Justice over impunity: the way towards accountability in Syria

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Abstract

After 6 years of conflict, Syria has descended into one of the most dramatic tragedies mankind has experienced since World War II. Over 500 thousand Syrians have been killed and millions displaced as Bashar al Assad has Gripped onto his throne to save the authoritarian regime his father created in the ’70s, no matter the costs. War crimes and crimes against humanity have been committed on a massive scale, the vast majority by the Assad regime and its allies, but also opposition armed groups and emergent terroristic organisations. Impunity, instead of justice, has been the rule of thumb. Domestic and international justice have failed to provide justice for the Syrian people, but this does not mean that there is no hope for accountability in Syria. Foreign courts have begun investigations and criminal proceedings for crimes committed in Syria, and these efforts represent a positive step in the right direction. At the same time, the heroic documentations performed by Syrian NGOs, together with the complementary work of the International Impartial Independent Mechanism for Syria, could prove fundamental for a future comprehensive process of accountability.

Introduction: making the case for accountability

In every situation in which a country has to deal with mass atrocities, being them the consequence of a conflict or of an authoritarian regime (or both of them), the supposed trade-off between peace and justice emerges. The question often raised is can both peace and justice be achieved together? Or, do they would one another, forcing a nation to make a difficult choice between impunity and stability on the one hand, and an unstable justice on the other hand?\(^{(1)}\)

The role of criminal prosecutions is crucial in this dichotomous debate. Scholars and practitioners remain divided, with extreme poles defined as maximalist and minimalist.\(^{(2)}\)

\(^{(1)}\) International Center for Transitional Justice, Pursuing Peace, Justice or Both? Factsheet, April 2009
According to maximalists, it is essential to hold the perpetrators of mass atrocities accountable through tribunals, and re-establish the rule of law. The failure in achieving justice would betray the victims, jeopardise reconciliation and consequently damage stability.\(^{(3)}\) The minimalist position, on the other hand, claims that former political leaders and commanders would never accept prosecution and would oppose prosecutions by any means, endangering stability and possibly fuelling new cycles of violence. According to minimalist, amnesties would be more efficient in the long run in maintaining a level of peace necessary for the society to break with the past and start a process of reconciliation.\(^{(4)}\)

If it has been proven that amnesties facilitate transitions, allowing former leaders to step back without risking justice, things are different when it comes to reconciliation. As Kai Ambos points out, the assumption that impunity represents a more fertile ground for reconciliation lays on a reductive definition of reconciliation as “nonlethal violence”; a more articulated definition of the term, which includes the concepts of social harmony and democratic reciprocity, would still not be achieved, allowing powerful perpetrators to escape justice.\(^{(5)}\)

This approach brings us to the difference between positive and negative peace, conceptualised by Johan Galtung.\(^{(6)}\) Negative peace is defined as simple absence of open conflict, while positive peace is a multifaceted concept which includes social cohesion, solidarity, trust, cooperation and legitimacy.\(^{(7)}\) A cease-fire can be sufficient for negative peace, but positive peace requires a far-reaching process of reconstruction of the moral and social fabric of a country. A process that would unlikely be achieved through widespread impunity and amnesties.

One of the main problems faced by scholars and practitioners in the field of post-conflict accountability and transitional justice is the lack of extensive and systematic empirical data to

\(^{(3)}\) Ibid.
\(^{(4)}\) Idem., p. 985
\(^{(7)}\) Ibid.
support the debate. In the last few years, however, more and more studies are trying to close this gap. Olsen, Payne and Reiter, for instance, have analysed the impact of several mechanisms on the human rights situation of a country in the context of a transition from authoritarianism to democracy or in the aftermath of a conflict. Comparing the data of 73 countries, the authors conclude that criminal prosecutions have been essential in every successful transition in the long run. The study also makes a case for the minimalists’ assumption that amnesties are necessary to foster stability and strengthen institutions in the fragile transitional period, but with significant restrictions; the transition can be successful only if amnesties are limited and allow some criminal prosecutions, or if they are completely discarded after an initial phase of impunity, as it happened for instance in Greece, Uruguay and Argentina.

Considering the specific context of Syria, the majority of Syrians believe justice will be fundamental, as confirmed by several surveys.

Syria has been characterised by a general climate of impunity for the abuses committed by state authorities for over 40 years. This general disregard for the rule of law has eroded trust towards state institutions, and has created the basis for the brutal repression of peaceful demonstrators that led to the conflict in the first place. Preserving this dangerous climate of impunity would leave root causes of the conflict un-remedied and even worsened, laying the foundations for a very fragile peace.

Discussing from an ivory tower without any reference to reality would be of little help. In a situation of conflict like the one in Syria, power unfortunately comes before law and sets its own rules. The current status of the conflict suggests that the Syrian regime is highly unlikely to lose the war and collapse. This is why it is important to analyse constraints and possibilities within a real context and not in an idealistic, utopian scenario. This will allow us to work on finding realistic paths towards accountability.

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(8) Olsen, Payne, Reiter, *The Justice Balance*

(9) Idem., pp. 997-1002.


Whether the regime collapses or not, millions of Syrians which have suffered and lost family members and friends at the hand of the regime will not forget and will not forgive. Justice is not simply a moral duty but it is also essential to build a positive and sustainable peace and pre-empt a continuation of conflict.

**Limits of national and international justice**

In a situation of mass atrocities and serious crimes, the ideal solution for achieving accountability would be fair and comprehensive prosecutions by domestic courts. In many cases, however, a history of extensive violence results in weak and delegitimized institutions, the judiciary included. In other cases the state has no interest in prosecuting wrongdoers, because they may still be powerful leaders willing to spark new violence if they are threatened with prosecutions and justice. Whenever the state is unable or unwilling to prosecute perpetrators of massive crimes, international justice should fill the gap and bring responsible individuals to justice. This was the idea behind the various international tribunals created starting from the ‘90s, and particularly the International Criminal Court (ICC).

In the case of Syria, however, domestic and international justice have so far fallen short of delivering even a glimpse of justice to the Syrian people.

**Domestic courts**

The judiciary has been an important pillar in Assad’s system of power. The lack of an independent judiciary has been essential in guaranteeing the climate of impunity that has allowed the regime to maintain its tight grip over Syrian society. In fact, the judiciary has never been allowed to develop as an independent institution, even before Hafez al Assad seized power in 1971.\(^{(12)}\) The state of emergency in place from 1963 to 2011 allowed the security apparatus to act outside the boundaries of law while the judiciary was subjugated to the

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executive power.\(^{(13)}\) At the current time the president heads the Supreme Judicial Council (the body responsible for appointing and suspending judges) and nominate the president of the Supreme Constitutional Court.\(^{(14)}\)

In such a context it comes to no surprise that the Syrian judiciary has been completely unable (and unwilling) to guarantee even minimum levels of accountability for the crimes of the regime after the revolution started in 2011. Its legitimacy, already low in the eye of millions of Syrians, has collapsed even further.

It must be recognised however, that several judges and lawyers have tried to carry out their function despite severe constraints. Some of them have left the official judiciary and have collaborated with opposition groups to create a judicial system in liberated areas. Apart from popular tribunals and Sharia Commissions, also professional tribunals have been set up. Examples are the United Judicial Council and the Independent Judicial Council, active in the areas of Aleppo and Idlib respectively.\(^{(15)}\) These efforts have gone some way to filling a huge gap, while facing several difficulties at the same time. The main problem has seemed to be the impossibility to guarantee the independence of the courts from the various armed groups which hold power in the area.\(^{(16)}\) This is unfortunately quite predictable in a situation of armed conflict and in the absence of a clear division of power.

If therefore domestic justice seems extremely far from being able to deliver justice to the Syrian people, we must also remember that a functioning judiciary will be essential for the future the country.\(^{(17)}\) International or foreign justice cannot completely substitute domestic courts, because it would be important to have a sort of national ownership of the process and also because the number of perpetrators is so high that comprehensive justice would need

\(^{(13)}\) Ibid.

\(^{(14)}\) Constitution of the Syrian Arab Republic (2012), art. 133, 141


\(^{(16)}\) Enab Baladi English, *Free Independent Syrian Judiciary Council*, 26 January 2016,
http://english.enabbaladi.net/archives/2016/01/free-independent-syrian-judiciary-council-2/

\(^{(17)}\) Dawlaty, No Peace Without Justice, *Transitional Justice in Syria*, p. 47, 74
the involvement of national courts.\(^{(18)}\) Building an independent and efficient judicial system, therefore, must be a priority in the aftermath of the conflict.

**Hindrances to international justice**

**ICC**

International criminal justice is guided by a principle according to which its role becomes relevant only when the state where serious crimes occurred is unable or unwilling to carry out prosecutions. A clear example is the case of Syria.\(^{(19)}\)

The Syrian conflict, however, has highlighted the limits of international criminal justice and how its main goal, the end of impunity worldwide, is far from being achieved. The ICC, established in 2002 when the statute of Rome came into force, has the mandate to prosecute perpetrators of war crimes, crimes against humanity and genocide.\(^{(20)}\) At least the first two categories of international crimes have been extensively committed in Syria, as documented by human rights activists, local and international NGOs and international organizations such as the UN.\(^{(21)}\) The ICC, however, can only exert jurisdiction over crimes committed within the territory or by a national of a state that ratified the statute of Rome, thus voluntarily accepting the jurisdiction of the court.\(^{(22)}\) However, it is perhaps obvious that many states where these crimes are most likely to occur, such as Syria, failed to ratify the convention.\(^{(23)}\) Even major


\(^{(19)}\) *last amended 2010*, 17 July 1998, art. 17(a)

\(^{(20)}\) Idem., art. 5


\(^{(23)}\) The Status of Ratification of the Rome Statute can be seen at https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20Rome%20Statute.aspx
international powers such as Russia and the US are not party to the statute, as they refused the idea that an international tribunal could prosecute their leaders.\(^{(24)}\)

The only way the ICC can exert jurisdiction over a country which did not ratify the Rome Statute is through a referral from the UN Security Council (SC) acting under chapter VII of the UN Charter.\(^{(25)}\) The five permanent members of the SC, however, can veto such referral. This was the case for Syria in 2014, when Russia and China vetoed a resolution to refer the case to the ICC.\(^{(26)}\) This means that any war criminals can be spared from the ICC if they have the political support of one of the five permanent members, as in the case of Bashar al Assad. Political considerations have the upper hand over law principles, and this is a strong weakness for a judicial body like the ICC.

Blaming the ICC, however, would be misguided, considering that the court can only act within the narrow space granted, or not granted, by states. Rather the Syrian situation confirms once again how the SC is unable to fulfil its “primary responsibility for the maintenance of international peace and security” whenever the political interest of one of the five permanent members is at stake.

At the present situation, and as long as the crimes of Bashar al Assad and his regime are shielded by their powerful Russian benefactor, accountability for the crimes committed in Syria from the ICC remains a far mirage.

A Syrian Special Tribunal

Aside from the ICC with all its inherent limitations, the idea of a special tribunal for Syria has gained some support over the past few years. In August 2013 a group of renowned international experts, in collaboration with Syrian lawyers and civil society organisations,

\(^{(24)}\) Ibid.
\(^{(25)}\) Idem., art. 13 (b)
drafted the statute of a hypothetical tribunal for the Syrian conflict, in a document called the Chautauqua Blueprint.\(^{(27)}\)

From a legal point of view, the establishment of a special tribunal could be problematic. Without the consent of the Syrian regime, only the SC would have an undisputed legal authority to create such a judicial body.

An alternative path could be followed. The General Assembly (GA) could partially take over the role of the SC and follow GA resolution 377 A (v), generally known as “Uniting for Peace”, adopted in 1950 following a SC stalemate during the Korean war. “Uniting for Peace” resolves that:

“if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security […], the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including […] the use of armed force when necessary […].”\(^{(28)}\)

The resolution has been controversial since it seems to stretch the powers of the GA, especially when it comes to the use of armed force, a prerogative of the SC.\(^{(29)}\) The creation of a Special Tribunal for Syria, however, could be a more feasible option, both politically and legally.

The power to create a tribunal is not among the rights conferred to the GA by the UN Charter, but at the same time the charter, as international law in general, is a “living tree” and must adapt to different times and circumstances in order to fulfil its purposes.\(^{(30)}\) The


\(^{(30)}\) Idem., p. 462-63
maintenance of international peace and security is the first purpose listed in the UN Charter, and large-scale violations of basic human rights have been considered as a threat to international peace by the SC at least since the ’90s. If it is surely true that the SC has the primary responsibility to maintain international peace and security, “primary” does not mean “exclusive”, and the GA exercises a secondary responsibility.

In similarity, the UN Charter obliges member states to act in accordance to the principles of the UN, including permanent members of the SC. As a consequence, the five permanent members have to use their veto power in good faith, respecting the purposes of the UN. Russia has irresponsibly used its veto power to shield its ally in Damascus, in clear violation of its obligation to act in accordance with the purposes of the UN to protect international peace and security. The failure of the Security Council to take action, as a consequence of Russian opposition, triggers the secondary responsibility of the GA.

In addition to the majority of UN member states, also the SC itself can request the GA to convene an emergency session to discuss matter of international peace and security. It can do so with the positive vote of 9 members, and the veto cannot be used as it is a procedural

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(33) This principle was confirmed by The International Court of Justice in the Advisory Opinion *Certain Expenses* (1962), p. 163, at http://www.icj-cij.org/files/case-related/49/049-19620720-ADV-01-00-EN.pdf

(34) United Nations, *Charter of the United Nations*, art. 2

(35) Andrew J. Carswell, *Unblocking the UN Security Council*, p. 470-71
decision.\(^{(36)}\) If the request came directly from the SC, the legitimacy of the GA to deliberate on the matter would be even stronger.\(^{(37)}\)

A Special Tribunal for Syria could only be located in a third country, and therefore the legal requirements could be met also without a GA resolution. The country which accepts to host the tribunal could expand its jurisdiction over the crimes committed in Syria through universal jurisdiction.\(^{(38)}\) A GA resolution, however, would be fundamental as it would give the process international legitimacy, qualifying it as a collective effort of the international community. There are many reasons to believe that such a move would gain wide recognition. During the past years, both member states, Syrians, and international NGOs have put pressure on the GA to take a more active stance over the Syrian situation.\(^{(39)}\)

It must be noted that even the creation of a special tribunal would not automatically solve the problem of impunity in Syria. The tribunal, indeed, could be unable to provide real justice simply because many perpetrators would be out of reach, safely protected in Syria or in an allied country. The creation of a Special Tribunal in a third country, with no possibility to bring to justice those who bear the greatest responsibility would likely be of little help, and could even be an obstacle for a more credible tribunal to be established in the post-conflict

\(^{(36)}\) According to resolution “Uniting for Peace”, the SC could refer a situation to the GA with the positive vote of seven members. This would breach art. 27 of the UN Charter which regulates the voting process of the SC. However, the request of a GA special session by the SC has always been considered as a procedural decision, requiring nine positive votes and without the possibility for permanent members to use the veto power. See Andrew J. Carswell, *Unblocking the UN Security Council*, p. 472.

\(^{(37)}\) Andrew J. Carswell, *Unblocking the UN Security Council*, p. 466


period. While international justice languishes, it is important to explore alternative avenues which could provide accountability or pave the way for future prosecutions.

**Alternative options**

**Foreign Courts**

While international justice has fallen short of providing justice for the Syrian people, foreign courts have taken a more active role in challenging the climate of impunity for the atrocities committed in Syria.

German and Swedish courts have taken the lead in this process. Seven persons have already been convicted for war crimes in Syria, albeit for crimes committed by opposition groups. Several investigations are currently ongoing. Sweden has opened a structural investigation (defined as broad preliminary investigations without specific suspects) into the Syrian case, while Germany has prosecuted crimes in the conflict in general and on the crimes committed by Daesh against the Yezidi minority.

In addition, Germany is carrying out specific investigations against senior officials of the Syrian regime. In March 2017 nine Syrian torturers survivors, supported by the European Centre for Constitutional and Human Rights (ECCHR), filed a complaint against six senior officials of the regime accused of carrying out systematic torture in the prisons of the regime. Similarly, in November 2017, a coalition of Syrian and international NGOs, including the ECCHR but also the Syrian Center for Legal Studies and Research and the Syrian Center for Media and Freedom of Expression, cooperated with 13 refugees in order to file a

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(40) Lattimer, Mojtahedi, Tucker, *A Step towards Justice*, p. 16
(42) Idem, p. 31
(43) Pauline Brosch, *Here’s how German courts are planning to prosecute Syrian war crimes*, The Washington Post, 4 April 2017, at https://www.washingtonpost.com/news/democracy-post/wp/2017/04/04/heres-how-german-courts-are-planning-to-prosecute-syrian-war-crimes/?utm_term=.5d32ece34a08
complaint against 17 high ranking officials of the regime.\(^{(44)}\) This active cooperation between Syrian refugees, civil society and criminal prosecutors could be essential in the fight against impunity and give Syrians some cause for hope.

Apart from the high number of Syrians who seek asylum in German and Sweden, the active role of Swedish and German courts has been made possible by the fact that both the countries apply an unadulterated version of universal jurisdiction. Through universal jurisdiction, foreign courts can exert their jurisdiction even when there is no direct link between the perpetrators or the victims and the country were the prosecution is carried out.\(^{(45)}\) The principle behind universal jurisdiction is that certain crimes, like genocide, war crimes and crimes against humanity, offend humanity as a whole, and it is the common responsibility of the global community to prevent those crimes from occurring.\(^{(46)}\)

Universal jurisdiction gives a greater degree of discretion to foreign courts, empowering them to prosecute individuals for crimes committed in Syria and in other conflicts around the globe, even when there is no direct connection with the prosecuting country. At the time being, in Europe, only Germany, Sweden and Norway have included universal jurisdiction in their domestic law,\(^{(47)}\) while other states such as Spain, have limited its applicability to avoid diplomatic headaches.\(^{(48)}\)

Other foreign courts, however, are dealing with the Syrian crisis on different jurisdictional basis, using the concept of passive personality (when the victim is a national of the prosecuting country). The specialized unit for the prosecution of genocide, crimes against

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\(^{(45)}\) Ibid.

\(^{(46)}\) Lattimer, Mojtahedi, Tucker, *A Step towards Justice*, p. 18

\(^{(47)}\) Human Rights Watch, *“These are the Crimes we are Fleeing”*, p. 16

\(^{(48)}\) In 2014 the conservative government of Mariano Rajoy passed a law that severely curbs the possibility to implement universal jurisdiction. The law has already negatively affected the fight against impunity in Syria, when in July 2017 an investigation against several high level officials of the Assad regime was halted by the High Court in Madrid because of lack of jurisdiction. See *Spain court drops complaint against Syrian security forces*, Reuters, 21 July 2017, at https://www.reuters.com/article/us-mideast-crisis-syria-spain/spain-court-drops-complaint-against-syrian-security-forces-idUSKBN1A61J1
humanity, war crimes and torture within the Paris Tribunal has opened a judicial investigation against the Syrian regime, after two Syrian-French nationals filed a complained on behalf of their brothers killed in Syria. (49) Similar investigations have been opened also in Austria and the US. (50)

These efforts constitutes a major step forward in reversing the impotence shown by the international community regarding justice for the Syrian people. At the same time, however, the cases that made it to the trial phase have been few and mostly against opposition or terrorist groups, with only one regime militiaman being convicted so far. (51)

However, there has been little motion in prosecuting Syrian regime figures. The prosecution of high level officials by foreign courts face some legal obstacles. High level officials enjoy immunity under international law, at least while they hold office. The International Court of Justice (ICJ) confirmed this principle in the Arrest Warrant case, stating that “in international law it is firmly established that...certain holders of high-ranking office in a State, such as the Head of State, the Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.” (52) This principle was established in customary international law as a way to permit state officials to conduct international relations without interference, (53) and it is included in the domestic law of several countries, including Germany and Sweden. (54)

The developments of international law towards a more victim-oriented perspective, together with the increasing recognition that certain crimes cannot be tolerated, make the

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(50) Idem., p. 9/66
(51) Human Rights Watch, “These are the Crimes we are Fleeing”, p. 33
(54) Human Rights Watch, “These are the Crimes we are Fleeing”, p. 43
case for a different approach to state immunity.\(^{(55)}\) The Rome Statute of the ICC clearly states that “official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute.”\(^{(56)}\) The preamble of the Rome Statute affirms “that the most serious crimes of concern to the international community as a whole must not go unpunished.”\(^{(57)}\) Shielding high officials from prosecution would not be consistent with the commitment of member states of the Rome Statue to end impunity for international crimes. Germany and Sweden, together with other 121 states, have signed and ratified the Rome Statute.\(^{(58)}\)

Foreign courts are limited in directly prosecuting high level perpetrators, primarily because such perpetrators would stay away from those states in which they might face prosecution. However, the opening of an official indictment would allow judicial authorities to issue international arrest warrants. An arrest warrant, even though it would currently be hard to be enforced, could affect the freedom of movement of Syrian high ranking officials, reducing safe heavens of impunity. In addition an official indictment would challenge that process of “rehabilitation” for the Assad regime which has been carried out by the regime and its allies, and prevent those officials from recycling themselves in a future Syria.\(^{(59)}\) All these things combined could also represent a deterrent for future violations. Far from being the perfect

\(\text{(55) Sevrine Knuchel, } \textit{State Immunity And The Promise Of Jus Cogens}, \text{ p. 151-52/ 174-75}\)

\(\text{(56) UN General Assembly, } \textit{Rome Statute of the International Criminal Court}, \text{ art. 27}\)

\(\text{(57) Idem., preamble}\)

\(\text{(58) See note 23}\)

\(\text{(59) An example can be the Sochi process and the call for a Syrian National Dialogue between the regime and an “opposition” selected among those who would likely accept Assad to stay in power. Such a process has the only goal to support Assad’s propaganda and present him as the sole legitimate leader of Syria, despite the opposition of millions of Syrians; see for example the opinion of the opposition’s High Negotiating Committee, } \textit{HNC: Russia Seeking to Rehabilitate Assad regime Through Sochi Conference}, \text{ National Coalition of Syrian Revolutionary and Opposition Forces, 3 November 2017, at http://en.etilaf.org/all-news/news/hnc-russia-seeking-to-rehabilitate-assad-regime-through-sochi-conference.html}\)
solution, such a course of action would be a first step in the attempts to bring Assad and his collaborators to justice.

Third states should enable their domestic courts to be as effective as possible. Some European countries, such as Germany, Sweden and France, have already created specific bodies in their judiciary to investigate international crimes.\(^{(60)}\) This example must be followed by other countries. In order to overcome the difficulties in investigating a crime scene to which there is no access, judicial authorities need to cooperate with each other, as well as with refugee communities and civil society.

At the same time progressive legislation should be passed in order to remove the roadblocks to ending impunity worldwide. Pure universal jurisdiction must be included in the domestic legal framework of other countries apart from the three mentioned above, and immunity for high level state officials should not be accepted when it comes to the prosecution of international crimes.

However, there should be no illusion. Foreign courts are not in any position to provide for a comprehensive process of accountability for Syria, particularly while the conflict is still ongoing.\(^{(61)}\) Such a process would necessarily need different political conditions within Syria and could only be carried out by domestic and/or international tribunals. But while these conditions are not in place, foreign courts can start the fight against impunity and show the Syrians people that accountability is possible.\(^{(62)}\)

It is not possible to go back in time and prevent the Syrian tragedy from happening. But it is still possible to avoid this tragedy occurring entirely in vain. One of the ways to respect the death of hundreds of thousands of people is to use this tragedy as a lesson for present and future generations. States must commit once and for all to ending impunity in any possible

\(^{(60)}\) Human Rights Watch, “These are the Crimes we are Fleeing”, p. 25-31; Trial International, Make way for Justice #3, Universal Jurisdiction Annual Review 2017, p. 26


\(^{(62)}\) Lattimer, Mojtahedi, Tucker, A Step towards Justice, p. 20
way, removing those obstacles, remnants of a different time in which international law was only a matter of states and power, on the way of a world free from impunity.

**Documentation efforts and the IIIM**

Any process of accountability, being through national, international or foreign courts, would not be possible without the tireless work of thousands of Syrian activists and NGOs, who since 2011 have documented the violations and the abuses committed during the conflict. This extensive effort, carried out in very dangerous conditions, has resulted in a huge mountain of material that has made the Syrian conflict the most documented conflict in history. This material is fundamental to publicly denounce the crimes and challenge the narrative of the regime, but it can potentially also be extremely useful for criminal prosecution.

At the same time, however, a significant part of this material would be difficult to be used in a court of law. This is because in several cases the material is not systematically classified. A video or a picture alone are not enough to reconstruct a crime scene; multiple resources must be used for cross-check and comparison, and therefore every document must be classified according to precise location and timeline. In addition, many activists and local NGOs do not apply consistent verification standards, and therefore their material will be less reliable in front of a judge. Moreover, a lack of a comprehensive international legal approach and a scarce awareness of legal standards could diminish the efficacy of the evidence collected in a criminal process.

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(64) In several countries, like in Argentina, the documentation efforts carried out by civil society organizations supported criminal prosecutions years after the crimes were committed, once the political conditions allowed it. See Priscilla Hayne, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commission*, Routledge, 2nd edition, New York, 2011, pp. 45-47

(65) Public International Law & Policy Group, *Mapping Accountability Efforts in Syria*, p. 29

(66) Ibid.

(67) Idem., p. 36
Several Syrians NGOs have tried to overcome these obstacles and classify the material in a scrupulous way according to international law standards. This different approach to documentation will be fundamental for accountability.\(^{(68)}\)

In this light the creation by the GA, in December 2016, of the International, Impartial Independent Mechanism (IIIM) could be a fundamental innovation.\(^{(69)}\) The IIIM has the monumental task to:

“collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.”\(^{(70)}\)

The IIIM will have the herculean task of transforming the material available, collected by SCSOs, as well as by international NGOs and the International Commission of Inquiry for Syria, into strong judicial evidence.\(^{(71)}\) Foreign courts that are currently investigating crimes in Syria could substantially benefit from this work, and at the same time strong evidence will be preserved for the future when hopefully conditions for a more comprehensive international and/or domestic accountability process may exist.

\(^{(68)}\) See for example the Syrian Accountability Project (http://syrianaccountabilityproject.syr.edu/), the Syria Justice and Accountability Center (https://syriaaccountability.org/what-we-do/) and the Violations Documentation Center in Syria (http://vdc-sy.net/en/)


\(^{(71)}\) Ibid.
In order to operate effectively, the IIIM will need strong financial support, estimated at 13 million USD.\(^{(72)}\) The GA decided that in the initial phase the mechanism will not be directly financed by UN budget, but through states’ voluntary contributions.\(^{(73)}\) Some states have already decided to support the IIIM, the main contributors being Germany, the Netherlands and Finland.\(^{(74)}\) Some others instead, including the US that in the Security Council loudly call for justice and accountability in Syria, have failed to pledge any contributions thus far.\(^{(75)}\) The IIIM is already experiencing financing problems, which have slowed down the work of the mechanism.\(^{(76)}\) In the future it will be important to assure a more stable financing mechanism, possibly through UN funds.

Another fundamental issue that could determine the failure or the success of the IIIM will be its ability to cooperate with the different actors that are working on documentation and accountability in Syria, particularly with Syrian civil society.\(^{(77)}\) The Terms of Reference for the work of the IIIM, prepared by the UN Secretary General in January 2017, does not clearly establish a mutually-beneficial relationship between the IIIM and Syrian civil society organisations (SCSOs). It seems instead to foresee a more unilateral engagement in which the only role of SCSOs is to share information with the IIIM.\(^{(78)}\)


\(^{(73)}\) UN General Assembly, *International, Impartial and Independent Mechanism*, par. 5

\(^{(74)}\) States’ voluntary contributions to the IIIM can be seen at http://www.un.org/News/dh/infocus/Syria/VoluntaryContributionsSyriaIIIM_1_july_2017.pdf

\(^{(75)}\) Ibid.


\(^{(78)}\) See Secretary General, *Terms of reference of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under*
Such a relationship must be inclusive and benefit all the parties involved. If the IIIM will be able to establish a fruitful relationship with SCSOs, discussing with them common strategies and objectives, it would have the legitimacy to act like a centralised body to coordinate accountability efforts. SCSOs would obviously maintain their autonomy, but centralised coordination would be essential for the different actors on the ground to cooperate towards shared goals, avoid duplication, standardise and improve the quality of the evidence collected and close gaps in documentation efforts.\(^{(79)}\)

The IIIM represents a path which is worth trying. Ultimately its success will not only depend on its ability to carry out its task, but on whether or not one day political and security conditions would allow for a real and comprehensive accountability process to be established. At the time being, with the regime gaining new territories every day and with Russia firmly at its side, it seems difficult to believe that such a day will come any time soon. But political conditions can change at any time. Whenever that time might come, Syrians and the international community must be ready.

**Conclusion**

The Assad regime, alongside many other armed groups in the conflict, have wrecked havoc on Syria and its population, with a disregard to human life and human sufferance which concerns us all as human beings. They have been able to do so with complete impunity, with the certainty that they will be spared from justice. This failure to bring to justice perpetrators of heinous crimes, in Syria as everywhere else in the world, is not just an insult to the thousands of victims. It also sets an example that those crimes can go unpunished, eroding established norms around crimes against humanity and war crimes, and its deterrence effect. This makes the world not only less just, but also less safe.

Achieving accountability for the crimes committed in Syria is also essential for laying down the foundation of a sustainable and inclusive peace, including the rule of law and social

\(^{(79)}\) Ingrid Elliott, ‘A Meaningful Step towards Accountability’?, p. 250-54
harmony. In this light, the struggle for justice in Syria is not just a moral duty, but also a pragmatic necessity.

Against a backdrop of the failure of national and international justice, foreign courts have taken a more active stance and have started to fight impunity in Syria. These efforts, despite their limits, most continue and increase.

However, only a more comprehensive national and/or international process of accountability in the future could lay down the foundation for a stable peace in Syria. In this light, the IIIM, alongside Syrian NGOs and activists, could be fundamental for supporting future prosecutions.

Even though justice seems unattainable at the moment, history can give some cause for hope. In several cases a path towards justice that looked precluded eventually found its way, in some cases after months, in some others after years or even decades. Despite the obstacle that sometimes look insurmountable, the struggle for accountability must continue, both for the dignity of the victims and for the future of Syria.