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## Sequencing Peace and Justice in Syria

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# SEQUENCING PEACE AND JUSTICE IN SYRIA

*Milena Sterio*\*

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## I. INTRODUCTION

Since 2011, the conflict in Syria has caused the death of hundreds of thousands of individuals and the displacement of millions.<sup>1</sup> Efforts to refer the Syrian situation to the International Criminal Court (ICC) have consistently failed despite well-documented reports about the commission of serious crimes in Syria, including the use of chemical weapons against civilians, torture, the use of child soldiers, and crimes of sexual violence.<sup>2</sup> Only a handful of situations have been investigated thus far, mostly within national jurisdictions of western European nations.<sup>3</sup> While the Security Council has been deadlocked with respect to Syria, the General Assembly passed a resolution in December 2016, 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 (Mechanism or IIIM).<sup>4</sup> As of today, it is unclear whether the evidence gathered through the Mechanism will be used in a subsequent prosecution, and whether the work of the Mechanism will lead toward accountability for those responsible for Syrian atrocities.

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1. Jack Moore, *Syria War Death Toll Hits 321,000 with Further 145,000 Missing: Monitor*, NEWSWEEK (Mar. 13, 2017, 1:14 PM), <http://www.newsweek.com/sixth-anniversary-syrian-conflict-looks-war-monitor-says-465000-killed-or-567181> (reporting that as of March 2017, the war in Syria has resulted in 321,000 deaths and that an additional 145,000 individuals were missing).

2. Press Release, Security Council, Referral of Syria to International Criminal Court Fails As Negative Votes Prevent Security Council from Adopting Draft Resolution, U.N. Press Release SC/11407 (May 22, 2014).

3. See *infra* Part II.

4. Beti Hohler & Elizabeth Pederson, *The Syria Mechanism: Bridge to Prosecutions Or Evidentiary Limbo?*, E-INT'L REL. (May 26, 2017), <http://www.e-ir.info/2017/05/26/the-syria-mechanism-bridge-to-prosecutions-or-evidentiary-limbo/>.

Parallel to the ongoing quest for accountability, the international community has been concerned with negotiating peace for Syria in order to end the violent civil war, which has already claimed thousands of lives.<sup>5</sup> Achieving peace in Syria may not necessarily lead toward immediate accountability, and conversely, a focus on accountability may derail the peace process. This Article will explore whether the dual goals of peace and justice can be reconciled in the Syrian context, and how these goals may be properly sequenced, in order to potentially achieve long-lasting peace in Syria without sacrificing justice. Part I will explore the tension between the dual goals of peace and justice in both a theoretical manner, as well as in the Syrian context. Part II will describe existing accountability models in the international community and how these may be applicable in the Syrian situation, and Part III will focus on the work of the Mechanism, an already established model of preliminary accountability for Syria. This Article will conclude that peace and justice may appear irreconcilable in some contexts, but that such goals may co-exist if properly sequenced and applied to a particular situation, such as Syria.

## II. DUAL GOALS OF PEACE AND JUSTICE

Peace and justice may co-exist in some contexts and societies. Peace and justice may however appear irreconcilable in other transitional justice scenarios. In some situations, the pursuit of justice and accountability may be viewed as undermining the prospects of peace. In such transitional justice societies, the pursuit of peace may appear more important than the quest for accountability, and the latter may be sacrificed in order to halt bloodshed and achieve peace.<sup>6</sup> In other situations, however, it may be possible to sequence peace and justice—to seek the end of violence first but to focus on accountability later.

In several Latin American countries, dictators which had ruled such countries in the late 1970s and early 1980s peacefully stepped out of power, but requested blanket amnesties for themselves and other members of their oppressive regimes.<sup>7</sup> In such instances, it may be argued that accountability

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5. *News Focus: Syria*, UN NEWS CTR., <https://www.un.org/apps/news/infocusRel.asp?infocusID=146> (last visited Jan. 18, 2018) (reporting on ongoing Syrian peace negotiations, and that parties to the peace process have met in Geneva four times during 2017, and three times during 2016; reporting also that parties to the peace process attended, in parallel, Astana peace talks in Kazakhstan in early 2017).

6. See TRANSITIONAL JUSTICE IN LATIN AMERICA: THE UNEVEN ROAD FROM IMPUNITY TOWARDS ACCOUNTABILITY 1–6 (Elin Skaar et al. eds., 2016).

7. Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707, 720–29 (1999); see Jo-Marie Burt, *The Torture Report: Latin America's Lessons for the*

was sacrificed toward the pursuit of peace and a peaceful transition to democracy. In many Latin American countries, however, accountability has become important and amnesty laws have been overturned or ignored. Thus, criminal trials have moved forward in several countries, including Argentina, Chile, Uruguay, Peru, and Guatemala.<sup>8</sup> It may be argued that while the pursuit of peace and the goal of a peaceful transition to democracy trumped accountability in the first instance in many Latin American societies, but that accountability remained important nonetheless and is currently at the forefront in many such countries and societies.

In other instances, peace and justice have always co-existed, either through peace accords coupled with modified accountability mechanisms, or through peace accords and concurrent prosecutions. South Africa is an example of the former. When the South African apartheid regime negotiated its surrender of power and agreed to transition to a democratic regime, questions of accountability prominently surfaced.<sup>9</sup> Would members of the apartheid regime face accountability for the atrocities which they committed while in power? If so, pursuant to which model of accountability? Accountability became a stumbling stone in the transition process, with the ruling apartheid party members requiring immunity from prosecution as a condition of their peaceful exit from power.<sup>10</sup> A solution was negotiated with the creation of the Truth and Reconciliation Commission (TRC)—a commission equipped with issuing amnesty (from domestic prosecution) to those who testified before it and were able to establish that the acts which they committed had a political purpose.<sup>11</sup> Ultimately, the TRC granted 1167 applications for amnesty, out of a total of 7000 applications received; those who did not receive amnesty from the TRC remained subject to the possibility of criminal prosecution in South African courts.<sup>12</sup> In South Africa, the goal of peace resulted in the creation

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*United States*, NACLA (Dec. 10, 2014), <https://nacla.org/news/2014/12/10/torture-report-latin-america's-lessons-united-states>.

8. Burt, *supra* note 7.

9. Jasmina Brankovic, *Responsabilidad y Reconciliación Nacional en Sudáfrica* [Accountability and National Reconciliation in South Africa], EDICIONES INFOJUS: DERECHOS HUMANOS 2, no. 4, 2013, at 55–86.

10. Unit 6. *The End of Apartheid and the Birth of Democracy*, S. AFR.: OVERCOMING APARTHEID BUILDING DEMOCRACY, <http://overcomingapartheid.msu.edu/unit.php?id=65-24E-6> (last visited Feb. 4, 2018); Alex Boraine, *Truth and Reconciliation in South Africa: The Third Way*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 141, 143–44 (Robert I. Rotberg & Dennis Thompson eds., 2000).

11. TRUTH AND RECONCILIATION COMMISSION, <http://www.justice.gov.za/trc/> (last visited Feb. 4, 2018).

12. *TRC Category - 3. Amnesty*, TRACES TRUTH, [http://truth.wvl.wits.ac.za/cat\\_descr.php?cat=3](http://truth.wvl.wits.ac.za/cat_descr.php?cat=3) (last visited Feb. 4, 2018).

of a modified accountability mechanism, the TRC. While many have applauded the TRC as an appropriate mechanism for achieving peace and reconciliation in South Africa, some have questioned whether such commissions in general provide appropriate accountability for those responsible of the most serious atrocities and violations of international law.<sup>13</sup> It may be concluded that in South Africa, peace and justice co-existed, but that justice took on a modified accountability form through the TRC.

The former Yugoslavia and Sierra Leone are examples of transitional justice scenarios where peace and accountability co-existed almost simultaneously. In the former Yugoslavia, the civil war ended with the Dayton Peace Accords of 1995; the accords did not include an immunity clause for any Serbian, Croatian, or Muslim leaders and their respective regimes.<sup>14</sup> The International Criminal Tribunal for Yugoslavia (ICTY), which was established through Security Council Chapter VII powers a few years before the Dayton Peace Accords, was ultimately able to prosecute most senior leaders of former Yugoslav states.<sup>15</sup> Thus, in the former Yugoslavia, justice was not sacrificed for peace, and the pursuit of peace did not derail the pursuit of accountability. Instead, peace and justice were correctly sequenced and it may be argued that both were achieved.

In Sierra Leone, the 1999 Lome Peace Accord contained an amnesty provision.<sup>16</sup> When the Special Court for Sierra Leone was established in 2002, the Court determined that it could impose accountability of those who may have been subjects of the amnesty provision of the Lome Peace Accord, because the amnesty concerned domestic prosecutions only and the Court was of an international/hybrid character.<sup>17</sup> In Sierra Leone, like in

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13. See *Azanian Peoples Org. (AZAPO) et al. v. President of the Republic of South Africa* 1996 (4) SA 1 (CC) at 22 para. 21 (S. Afr.).

14. See generally General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.-Croat.-Yugo., Dec. 14, 1995, 35 I.L.M. 75; see also John R.W.D. Jones, *The Implications of the Peace Agreement for the International Criminal Tribunal for the Former Yugoslavia*, 7 EUR. J. INT'L L. 226, 234 (1996) (noting that the Dayton Peace Accords did not contain an amnesty clause).

15. The ICTY "was established by the Security Council under Chapter VII of the United Nations Charter as an enforcement measure aimed at restoring and maintaining international peace and security in the region (S/RES/827 (1993))." Jones, *supra* note 14, at 226 n.2 (1996). For a general discussion of the relationship between the Dayton Peace Accords and the ICTY, see *id.* at 226-44.

16. Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Sierra Leone, Sierra-Leona-R.U.F./S.L., July 7, 1999.

17. Special Court for Sierra Leone Appeals Chamber, May 25, 2004, SCSL-2004-14-AR72(E), (SL); Press Release, Amnesty International, Sierra Leone: Special Court Rejects Amnesty for the Worst Crimes Known to Humanity (Mar. 18, 2004) ("The Special Court for Sierra Leone held that, in accordance with international law, the general amnesty granted in the 1999 Lomé peace agreement

the former Yugoslavia, peace and justice were properly sequenced and somewhat simultaneously achieved.

The above examples demonstrate that peace and justice may co-exist, and that, if sequenced properly, both may be achieved in a transitional society. In Syria, the goal of peace should not altogether trump the goal of accountability. Peace and accountability could co-exist, similar to the South African, Yugoslav, and Sierra Leonian experiences. Peace and justice could co-exist either pursuant to the South African model, where accountability took the form of a TRC, or pursuant to the former Yugoslavia and Sierra Leone models, where a peace treaty was signed and accountability imposed, through an international or hybrid tribunal, in the short term following the achievement of peace. The section below will briefly discuss existing accountability options for Syria.

### III. EXISTING ACCOUNTABILITY AND JUSTICE MODELS

Several accountability models exist and have already been utilized in different international and non-international conflicts. Such accountability models include national prosecutions, internationalized domestic war crimes chambers, hybrid tribunals, international ad hoc tribunals, and the ICC.<sup>18</sup> In addition, truth and reconciliation commissions, as mentioned above, have been formed and analyzed as alternative models of accountability.<sup>19</sup> This section will briefly describe such existing models of accountability while assessing whether they could be utilized in the Syrian context.

Perpetrators of atrocities such as war crimes, crimes against humanity, genocide, or other violations, can be prosecuted in national courts, provided that such national jurisdictions have penal laws which have codified such international crimes as well as appropriate jurisdictional statutes.<sup>20</sup> As of today, many national jurisdictions have penal codes which embrace international crimes.<sup>21</sup> In addition, perpetrators of international offenses

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was 'ineffective' in preventing international courts, such as the Special Court, or foreign courts from prosecuting crimes against humanity and war crimes.").

18. See generally Milena Sterio, *The Future of Ad Hoc Tribunals: An Assessment of Their Utility Post-ICC*, 19 ILSA J. INT'L & COMP. L. 237 (2013) (noting different types of models of accountability and existing tribunals).

19. Abdul Rahman Lamin, *Building Peace Through Accountability in Sierra Leone: The Truth and Reconciliation Commission and the Special Court*, 38 J. ASIAN & AFR. STUD. 295 (2003) (discussing truth and reconciliation commissions and accountability).

20. See, e.g., Helmut Kreicker, *National Prosecution of International Crimes from A Comparative Perspective*, 5 INT'L CRIM. L. REV. 313 (2005).

21. DAVID A. KAYE, COUNCIL ON FOREIGN REL., COUNCIL SPECIAL REP. NO. 61, JUSTICE BEYOND THE HAGUE: SUPPORTING THE PROSECUTION OF INTERNATIONAL CRIMES IN NATIONAL

can often be charged and prosecuted for domestic law offenses, such as murder, torture, rape, kidnapping, etc.<sup>22</sup> Most national jurisdictions require a nexus between the perpetrator or investigated alleged crime and their own territory.<sup>23</sup> Thus, many national courts will exercise jurisdiction over an offender if the offender is a national of the prosecuting state, if victims were nationals of the prosecuting state, or if the national security interests of the prosecuting state were somehow harmed by the underlying criminal offense.<sup>24</sup> Some countries have codified the principle of universal jurisdiction and allow for prosecutions of all alleged criminals for particularly heinous offenses, such as genocide, torture, slavery, etc.<sup>25</sup>

Perpetrators of atrocities in Syria could be prosecuted in Syrian national courts for domestic/Syrian law offenses under Syrian criminal law.<sup>26</sup> Syrian courts would surely have jurisdiction over Syrian perpetrators for alleged crimes committed on Syrian territory. This scenario, although theoretically possible, is not feasible in the current political climate and leadership of President Assad. It is unlikely that President Assad would allow Syrian courts to investigate atrocities which may potentially implicate his own regime. In addition, because of the ongoing conflict in Syria, it is uncertain how much capacity Syrian domestic courts would have to undertake a complex investigation and prosecution, which could implicate a multitude of evidentiary documents, witnesses, and other resources.<sup>27</sup>

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COURTS 6 (June 2011), [https://www.cfr.org/sites/default/files/pdf/2011/05/Beyond\\_The\\_Hague\\_CSR\\_61.pdf](https://www.cfr.org/sites/default/files/pdf/2011/05/Beyond_The_Hague_CSR_61.pdf) (noting that countries such as Argentina, Bosnia, Colombia and Germany have established national courts and specialized chambers capable of prosecuting individuals for war crimes and crimes against humanity, and that many NATO countries have the practice of prosecuting their own military personnel accused of war crimes).

22. See, e.g., *Courts of First Resort: Prosecuting International Crimes at the National Level*, ICTJ (Oct. 24, 2012), <https://www.ictj.org/news/courts-first-resort-prosecuting-international-crimes-national-level> (reporting on the Greentree Conference on Complementarity, at which conference participants assessed national prosecutions for the purposes of ICC complementarity with respect to Colombia, the Democratic Republic of the Congo (DRC), Guatemala, and Ivory Coast.); see also *National Prosecutions of International Crimes*, MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES STRAFRECHT, [https://www.mpicc.de/en/forschung/forschungsarbeit/strafrecht/nationale\\_strafverfolgung.html](https://www.mpicc.de/en/forschung/forschungsarbeit/strafrecht/nationale_strafverfolgung.html) (last visited Jan. 31, 2018) (reporting on conferences and reports issued for various countries around the world and their capacity to prosecute international crimes, in the context of ICC complementarity regime).

23. Kreicker, *supra* note 20.

24. *Id.*

25. See generally Elizabeth B. Ludwin King, *Big Fish, Small Ponds: International Crimes in National Courts*, 90 IND. L.J. 829 (2015).

26. Kreicker, *supra* note 20. This conclusion flows from the principle of territoriality of jurisdiction: the idea that states have territorial jurisdiction over offenses committed on their territory.

27. Mark Chadwick, *Justice in Syria: Five Ways to Prosecute International Crime*, CONVERSATION (July 10, 2017, 9:05 AM), <http://theconversation.com/justice-in-syria-five-ways-to-prose>

Moreover, it is uncertain whether the Syrian judiciary is truly independent and neutral, and whether it would be able to lead a politically charged investigation without interference from the Assad regime.<sup>28</sup>

National courts of other states, however, could investigate and possibly prosecute perpetrators of atrocities in Syria. These types of proceedings can occur either in situations where the prosecuting authority has a nexus to the alleged crime (for example, if the perpetrator is a national or resident of the prosecuting state), or in countries where universal jurisdiction statutes exist and where the heinous and universal nature of the alleged crime justifies prosecution by any state's courts.<sup>29</sup> According to recent reports, investigations into Syria are already occurring in France, Finland, Germany, the Netherlands, Norway, Sweden and Switzerland.<sup>30</sup> In Sweden, three individuals have been separately tried and convicted of crimes committed in Syria's war after they left the country and traveled to Sweden.<sup>31</sup> In addition, German authorities have successfully prosecuted perpetrators of Syrian atrocities.<sup>32</sup> More investigations and cases of this sort could take place in the future, and it is human rights defenders' hope that the Mechanism will continue to assist with such prosecutions and cases.<sup>33</sup> While prosecuting perpetrators of Syrian atrocities in national courts under universal jurisdiction constitutes imperfect justice (because such cases are often piecemeal, unlikely to satisfy all victims, result in trials in absentia, and may result in dismissals), slow and imperfect justice may

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cute-international-crime-75908 ("Prosecution of atrocities in the Syrian courts would present considerable logistical and financial difficulties for a ruined state. Even if national trials were feasible (if funded externally, for instance) they would risk being politically vulnerable to manipulation by the ruling elite, whoever that may be.").

28. *Id.*

29. *Justice for Syria*, AMNESTY INT'L, <https://www.amnesty.org/en/latest/campaigns/2017/03/justice-for-syria/> (last visited Jan. 31, 2018) [hereinafter AMNESTY INT'L].

30. *Q&A: First Cracks to Impunity in Syria, Iraq*, HUM. RTS. WATCH (Oct. 20, 2016, 12:01 AM), <https://www.hrw.org/news/2016/10/20/qa-first-cracks-impunity-syria-iraq> [hereinafter HUM. RTS. WATCH: Q&A]; see also Chadwick, *supra* note 27 (reporting that in Sweden, Finland, Germany and Switzerland refugees present in those countries and suspected of international crimes are being prosecuted under the doctrine of universal jurisdiction).

31. Vera Padberg, *Prosecutions of Syrian War Crimes*, iLAWYER BLOG (Feb. 18, 2017), <http://ilawycrblog.com/prosecutions-of-syrian-war-crimes/>.

32. *Syria: First Atrocities Trials Held in Europe*, HUM. RTS. WATCH (Oct. 3, 2017, 12:00 AM), <https://www.hrw.org/news/2017/10/03/syria-first-atrocities-trials-held-europe> (reporting that German courts have successfully prosecuted and convicted Syrian perpetrators, albeit on terrorism charges, and that Swedish courts have also successfully prosecuted and convicted perpetrators of Syrian atrocities).

33. See AMNESTY INT'L, *supra* note 29.



be beneficial to no justice at all.<sup>34</sup> According to war crimes prosecutor Stephen Rapp, “the slow-moving wheels of justice eventually caught up with Chile’s Augusto Pinochet and Slobodan Milosevic of the former Yugoslavia.”<sup>35</sup> As of today, it appears that the Mechanism will cooperate with national jurisdictions and will share some of its investigative work with national prosecutors and that national prosecutions may represent the only near-future model of accountability for Syria.

Because national prosecutions often suffer from “defects,” such as inexperienced judges, prosecutors, and defense counsel, inadequate criminal laws and jurisdictional statutes, and insufficient resources, some countries have created specialized war crimes chambers within their existing judiciaries to investigate and prosecute cases involving international crimes and atrocities.<sup>36</sup> Such war crimes chambers already exist in Bosnia and Herzegovina.<sup>37</sup> The advantage of specialized war crimes chambers is that they may receive assistance from the international community through programs to train judges, prosecutors, and defense counsel, assistance with the possible re-drafting of national penal laws as well as with communications and outreach strategies, and other financial resources. Some domestic war chambers may become “internationalized” in light of significant involvement and assistance by the international community.<sup>38</sup> Examples of internationalized domestic war crimes chambers include the Iraqi Special Tribunal, as well as the new Kosovo Specialist Chambers.<sup>39</sup>

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34. See HUM. RTS. WATCH: Q&A, *supra* note 30.

35. James Reinl, *Could Syria’s ‘Prosecutor Without A Tribunal’ Work?*, ALJAZEERA (May 31, 2017), <http://www.aljazeera.com/indepth/features/2017/05/syria-prosecutor-tribunal-work-170529110910869.html>.

36. Sterio, *supra* note 18, at 244.

37. *Id.* at 245 (noting that the Bosnian War Chamber “is a specialized domestic chamber that handles various war crimes cases, either handed down by the ICTY as part of its completion strategy, or investigated on its own,” that the Chamber applies local law and is located in the capital city of Sarajevo, and that the Chamber “employs a mix of international staff, as well as local Bosnian Serbs, Croats, and Muslims”).

38. *Id.*

39. *Id.*; see KOSOVO SPECIALIST CHAMBERS & SPECIALIST PROSECUTOR’S OFF., <https://www.scp-ks.org/en> (last visited Jan. 31, 2017) [hereinafter KOSOVO] (“Kosovo Specialist Chambers and Specialist Prosecutor’s Office are part of the judicial system of Kosovo. The Chambers are attached to each level of the Kosovo court system . . . . They are of temporary nature with a specific mandate and jurisdiction, namely over certain crimes against humanity, war crimes and other crimes under Kosovo law which allegedly occurred between 1 January 1998 and 31 December 2000 . . . . The Specialist Chambers have a seat in The Hague, the Netherlands, and are to be staffed with international judges, prosecutors and staff.”).

Under the current Syrian leadership of President Assad, it is unrealistic to expect the creation of a specialized war chamber. The same deficiencies which would plague a national prosecution in Syria would similarly affect a specialized tribunal or chamber. Because of resources necessary to create a specialized war crimes chamber, it is also unrealistic to expect that a foreign jurisdiction would create a specialized chamber within its own judicial system solely for the benefit of prosecuting Syrian atrocities. The existing and past war crimes chambers and tribunals, in Bosnia, Kosovo, and Iraq have all been created toward the purpose of prosecuting individuals responsible for atrocities committed in those same countries.<sup>40</sup> A specialized war crimes chamber, or a national prosecution, in Syria could however exist if a new regime were to be put in place or elected. If President Assad were to step down, a new leadership committed to transitional justice may be interested and able to prosecute perpetrators either in Syrian national courts or in a specialized war crimes chamber. As of today, this is a remote possibility.

A third model of accountability which has been utilized by some countries over the past two decades is the creation of a hybrid tribunal. Hybrid tribunals are typically established through an agreement between the host nation, affected by a conflict and resolving transitional justice issues, and the international community, typically the United Nations.<sup>41</sup> Recent examples of hybrid tribunals include the Special Court for Sierra Leone and the Special Tribunal for Lebanon.<sup>42</sup> Hybrid tribunals typically apply a mixture of domestic and international law and are typically composed of judicial chambers consisting of domestic and international judges.<sup>43</sup> They may be located in the host country and thus may have a stronger territorial nexus to the conflict which they are trying to address.<sup>44</sup>

In theory, one could envision the creation of a hybrid tribunal for Syria in the future. Academics have already proposed the creation of such a tribunal.<sup>45</sup> In the United States, a group of senators recently introduced a

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40. See KOSOVO, *supra* note 39; Sterio, *supra* note 18.

41. Sterio, *supra* note 18, at 240–41.

42. *Id.*

43. *Id.* at 241.

44. See, e.g., Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 N.Y.U. J. INT'L L. & POL. 1013, 1023–25 (2009).

45. See *Blue Ribbon Panel of Experts to Unveil Draft Statute for Syrian Tribunal on October 3, 8:30-9:30 AM, At the National Press Club in Washington D.C.*, PILPG (Sept. 25, 2013), <https://www.publicinternationallawandpolicygroup.org/blue-ribbon-panel-of-experts-to-unveil-draftstatuteforsyrian-tribunal-on-october-3-830-930-am-at-the-national-press-club-in-washington-d-c/> (reporting that a panel of former international tribunal chief prosecutors, international judges, and leading experts has prepared a Draft Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes).

bipartisan bill—Syrian War Crimes Accountability Act—aimed at investigating war crimes, crimes against humanity, and genocide in Syria and at imposing accountability on Syrian President Assad.<sup>46</sup> In this bill, the senators called on the United States Secretary of State to assist in creating a hybrid tribunal to investigate and prosecute those responsible for most heinous abuses in Syria, as part of “credible transitional justice efforts.”<sup>47</sup>

Nonetheless, the hybrid tribunal option remains difficult to implement while President Assad is in power. The establishment of a hybrid tribunal presupposes the host country’s agreement, and as mentioned above, it is unlikely that the Assad regime would agree to an investigation and prosecutions by a hybrid tribunal which would implicate itself.<sup>48</sup> If Syrian leadership changed and a new regime accepted to work with the international community to establish a hybrid tribunal, this option may be attractive for a conflict such as the one in Syria. One of the main advantages of hybrid tribunals is their ability to tailor their statutes to the particular conflict they are seeking to address, by incorporating both domestic and international law offenses. A hybrid tribunal for Syria could prosecute perpetrators for international crimes, but could also incorporate Syrian penal law offenses, if necessary. Another advantage of such tribunals is their proximity to the conflict, if they are located in the host country. This is helpful because in terms of outreach to the Syrian people, reconciliation, and national healing, a hybrid tribunal located in Syria would be able to more easily investigate and collect evidence and would likely perform better.<sup>49</sup> As of today, because the probability of regime change in Syria remains low for the near future, a hybrid tribunal remains a theoretical but unlikely option.

A fourth model of accountability involves the creation of an ad hoc international criminal tribunal. The United Nations Security Council, through its Chapter VII powers, created two such tribunals in the 1990s, for the former Yugoslavia and for Rwanda.<sup>50</sup> These tribunals were created against the wishes of the former Yugoslavia and Rwanda and were located outside of these two countries, at The Hague and in Arusha, Tanzania,

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46. *US Senators Call for ‘Hybrid Tribunal’ for Syrian War Crimes*, RT (Apr. 8, 2017, 11:16), <https://www.rt.com/usa/384024-hybrid-tribunal-syria-bill/>.

47. *Id.*

48. Chadwick, *supra* note 27 (“If the Bashar al-Assad regime is to remain in power in Syria this may create significant difficulties for this approach. Its success would depend on the government’s willingness to cooperate and submit itself to investigation alongside opposition groups.”).

49. See Sterio, *supra* note 18, at 240.

50. Marieke L. Wierda, *What Lessons Can Be Learned from the Ad Hoc Tribunals?*, 9 U.C. DAVIS J. INT’L L. & POL’Y 13, 13–14 (2002) (noting the establishing of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)).

respectively.<sup>51</sup> International ad hoc tribunals are composed of international judges and apply international criminal law; they typically do not incorporate any of the features of domestic criminal systems and do not employ local judges.<sup>52</sup> Although such tribunals do not necessitate the relevant country's approval, they do require a Security Council resolution because they involve a process which breaches the affected country's sovereignty. In the Syrian context, Russia and China have already vetoed resolutions which would have authorized the referral of the Syrian situation to the ICC, and it is highly likely that Russia and China would also veto a resolution seeking to establish the creation of a new ad hoc tribunal for Syria.<sup>53</sup> Thus, this option remains of limited utility today. If the geopolitical situation were to change drastically and if Russia and China ceased to support Assad, or if Assad were to step down and a new regime, less pro-Russian and pro-Chinese, were put in power in Syria, then an international ad hoc tribunal could be possible. In the short term, this is unlikely to occur.

Last, the ICC is another model of accountability, where perpetrators of atrocities, such as those committed in Syria, can be prosecuted. The ICC has jurisdiction over three main categories of crimes: genocide; crimes against humanity; and war crimes.<sup>54</sup> In order for a case to come within the ICC's jurisdiction, the alleged crime or crimes must have been committed on the territory of a member state, or the perpetrator must be a national of a member state.<sup>55</sup> Additionally, cases may be referred to the ICC by the Security Council.<sup>56</sup> Syria is not a member of the ICC.<sup>57</sup> Assuming war crimes and crimes against humanity took place in Syria, the ICC would have jurisdiction only over cases involving so-called "foreign fighters"—individuals who are nationals of an ICC member state and who chose to fight in the Syrian conflict.<sup>58</sup> The court would not have jurisdiction over

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51. *Id.*

52. Sterio, *supra* note 18, at 238.

53. See Chadwick, *supra* note 27.

54. See, e.g., James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 VILL. L. REV. 1, 2–3 (2009) (describing the establishment of the International Criminal Court, Situations and Cases).

55. *Id.* at 3.

56. Simi Singh, *The Future of International Criminal Law: The International Criminal Court (ICC)*, 10 TOURO INT'L L. REV. 1, 8–9 (2000); see also Sterio, *supra* note 18, at 239–40.

57. Chadwick, *supra* note 27.

58. See Jennifer Trahan, *New Paths to Accountability for Crimes in Syria and Iraq (Including ICC Jurisdiction over Foreign Fighters)*, JUST SECURITY (Nov. 12, 2014), <https://www.justsecurity.org/17308/paths-accountability-crimes-syria-iraq-including-icc-jurisdiction-foreign-fighters/> (noting that the ICC would have jurisdiction over "foreign fighters").

cases involving Syrian nationals, because the alleged crimes occurred in Syria, on the territory of a non-member state, and the Syrian perpetrators are not nationals of a member state.<sup>59</sup> As mentioned above, the United Nations Security Council can refer any case to the ICC; in the case of Syria, however, Russia and China have already exercised their respective veto powers over a proposed resolution referring the Syrian situation to the ICC.<sup>60</sup> Thus, the ICC is of limited utility in the Syrian context, as it can only assume jurisdiction over cases involving foreign fighters who are nationals of ICC member states.

This relative lack of accountability mechanisms for Syria—as detailed above, in the current situation, where the only viable accountability model is national prosecutions of perpetrators in the courts of third countries which are willing and able to take such remote cases—has led the General Assembly to envision a more creative solution. Thus, in December 2016, the General Assembly passed a resolution creating a Mechanism for Syria.<sup>61</sup> The section below will discuss the Mechanism’s main features and will assess whether the Mechanism can lead toward accountability in Syria.

#### IV. IIIM

As mentioned above, the United Nations General Assembly created a Mechanism for Syria in December 2016.<sup>62</sup> The Mechanism is not a tribunal, and its purpose instead is to collect and preserve evidence, which will later be shared with relevant international and national tribunals that may in the future prosecute those responsible for crimes committed in Syria.<sup>63</sup> The Mechanism’s mandate is to focus on the most serious crimes: genocide; crimes against humanity; and war crimes.<sup>64</sup> The Mechanism will be located in Geneva, and it will be staffed with an international judge or prosecutor and renown experts in international criminal law.<sup>65</sup> The Mechanism’s primary purpose will be to collect and organize evidence

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59. *Id.*

60. *Id.*

61. *Syria: UN General Assembly Adopts Resolution on War Crimes Investigations*, HUM. RTS. WATCH (Dec. 21, 2016, 5:15 PM), <https://www.hrw.org/news/2016/12/21/syria-un-general-assembly-adopts-resolution-war-crimes-investigations>.

62. *Id.*

63. *Id.*

64. Zeid Ra’ad Al Hussein, *International, Impartial and Independent Mechanism on International Crimes Committed in the Syrian Arab Republic*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER (Feb. 27, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21241>.

65. *Id.*

(both inculpatory and exculpatory), which will in the future be shared with competent tribunals and which will contribute toward future prosecutions of perpetrators of Syrian atrocities.<sup>66</sup> The Mechanism, however, will not share information with jurisdictions and authorities which impose the death penalty, and/or which do not abide by basic international human rights standards, such as the right to a fair trial.<sup>67</sup> According to one set of commentators, “[t]he Mechanism is an important addition to the international justice landscape” which may “provide a bridge between the contemporaneous collection of evidence and its use in trials that may take place years or even decades later.”<sup>68</sup> Overall, the Mechanism’s ultimate goal “is to ensure justice for the victims of these crimes and for all the Syrian people affected by the violence.”<sup>69</sup>

For now, according to Kenneth Roth, executive director of Human Rights Watch, the Mechanism is a “prosecutor without a tribunal,” and it remains to be seen how the evidence it collects may be used in the future, and whether the Mechanism will ultimately contribute toward the protection of human rights.<sup>70</sup> Because of Russian and Chinese veto, Security Council has been deadlocked and it is unlikely that the Syrian situation will be referred to the ICC in the near future, or that an ad hoc tribunal will be established for Syria.<sup>71</sup> Thus, it appears more likely that the Mechanism will share evidence and information with national jurisdictions, prosecuting perpetrators of Syrian atrocities under a universal jurisdiction model.

In sum, it may be argued that the Mechanism is the first step necessary toward protecting human rights in Syria, by collecting evidence necessary toward successful future prosecutions and by initiating the accountability conversation regarding Syria within the international community. As mentioned above, in light of the Russian and Chinese veto, it is unlikely that the Security Council will refer the Syrian situation to the ICC in the near future.<sup>72</sup> It is more likely that the Syrian situation will be investigated within national jurisdictions. If President Assad were to step down and if a new regime were to be elected or otherwise installed in Syria, a new hybrid tribunal could be established for Syria. Such a hybrid tribunal in Syria

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66. *Id.*

67. Hohler & Pederson, *supra* note 4.

68. *Id.*

69. Kailey Love, *Will U.N.'s Accountability Mechanism Provide Justice in Syria?*, WASH. REP. ON MIDDLE E. AFF., <https://www.wrmea.org/jordan/lebanon/syria/will-u.n.s-accountabilitymechanism-provide-justice-in-syria.html> (last visited Jan. 23, 2018).

70. Reinl, *supra* note 35.

71. Trahan, *supra* note 58.

72. *Id.*

could build upon the legacy of the Special Court for Sierra Leone and the Special Tribunal for Lebanon, and it could contribute further toward the protection of human rights in the international community. The Mechanism is likely to work with both national jurisdictions as well as with any Syria hybrid tribunal in the future; it is, therefore, the first important step toward accountability for Syria.

## V. CONCLUSION

With respect to Syria, it may be that the war ends in regime transition and that members of the Assad leadership face accountability, either in the ICC (assuming no Russian or Chinese veto), or in an ad hoc tribunal, set up by the Security Council or negotiated by the new Syrian leadership and the international community. If Assad were to step down from power, a new Syrian government could also choose to initiate national prosecutions, or to establish a specialized war crimes chamber to try those responsible for the most serious atrocities during the Syrian civil war. Because many accountability options remain open in the future, the ongoing quest for peace in Syria should not sacrifice accountability. Peace negotiators should focus instead on ending violence without promising blanket immunity to those involved in the conflict, thereby leaving open the option of near-future accountability, through domestic or international prosecutions. Peace and justice can be sequenced properly in Syria, as both of these goals are fundamental to the achievement of global peace and stability.