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Seeking International Criminal Justice in Syria

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I. INTRODUCTION

The report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic (U.N. Mission), released in September 2013, confirmed that “chemical weapons have been used in the ongoing conflict between the parties in the Syrian Arab Republic, [as well as] against civilians, including children, on a relatively large scale.”¹ In a note accompanying the report, the Secretary-General of the United Nations condemned the use of chemical weapons as “a war crime and grave violation of the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare and other relevant rules of customary international law.”²

Although attention in recent months has focused on the atrocities caused by the use of chemical weapons in Syria, throughout the course of the conflict a much wider range of potentially criminal conduct has taken

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1. Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013, ¶ 27, A/67/997-S/2013/553 (Sept. 16, 2013).

2. *Id.*, Note by the Secretary-General, ¶ 1.

place. In August 2013, the Independent International Commission of Inquiry on the Syrian Arab Republic reported massacres and unlawful killings, arbitrary arrests and unlawful detention, hostage taking, enforced disappearance, torture and ill-treatment, sexual violence, violation of children's rights, unlawful attacks, attacks on protected persons and objects, pillaging and destruction of property, use of illegal weapons (including chemical weapons), sieges and attacks on food security.³ The report suggests that a broad array of war crimes and crimes against humanity have been committed on Syrian territory by both government forces and anti-government armed groups.⁴

Individuals responsible for these serious crimes must be held accountable for their actions. International criminal justice plays an important role in responding to the commission of international crimes. The investigation and prosecution of individuals serves a variety of purposes, from retribution to deterrence to establishment of the truth.⁵ Perhaps most importantly, the international criminal justice process has been understood to provide a foundation for future peace by breaking down assumptions of collective guilt, creating a basis for reconciliation and preventing calls for revenge.⁶

In the absence of domestic criminal proceedings, the International Criminal Court (ICC), which came into operation in 2002 and has prospective jurisdiction over the most serious crimes of concern to the international community,⁷ provides perhaps the most obvious venue to hold accountable those who have committed serious crimes in Syria. Other possible settings include an *ad hoc* international criminal tribunal created under the Chapter VII powers of the United Nations Security Council,⁸ an interna-

3. U.N. Gen. Assembly, Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶¶ 40–190, U.N. Doc. A/HRC/24/46 (Aug. 16, 2013).

4. *Id.*, ¶¶ 192, 194.

5. For discussion of the purposes of international criminal justice, see Mirjan Damaška, *What is the Point of International Criminal Justice?* 83 CHICAGO-KENT LAW REVIEW 329 (2008); Payam Akhavan, *Can International Criminal Justice Prevent Future Atrocities?*, 95(1) AMERICAN JOURNAL OF INTERNATIONAL LAW 7 (2001); Antonio Cassese, *Reflections on International Criminal Justice* 61 MODERN LAW REVIEW 1 (1998).

6. Cassese, *supra* note 5, at 1, 6, 10.

7. Rome Statute of the International Criminal Court arts. 5, 11, July 17, 1998, 2187 U.N.T.S. 90.

8. *See, e.g.*, Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993), adopting The Secretary-General Report Pursuant to Paragraph 2 of Security Council Resolution 808; Statute of the International Criminal Tribunal for Rwanda

tionalized criminal tribunal with domestic and international elements,⁹ and the domestic courts of third States operating on the basis of universal jurisdiction. The remainder of this article will examine the possible institutions in which justice may be sought for the crimes committed in Syria. It concludes by emphasizing the benefits of a multi-layered response, combining both domestic and international(ized) institutions.

II. POSSIBLE VENUES FOR JUSTICE

A. Domestic Courts in Syria

Syrian authorities are under an obligation to investigate and prosecute those suspected of having committed international crimes on Syrian territory.¹⁰ This obligation has its basis in both customary and conventional international law.¹¹ There are several advantages to the pursuit of justice in

(ICTR), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994).

9. Examples include Statute of the Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 145; 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 (2001), amended by NS/RKM/1004/006 (Oct. 27, 2004), *available at* http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf; Law of the Iraqi Higher Criminal Court, No. 10 (Oct. 9, 2005), Official Gazette of the Republic of Iraq, No. 4006 (Oct. 18, 2005); Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, Annex, U.N. Doc. S/RES/1757 (May 30, 2007); War Crimes Chamber of Bosnia and Herzegovina, State Court, Special Department for War Crimes in the State Prosecutor's Office (Mar. 9, 2005), <http://www.sudbih.gov.ba/?jezik=e>.

10. The obligation on State authorities to prosecute international crimes committed in Syria has been discussed by the Independent International Commission of Inquiry on the Syrian Arab Republic. *See* U.N. Gen. Assembly, Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶¶ 21–24, U.N. Doc. A/HRC/21/50 (Aug. 16, 2012).

11. A customary obligation in international and non-international armed conflict has been recognized by the ICRC. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2 volumes) r. 158 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter Customary IHL Study]. An obligation to prosecute in respect of acts of torture can also be found under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment arts. 5, 7, June 26, 1987, 1465 U.N.T.S. 85. The scope of this obligation has recently been discussed by the International Court of Justice. *See* Questions

the domestic courts of States on whose territory crimes are committed. These include the potential for greater impact within the local population and access to evidence and perpetrators that exceeds that of the other options, all of which rely on State cooperation.

The pursuit of justice at the domestic level in Syria is, however, unlikely while the conflict continues.¹² Even when the conflict ends, domestic courts can be expected to face difficulties overseeing the investigation and prosecution of the complex international crimes that have been committed in their own State. The construction of domestic capacity in the aftermath of the conflict is crucial in light of the limited capacity of international criminal justice institutions, such as the ICC, an internationalized tribunal and third States, to oversee the investigation and prosecution of a large number of cases. The strengthening of domestic criminal justice institutions is necessary to ensure that individuals who cannot be investigated and prosecuted elsewhere do not go unpunished.¹³

B. *The International Criminal Court*

The ICC is intended to act as a “court of last resort,” which operates in the absence of genuine proceedings at the domestic level.¹⁴ Cases are admissible before the ICC if they are not being, and have not been, investigated or prosecuted by a State with jurisdiction, and if they are of sufficient gravity to justify further action by the Court.¹⁵ The ICC provides a possible route to justice in the absence of genuine proceedings at the domestic level. In many respects the ICC is well placed to address the crimes allegedly committed in Syria. The Court is an established institution with the capacity to

Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 144 (July 20).

12. U.N. Gen. Assembly, Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Annex XIV, 22d Sess., U.N. Doc. A/HRC/22/59 (Feb. 5, 2013) [hereinafter Report of the Independent International Commission of Inquiry on the Syrian Arab Republic].

13. *Id.*

14. For discussion of the principle of complementarity, see Carsten Stahn, *Complementarity: A Tale of Two Notions* 19 CRIMINAL LAW FORUM 87 (2008); John T. Homes, *Complementarity: National Courts versus the ICC, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* (Volume II) (Antonio Cassese, Paola Gaeta & John R. W. D. Jones, eds., 2002).

15. Rome Statute, *supra* note 7, art. 17.

investigate and prosecute complex international crimes cases.¹⁶ It is less susceptible to bias than domestic courts and may be less likely to spark further conflict in the region.¹⁷ For this reason, it may provide an appropriate forum for proceedings against higher-level perpetrators that may be more politically charged and destabilizing.

There are, however, a number of difficulties associated with the ICC as a forum for justice in Syria. One key issue is that of triggering the Court's jurisdiction. Since Syria is not a State party to the Rome Statute, a referral from the United Nations Security Council, acting under Chapter VII of the U.N. Charter, is required to trigger the jurisdiction of the Court.¹⁸ A State party to the Rome Statute cannot refer the situation to the ICC; nor can the Prosecutor initiate an investigation *proprio motu*.¹⁹ The Security Council has already made two referrals to the ICC, in relation to the situation in Darfur, Sudan, in 2005 and that in Libya in 2011.²⁰ Whilst some members of the Security Council, including the U.K. and France, have supported the referral of the situation in Syria to the ICC, the U.S., China and Russia, each of which holds the power to veto action by the Security Council, have not supported such a move.²¹ Russia is reported to have described a referral as

16. For information on the twenty cases in eight situations that have been brought before the ICC, see *Situations and Cases*, ICC, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited Nov. 19, 2013).

17. William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement* 24(1) MICHIGAN JOURNAL OF INTERNATIONAL LAW 1, 15–16 (2002–2003).

18. Rome Statute, *supra* note 7, arts. 12–13.

19. *Id.*

20. See S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005); S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

21. Amnesty International has identified 64 countries that support a referral of the situation in Syria to the ICC, including six members of the U.N Security Council. *The Countries that Support Referring Syria to the International Criminal Court—and Some Absent Friends*, AMNESTY INTERNATIONAL UK, <http://www2.amnesty.org.uk/blogs/campaigns/syria-icc-international-criminal-court> (last visited Nov. 19, 2013). In January 2013, Switzerland, together with the governments of 56 States, including the U.K. and France, requested the Security Council “to act by referring the situation in the Syrian Arab Republic as of March 2011 to the International Criminal Court (ICC) without exceptions and irrespective of the alleged perpetrators.” See Letter from the Permanent Mission of Switzerland to the United Nations Security Council Secretariat, Jan. 14, 2013, *available at* <http://www.news.admin.ch/NSBSubscriber/message/attachments/29293.pdf>.

“ill-timed and counterproductive.”²² Therefore, a referral from the Security Council is, for the time being, unlikely.

It would, of course, be possible for a post-conflict government in Syria to ratify the Rome Statute and refer its own situation to the ICC or permit the Prosecutor to exercise jurisdiction on the basis of her *proprio motu* powers of investigation.²³ The ICC has already received a number of referrals from States concerning crimes committed on their territory.²⁴ Self-referrals have been criticized as an abdication of responsibility to investigate and prosecute on the part of domestic authorities.²⁵ However, such referrals are both consistent with the text of the Rome Statute and its object and purpose, which is to ensure that individuals are held accountable for the commission of international crimes in situations where justice is not sought at the domestic level.²⁶ Another option would be for the Syrian authorities to accept the jurisdiction of the ICC under Article 12(3) of the Rome Statute, which would allow the Prosecutor to initiate an investigation *proprio motu*.²⁷

It is important that any future referral from the Security Council or a State party to the Rome Statute does not undermine the independence of the ICC by seeking to limit the scope of the referral to one side of the con-

22. See UPDATE 1-Russia Opposes Syria Crisis War Crimes Referral, REUTERS (Jan. 15, 2013), <http://www.reuters.com/article/2013/01/15/syria-crisis-russia-idUSL6N0AKCNB20130115>.

23. Rome Statute, *supra* note 7, art. 13. In order to allow the Court to address crimes committed since the beginning of the conflict the Syrian authorities would need to make a declaration under Article 12(3) accepting the jurisdiction of the Court for crimes committed after entry into force of the Statute in 2002. If no declaration is made, the Court would only have jurisdiction with respect to crimes committed after entry into force of the Rome Statute in Syria. *Id.*, art. 11(2).

24. These are the situations in Uganda, the Democratic Republic of the Congo, the Central African Republic, Mali and, more recently, the Union of the Comoros.

25. WILLIAM A. SCHABAS, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 165 (4th ed. 2011). See also Phil Clark, *Chasing Cases: The ICC and the Politics of State Referral in the Democratic Republic of the Congo and Uganda*, in THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE (Volume II) 1201 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

26. See Darryl Robinson, *The Mysterious Mysteriousness of Complementarity*, 21 CRIMINAL LAW FORUM 67 (2010).

27. An investigation has been initiated in such a manner in the Côte d'Ivoire. See Situation in the Côte d'Ivoire, Case No. ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the situation in the Republic of Côte d'Ivoire, Pre-Trial Chamber III, (Oct. 3, 2011), <http://www.icc-pi.int/iccdocs/doc/doc1240553.pdf>.

flict.²⁸ Where States have attempted to do so in the past, the Prosecutor has interpreted the referral to include all crimes committed within the territory.²⁹ If the Security Council was to refer one side of a conflict to the ICC, the Prosecutor could refuse to initiate an investigation under Article 53(1)(c) of the Rome Statute, which requires the Prosecutor to determine that an investigation would be in the interests of justice.³⁰

Another difficulty raised by prosecutions at the ICC is the Court's reliance on the cooperation of States to oversee the criminal justice process. If the jurisdiction of the Court is triggered and the Prosecutor decides to initiate an investigation, the Court will be heavily dependent on State cooperation to gain access to evidence, transfer perpetrators to the Court, protect witnesses and so on. Past practice has shown that State cooperation has not always been forthcoming in relation to situations that have been referred to the ICC by the Security Council, despite the existence of an obligation to cooperate in the Security Council resolution making the referral.³¹ Moreover, whilst a self-referral from Syrian authorities may initially be

28. For discussion as to whether or not the Security Council could restrict a referral to the Syrian government's use of chemical weapons, see Kevin Jon Heller, *Could the Security Council Refer Only Assad's Use of Chemical Weapons?* OPINIO JURIS (Aug. 27, 2013), <http://opiniojuris.org/2013/08/27/security-council-refer-assads-use-chemical-weapons/>. It should be noted that previous referrals from the Security Council have sought to restrict their scope. See, e.g., S.C. Res. 1970, ¶ 6, U.N. Doc. S/RES/1970 (Feb. 26, 2011) (S.C. Resolution 1970 sought to limit the exercise of the Court's jurisdiction in Libya by providing that "nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.").

29. Following the Ugandan self-referral in December 2003, the Office of the Prosecutor of the ICC "informed the Government of Uganda that, in compliance with its obligations of impartiality, the Office would interpret the referral to include all crimes committed within Northern Uganda." See Office of the Prosecutor, Report on the Activities Performed during the First Three Years (June 2003–June 2006), 25 (Sept. 12, 2006), http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf. However, the Prosecutor has subsequently been criticized for failing to address both sides of the conflict. See William A. Schabas, *Complementarity in Practice: Creative Solutions or a Trap for the Court?*, in THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS 36 (Mauro Politi & Federica Gioia eds., 2008).

30. See also Heller, *supra* note 28.

31. See Göran Sluiter, *Obtaining Cooperation from Sudan—Where is the Law?* 6 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 871 (2008).

accompanied by State cooperation, this could easily be lost following a change in government or the decision of the Prosecutor to investigate the conduct of State officials,³² rendering the Court ineffective.

A further issue associated with the ICC as a forum for justice concerns the Court's substantive jurisdiction. It is not clear from the text of the Rome Statute whether the Court has jurisdiction to address the use of chemical weapons. Reference to chemical weapons was removed from the Statute during the drafting process as a compromise for States that felt chemical and biological weapons should not be included in the Statute if nuclear weapons were left out.³³ Nevertheless, the Statute was adopted with three provisions that could be read to encompass chemical weapons.³⁴

These provisions do not, however, apply to non-international armed conflicts, such as the conflict in Syria.³⁵ During the first Review Conference of the Rome Statute in 2010, Article 8 was amended to prohibit the use of the same range of weapons in a non-international armed conflict that are not permitted in the context of an international armed conflict.³⁶ Some ambiguity exists as to the entry into force of the provisions and the ability of the ICC to exercise jurisdiction on the basis of a referral from the Security Council.³⁷ Putting these issues to one side, the question remains as to

32. Paola Gaeta, *Is the Practice of "Self-Referrals" a Sound Start for the ICC?*, 2 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 950 (2004).

33. SCHABAS, *supra* note 25, at 138.

34. Rome Statute, *supra* note 7, art. 8(2)(b)(ii) (prohibiting "employing poison or poisoned weapons"); *Id.*, art. 8(2)(b)(xviii) (prohibiting "employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices"); and *id.*, art. 8(2)(b)(xx) (prohibiting "employing weapons, projections and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict . . .").

35. See *Syria: ICRC and Syrian Arab Red Crescent Maintain Aid Effort Amid Increased Fighting*, ICRC (July 17, 2012), <http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm>.

36. Amendments to the Rome Statute, RC/Res. 5 (2010). See also Amal Alamuddin and Philippa Webb, *Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute*, 8(5) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1219 (2010).

37. The amendment is stated to "enter into force in accordance with article 121, paragraph 5 of the Statute." Amendments to the Rome Statute, *supra* note 36, ¶ 1. It is unclear from the text of Article 121(5) whether the ICC could exercise jurisdiction in relation to the crimes listed in the amendment following referral by the Security Council. For discussion, see Dapo Akande, *Can the ICC Prosecute for Use of Chemical Weapons in Syria?*, EJJLTALK! (Aug. 23, 2013), <http://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/>.

whether or not the provisions can be interpreted to include the use of chemical weapons.³⁸

Another approach would be to bring charges for the war crime of intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities.³⁹ The use of chemical weapons may also constitute a crime against humanity under the Rome Statute if it amounts to a “widespread or systematic attack directed against any civilian population, with knowledge of the attack” and results in one or more of the prohibited acts listed in the Rome Statute, such as murder or torture.⁴⁰ It is worth noting that Article 7 of the Rome Statute, which provides the Court with jurisdiction over crimes against humanity, requires the prohibited acts to be carried out “pursuant to or in furtherance of a State or organizational policy to commit such an attack.”⁴¹

Even if the ICC does exercise jurisdiction and gains the State support required to bring perpetrators to justice, it could only ever provide a partial response to the atrocities committed in Syria. The ICC is a court of limited capacity and as such is restricted to trying a small number of perpetrators. If the jurisdiction of the ICC is triggered, the Prosecutor is likely to follow its policy of focusing on those bearing greatest responsibility for crimes committed on the territory,⁴² leaving the crimes of lower level perpetrators to be addressed elsewhere.

38. For discussion see *id.*; Heller, *supra* note 28.

39. Rome Statute, *supra* note 7, art. 8(2)(e)(i).

40. *Id.*, arts. 7(1)(a) and (f).

41. *Id.*, art. 7(2)(a). In its decision of March 31, 2010, Pre-Trial Chamber II of the ICC interpreted the concept of an organization under Article 7(2)(a) to include non-State entities. See Situation in the Republic of Kenya, Case No., ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, ¶ 92 (Mar. 31, 2010). See also Claus Kress, *On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision*, 23 LEIDEN JOURNAL OF INTERNATIONAL LAW 23 (2010).

42. In a policy paper released in 2003, the Office of the Prosecutor stated its policy, in light of the limited resources available to the Court: “On the one hand it will initiate prosecutions of the leaders who bear most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means.” See Office of the Prosecutor, Paper on Some Policy Issues Before the Office of the Prosecutor, International Criminal Court, 3 (Sept. 2003), available at http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf.

C. *An Ad Hoc International Criminal Tribunal*

The formation of an *ad hoc* international criminal tribunal, similar to that created for the Former Yugoslavia and Rwanda under the Security Council's Chapter VII powers, would offer an alternative to prosecution before the ICC.⁴³ The establishment of an international criminal tribunal for Syria was proposed by a group of U.S. congressmen in September 2013.⁴⁴ This approach is questionable for two reasons. First, the creation of such a tribunal would be dependent on the will of the Security Council acting under Chapter VII of the U.N. Charter. It is clear from the refusal of the Security Council to refer the situation in Syria to the ICC that there is currently insufficient will to allow an international criminal justice institution to oversee the investigation and prosecution of crimes committed on the territory.

Second, even if such will did exist, it would be more efficient and cost effective to refer the situation to the ICC rather than to establish another *ad hoc* institution in the image of the International Criminal Tribunal for the former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR).⁴⁵ One of the key benefits of establishing the ICC is that the time-consuming and costly process of creating new institutions can be avoided by referring situations to a permanent mechanism.⁴⁶ In the event that sufficient will is gathered for the pursuit of international criminal justice, it would be more likely, and more prudent, for the Security Council to refer the situation to the ICC under Article 13(b) of the Rome Statute than to establish a new institution for the same purpose.

D. *An Internationalized Criminal Tribunal*

The creation of an internationalized criminal tribunal, combining international and domestic elements in terms of personnel and, perhaps, applica-

43. *See supra* note 8.

44. Immediate Establishment of a Syrian War Crimes Tribunal Resolution, H. Con. Res. 51, 113th Cong. (2013) (referred to committee).

45. The total costs of the ICTY and the ICTR have been estimated to be \$2,319,357,047 and \$1,757,521,910, respectively. *See* Daniel McLaughlin, *International Criminal Tribunals: A Visual Overview*, Report of the Leitner Centre of International Law and Justice (2013), available at <http://www.leitnercenter.org/files/News/International%20Criminal%20Tribunals.pdf>.

46. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *supra* note 12, Annex XIV.

ble law, would provide another possible venue for justice.⁴⁷ In August 2013, a group of international experts put forward a proposal for the establishment of such a tribunal.⁴⁸ The tribunal would have its seat in Damascus, Syria.⁴⁹ Its purpose, according to the proposal, would be to “prosecute those most responsible for atrocity crimes committed in Syria by all sides of the conflict when the political situation permits, presumably following a change in government.”⁵⁰ The tribunal is envisaged to work alongside the ordinary criminal and military courts of Syria, which would oversee the prosecution of lower level perpetrators. It also could possibly form part of a multilayered institutional arrangement, operating at a midway point between domestic criminal courts and the ICC if a referral is made and the Court’s admissibility criteria are satisfied.

The establishment of an internationalized criminal tribunal would provide a possible route to justice in the absence of domestic or international trials. In some respects, trials before an internationalized mechanism may be considered preferable to purely international or domestic trials. One advantage of an internationalized criminal tribunal is its ability to combine international and local personnel. The proposal for an internationalized tribunal for Syria provides that international personnel such as judges or advisers would work alongside domestic staff.⁵¹

Whilst the involvement of local personnel could enhance the sense of domestic ownership and impact of proceedings within the local population,⁵² the participation of international personnel could bring expertise and increase the perceived independence and impartiality of the criminal justice process.⁵³ The combination of international and domestic personnel could also allow for an exchange of knowledge and expertise which may ultimate-

47. *See supra* note 9.

48. The Draft Statute for a Syrian [Extraordinary] [Special] Tribunal to Prosecute Atrocity Crimes can be found in the Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes (Aug. 27, 2013), available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2013/09/Chautauqua-Blueprint1.pdf> [hereinafter Chautauqua Blueprint].

49. *Id.*, art. 3.

50. *Id.*, at 1.

51. *Id.*, art. 5.

52. Lindsay Raub, *Positioning Hybrid Trials in International Criminal Justice*, 42 INTERNATIONAL LAW AND POLITICS 1013, 1017, 1041–44 (2009). *See also* Laura A. Dickinson, *The Promise of Hybrid Court* 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 295, 306 (2003).

53. Dickinson, *supra* note 52, at 306.

ly strengthen domestic capacity to oversee the investigation and prosecution of international crimes.⁵⁴

Although the creation of an internationalized criminal tribunal for Syria has many potential advantages, it also raises a number of concerns. One issue is that the involvement of victors in the prosecution of the defeated could result in biased and unfair trials. Other internationalized tribunals, such as the Iraqi High Tribunal and the Extraordinary Chambers in the Courts of Cambodia, have been criticized on this basis.⁵⁵ A way of avoiding accusations of victors' justice would be to couple the establishment of an internationalized criminal tribunal with a referral to the ICC.⁵⁶ This would allow the ICC to address the most politically sensitive, and possibly destabilizing, cases in an independent and impartial manner and reduce the potential for allegations of bias. It would, of course, be dependent on the will of the post-conflict government (or the Security Council) to make such a referral. Previous tribunals have also faced challenges in the form of financial instability, coordination between their international and national components and difficulties in securing the cooperation of local authorities or the authorities of third States.⁵⁷ An internationalized tribunal for Syria could encounter similar obstacles. If it does, the likelihood it will render justice could be significantly reduced.

E. The Domestic Courts of Third States

Individuals responsible for the commission of international crimes in Syria could also be brought to justice before the courts of third States. The principle of universal jurisdiction provides a basis on which States can exercise

54. Raub, *supra* note 52, at 1043; Dickinson, *supra* note 52, at 307.

55. Carsten Stahn, *Syria, Security Resolution 2118 (2013) and Peace versus Justice: Two Steps Forward, One Step Back?*, EJILTALK! (Oct. 3, 2013), <http://www.ejiltalk.org/syria-security-resolution-2118-2013-and-peace-versus-justice-two-steps-forward-one-step-back/>. In relation to the Iraqi High Tribunal, see Michael A. Newton, *The Iraqi High Criminal Court: Controversy and Contributions*, 88 INTERNATIONAL REVIEW OF THE RED CROSS 862 (2006); Michael P. Scharf, *The Iraqi High Tribunal: A Viable Experiment in International Justice?*, 5(2) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 258 (2007); Sylvia de Bertadano, *Were there More Acceptable Alternatives to the Iraqi High Tribunal?*, 5(2) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 294 (2007); HUMAN RIGHTS WATCH REPORT, DUJAIL: THE FIRST TRIAL BEFORE THE IRAQI HIGH TRIBUNAL (2006), <http://www.hrw.org/reports/2006/11/19/judging-dujail>.

56. The operation of hybrid courts has been considered to be compatible with the ICC's complementarity regime. See Dickinson, *supra* note 52, at 309.

57. Raub, *supra* note 52, at 1044–46.

criminal jurisdiction over certain offenses despite the lack of a territorial or nationality nexus with the offense.⁵⁸ A number of States have used the principle to oversee the prosecution of individuals for the commission of international crimes.⁵⁹ Since the principle of universal jurisdiction applies to war crimes and crimes against humanity, it would be applicable to crimes committed on Syrian territory.⁶⁰ The exercise of universal jurisdiction by third States may provide a route to justice in the event that domestic courts fail to investigate and prosecute and an international(ized) institution is not given jurisdiction.

It is unlikely, however, that a large number of perpetrators would be tried before the domestic courts of third States. First, a third State must have enacted domestic laws enabling it to investigate and prosecute on the basis of universal jurisdiction.⁶¹ Second, the third State would need to be in possession of sufficient evidence and have access to witnesses before it could carry out a successful prosecution.⁶² This would entail the cooperation of the territorial State, which may not be forthcoming. Third, the domestic law of the third State may require presence of the accused on the territory for jurisdiction to be exercised.⁶³ Even if trials *in absentia* are permitted under its domestic law, such trials are likely to be criticized on human rights grounds.⁶⁴ Moreover, difficulties can be expected in gaining access to evidence if the reason for the absence of the accused is connected to refusal of the territorial State to permit extradition.⁶⁵ Finally, as affirmed by the I.C.J. in the *Arrest Warrant Case*, sitting government officials are immune from prosecution in the courts of third States during their term of

58. STEVEN R. RATNER, JASON S. ABRAMS & JAMES L. BISHOFF, ACCOUNTABILITY FOR HUMAN RIGHTS IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 178 (3d ed. 2009).

59. *Id.*, at 198.

60. See Institute of Int'l Law, Seventh Comm'n Resolution, Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes (Aug. 26, 2005) (by Christian Tomuschat), available at http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf.

61. RATNER, ABRAMS & BISHOFF, *supra* note 58, at 198.

62. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *supra* note 12, Annex XIV.

63. ANTONIO CASSESE, PAOLA GAETA, LAUREL BAIG, MARY FAN, CHRISTOPHER GOSNELL & ALEX WHITING, CASSESE'S INTERNATIONAL CRIMINAL LAW 278 (3d ed. 2013).

64. *Id.*, at 280.

65. *Id.*

office.⁶⁶ Consequently, whilst it is possible for third States to prosecute individuals for crimes committed during the conflict in Syria, other mechanisms are likely to play a more significant role in the fight against impunity.

III. CONCLUDING OBSERVATIONS

Justice for the crimes committed during the course of the conflict in Syria is likely to be pursued in a number of different arenas.⁶⁷ A combination of accountability mechanisms may, indeed, be desirable. There are clear benefits to the prosecution of higher-level perpetrators before the ICC and an internationalized criminal tribunal, whilst lower level perpetrators are addressed by domestic criminal courts. A multi-layered institutional arrangement would allow the benefits of local trials to be realized and at the same time ensure that the highest level perpetrators are tried fairly and impartially before an international mechanism in a manner that is less likely to disrupt a fragile peace settlement. The potential for several judicial mechanisms to exercise jurisdiction in relation to the crimes committed in Syria raises interesting questions about the nature of the institutional relationship between those mechanisms and the distribution of cases between them.

Regardless of whether or not the situation in Syria is referred to the ICC or an internationalized court is established, domestic courts will have an important role to play in the fight against impunity for crimes committed throughout the course of the conflict. Practice to date has shown that international and internationalized mechanisms are only able to oversee the trial of a relatively small number of high-level perpetrators and would be unable to address all the crimes that are understood to have been committed on Syrian territory. Thought must, therefore, be given to the construction of domestic capacity to investigate and prosecute international crimes as part of the post-conflict reconstruction process.

It is possible for international and internationalized criminal justice mechanisms to play a role in boosting the capacity of domestic criminal courts through the exchange of information and expertise. The impact of

66. Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 ¶ 58 (Feb. 14). *See also* RATNER, ABRAMS & BISHOFF, *supra* note 58, at 207.

67. *See* Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *supra* note 12, Annex XIV.

an internationalized criminal tribunal on the construction of domestic capacity would depend on the nature and degree of interaction between international and domestic staff and efforts made to transfer expertise to local courts. The ICC could also assist in the construction of domestic capacity. Indeed, the principle of complementarity that underpins the ICC's system of justice has been understood to include a "positive" aspect whereby the Court seeks to promote trials at the domestic level.⁶⁸ The ways in which the ICC can boost domestic capacity are, however, limited by the budget of the ICC as well as its judicial mandate.⁶⁹

Given the budgetary restrictions of international and internationalized courts and tribunals, and their limited mandates, other international organizations, civil society and third States will be required to contribute in order to build a domestic system capable of seeking justice for those affected by the crimes committed during the course of the conflict in Syria. These actors must now work together to ensure that these atrocities do not go unpunished and that those responsible are brought, fairly and impartially, to justice.

68. Stahn, *supra* note 14, at 88. See also William W. Burke-White, *Implementing a Policy of Positive Complementarity in the Rome System of Justice* 19 CRIMINAL LAW FORUM 19 (2008).

69. For an outline of the role that the Office of the Prosecutor can play in encouraging genuine national proceedings, see The Office of the Prosecutor, International Criminal Court, Prosecutorial Strategy (2009-2012), ¶ 17 (Feb. 1, 2010), <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf>.