that states can utilize a treaty to create an international institution to exercise jurisdiction based on international law precepts, any number of states could ratify a multilateral instrument aimed at prosecuting international crimes committed in Syria through the creation of an international court exercising a form of international jurisdiction—a common organ of the participating states on which they would confer international legal personality.[179] Such an institution would not be dependent on the delegation of any particular species of domestic jurisdictional competency. In essence, such a court could be considered a mini-ICC, which is an international organization with an international legal personality with which all states—even non-members—must interact, even if they do not have formal treaty-based duties towards that organization. Thus, the principle of complementarity dictates that non-party states can avoid ICC jurisdiction if they adequately prosecute crimes committed by their nationals, even though they have not "accepted" the concept of complementarity through ratification of the Rome Statute. Even

[175] *See* Kaul, *supra* note 169, at 591 ("States have a legitimate and acknowledged legal basis to use, if they so wish, the universality approach with regard to these core crimes, either in their national criminal jurisdiction systems or when establishing together a new and completely international criminal justice system."); Andreas Zimmerman, *The Creation of a Permanent International Criminal Court*, 2 MAX PLANCK Y.B. INT'L L. 169, 205-06 (1998).
[176] *Id*. at 210.
[177] Lee A. Casey & David B. Rivkin Jr., *The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties*, 44 VA. J. INT'L L. 63, 75 (2003).
[178] Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re: Al-Bashir Appeal, Case No. ICC-02/05-01/09 OA2 (May 6, 2019).
[179] Kaul, *supra* note 169, at 591.

organizations with relatively few members have been accorded international legal personality and such juridical capacity as against non-members.[180]

To be sure, some states may object to such an enterprise on the grounds that their nationals cannot be prosecuted by an international body without the state's consent, but this position does not find authority in any caselaw. In the *Reparations For Injuries Case*, for example, the ICJ ruled that the United Nations could bring an international claim against the government of a non-member state to obtain reparation for injuries suffered by U.N. personnel.[181] The *Monetary Gold* principle—which states that an international tribunal is not competent to pronounce upon the rights and duties of a state absent its consent—is inapplicable vis-à-vis the ICC, except maybe in the context of the crime of aggression, because the Court does not exercise jurisdiction over states themselves but rather over their nationals.[182]

Under either theory—pooled national jurisdiction or institution exercising international jurisdiction—an agreement to create such an *ad hoc* international institution for Syria could be open to any number of states committed to contributing to the establishment, funding, and staffing of the new judicial body. By involving fewer states, such arrangements are potentially easier to negotiate, but that leaves the institution with fewer sources of funding and other forms of support while also opening it up to allegations of undue influence. While states have collectively created multilateral tribunals for discrete incidents, as discussed more fully below, they have not created a judicial institution of this projected magnitude (when it comes to the number of crimes committed and potential defendants) since the World War II period. To be sure, finding a critical mass of states to support a tribunal (politically and financially) with such a potentially expansive docket will pose a challenge. One obvious incentive to highlight is that the institution would offer a forum for burden sharing since many states are already pursuing individual cases within their domestic courts. Assuming Russia will continue to block any decisive action by the Security Council, additional democratic legitimacy and cooperative assistance could be afforded to any such effort by the U.N. General Assembly, which has regularly issued resolutions commending and recommending various international justice efforts,[183] or the League of Arab States, as a regional effort. Under these circumstances, the tribunal could enjoy binding authority at least among the states involved or otherwise acceding to this effort.

If this proposal were to move forward, treaty signatories would need to locate an appropriate venue. Given that liberated areas within Syrian territory are in short supply or overtaxed, a willing state would likely have to be identified to host the nascent institution and provide related services (such as prisons and security). Obvious options include the immediate border states. However, these governments are overwhelmed by refugee flows, cross-border violence, and other spillover effects from the Syrian and Iraq conflicts and may be reluctant to further antagonize the Assad regime by hosting a controversial accountability mechanism. In any

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[180] Philippe Gautier, *The Reparations for Injuries Case Revisited: The Personality of the European Union*, 4 MAX PLANCK Y.B. U.N. LAW 331 (2000) (discussing the legal personality of the EU); İslam Safa Kaya & Mustafa Aykanat, *International Legal Personality of International Organizations: OPEC Case*, J. INSTITUTE OF SOCIAL SCIENCES 63 (Dec. 2016) (discussing same for OPEC).

[181] *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion 1949 I.C.J. 174 (Apr. 11).

[182] Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland, and United States of America), 1954 I.C.J. 19, 32-33 (June 15) (Preliminary Question).

[183] *See, e.g.*, G.A. Res. 69/188, ¶ 8, U.N. Doc. A/RES/69/188 (Dec. 18, 2014) (recommending that the Security Council refer the situation in North Korea to the ICC) (116 states in favor).

case, Lebanon remains within Syria's orbit and Jordan is working to normalize relations now that the war is winding down. This leaves Iraq, which has rejected an international tribunal for crimes committed at home, and Turkey, which faces potential liability for its own actions in Syria (particularly around Afrin).[184] Few of these border states have empowered their own courts to exercise extraterritorial jurisdiction, so the pooled competency model is less viable here.

At the level of individual Arab League members, Qatar has played an active role in the accountability space. In addition to its controversial role financing elements of the opposition,[185] it has also consistently called for criminal trials,[186] commissioned human rights documentation efforts,[187] co-sponsored with Liechtenstein the proposal to create the IIIM, and then pledged $500,000 towards the mechanism.[188] Given this degree of investment in accountability, and its own indigenous resources, Qatar might have been persuaded to host such a tribunal. Were this to move forward, international involvement could and should be mobilized to ensure greater independence and fairness given that Qatar—like many countries in the region—has deep political interests in the conflict and its own due process deficits.[189] Absent more multilateral involvement, a tribunal set in any of the neighboring states could raise serious questions of impartiality and undermine the legitimacy of any outcome.

Any of the models above could be fully international—with judges, lawyers, and staff drawn from the international community applying international criminal law. There are certain benefits that accrue to being considered an "international" court in terms of having the ability to override elements of domestic law. In a number of instances—such as with respect to domestic amnesty laws,[190] pardons,[191] or immunities[192]—international courts, even some with extensive hybrid elements, have asserted special prerogatives to prosecute offenders that inure to them by virtue of their status as an autonomous international institution not bound by domestic legal arrangements or customary international law rules geared towards national institutions. The

[184] Bulent Aliriza, *Understanding Turkey's Afrin Operation*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (Jan. 28, 2018).
[185] Roula Khalaf and Abigail Fielding-Smith, *How Qatar Seized Control of the Syrian Revolution*, FINANCIAL TIMES, May 17, 2013.
[186] *Qatar stresses the Need for Accountability in Syrian War*, GULF TIMES, Mar. 3, 2017, http://www.gulf-times.com/story/535080/Qatar-stresses-need-for-accountability-in-Syrian-w.
[187] *A Report into the Credibility of Certain Evidence with regard to Torture and Execution of Persons Incarcerated by the Current Syrian Regime*, http://i2.cdn.turner.com/cnn/2014/images/01/20/syria-board.of.inquiry.doha.jan.2014.18.1.version.x.to.print..pdf. *See* Ian Black, *Syrian Regime Documentary Shows Evidence of 'Industrial Scale' Killing of Detainees*, THE GUARDIAN, Jan. 21, 2014.
[188] Ministry of Foreign Affairs, *Qatar Says Accountability Will End Violence in Syria* (Feb. 28, 2017), https://www.mofa.gov.qa/en/all-mofa-news/details/1438/06/01/qatar-says-accountability-will-end-violence-in-syria. *Id*.
[189] Human Rights Council, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, *Mission to Qatar*, U.N. Doc. A/HRC/29/26/Add.1 (Mar. 31, 2015) (identifying shortcomings in the administration of justice within Qatar).
[190] Michael Adenuga, *The Amnesty Provision of the Lomé Agreement and its Impact on the Special Court for Sierra Leone* (Dec. 6, 2007), http://lipietz.net/The-Amnesty-provision-of-the-Lome-Agreement-and-its-impact-on-The-Special-Court.
[191] Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne Bis In Idem* and Amnesty and Pardon), Case File 002/19-09-2007/ECCC/TC (Nov. 3, 2011).
[192] *See* Paola Gaeta, *Does President Al Bashir Enjoy Immunity from Arrest?*, 7 J. INT'L CRIM. JUST. 315 (2009).

International Court of Justice in the Arrests Warrant Case, for example, recognized that international institutions are not bound by immunities that might apply in domestic courts.[193]

Notwithstanding these practical challenges, a number of prior models suggest that there are no legal bars to this proposal. One early, though somewhat orthogonal, precedent for this idea of pooling jurisdiction to create multilateral courts is found in the mixed slavery courts established by Great Britain in the early 19th century in an effort to eradicate the slave trade, a forgotten chapter in the story of international criminal law that was rediscovered by scholars.[194] The British strategy involved executing a network of bilateral treaties with maritime states, including Spain, Brazil, the Netherlands, and Portugal.[195] These treaties gave parties the right to search and condemn vessels engaged in the slave trade and to subject them to trial before a mixed commission featuring judges from the capturing nation, the flagship nation, and potentially a "neutral" nation.[196] The mixed commissions were established in treaty-partners' ports-of-call, including Freetown, Sierra Leone; Havana, Cuba; Rio de Janeiro, Brazil; and Suriname.[197] This network of otherwise bilateral treaties established something close to a global enforcement regime even without the involvement of France (which never joined) and the United States (which joined late in the game).

These tribunals were not strictly penal in nature. Rather, they "had jurisdiction only over the ships and their cargo; the crew would either be let loose or repatriated for prosecution."[198] Later, "the mixed courts were authorized to hold slave crews in custody until they could be transferred to national authorities for trial."[199] The ships were generally auctioned off, with the proceeds going toward the expenses associated with the courts, the two governments, and the captors as prize money.[200] As such, these courts administered what were more in the nature of *in rem* actions, although it has been argued that "[c]ondemnation of a vessel, while nominally *in rem*, can be criminal when done to punish the owner"[201] as with civil forfeiture laws.[202] All told, upwards of 80,000 would-be slaves were freed by these mixed courts over the course of their existence.[203] A similar model using a web of treaties has been considered in the piracy context.[204]

More recently, and more on point, the Nuremberg Tribunal owes its provenance to a quadripartite agreement (the London Agreement of August 8, 1945) between states specially affected by the Third Reich's acts of aggression and other international crimes.[205] As contemplated by Article 5, nineteen other states eventually adhered to the treaty, which contained the Tribunal's

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[193] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, ¶ 61 (Feb. 14).
[194] *See* Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L. J. 550, 552-53 (2008).
[195] *Id.* at 603.
[196] *Id.* at 579.
[197] *Id.*
[198] Eugene Kontorovich, *The Constitutionality of International Courts: The Forgotten Precedent of Slave Trade Tribunals*, 158 U. PA. L. Rev. 39, 83 (2010).
[199] Martinez, *supra* note 194, at 591 n.180.
[200] *Id*. at 591.
[201] Kontorovich, *supra* note 198, at 84.
[202] *Id.* at 84-85.
[203] Martinez, *supra* note 194, at 602.
[204] *See* Van Schaack, *supra* note 4, at 148.
[205] Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 280.

substantive Charter in an annex.[206] Germany did not consent to these trials, although it was, at the time, under occupation with its sovereignty being held essentially in trust by the occupying powers that collectively created the Tribunal. The Nuremberg Tribunal implied as much when it stated: "the making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world."[207] The Tokyo Tribunal was even more intimately tied to the postwar occupation since it was created by a unilateral proclamation of General Douglas MacArthur, who had been declared the Supreme Commander of the Allied Powers in occupied Japan.[208] A number of other states who were party to the Japanese instrument of surrender supported the effort, in word and deed.[209]

To be sure, the juridical basis for the two postwar Tribunals remains somewhat unsettled. Some have argued that they were essentially occupation courts premised on the victorious Allies' exercise of German and Japanese sovereignty in trust.[210] Under this view, the Allies were channeling these states' inherent criminal jurisdiction when they prosecuted the Nazi and Imperial Japanese leadership. They could also be conceptualized as the collective exercise of military jurisdiction, which at the time included jurisdiction over war crimes under customary international law.[211] Others have argued that the Nuremberg and Tokyo Tribunals were exercising a form of *sui generis* international jurisdiction not grounded in, or limited by, any source of domestic law. The fact that the Allies prosecuted crimes that did not find expression in local law (or international law for that matter)—i.e., crimes against humanity and crimes against the peace—suggests that the two tribunals were unmoored from any particular municipal legal framework. Given that the United Nations was founded as these tribunals were carrying out their work, the judicial proceedings received their multilateral imprimatur only by virtue of the accession of other states to the tribunals' constitutive documents and signatories' subsequent participation in the trials. That said, the General Assembly later blessed the Nuremberg Principles,[212] setting in motion a process that would eventually lead to the establishment of the ICC and the entire system of international criminal justice, albeit decades later.

Another idiosyncratic example of states combining forces to prosecute international crimes (though on rather traditional grounds) is found in the Lockerbie proceedings, which prosecuted Libyan nationals accused of participating in the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland, under Scottish law at a decommissioned U.S. Air Force base in the Netherlands. This arrangement came about following a joint national investigation, which led to the conclusion that the bombing had been the work of two Libyan agents.[213] The United Kingdom

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[206] *Id*. at art. 5.
[207] Nuremberg Judgment, *supra* note 162, at 461.
[208] International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml.
[209] *See* Zachary Kaufman, *Transitional Justice for Tōjō's Japan: The United States Role in the Establishment of the International Military Tribunal for the Far East and Other Transitional Justice Mechanisms for Japan After World War II*, 27 EMORY INT'L L. REV. 755, 769 (2013).
[210] *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, CONTEMPORARY CHALLENGES TO IHL—OCCUPATION: OVERVIEW (June 11, 2012).
[211] I am indebted to Professor Yuval Shany for this insight.
[212] G.A. Res. 1/95, U.N. Doc. A/RES/1/95 (Dec. 11, 1946) (affirming the principles of international law recognized by the IMT Charter and judgment).
[213] Jesse Greenspan, *Remembering the 1988 Lockerbie Bombing*, THE HISTORY CHANNEL (Dec. 20, 2013), http://www.history.com/news/remembering-the-1988-lockerbie-bombing.

and the United States both issued indictments in 1991.[214] Libya, however, refused to extradite its nationals, asserting the right to prosecute them itself under the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, which contains an *aut dedere aut judicare* provision at Article 7.[215] In an unprecedented move, the Security Council demanded that Libya cooperate with the investigations and surrender the suspects to either the United Kingdom or the United States for trial. In Resolution 731, it also imposed sanctions on Libya for non-cooperation, which marks the first Security Council resolution to, in essence, require a state to hand over its nationals for trial abroad.[216] These demands were reiterated in subsequent Security Council resolutions, which also imposed strict sanctions in light of Libya's non-compliance with Resolution 731.[217]

Following a decade of negotiations and a foray to the ICJ,[218] an agreement was reached in 1998[219] that would allow the suspects to be prosecuted in the "neutral" forum described above.[220] Although the Security Council blessed the arrangement,[221] implementation required the passage of Scottish legislation to enable a Scottish court, possessing a full juridical personality and enjoying all applicable privileges and immunities, to sit extraterritorially.[222] The United Kingdom covered any costs incurred by the Netherlands.[223] The deal also enjoyed the endorsement of the Organization of African Unity (now the African Union), the League of Arab States, the Non-Aligned Movement, and the Organization of the Islamic Conference.[224] Libya remained involved because the suspects were there; theoretically, this arrangement could have moved forward without Libyan consent if the suspects were found elsewhere or if local law allowed for trials *in absentia*.

This arrangement had some of the features of the Nuremberg Tribunal in that it was empowered by the agreement of a small number of implicated states. It embodied a negotiated

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[214] *Id.*

[215] The Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 7, Sept. 23, 1971, 24 U.S.T 564, 974 U.N.T.S. 177; *see generally* JOHN P. GRANT, THE LOCKERBIE TRIAL: A DOCUMENTARY HISTORY (2004).

[216] S.C. Res. 731, ¶ 3, U.N. Doc. S/RES/731 (Jan. 21, 1992).

[217] *See* S/RES/748, *supra* note 125, ¶¶ 4-5; S.C. Res 883, ¶ 3, U.N. Doc. S/RES/883 (Nov. 11, 1993).

[218] Libya brought suit under the Montreal Convention, arguing that neither the United States nor the United Kingdom could compel it to surrender its nationals. The respondents claimed that the ICJ lacked jurisdiction under the treaty and that the claims had been rendered moot by action before the Security Council. The parties voluntarily discontinued the proceedings. *See* Press Release, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, I.C.J. Press Release 1998/5 (Feb. 27, 1998).

[219] Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands Concerning a Scottish Trial in the Netherlands, U.K.–Neth., Sept. 18, 1998, art. 3, 2062 U.N.T.S. 81 [hereinafter *Lockerbie Treaty*]. (The terms of the arrangement were set forth in an August 24, 1998, letter from the United Kingdom and the United States to the U.N. Secretary-General, which is attached as an annex to the aforementioned treaty).

[220] *See* Donna E. Arzt, *The Lockerbie "Extradition by Analogy" Agreement: "Exceptional Measure" or Template for Transnational Criminal Justice?*, 18 AM. UNIV. INT'L L. REV. 163 (2002).

[221] S.C. Res. 1192, ¶ 3, U.N. Doc. S/RES/1192 (Aug. 27, 1998) (calling upon the United Kingdom and the Netherlands to take steps to enable a Scottish court to operate on Dutch territory, mandating that all states cooperate with the proceedings, and indicating an intention to suspend sanctions when the two accused arrived in the Netherlands).

[222] 1998 No. 2251, United Kingdom High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998, § 3, as *reprinted in* 38 I.LM. 942 (1999).

[223] Lockerbie Treaty, *supra* note 219, at 91.

[224] KHALIL I. MATAR & ROBERT W. THABIT, LOCKERBIE AND LIBYA: A STUDY IN INTERNATIONAL RELATIONS 95-96 (2004).

compromise of competing entitlements to jurisdiction as between Libya (which asserted the nationality principle), Scotland (entitled to invoke the passive personality and territorial principles), and the U.S. (passive personality, but also territoriality given that Pan Am was a U.S. airline). The similarities between Lockerbie and Nuremberg end there, however. Besides the obvious difference in scope, the Lockerbie Tribunal also proceeded with the overt consent—albeit coerced by crippling sanctions—of the nationality state.

A model similar to the Lockerbie solution and the proposed pooling of jurisdiction for Syria has been under consideration for the 2014 downing of Malaysia Air Flight 17 ("MH17") as a way of circumventing Russia's veto of a Dutch/Malaysian proposal to establish an international tribunal.[225] The Minister for Transport of Malaysia presented the draft resolution, which received eleven affirmative votes and three abstentions (Angola, China and Venezuela).[226] Russia's veto reflected its views that any international tribunal would be "politicized" and "counterproductive."[227] If such a tribunal were to move forward, the most affected states at a minimum would include Ukraine, as the territorial and potentially nationality state; Malaysia, as the state of registration as well as the state of nationality of some of the victims; and the Netherlands (and others), also invoking the passive personality principle (two-thirds of those killed were Dutch). [228] These states could, in essence, combine their respective jurisdictional competencies,[229] including potentially the collective exercise of universal jurisdiction if the attack amounted to a war crime or one of the many acts of terrorism that is subject to treaty- or customary international law-based universal jurisdiction.[230] The nationality of the perpetrators is unknown, which complicates the question of whether Russia's assent would be at all relevant, as a legal or practical matter, for any tribunal to function. The proposed tribunal has not come to be; instead, the Dutch have submitted legislative proposals that will allow the District Court of The Hague to prosecute the attack, regardless of the nationality of the victims, a setup more similar to the Lockerbie precedent.[231] The states in question (the above referenced states plus Australia) have formed a Joint Investigative Team to investigate the attack and will provide political and financial support to the Dutch adjudication.[232]

Notwithstanding these prior arrangements and active projects, the idea of a tribunal being created by a multilateral agreement to target the nationals of, and events occurring within, a non-consenting state continues to raise acute political concerns among some states. In particular, if

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[225] *See* Rick Gladstone, *Russia Vetoes U.N. Resolution on Tribunal for Malaysia Airlines Crash in Ukraine*, N.Y. TIMES, July 29, 2015.

[226] Press Release, Security Council, *Security Council Fails to Adopt Resolution on Tribunal for Malaysia Airlines Crash in Ukraine, Amid Calls for Accountability, Justice for Victims*, U.N. Press Release SC/11990 (July 29, 2015).

[227] *Moscow Explains Why it Sees Establishment of International Tribunal on MH17 Crash as Premature*, RUSSIA BEYOND THE HEADLINES (July 30, 2015).

[228] *See* Aleksandra Gjorgievska, *The Lives Lost in the MH17 Disaster*, TIME, July 21, 2014 (providing the breakdown of number of deaths).

[229] Aaron Matta & Anda Scarlat, *Malaysia Airlines Flight MH-17—Possible Legal Avenues for Redress (Part 2)*, OPINIO JURIS (Aug. 28, 2015).

[230] *See, e.g.*, Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation art. 5, 974 U.N.T.S. 177 (Sept. 23, 1971) (calling on parties to establish their jurisdiction when offenders are present in their territory and not extradited).

[231] Government of the Netherlands, Legislative Proposals Submitted to Dutch House of Representatives for Criminal Proceedings Related to Downing of MH17, Mar. 21, 2018, https://www.government.nl/topics/mh17-incident/news/2018/03/21/legislative-proposals-submitted-to-dutch-house-of-representatives-for-criminal-proceedings-related-to-downing-of-mh17.

[232] Openbaar Ministerie, MH17 Crash, https://www.om.nl/onderwerpen/mh17-crash/.

such a tribunal can be created to prosecute crimes committed in Syria and by Syrian regime officials, what is to stop a handful of states from pooling their domestic jurisdictional competencies to prosecute individuals accused of committing international crimes and hailing from any other state that might also be on the receiving end of such an exercise in lawfare? The United States or Israel, for example, might become immediate targets of a parallel effort given controversial elements of their foreign policies. At some level, the principle of universal jurisdiction and the network of international criminal law treaties mandating prosecutions for their breach already create the real possibility that individuals accused of committing international crimes abroad may be prosecuted anywhere in the world. At the same time, there is something more potent about the idea of multiple states banding together to redress perceived criminal conduct, particularly in the face of entrenched impunity. In any case, the Syria proposal continues to circulate among diplomatic circles, but no concrete progress has yet been made.

A Once and Future Hybrid Court

Many of the above models could be hybridized in multiple ways by including Syrian personnel and law as appropriate.[233] The hybrid model—and the prioritization of the local over the international—is having a bit of a renaissance in international affairs, in part because it allows states to reclaim the justice imperative while also responding to the international community's unwillingness to invest in additional standalone *ad hoc* tribunals.[234] Such an institution has the potential to marry the imperative of Syrian leadership, agency, and ownership with the utility, and at times necessity, of international expertise and, in so doing, build "dual international and national legitimacy."[235]

International justice can be hybridized in multiple ways. Historically, the legal foundation of hybrid courts has been an agreement between the United Nations and the affected country forged after the conflict has ended.[236] In the alternative, "mixed" chambers have been created pursuant to domestic legislation allowing for the integration of international personnel within the courts of a domestic legal system and the application of international as well as local law, both substantive and procedural. In this way, hybridity can be part of the legal foundation of an institution or infused operationally. Either way, the hybrid model allows elements of the local legal culture to find expression, subject to the constraints of international human rights law, and encourages capacity building and norm diffusion.[237]

The specialized chambers in Bosnia-Herzegovina (BiH)[238] offer an example of the archetypal mixed chambers. The BiH chambers owe their provenance to a proposal developed by the ICTY and the U.N. High Representative for Bosnia and Hercegovina that was blessed by the Security Council as part of the ICTY's completion strategy and funded through a donors' conference.[239] The operative domestic legislation allowed for the injection into the domestic

[233] *See generally* Van Schaack, *supra* note 4 (discussing various hybrid models); Beth Van Schaack, *A Mixed Chamber for Syria: An Idea Whose Time has Come?*, JUST SECURITY (May 28, 2014).
[234] *See* Shannon Maree Torrens, *State Dissent and the Reemergence of the Hybrid Court*, JUSTICE IN CONFLICT (Mar. 14, 2018). *See generally* The Hybrid Justice Project, https://hybridjustice.com/.
[235] Keppler, *supra* note 157.
[236] *See generally* Laura Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003).
[237] *See* Jane Stromseth, *Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?*, 1 HAGUE J. RULE OF L. 87 (2009).
[238] Law on Court of Bosnia and Herzegovina, Off. Gazette of BiH, No. 49/09 (Bosn. & Herz.) http://www.sudbih.gov.ba/files/docs/zakoni/en/Law_on_Court_BiH_-_Consolidated_text_-_49_09.pdf.
[239] S.C. Res. 1503, ¶ 1, U.N. Doc. S/RES/1503 (Aug. 28, 2003).

system of international staff who were gradually phased out over the years.[240] The mixed chamber idea is being deployed in the Central African Republic[241] and was contemplated in the Democratic Republic of Congo (although this effort has largely stalled).[242] Many hybrid institutions also allow for prosecutions under a mix of international and domestic criminal law.

Ordinarily, it is the territorial state whose courts are hybridized with international elements so that the accountability exercise is deeply rooted in the domestic system. In the prior models, state consent was thus a crucial element. That said, a new form of non-governmental hybridity can be envisioned. There is nothing stopping one of the border states with Syria from allowing its domestic system to be hybridized through the inclusion of international, as well as Syrian, experts and staff if it were to take on the task of prosecuting international crimes in Syria.[243] This would offer options for capacity building and burden sharing while rectifying due process deficits in these legal systems. The Extraordinary African Chambers, which included non-Senegalese judges, stand as a notable example. To be sure, "[e]mbarking on a hybrid court without the partnership of a government is in many respects counter to some of the traditional objectives that have fueled the establishment of hybrid accountability mechanisms."[244] But, many of these benefits can accrue even absent Syrian state involvement.

Obviously, no agreement with the Syrian government or domestic legislation is likely to be forthcoming in the Syrian context at this point. This was not always the case, however.[245] When there was some possibility that the war would result in a genuine political transition, the shell of a hybrid or mixed court could have been created that integrated Syrian expertise from the diaspora and the ranks of juridical defectors, as represented by the Free Syrian Lawyers and Free Syrian Judges.[246] The international community could have incorporated these ideas into peace talks. Progress could have been made with the assistance of international expertise, which would involve international and domestic judges, prosecutors, defense counsel, and staff working in tandem.[247] In addition, international partners could provide technical and practical support on issues such as

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[240] BiH Law, *supra* note 238, at art. 49.

[241] *See* Loi 15/003 du 3 juin 2015 portant création, organisation et fonctionnement de la Cour pénale spéciale, Journal Officiel de la République Démocratique du Congo; Patryk Labuda, *The Special Criminal Court in CAR: Failure or Vindication of Complementarity?*, 17 J. INT'L CRIM. JUST. 1 (2017).

[242] International Center for Transitional Justice, *The Accountability Landscape in Eastern DRC* (July 2015), https://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-Prosecutions-2015_1.pdf. For various models that could have been established in the DRC, see Patryk I. Labuda, *Applying and "Misapplying" the Rome Statute in the Democratic Republic of Congo, in* CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS 416 (Christian De Vos et al. eds., 2015).

[243] Ryngaert & Siccama, *supra* note 21, at 7.

[244] Keppler, *supra* note 157, at 22.

[245] *But see* DPRK COI Report, *supra* note 57, at ¶ 1202 (concluding that a hybrid court is unfeasible even if North Korea's consent were forthcoming, because in "the absence of profound reforms to the DPRK's political and justice system, any DPRK judges designated to participate in such a hybrid court would lack the impartiality and independence necessary to carry out criminal trials that would likely involve very senior officials as defendants.").

[246] For a discussion of these organizations and the response of the legal profession generally to the revolution, see INTERNATIONAL LEGAL ASSISTANCE CONSORTIUM, ILAC RULE OF LAW ASSESSMENT REPORT: SYRIA 2017 68-71 (2017). For example, one notable jurist of Syrian descent is Judge Rosemary Barkett, formerly of the 11th Circuit and now on the U.S.-Iran Claims Tribunal. American Bar Association, Rosemary Barkett, https://www.americanbar.org/content/dam/aba/directories/women_trailblazers/barkett_bio.authcheckdam.pdf.

[247] Beth Van Schaack, *"More than a Domestic Mechanism": Options for Hybrid Justice in Sri Lanka, in* TRANSITIONAL JUSTICE IN SRI LANKA: MOVING BEYOND PROMISES 331 (Bhavani Fonseka ed., 2017) (profiling models for integrating international personnel into transitional justice mechanisms).

witness protection and training for judges, lawyers, and other personnel; and international actors could lend expertise for a baseline review of Syrian criminal and military law and support drafting necessary legislation, rules of procedure, codes of conduct, and other related documents. In addition to laying the groundwork for future accountability, once the political will and resources arrive, this preliminary work offers a form of capacity building and technology transfer. Under certain circumstances, such an entity could potentially operate in liberated areas or an internationally-protected buffer zone.[248] The former are now in short supply, and the latter will not exist without a robust no-fly zone, so any institution building would have to happen outside of Syria with the idea of transitioning internally if and when conditions allow. Such a proto-tribunal could undertake this preliminary work and await activation from the Security Council or a new Syrian government when it could be injected as a special judicial chamber into the Syrian judicial system.

Over the course of the conflict, some Syrian opposition voices have issued strong calls for justice, providing a clear indication that Syrians were committed to pursuing some form of domestic accountability early in any transition. Syrians as a whole, however, remained unprepared to meaningfully conceptualize or launch prosecution processes given a deteriorated judiciary and limited expertise on international law. In general, opposition Syrians seemed to express somewhat contradictory preferences for a domestic mechanism under Syrian control, on the one hand, and an ICC referral, on the other. Considering the lack of cohesion among the Syrian opposition, and by extension the lack of clear interlocutors with whom the international community could collaborate on a tribunal concept, it would be necessary to engage in outreach to the various elements of the Syrian opposition to socialize this idea and identify willing collaborators. In connection with meetings in Doha, Qatar, in November 2012, the opposition attempted to streamline its structure and organize a new leadership council.[249] This provided an opportunity for the international community to advocate for the establishment of a Transitional Justice or Accountability Committee, which could have served as legitimate interlocutors in discussions surrounding the necessary preparatory activities and received the proffered technical support. This Committee could eventually form the basis of a more permanent Ministry of Human Rights or Transitional Justice.

In any hybrid arrangement, involving Syrians experts from the start (and not just as defense counsel) could lend greater local ownership and thus legitimacy to the process while contributing to building domestic capacity. Getting the balance right between Syrian ownership and international legitimacy would be vitally important to ensure both fair outcomes and appropriate international engagement.[250] International and Syrian justice architects would need to determine what degree of international involvement would be necessary, desirable, and/or palatable. If such an effort moves forward post-conflict, the international community should encourage any

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[248] Mark Lattimer et al., *A Step Towards Justice: Current Accountability Options for Crimes Under International Law Committed in Syria*, CEASEFIRE CENTRE FOR CIVILIAN RIGHTS & SYRIA JUSTICE & ACCOUNTABILITY CENTER 5 (2015).

[249] *Guide to the Syrian Opposition*, BBC, Oct. 17, 2013 (describing formation of the National Coalition of Syrian Revolutionary and Opposition Forces).

[250] For example, the Iraqi High Tribunal did not receive broad international support, in part because it was seen as an outgrowth of an unlawful war launched by the United States but also because there were elements of Iraqi criminal procedure, most notably the availability of the death penalty, that made international support virtually impossible. *See generally* M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT'L L. J. 327 (2005).

transitional government to accept and enable expert assistance—either by way of embedded staff or dedicated advisors—including by drawing expertise from the diaspora. That said, pushing for this too aggressively can ultimately be counter-productive if it generates resistance on sovereignty or nationalism grounds. It can also trigger claims of victors' justice (or losers' justice) if individuals from only one side of the conflict are represented. Getting advanced buy-in and building productive relationships in advance of a transition can mitigate these sources of resistance.

To a certain degree, future personnel of such a tribunal could be identified in advance through the process of consultation and negotiation with Syrian jurists. An obvious place to start would be the networks developed through the Syria Justice and Accountability Centre (SJAC); the U.S. State Department and U.K. Foreign Office-funded Office of Syrian Opposition Support (OSOS),[251] the Commission on International Justice & Accountability (CIJA), and the Access, Research & Knowledge (ARK) consultancy, which helped to stand up the OSOS and train future Syrian civil administrators.[252] In addition, the IIIM could be tasked with mentoring Syrian jurists. These organizations could sponsor focused training sessions covering the knowledge and skills necessary to host a credible and fair accountability process. That said, focusing on integrating legal experts only associated with the opposition would politicize the process and render it more difficult to work collaboratively with lawyers who remained loyal to the regime.

Building Diplomatic Support For Any of These Models

The viability and sustainability of any form of *ad hoc* tribunal would be significantly enhanced with international support and sponsorship (diplomatic and financial) by regional organizations and interested states, acting as guarantors—and funders—of the process. There are a number of diplomatic steps that could have been taken, and still could be taken, in various multilateral vectors to build support around any of these justice models. Outreach activities would be dedicated to identifying allies and partners in this endeavor, building momentum for a tribunal outcome, and developing a shared vision of a tribunal and a common strategic approach to pursuing the necessary preliminary steps. This would ensure effective burden sharing, cross-regional leadership, and multilateral buy-in. This process would also need to include a careful consultative process to socialize transitional justice concepts amongst influential Syrian groups and retain space for Syrian involvement while at the same time harnessing external resources, political will, oversight, and expertise to enhance any accountability outcome and avoid the threat of victor's justice and post-transition vigilantism.

Initial outreach would target a discrete set of states that demonstrated positive leadership on Syria and/or accountability (specifically Australia, Canada, Denmark, France, Morocco, Switzerland, Qatar, the United Kingdom and other states that supported the IIIM) as well as elements of the Arab League and other members of the Friends of the Syrian People (FOSP), in order to develop a common assessment of the situation, lock in states' commitments, identify the tribunal's ideal parameters and core principles, and agree upon a formula for burden-sharing. Including members of the Arab League would signal regional solidarity, address local sensitivities, and help engender support for international criminal law in a region where norms of accountability remain fledgling. This focused advocacy could coincide, or be followed by, consultations with a range of traditional accountability-centric donors, other members of the P-5, and relevant U.N.

[251] Damien McElroy, *Britain and US Plan a Syrian Revolution from an Innocuous Office Block in Istanbul*, THE TELEGRAPH, Aug. 26, 2012.
[252] ARK, Our Offer, https://www.arkgroupdmcc.com/.

actors, including the U.N.-Arab League *Special Representative* and the members of the U.N. Commission of Inquiry and IIIM. Once multilateral support from a core group of interested states was secured, the tribunal concept could be rolled out and advocated in a range of diplomatic fora—including the full FOSP, the Human Rights Council, the Security Council, the Geneva and Astana negotiations,[253] and the U.N. General Assembly—to build further momentum. This could be done either as part of the formal agenda of these bodies or as side events.

In the context of any outreach process, there would be a need to placate ICC devotees who perceived a proposed Syrian tribunal as threatening to the Court, which was designed to be a standing body, with close to universal membership. Among the likely concerned actors are Switzerland, which first disseminated an international petition seeking an ICC referral by the Security Council;[254] France, which tabled the doomed ICC referral resolution; and the various High Commissioners for Human Rights, who have called for Council action and an ICC referral.[255] With these interlocutors, it would have to be emphasized that an ICC referral was foreclosed at the Security Council and that the Court, in any case, would not be prepared to take on the entire Syrian situation, given its current caseload, shrinking budget, and efforts to consolidate its investigations and prosecutions already underway. Assuming a successful referral was achieved, the Court would be unlikely to pursue more than a handful of cases, involving those most responsible for abuses, which would require a credible complementarity arrangement with domestic courts or other judicial bodies to avoid broad-based impunity, address accountability at all levels of responsibility, and pre-empt acts of private vengeance. Even strong ICC aficionados should recognize the need for credible, fair, and even-handed complementarity mechanisms to ensure more broad-based accountability given the scale of criminal conduct during the Syrian uprising and war. Lastly, it could be emphasized that a future Syrian government would always retain the right to refer the situation to the Court if it so chose, whether or not a standalone tribunal exists. Indeed, the situation in the Central African Republic (CAR) presents a unique example of the exercise of concurrent jurisdiction between the SCC and the ICC, which has two CAR scenarios under consideration (the civil war from 2002-3 and the subsequent outbreak of violence between the Séléka and anti-Balakas starting in 2012).[256]

Many strong supporters of an ICC referral eventually expressed a willingness to consider other alternatives. The European Union and its member states, for example, "have been staunch allies of the ICC from its inception, offering continued political, diplomatic, financial and logistical support, including the promotion of universality and the defence of the integrity of the Rome

[253] *What is the Geneva II Conference on Syria*, BBC, Jan. 22, 2014; Patrick Wintour, *Syrian Government to Join UN Peace Talks in Geneva*, THE GUARDIAN.
[254] *See* Letter dated 14 January 2013 from the Chargé d'affairs a.i. of the Permanent Mission of Switzerland to the United Nations addressed to the Secretary-General, U.N. Doc. A/67/694-S/2013/19 (Jan. 16, 2013). Russia responded with a statement of its own indicating that the letter was "ill-timed and counterproductive." HUMAN RIGHTS WATCH, WORLD REPORT 2014: SYRIA, https://www.hrw.org/world-report/2014/country-chapters/syria.
[255] *'Syria Must be Referred to the ICC'—UN Human Rights Commissioner*, AMN, Mar. 3, 2018 (recounting statement by Prince Zeid Raad Zeid al-Hussein).
[256] *See* Patryk Labuda, *The Special Criminal Court in The Central African Republic*, 22(2) ASIL INSIGHTS (Jan. 22, 2018) (discussing jurisdiction overlap between SCC and the ICC).

Statute system,"[257] and has signed an agreement on cooperation and assistance with the Court.[258] As the conflict wore on, and the potential utility of the ICC receded, the EU suggested that its members should explore other means to prosecute crimes committed in Syria, including through the establishment of an International Criminal Tribunal for Syria and Iraq.[259] Likewise, members of the COI originally supported an ICC referral but eventually backed the idea of an *ad hoc* tribunal as well.[260]

Had it commenced earlier, this work could have culminated in the formation of a multilateral accountability working group—as a subset of the FOSP or a more discrete stand-alone collective of like-minded states. Such a working group could have taken up the challenge of building the shell of a tribunal in consultation with Syrian partners. This working group would have a mandate to look at a range of accountability and transitional justice issues and serve as the primary forum for building and supporting an eventual tribunal. This work could include assembling pledge commitments and an international assistance package in order to underwrite a range of subsequent activities (including technical support and international secondments) for the tribunal. Operational activities that could be undertaken include drawing up a notional statute for the court, gaining a better understanding of the local judicial system to look for legal synergies, identifying personnel, and ramping up support for efforts to gather evidence that could be used to prosecute those responsible for atrocities, including signaling that dossiers are being compiled on individual perpetrators. Public and consultative efforts to draw up the foundational elements of the tribunal's statute would have provided a key indicator that accountability was forthcoming and demonstrate the international community's commitment to justice for atrocities in Syria. Consultation and discussion around drafting the elements of a tribunal statute would clarify questions related to which of the *ad hoc* and hybrid models is best-suited for Syria. Given the number of open issues, it would be conceivable to initiate a process that would leave open the possibility of multiple outcomes, rather than explicitly endorsing an international/hybrid tribunal or a domestic special chambers model at the outset.

Consultations and drafting sessions could be undertaken at several existing platforms—such as the FOSP; the Geneva peace process; the competing Astana gatherings; the proposed constitutional commission (which has not gained traction); or an *ad hoc* multilateral assembly dedicated to this task. Elements of the Syrian opposition—including legal aid and bar associations, human rights activists, law professors, and expatriate jurists—could be actively engaged in this process in a way that would lend Syrian ownership and legitimacy to the future court and ensure that it reflects those local judicial traditions that are also consistent with international due process standards. Organizing this discussion might offer a collective challenge around which the opposition could cohere under international auspices to ensure that any mechanism is not seen as

[257] *See* Addressing Human Rights Violations in the Context of War Crimes, and Crimes Against Humanity, Including Genocide, 2018/C 334/07, Official Journal of the European Union (July 4, 2017), P8_TA(2017)0288, ¶ O. *See also* Common Council Position 2003/444/CFSP on the International Criminal Court, Official Journal L 150 (June 16, 2003), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:r10150&from=EN (declaring the crimes within the jurisdiction of the ICC are of concern to all Member States, which are determined to cooperate on the prevention of those crimes and on putting an end to impunity for the perpetrators thereof).
[258] Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, EU Doc. 14298/05 (Dec. 6, 2005).
[259] Addressing Human Rights Violations, *supra* note 257, ¶ 43.
[260] Julian Borger, *Call for Special Tribunal to Investigate War Crimes and Mass Atrocities in Syria*, THE GUARDIAN, Mar. 17, 2015 (recounting remarks by commissioners).

one-sided or unfair. A process of building an accountability mechanism pre-transition would also contribute to capacity-building within the Syrian legal community to hold fair and effective trials as well as the inculcation of rule-of-law principles in keeping with the principle of positive complementarity. If undertaken earlier in the conflict, these various lines of effort could have converged around, and culminated in, an "accountability convention" of sorts whose participants could negotiate and finalize a more complete set of constitutive documents for the future tribunal as well as resolve outstanding issues about the degree of international involvement and support, the precise modalities of any turnkey mechanism, a regime for allocating jurisdiction to parallel judicial bodies, etc.

Necessary Elements of Any Model

A constitutive instrument would likely include draft provisions on a number of essential issues, some of which might have been easier to achieve early in the conflict.[261] First, it would be necessary to define the tribunal's subject matter jurisdiction—i.e., the prosecutable crimes. Options include: the core international crimes prosecutable before other international tribunals (war crimes, crimes against humanity and genocide), other discrete international crimes (torture, summary execution, disappearances, and terrorism) subject to expansive principles of jurisdiction, and extant domestic crimes if appropriate. The war crimes provisions could include reference to the war crimes that have come to define the conflict: the prevalence of unlawful means and methods of warfare, including the discharge of prohibited weapons (such as cluster munitions and chemical/biological weapons), and the use of starvation as a weapon of war. Syria has not codified any international crimes, but its provisions on ordinary crimes (murder, assault) could be invoked alongside customary international law.[262] The incorporation of domestic law would allow the tribunal to address other crimes—such as abuse of power and corruption—that may have facilitated the commission of atrocities. Appropriate gravity thresholds could be formulated to control the breadth of the tribunal's jurisdiction. In addition, the statute of an *ad hoc* tribunal could include reference to Islamic international criminal law.[263] This would be a novelty and might enable the tribunal to establish the responsibility of ISIL actors under their own espoused value system.[264]

Second, the basic documents would also outline the tribunal's personal jurisdiction and address prosecutorial priorities, e.g., whether the tribunal would be empowered to prosecute potentially all offenders, only the top leadership, only those who bear the greatest responsibility for atrocities, or those whose prosecution would help dismantle criminal networks or structures.[265] In order to encourage defections of the rank-and-file and manage expectations, the draft statute

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[261] *See* The Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes, http://insct.syr.edu/wp-content/uploads/2013/09/Chautauqua-Blueprint1.pdf.

[262] *See* Syrian Penal Code, Promulgated by Legislative Decree No. 148/1949, WIPO, http://www.wipo.int/wipolex/en/text.jsp?file_id=478172; AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD—2012 UPDATE 111 (2010), https://www.amnesty.org/download/Documents/24000/ior530192012en.pdf (noting that the Syrian penal code contains no provision for war crimes, crimes against humanity, genocide, or torture).

[263] *See* FARHAD MALEKIAN, PRINCIPLES OF ISLAMIC INTERNATIONAL CRIMINAL LAW: A COMPARATIVE SEARCH (2011).

[264] Sergey Sayapin, *A "Hybrid" Tribunal for Daesh?*, EJIL: *TALK!* (May 4, 2016).

[265] *See* Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff, U.N. Doc. A/HRC/27/56, ¶¶ 33-43 (Aug. 27, 2014) (discussing the importance of adopting a prosecutorial strategy where mass crimes are at issue given the impossibility of prosecuting all perpetrators).

could signal that the tribunal would focus on prosecuting persons in leadership positions as well as individuals, whether military or civilian, who are deemed "most responsible" for crimes against the Syrian people.[266] Many other hybrid tribunals envision a division of labor whereby the international body prosecutes those who unleashed a campaign of abuses or committed exemplary atrocities, whereas the domestic authorities prosecute perpetrators linked to more discrete crimes or mete out conditional pardons or amnesties.[267] If this effort had been initiated with anti-government actors, it would have been necessary to address with a degree of sensitivity the fact that there may be members of the opposition who would fall within the future tribunal's jurisdiction, even if it is limited to those "most responsible" for abuses, given the commission of crimes on all sides, including custodial abuses and the use of human shields by pro-regime elements.[268]

Furthermore, in light of the degree of international involvement in the conflict—in the form of individual foreign fighters as well as great power interventions—it would be necessary to determine whether the tribunal would have jurisdiction over only Syrian nationals or other nationals committing crimes on Syrian territory.[269] The ICTR, for example, could assert jurisdiction over crimes committed within Rwanda and crimes committed by Rwandan citizens elsewhere.[270] It will be difficult to craft a personal jurisdiction regime that reaches Syrian perpetrators and foreign fighters, but not individuals associated with foreign interventions. ISIL membership, or limiting the court's temporal jurisdiction to crimes post-2014, offer options for cabining the tribunal's jurisdiction, but such limitations threaten to undermine the legitimacy of the institution in the eyes of Syrians and others in the region. By way of precedent, the Council limited the ICTR's jurisdiction to 1994 against the wishes of Rwanda, which argued that "pilot projects" that preceded the genocide should fall within the ICTR's temporal jurisdiction, but violence post-genocide should not.[271]

Third, there would undoubtedly be the need to undertake some deliberations over the tribunal's temporal or geographic jurisdiction. One of the benefits of an *ad hoc* tribunal as compared to the ICC is the potential to be flexible when it comes to these elements. Many Syrians

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[266] SCSL Statute, *supra* note 42, at art. 1(1).

[267] *See* Louise Mallinder, *Can Amnesties and International Justice be Reconciled?*, 1 INT'L J. TRANSITIONAL JUST. 208 (2007).

[268] *See, e.g.*, Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/34/64, ¶ 65 (Feb. 2, 2017) (noting that rebels used civilians as human shields as they fled Aleppo).

[269] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 art. 1, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994). The latter power was never exercised notwithstanding revenge crimes committed against Hutu refugees in neighboring countries. Ofelia de Pablo, et al., *Congo Examines Mass Graves to Find Proof of Revenge Genocide on Hutus*, THE GUARDIAN, Sept. 11, 2010.

[270] Art. 1, Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, Annex, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

[271] Faustin Mafeza, *The Temporal Jurisdiction of the International Criminal Tribunal for Rwanda (ICTR) and its Impact on the Establishment of Evidences of Conspiracy to Commit Genocide: Case of Théoneste Bagosora, Ferdinand Nahimana and their Co-Defendants*, 3(3) GLOBAL J. INTERDISC. SOC. STUD. 156 (May-June 2014).

would insist that any tribunal not be limited to the current conflict but also be empowered to assert jurisdiction over exemplary historical massacres, such as the 1982 Hama Massacre,[272] or systemic repression under the Assad regime.[273] In terms of geographic jurisdiction, the degree of overlap between the conflicts in Syria and Iraq, and the crossover crimes involving Yezidi trafficking and enslavement victims and the use of child soldiers by ISIL, might suggest that crimes with a nexus to Iraq should also fall within the tribunal's jurisdiction. The Kosovo Specialist Chambers, for example, have jurisdiction over crimes committed or commenced in Kosovo, which will include crimes consummated in neighboring Albania.[274] That said, any tribunal that threatened to address events in the Golan Heights might trigger resistance from supporters of Israel. It is not clear whether President Trump's recognition of the Golan as part of Israel would change these negotiation dynamics.

Fourth, it might also be possible to identify available defenses, as well as mitigating and aggravating factors for sentencing. Although controversial, the statute could include some formulation of the superior orders defense, allowing for mitigation or even pardon in situations in which the orders that were followed were not manifestly unlawful.[275] The statute, or accompanying sentencing guidelines, may also suggest mitigation in cases in which the defendant is willing to accept responsibility for crimes or sincerely participate in a genuine transitional justice program (along the lines of the conditional amnesty granted by the South African Truth and Reconciliation Commission)[276] or community service (as was the case in Timor-Leste).[277] Likewise, the statute could indicate that individuals willing to implicate higher-ups responsible for ordering or orchestrating offenses would be eligible for something akin to use immunity[278] or criminal diversion.[279] Additional mitigating factors might include the fact of desertion or defection. Although building these sentencing options into international criminal law institutions is uncommon, signaling the possibility of clemency for those who deserted, defected, defied orders, or otherwise undertook acts of resistance and for those willing to participate meaningfully in a

[272] The Swiss have opened an investigation into Rifaat Al-Assad, Bashar Al-Assad's uncle, for historical crimes when he was in commend of the dreaded Defense Brigades. These include massacres in Tadmor prison in 1980 (which resulted in the death of almost 1,000 prisoners) and in Hama in 1982 (in which thousands were killed following an uprising). Stephanie Nebehay, *Swiss War Crimes Inquiry Into Assad's Uncle Stalled, Rights Group Says*, REUTERS, Sept. 25, 2017. He has been investigated elsewhere in Europe for tax fraud and money-laundering. *Id*.

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

[274] Law on Specialist Chambers and Specialist Prosecutor's Office, Law No. 05/L-53, art. 8, http://www.kuvendikosoves.org/common/docs/ligjet/05-L-053%20a.pdf ("Consistent with the territorial jurisdiction of Kosovo courts under applicable criminal laws in force between 1 January 1998 and 31 December 2000, the Specialist Chambers shall have jurisdiction over crimes within its subject matter jurisdiction which were either commenced or committed in Kosovo.").

[275] Rome Statute of the International Criminal Court art. 33, July 17, 1998, 2187 U.N.T.S. 90.

[276] *See* Promotion of National Unity and Reconciliation Act, Act 95-34 (July 26, 1995) (S.Afr.).

[277] Simon Chesterman, *Truth and Reconciliation in East Timor*, GLOBAL POLICY FORUM (May 2001).

[278] *See, e.g.*, 18 U.S.C. § 6002 ("no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.").

[279] *See, e.g.*, CENTER FOR PRISON REFORM, DIVERSION PROGRAMS IN AMERICA'S CRIMINAL JUSTICE SYSTEM (Aug. 2015).

national reconciliation program, might work to balance a pro-defection/desertion policy with a desire to lay the groundwork for more robust accountability.

Fifth, the statute could, and likely should, include provisions setting out the tribunal's relationship to other tribunals with potentially concurrent jurisdiction, such as domestic courts in Europe hearing discrete cases, or even the ICC in the event that a referral is eventually forthcoming. If an ICC referral eventuates, the *ad hoc* tribunal's relationship to the complementarity regime may need clarification to avoid unnecessary admissibility and jurisdictional challenges in either forum. Furthermore, the ICC Statute's complementarity regime does not envision regional or *ad hoc* tribunals with concurrent jurisdiction, so the legal relationship between a dedicated Syria court and the ICC might need to be thought through. Sixth, these core documents may also include a sunset provision, which would wind down the tribunal, transfer its docket to the domestic system, or eliminate international involvement once a set of benchmarks had been reached and full domestic capacity had been achieved. This option proved useful in the BiH special chambers.[280] Building the demise of the tribunal into its constitutive documents might obviate the need to create a separate residual mechanism, as has been done with the ICTY/R and the SCSL.[281]

Seventh, working with Syrian jurists, it would also be possible to identify the rules of procedure and evidence. There may be elements of the civil law tradition, or other indigenous dispute resolution traditions, that could be incorporated into any constitutive document. Fully considering the scope of extant penal law and procedure would lend a degree of local ownership and relevance that may be attractive to future Syrian authorities. Any international instrument, however, would have to be consistent with international fair trial rules and principles, which would help insulate it from challenge.[282] The tribunal's statute could preserve the potential for domestic civil redress and criminal asset forfeiture or even a more fulsome reparations regime.

Eighth, it might also be useful to consider how to integrate the tribunal into a broader transitional justice strategy. Historically, prosecutions and other forms of transitional justice (such as truth commissions or lustration programs) have operated in virtual acoustic separation.[283] The constitutive documents under consideration, by contrast, could creatively conceptualize ways the tribunal could be integrated into a larger transitional justice strategy that might include limited and conditional amnesties for rebels who engaged in the armed conflict without the privilege of doing

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[280] HUMAN RIGHTS WATCH, BOSNIA: KEY LESSONS FROM WAR CRIMES PROSECUTIONS (Mar. 12, 2012).
[281] *See* U.N. International Residual Mechanism for Criminal Tribunals, http://www.irmct.org/en.
[282] *See* Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with the inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) art. 1 (providing for jurisdiction over "senior leaders of Democratic Kampuchea [the Khmer Rouge] and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia.").
[283] *See* Charles C. Jalloh, *Toward Greater Synergies between Courts and Truth Commissions in Post-Conflict Contexts: Lessons from Sierra Leone, in* ARCS OF GLOBAL JUSTICE: ESSAYS IN HONOR OF WILLIAM A. SCHABAS 417 (Meg deGuzman & Diane Amann eds. 2018); HUMAN RIGHTS WATCH, THE INTERRELATIONSHIP BETWEEN THE SIERRA LEONE SPECIAL COURT AND TRUTH AND RECONCILIATION COMMISSION (Apr. 18, 2002), https://www.hrw.org/news/2002/04/18/interrelationship-between-sierra-leone-special-court-and-truth-and-reconciliation# (setting forth proposals for how the two institutions should interact).

so;[284] a release mechanism for detainees based upon agreed upon criteria;[285] a truth commission to compile a definitive history of the origins, patterns, and practices of violence that is resistant to revisionism; a lustration/vetting program to ensure that perpetrators do not retain positions of power or influence in the new government; restitution programs covering land, property, and other contested assets; and institutional reform. As part of this process, negotiators could consider how to reconcile the establishment of a mechanism for accountability with other potential outcomes to the Syrian crisis, such as a "soft landing" for President Assad and his inner circle.

When embedded within a comprehensive transitional justice framework, accountability processes can contribute to broader stabilization and atrocity prevention goals. To be sure, the emphasis on legal or judicial responses can privilege retributive forms of justice over more restorative options and complicate efforts to resolve conflicts. Under any arrangement, penal accountability efforts constitute just one among various transitional justice processes that serve to generate a definitive record of events, individuate guilt to prevent collective retribution, rehabilitate victims, reform institutions, and build a climate for reconciliation and the establishment of the rule of law, which would address many of the issues that drove the revolution from the start. Any criminal accountability program could be designed at the outset such that it could be later integrated into a broader transitional justice agenda.

Conclusion

This chapter demonstrates that there is no shortage of ideas and options for accountability; what has been missing is a political consensus from which to proceed. Any of these proposals could have been pursued early in the conflict or over its course. To be sure, it may be too late for many of these models to be implemented, given that the parties are now indelibly polarized and Assad is close to all-out victory. This suggests the value of pursuing accountability immediately, as atrocities commence, rather than pushing it off on the assumption that it will be dealt with later. In addition to keeping more accountability options open, this alacrity also has the benefit of capturing any potential deterrent power of the international community taking concrete action around accountability.

To be sure, advancing the international/hybrid tribunal model would have undoubtedly entailed significant diplomatic exertion in order to build and sustain robust international support. Widespread and consistent calls for perpetrators to be held to account—including for an ICC referral—from a range of countries demonstrates that there may have been sufficient appetite in the international community to contribute to a multilateral accountability initiative early in the conflict if powerful states were willing to step forward with viable proposals. In the end, the international community remained fixated on the ICC as the most desirable forum for justice while also working to halt the war and the concomitant atrocities. As a result, other worthy options for justice did not receive the attention they deserved.

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[284] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art 6(5), 1125 U.N.T.S. 1979 (June 8, 1977) ("At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.").

[285] *See* Independent International Commission of Inquiry on the Syrian Arab Republic, *Detention in the Syrian Arab Republic: A Way Forward* (Mar. 8, 2018).