

“Closing the Accountability Gap in Syria: Pathways to Prosecution”

**Testimony of Professor Milena Sterio,
The Charles R. Emrick Jr. – Calfee
Halter & Griswold Professor of Law,
Cleveland-Marshall College of Law;
Managing Director, Public
International Law & Policy Group**

United States Senate Committee on
Foreign Relations

May 18, 2022

Introduction

Good morning Chairman Menendez, Ranking Member Risch, and members of the Committee. It is an honor to testify before you today. It is also a privilege to share this platform with the other individuals testifying before the committee.

The conflict in Syria has continued over the past ten years, and has resulted in the commission of countless atrocities, ordered and orchestrated by the Syrian government as well as by other non-state actors, rebel and terrorist groups.¹ The need for accountability for such atrocities committed by Syrian officials, rebel commanders, and terrorist leaders has grown. As documented by the United Nations Human Rights Council's Independent and International Commission of Inquiry, the atrocities in Syria are among the worst in history.² They include mass executions, widespread rapes, systematic torture, intentionally targeting hospitals, and repeated use of chemical weapons against civilians. The vast majority of international crimes have been committed in a methodical fashion by the Syrian government, encouraged by the long-standing culture of impunity. These crimes require prosecution to bring justice for the victims, deter vigilantism, and prevent recurrence.³ In particular, crimes ordered by Syrian government leaders require prosecution from a global deterrence standpoint: in light of the ongoing conflict in Ukraine, and the ordering of atrocities there by Russian leaders, establishing accountability for those who order the commission of atrocity crimes – whether in Syria or in Ukraine- has become paramount.

Accountability options for the prosecution of Syrian leaders who have ordered the commission of atrocity crimes range from prosecutions in the courts of Syria and prosecutions in the national courts of various countries under the principle of universal jurisdiction, to the establishment of a hybrid tribunal for Syria, and prosecutions in the International Criminal Court at The Hague.

Prosecutions in the Courts of Syria

While the Assad regime remains in power, it is unlikely that Syrian courts will investigate and prosecute any government leaders who have ordered the commission of atrocity crimes. However, assuming that there may be a transition of leadership in Syria at some point in the future, a new Syrian regime may become interested in imposing accountability on individuals associated with the Assad regime. Should that be the case, then Syrian courts would have territorial jurisdiction over any crimes committed in Syria and would be well-placed to investigate and prosecute the commission of such crimes. Examples of countries where domestic

¹ For a detailed timeline of the ongoing conflict in Syria, see MICHAEL P. SCHARF, MILENA STERIO & PAUL R. WILLIAMS, *THE SYRIAN CONFLICT'S IMPACT ON INTERNATIONAL LAW* 9-16 (2020).

² Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?* 16 J. INT'L CRIM. L. 165, 166 (2018).

³ GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 284 (2000).

courts have investigated similar crimes after a change in the governing regime include East Timor, Cambodia, and Colombia.⁴

If prosecutions were to occur in the Syrian courts at some point in the future, the international community could assist Syria by supporting the establishment of special internationalized chambers dedicated to the prosecution of atrocity crimes within the Syrian judicial system. Such internationally-supported domestic chambers have already been created in Iraq, in Bosnia, as well as in the context of piracy prosecutions in Kenya and in The Seychelles.

In order to prosecute Saddam Hussein, the deposed leader of Iraq, as well as other members of his regime, the Iraqi Special Tribunal was established in 2003 through an Iraqi law approved by the United States. Located in Baghdad, the Court was a domestic tribunal that employed domestic judges, prosecutors, defense attorneys, and applied Iraqi law. The tribunal was heavily supported by the international community, particularly the United States, which provided various forms of support and training for the Court's personnel. Thus, this tribunal is a model of an "internationalized" domestic court: a justice mechanism embedded in the domestic system of the relevant nation, aided by various international organizations and authorities in order to enhance its effectiveness. The Iraqi Special Tribunal successfully convicted Saddam Hussein, and in addition, has prosecuted several other members of the deposed Ba'athist regime.⁵

The Bosnian War Chamber is a specialized domestic chamber that handles various war crimes cases, either handed down by the International Criminal Tribunal for Yugoslavia as part of its completion strategy, or investigated on its own. The Chamber is a domestic tribunal within the Bosnian judicial system; it applies local law and it is located in capital city of Sarajevo. The Chamber, however, employs a mix of international staff, as well as local Bosnian Serbs, Croats, and Muslims. Like the Iraqi Special Tribunal, the Bosnian War Chamber has benefitted from generous international support, and its processes have been "internationalized" to ensure procedural quality of prosecutions and to guarantee the delivery of justice pursuant to international standards.⁶

Finally, more recent examples of internationalized domestic chambers include special piracy courts in Kenya and the Seychelles, where captured Somali pirates are being transferred for prosecution under the national systems of these two countries. A piracy chamber has developed in Mombasa, Kenya, where several successful prosecutions have taken place since 2006. Kenyan piracy courts are domestic; they also employ Kenyan lawyers, apply Kenyan law, and are located in this host nation. In the Seychelles, piracy prosecutions have been taking place since 2009 in the Supreme Court located in the capital city of Victoria. The Seychellois prosecutions are conducted using local law by Seychellois judges, prosecutors, and defense attorneys. The piracy prosecutions in both Kenya and the Seychelles have benefitted from international assistance by the United Nations Office of Drugs and Crime, which has provided both monetary and logistical support, as well as personnel in the form of "loaned" prosecutors,

⁴ See e.g., James D. Meernik, Angela Nichols and Kimi L. King, *The Impact of International Tribunals and Domestic Trials on Peace and Human Rights After Civil War*, 11 INT'L STUDIES PERSPECTIVES 309 (2010).

⁵ Michael P. Scharf, *Forward: Lessons from the Saddam Trial*, 39 CASE WESTERN J. INT'L L. 1 (2007).

⁶ Hybrid Justice, *The War Crimes Chamber in Bosnia and Herzegovina*, <https://hybridjustice.com/the-war-crimes-chamber-in-bosnia-and-herzegovina/>.

defense attorneys, translators, and interpreters. In this sense, piracy prosecutions in Kenya and the Seychelles, although conducted in national courts, have been "internationalized," due to support and involvement by the United Nations.⁷

Thus, if domestic-level prosecutions were to occur in the courts of Syria, such prosecutions could occur either at regular Syrian courts or at specialized internationalized chambers created through the support of the international community.

Prosecutions in Various National Courts under the Principle of Universal Jurisdiction

Syrian perpetrators of atrocities can be prosecuted by different national-level courts of various countries under the principle of universal jurisdiction. Universal jurisdiction provides every state with the authority to prosecute a limited category of offenses generally recognized as of universal concern, regardless of where the offense occurred, the nationality of the perpetrator, or the nationality of the victim. While other bases of jurisdiction require connections between the prosecuting state and the offense, the perpetrator, or the victim, universal jurisdiction assumes that every state has a sufficient interest in exercising jurisdiction to combat egregious offenses that states universally have condemned.⁸

There are two premises underlying universal jurisdiction. The first involves the gravity of the crime. Crimes subject to universal jurisdiction are so threatening to the international community or so heinous in scope and degree that they offend the interest of all humanity, and any state may, as humanity's agent, punish the offender. The second involves the *locus delicti* (place of the act). Crimes subject to universal jurisdiction occur in territory over which no country has jurisdiction or in situations in which the territorial State and State of the accused's nationality are unlikely to exercise jurisdiction, because, for example, the perpetrators are State authorities or agents of the State.⁹

There are two approaches to universal jurisdiction. The first is the "no safe haven" approach, pursuant to which states may exercise universal jurisdiction over perpetrators found in their territory to avoid becoming a refuge for perpetrators of grave international crimes. The second is the "global enforcer" approach, under which domestic courts conduct prosecutions on behalf of humanity. Under this second approach, investigations, indictments, and requests for extradition may be initiated even where the perpetrator is not located within the state's territory.¹⁰

The first widely accepted crime of universal jurisdiction was piracy. For 500 years, States have exercised jurisdiction over piratical acts on the high seas, even when neither the pirates nor their victims were nationals of the prosecuting state.¹¹

⁷ Milena Sterio, *Piracy Off the Coast of Somalia: The Argument for Pirate Prosecutions in the National Courts of Kenya, The Seychelles, and Mauritius*, 4(2) AMSTERDAM LAW FORUM 104 (2012).

⁸ Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 TEXAS L. REV. 785, 786 (1988).

⁹ *See id.*; see also Lee. A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States Is in Breach of Its International Obligations*, 39 VA. J. INT'L L. 425, 435 (1999).

¹⁰ Devika Hovell, *The Authority of Universal Jurisdiction*, 29 EJIL 427, 439 (2018).

¹¹ Randall, *supra* note 8.

In the aftermath of the atrocities of the Second World War, the international community extended universal jurisdiction to war crimes and crimes against humanity. Trials exercising this jurisdiction took place in international tribunals at Nuremberg, as well as domestic courts across the globe.¹² Some individuals faced trial in the states in which they had committed their crimes, but others were tried by other states in which they were later captured, surrendered, or found - including such far off countries as Canada and Australia.¹³ Thus, on the basis of universal jurisdiction, Israel tried Adolph Eichmann in 1961 and John Demjanjuk in 1988 for crimes committed before Israel even existed as a State.¹⁴ In extending universal jurisdiction to war crimes and crimes against humanity, an analogy was made between those offenses and piracy. Like piracy, the Nazi offenses during the war involved violent and predatory action and were typically committed in locations where they would not be prevented or punished through other bases of jurisdiction.

On December 11, 1946, the United Nations General Assembly unanimously affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal, thereby codifying the jurisdictional right of all States to prosecute perpetrators of the offenses addressed by the Nuremberg Tribunal, namely war crimes, crimes against humanity, and the crime of aggression.¹⁵ The General Assembly has subsequently confirmed that no statute of limitations or amnesty may be applied to bar prosecution of such crimes and that all states have a duty to cooperate in their prosecution.¹⁶ International courts have repeatedly cited the Nuremberg precedent as crystallizing universal jurisdiction for the core international crimes under customary international law.¹⁷

¹² See Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT'L L. J. 357, 390 (2012). Between 1945 and 2010, there were prosecutions for crimes under international law based on universal jurisdiction in seventeen states (Argentina, Australia, Belgium, Canada, Denmark, Finland, France, Germany, Israel, the Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom, and the United States). Amnesty Int'l, UN General Assembly Should Support this Essential International Justice Tool (2010), <https://www.amnesty.org/en/wp-content/uploads/2021/07/ior530152010en.pdf>.

¹³ R. v. Imre Finta [1994] 28 C.R. (4th) 265 (S.C.) (Canada); Polyukovich v. Commonwealth, (Austl. 1991) 172 C.L.R. 501.

¹⁴ The Supreme Court of Israel held in the Eichmann case that “[t]here is full justification for applying here the principle of universal jurisdiction since the international character of crimes against humanity... dealt with in this case is no longer in doubt.... The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.” Attorney General of Israel v. Eichmann, 36 I.L.R. 277, 299, 304 (Isr. S. Ct. 1962). For a more detailed account of the Demjanjuk case, see Scharf, Sterio & Williams, *supra* note 1, at 100, n. 50.

¹⁵ G.A. Res. 95, U.N. Doc. A/64/Add.1, at 188 (1946).

¹⁶ See, e.g., Declaration on Territorial Asylum, G.A. Res. 2312, 22 U.N. GAOR, 22d Sess., Supp. No. 16, at 81, U.N. Doc. A/6716 (1967); United Nations Resolution on War Criminals, G.A. Res. 2712, U.N. GAOR, 25th Sess., Supp. No. 28, at 78-79, U.N. Doc. A/8028; Questions of the Punishment of War Criminals and of Persons Who Have Committed Crimes against Humanity, G.A. Res. 2840, U.N. GAOR, 26th Sess., Supp. No. 29, at 88, U.N. Doc. A/8429 (1971); United Nations Resolution on Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30 at 79, U.N. Doc. A/9030 (1973).

¹⁷ Prosecutor v. Tadic, Case No. IT-94-1-1, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction 62 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995); Prosecutor v. Ntuyuhaga, Case No. ICTR-96-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment (Int'l Crim. Trib. for Rwanda Mar. 18, 1999); Prosecutor v. Kallon and Kamara, Case Nos. SCSL-2004-15 AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lome Accord Amnesty 67-71 (Special Ct. for Sierra Leone, Mar. 13, 2004); Case No.

In the 1990s, domestic courts of Denmark, Austria, and Germany relied on universal jurisdiction in trying Croatian and Bosnian Serb nationals for war crimes and crimes against humanity committed in Bosnia in 1992.¹⁸ Courts in Belgium cited universal jurisdiction as a basis for issuing arrest warrants and prosecuting persons involved in the atrocities in Rwanda in 1994, including cases that did not involve Belgian victims.¹⁹ And courts in Spain relied on universal jurisdiction to request the extradition of former Chilean leader, General Augusto Pinochet, for crimes against humanity committed during his reign.²⁰ Crimes over which universal jurisdiction extends include piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture.²¹

In the context of the Syrian conflict, some courts have already relied on the principle of universal jurisdiction to initiate investigations and prosecutions. Soon after the outbreak of the Syrian civil war, the German Federal Prosecutor's War Crimes Unit opened several "structural investigations" into more than 2,800 crimes committed in Syria. This involves investigating specific structures within which international crimes have been allegedly committed rather than investigating specific persons.²²

This technique serves several purposes. First, it can enable the prosecutor to react swiftly when a suspect enters Germany in the future. Second, it can facilitate future proceedings in a third state or before an international court. Third, it can lead to the opening of an investigation against a specific individual and can serve as the basis for an international arrest warrant or extradition request.²³

Taking advantage of the thousands of Syrian refugees pouring into Germany starting in 2011, the staff of the German War Crimes Unit interviewed 200 witnesses in two structural investigations. One, based on the "Caesar photos," is focused on crimes committed by the Syrian regime as captured in thousands of photos smuggled out by a former Syrian official. The other, based on interviews of Yazidi refugees in Germany, is focused on crimes committed by the ISIS terrorist organization against that ethnic group in Syria.²⁴ So far, the structural investigations have led to multiple investigations against more than two dozen suspects.

In June 2018, Germany issued an international arrest warrant for Syrian General Jamil Hassan, a member of Assad's inner circle, charging him with war crimes and crimes against humanity. In February 2019, after the general travelled to Lebanon seeking medical treatment,

STL-11-01/1 Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging 103 (Special Trib. for Leb. Feb. 16, 2011).

¹⁸ Scharf, Sterio & Williams, *supra* note 1, at 101-102 and n. 56.

¹⁹ See Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 577 (1995).

²⁰ Human Rights Watch, *The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad*, Nov. 1, 1998, <https://www.hrw.org/report/1998/11/01/pinochet-precedent/how-victims-can-pursue-human-rights-criminals-abroad>.

²¹ Scharf, Sterio & Williams, *supra* note 1, at 102-103 (noting also that universal jurisdiction has been extended by treaty to other crimes, including several terrorism offenses).

²² Hovell, *supra* note 10, at 448.

²³ Kaleck & Kroker, *supra* note 2, at 179-180.

²⁴ *Id.*

Germany made a formal extradition request of Lebanon for Hassan's surrender. A few days later, the United States government issued a statement supporting Germany's extradition request for the high-ranking Syrian official. By taking this step, the United States placed itself on the record in support of Germany's exercise of universal jurisdiction.²⁵

On Jan. 13, 2022, the Higher Regional Court in Koblenz, Germany, convicted senior Bashar al-Assad government official Anwar Raslan for a crime against humanity—in the form of killing, torture, serious unlawful detention, rape and sexual assault—and sentenced him to life in prison. Raslan was the former head of the Syrian General Intelligence Directorate's investigation department—specifically overseeing the investigations section of Branch 251 and later Branch 285, detention centers where officials held and interrogated suspected anti-government activists.²⁶ The court found it had been proved that Raslan was “a co-offender in a protracted and systematic attack that was launched against the civilian population of Syria, resulting in 27 people being murdered and 4,000 others having their physical freedom impaired in a serious manner, they also having been subjected to torture during their times in prison.”²⁷ In February 2021, the same German court also convicted Raslan's co-defendant, Eyad al-Gharib.²⁸

Germany is the first country to have launched these structural investigations related to Syria, and it established a model for other states wishing to serve the interests of a broader international fight against impunity. France has also embraced the strategy of structural investigations, with the limitation that French law requires that one or more of the victims of each case be a French national or that the suspect is located in French territory.²⁹ Using this authority, in 2018, a French court issued international arrest warrants for three high level Assad regime officials (Ali Mamluk, director of the National Security Bureau; Jamil Hassan, head of Syrian Air Force Intelligence, and Abdel Salam Mahmoud, director of an Air Force Intelligence investigative branch), charging them with complicity in the disappearance of dual French-Syrian nationals.³⁰

Meanwhile, a number of other European states have begun prosecuting Syrian perpetrators found in their territory under the “no safe haven approach.” Most of these have ended with convictions, such as the Austrian case against a 27-year old Syrian asylum seeker and former member of the opposition Farouq Brigade, who was sentenced to life in May 2017 for the multiple murders of government soldiers near Homs between 2013 and 2014.³¹ In Sweden, a 28-year old Syrian Asylum seeker and former member of the Free Syrian Army was sentenced to eight years in 2013 for war crimes and torture.³² In September 2017, a collective of Swiss lawyers disclosed

²⁵ Ryan Goodman, *Breaking: United States Supports Germany's International Arrest Warrant for Accused Syrian War Criminal*, JUST SECURITY (Mar. 6, 2019), <https://www.justsecurity.org/63079/breaking-united-states-supports-germanys-international-arrest-warrant-accused-syrian-war-criminal-a-rare-exercise-universal-jurisdiction-general-jamil-hassan/>.

²⁶ Hayley Evans, *A Survey of Recent Developments and Trends in Universal Jurisdiction*, LAWFARE, Feb. 9, 2022, <https://www.lawfareblog.com/survey-recent-developments-and-trends-universal-jurisdiction>.

²⁷ *Id.*

²⁸ BBC, *Syria torture: German court convicts ex-intelligence officer*, Feb. 24, 2021, <https://www.bbc.com/news/world-europe-56160486>.

²⁹ Kaleck & Kroker, *supra* note 2, at 173.

³⁰ Trial International, *Universal Jurisdiction Annual Review 2019*, https://trialinternational.org/wp-content/uploads/2019/03/Universal_Jurisdiction_Annual-Review2019.pds.

³¹ Kaleck & Kroker, *supra* note 2, at 173.

³² *Id.*

the existence of a criminal investigation into Rifaat Al-Assad—Syrian President Bashar Al-Assad’s uncle, often referred to as the “Butcher of Hama”—for war crimes allegedly committed in 1982.³³ In the Netherlands, in 2020 and 2021, an Amsterdam court prosecuted a Syrian national on charges of war crimes and terrorism under the principle of universal jurisdiction.³⁴

As a result, after falling out of favor during the past twenty years, countries around the world are expanding the use of the global enforcer approach to universal jurisdiction to prosecute Syrian officials and rebels for war crimes and crimes against humanity. The prosecution of Syrian leaders for atrocity crimes in the national courts of different countries around the globe, under the principle of universal jurisdiction, is thus an important accountability option.

The Establishment of a Hybrid Tribunal for Syria

In addition to national-level prosecutions under the principle of universal jurisdiction, another important accountability option is the establishment of a hybrid tribunal for Syria.

Hybrid tribunals are courts that combine elements of international and national prosecutions. They employ a mix of international and national judges; they apply both international and domestic criminal laws; they may be located in a host country whose violent past they may be attempting to address; and they strive to fulfill goals of international justice while also helping to promote the growth of the local judiciary, court system, and civil society in general. Recent examples of these hybrid tribunals include the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon (STL).³⁵

The Special Court for Sierra Leone was established in 2002, through an international agreement between the United Nations and Sierra Leone, the host country. The Court had jurisdiction over atrocities that took place in 1996 during Sierra Leone's civil war. It was located in Freetown, the capital of Sierra Leone, but employed a mix of international and local judges. Its statute included both international law offenses and crimes derived from Sierra Leone, which were specific to the conflict that ravaged this nation for many years. The most prominent defendant prosecuted in the Special Court is Charles Taylor, the former President of Liberia, who was accused of supporting violent rebel groups in Sierra Leone during the 1990s.³⁶ The SCSL completed its mandate in 2013 and formally closed; in its place, the so-called Residual Special Court for Sierra Leone was established in order to continue to carry out the Special Court’s mandate. Many have described the Special Court as a model hybrid tribunal.³⁷

The ECCC was established in 2003, through an agreement between the United Nations Secretary-General and the Cambodian government in order to try the former leaders of the

³³ *Switzerland Judicial Development*, in TRIAL International Make Way for Justice #4: Momentum towards accountability 78, 79 (2018).

³⁴ Alexandra Lily Kather, “*Water Finds Its Way*”? *Universal Jurisdiction as an Avenue for Justice in Syria*, ARTICLES OF WAR, Jul. 28, 2021, <https://lieber.westpoint.edu/water-finds-way-universal-jurisdiction-justice-syria/>.

³⁵ Milena Sterio, *The Future of Ad Hoc Tribunals: An Assessment of Their Utility Post-ICC*, 19 ILSA J. INT’L & COMP. L. 237 (2013).

³⁶ *Id.*

³⁷ Special Court for Sierra Leone, Residual Special Court for Sierra Leone, <http://www.rscsl.org>.

Khmer Rouge regime for atrocities committed between 1975 and 1979 when Pol Pot ruled Cambodia and orchestrated a series of devastating policies, which resulted in the death of almost a third of the country's population. The ECCC is composed of a Pre-Trial Chamber, a Trial Chamber, and a Supreme Court Chamber; all the chambers consist of international as well as Cambodian judges. The Court also has an international and a domestic prosecutor. The Court's statute is a mix of international and domestic law offenses, similar to the statute of the aforementioned Special Court for Sierra Leone. Since 2009, the ECCC, located in the capital city of Phnom Penh, has prosecuted several high-level members of the Khmer Rouge regime.³⁸

The STL was created in 2007 by the Security Council to try persons responsible for assassinations, and those attempted, of prominent Lebanese political and media figures since 2004. In particular, the STL has investigated the assassination of former Prime Minister Rafiq Hariri. Because of security concerns, the STL was located at The Hague, unlike the aforementioned tribunals, which have all been located in host countries.³⁹ The Tribunal was composed of both international and Lebanese judges, but it applied Lebanese law. Also, unlike the aforementioned hybrid tribunals, which have had jurisdiction over both international and national crimes, the STL had jurisdiction solely over national crimes, as they relate to the Hariri assassination and other assassination attempts. Thus, this Tribunal did not investigate "traditional" international crimes, such as genocide, war crimes, or crimes against humanity, but instead has focused on terrorism. The STL had a three-year mandate, which can be extended by the Security Council upon review. The Tribunal began its work in 2009, and it has already investigated several individuals and issued nine indictments.⁴⁰ The STL is different from the hybrid tribunals because it was created through the Security Council Chapter VII powers, but it contains similarities because its creation was requested by the Lebanese government and because the tribunal employed so many features of domestic Lebanese law.

Many have already advocated for the creation of a hybrid tribunal for Syria.⁴¹ Such a tribunal could be created through a United Nations General Assembly or Secretary-General and the government of Syria, similar to the SCSL and the ECCC. Or, such a tribunal could be established through a Security Council Resolution, such as the STL. Both options are unlikely in the context of Syria at the present. It is unlikely that the Assad government will agree to the creation of an ad hoc tribunal, and the Security Council remains paralyzed in light of the Russian and Chinese veto. However, these options are important accountability avenues and should remain part of any future accountability discussions regarding Syria.

Prosecutions at the International Criminal Court

³⁸ See, e.g., Open Society Justice Initiative, Performance and Perception: The Impact of the Extraordinary Chambers in the Court of Cambodia, February 2016, <https://www.justiceinitiative.org/publications/performance-and-perception-impact-extraordinary-chambers-court-cambodia>.

³⁹ Special Tribunal for Lebanon, About the STL, <https://www.stl-tsl.org/en/about-the-stl>.

⁴⁰ *Id.*

⁴¹ RADWAN ZIADEH, ACCOUNTABILITY IN SYRIA: ACHIEVING TRANSITIONAL JUSTICE IN POSTCONFLICT SOCIETY (2020).

The International Criminal Court (ICC) Statute was negotiated in 1998; the Court became operational in 2002 and has commenced investigations in 17 situations, resulting in a total of 31 cases since its inception.⁴²

The ICC is the only permanent international criminal court. It is located at The Hague, in the Netherlands, and it has jurisdiction over genocide, crimes against humanity, war crimes, as well as aggression. While many have applauded the creation of the ICC as a tremendous development in the field of international criminal law, others have remained skeptical about its ability to accomplish many of the existing goals of international justice.⁴³ The ICC has limited resources and can only prosecute a handful of cases. Its jurisdiction is limited temporally, to 2002 onward, and its ability to hear any case depends on its ability to properly acquire power over a situation—the Court can exercise jurisdiction pursuant to a Security Council referral, pursuant to a referral by a state party, or pursuant to the prosecutor's decision to initiate an investigation.⁴⁴ In some instances, political forces and influences may prevent the Court from investigating a case. Finally, the ICC functions based on the "'complementarity' principle"; it can only exercise jurisdiction if a state is unwilling or unable to prosecute.⁴⁵

In the context of Syria, the ICC is a limited accountability option. Syria is not a member state of the ICC. As this Court has jurisdiction only in situations where the alleged perpetrator is a citizen of a member state or if the alleged crimes take place on the territory of a member state, the Court can only launch prosecutions against individuals who committed crimes in Syria but who are nationals of ICC member states. Moreover, although in theory a case can be referred to the ICC through a Security Council resolution, any such resolution regarding Syria is highly unlikely in light of the Russian and Chinese veto. The ICC is an important global accountability option at a theoretical level, and its involvement in Syria should continue to be explored.⁴⁶

International, Impartial and Independent Mechanism for Syria

Although the international community has thus not acted in terms of imposing accountability on Syrians who have committed atrocities during this decade-long conflict, the United Nations General Assembly has acted and has established the International Impartial and Independent Mechanism for Syria.

Despite significant evidence of atrocity crimes being committed by all sides to the conflict — particularly by government forces — the UN Security Council has been paralyzed by the Russian and Chinese veto, unable to take any steps towards accountability in Syria. In May 2014, Russia vetoed a Security Council resolution that would have referred the situation in Syria

⁴² International Criminal Court, About the Court, <https://www.icc-cpi.int/about/the-court>.

⁴³ For a discussion of challenges facing the ICC, see Milena Sterio, *The International Criminal Court: Current Challenges and Prospect of Future Success*, 52 CASE W. RES. J. INT'L L. 467 (2020).

⁴⁴ *Id.*

⁴⁵ Linda E. Carter, *The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem*, 8 SANTA CLARA J. INT'L L. 165 (2010).

⁴⁶ Patrick Wintour, *Human rights lawyers attempt to bring Syria war crimes cases to ICC*, THE GUARDIAN, Feb. 16, 2022 (describing efforts by human rights lawyers to argue that the ICC should have jurisdiction in Syria because some of the victims have fled to Jordan, which is a state party to the ICC).

to the International Criminal Court.⁴⁷ Later, Russia vetoed a Security Council resolution that would have established an investigative mechanism to document Syrian use of chemical weapons and other atrocities. In all, Russia has vetoed twelve resolutions to prevent accountability of the Syrian government since the outbreak of the Syrian civil war.⁴⁸

On December 21, 2016, the United Nations General Assembly took a historic step in establishing a Mechanism to investigate and preserve evidence of international crimes in Syria, the first time the Assembly has established such a body.⁴⁹ Despite objection by Russia, the General Assembly adopted Resolution 71/248 by a vote of 105 to 15 with 52 abstentions, creating the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, known in shorthand as the IIIM.⁵⁰

The IIIM is empowered to collect evidence from other bodies including the Independent International Commission of Inquiry established by the Human Rights Council, and to conduct its own investigations “including interviews, witness testimony, documentation and forensic material.”⁵¹ The General Assembly Resolution further envisages that the IIIM will analyze the collected evidence and prepare files of evidence that could be provided to “national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.”⁵²

This was the first time in history that the General Assembly has established an investigative body to assemble and analyze evidence of international crimes for the purpose of preserving evidence for future international or domestic trials.

Article 10 of the UN Charter gives the General Assembly the power to “discuss” and make “recommendations” concerning “any questions or matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter.”⁵³ A limitation on this power is set forth in Article 12 of the Charter which stipulates that the General Assembly cannot make recommendations when the Security Council is exercising its functions with respect to a particular dispute or situation, unless the Council requests the General Assembly to do so.⁵⁴ But this limitation has been honored increasingly in

⁴⁷ I. Black, *Russia and China Veto UN Move to Refer Syria to International Criminal Court*, THE GUARDIAN, May 22, 2014.

⁴⁸ RTE, *Russia’s 12 Vetoes on Syria*, Apr. 11, 2018, <https://www.rte.ie/news/world/2018/0411/953637-russia-syria-un-veto>.

⁴⁹ Alex Whiting, *An Investigation Mechanism for Syria: The General Assembly Steps Into the Breach*, 15 J. INT’L CRIM. JUST. 231 (2017).

⁵⁰ UN Doc. A/71/L.48, Dec. 21, 2016.

⁵¹ Secretary-General, *Report of the Secretary-General on the Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, UN Doc. A/71/755, Jan. 19, 2017, at para. 12.

⁵² UN Doc. A/71/L.48, 21 Dec. 2016, at para. 4.

⁵³ UN Charter, art. 10.

⁵⁴ *Id.*, art. 12.

the reach and was not seen as limiting the General Assembly's involvement in major crises including the former Yugoslavia, Rwanda, Libya, and Syria over the past thirty years. As such, it is within the mandate of the General Assembly to consider questions of threats to peace and security in Syria and whether a referral to the ICC or the establishment of an ad hoc tribunal is warranted. Further, Article 22 of the Charter empowers the General Assembly to "establish such subsidiary organs as it deems necessary for the performance of its functions."⁵⁵ Therefore, the General Assembly has the authority to establish a "subsidiary organ" to collect and assess the available evidence of international crimes in Syria in order to inform the General Assembly's discussion and recommendations on these matters. Now, the evidence collected by the IIIM would undeniably not be used solely (or even primarily) for the purpose of the General Assembly's discussion and recommendations, but it is not clear that additional uses of the information would render the creation of the IIIM beyond the power of the General Assembly.

The establishment of this novel institution by the General Assembly clearly evinces a fundamental power shift away from the Security Council and to the General Assembly caused by the international community's frustration with the abuse of the veto to prevent action to deal with international atrocities.

On July 3, 2017, the Secretary General appointed as the head of the IIIM Catherine Marchi-Uhel, a former French judge with broad international experience trying and adjudicating war crimes. During her 27-year career, Marchi-Uhel has provided legal support to the International Criminal Tribunal for the Former Yugoslavia, the UN Mission in Liberia, and the UN Interim Administration Mission in Kosovo. She has also adjudicated for the Extraordinary Chambers in the Courts of Cambodia and served as Ombudsperson to the UN Security Council's Sanctions Committee. Before, that, she has served as Head of Chambers at the International Criminal Tribunal for the Former Yugoslavia, and as an international judge at the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia.⁵⁶

At a lecture at Case Western Reserve University School of Law soon after her appointment, Marchi-Uhel said: "I believe that the creation of the Mechanism is an important demonstration of the international community's will to ensure that crimes committed in Syria do not go unpunished."⁵⁷ She noted that the Mechanism can play an immediate, significant role in supporting ongoing and future investigation of crimes committed in Syria by national prosecutors.⁵⁸

Conclusion

The massive number of Syrians that have fled the violence in Syria has had an undeniable impact on the international community's approach to international criminal justice. Over 1 million Syrian refugees have migrated to Europe, with 530,000 settling in Germany,

⁵⁵ UN Charter, art. 22.

⁵⁶ Scharf, Sterio & Williams, *supra* note 1, at 96.

⁵⁷ Catherine Marchi-Uhel, Klatsky *Endowed Lecture in Human Rights*, 51 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 223-235 (2019).

⁵⁸ *Id.*

110,000 in Sweden, 50,000 in Austria, and smaller numbers in other countries.⁵⁹ Many of the refugees are victims of international crimes. Others are perpetrators. The issue of accountability was quite literally delivered to the doorsteps of the European States by the refugees arriving from Syria and there is reason to believe that the stream of universal jurisdiction cases will continue to increase in the coming years.

As this testimony has documented, there is a pressing need to establish accountability for atrocities committed during the Syria conflict. Different accountability options, as mentioned above, including prosecutions in Syrian courts, national-level prosecutions under the principle of universal jurisdiction, the establishment of a hybrid tribunal for Syria, as well as prosecutions at the International Criminal Court. The international community has already acted, through the United Nations General Assembly, to establish an investigative mechanism for Syria, the IIM. It is time that the international community, with support from the United States, act toward accountability. Imposing accountability on Syrian leaders in particular is paramount in the wake of the ongoing conflict in Ukraine, and the commission of atrocities there by Russian forces. It is crucial to establish that accountability attaches to all those who order the commission of atrocities, whether they be located in Syria or in Ukraine.

The United States should continue to support accountability for Syrian leaders accused of having ordered the commission of atrocities. In particular, the United States could provide financial and logistical support to the IIM, as well as to countries which have initiated domestic-level prosecutions under the principle of universal jurisdiction. The United States could also support the creation of an ad hoc tribunal for Syria. United States' support in closing the accountability gap in Syria is particularly important today, in the wake of the Russian aggression against Ukraine, from the perspective of both deterrence as well as the notion of individual criminal responsibility for leaders who order the commission of atrocities.

⁵⁹ See generally Scharf, Sterio & Williams, *supra* note 1, at 110.