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ACCOUNTABILITY IN SYRIA

What Are the Options?

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OVER SEVEN YEARS SINCE THE BEGINNING OF THE uprising in Syria and the civil war that followed, almost half a million are dead¹ and millions displaced, both internally and abroad.² The suffering and destruction are immense, and the consequences are further destabilizing the volatile region, urging repeated calls for action.³ Staggering numbers of refugees, struggling to escape the horror, reach the distant shores of mostly unwelcoming states.⁴ The violence caused one of the biggest population movements in recent history. Providing aid to affected populations is an ongoing struggle.⁵ In that context, one important question concerns justice and accountability.

Due to the massive numbers of victims and daily reports of carnage, accountability for crimes in Syria became a regular point of contention among diplomats, policy makers, activists, scholars, and practitioners. Even as we witnessed crises in Yemen, South Sudan, Iraq, Libya, Burundi, and most recently, Myanmar, no other crisis was reported on as much as Syria. The media coverage of the carnage fueled debates about accountability. However, at present, no international criminal court has jurisdiction over Syria, no special court was established, and other criminal accountability efforts address only a small fragment of the vast needs for justice.

What is the appropriate response to widespread violations of international law such as indiscriminate attacks on civilians, the use of torture, and sexual slavery?⁶ Are criminal proceedings a way forward, and if so,

what form should they take?⁷ What recommendations for policy solutions fill the space created by demands for justice? This chapter analyzes the options, arguing that an international, special tribunal for Syria within the United Nations (UN) system is the best way forward. In terms of capacity, an ad hoc tribunal⁸ or a hybrid⁹ is the institutional solution that is best suited to achieve some accountability for the crimes that are being committed. Until the establishment of such an institution becomes politically possible, which may occur only in the distant future, other avenues of accountability should be pursued, primarily through the newly established International, Impartial and Independent Mechanism (IIIM) on international crimes committed in the Syrian Arab Republic.¹⁰

Since the establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda in the 1990s, there has been a significant paradigm shift, and expectations of justice entered debates on contemporary conflicts.¹¹ Accountability now forms part of the policy tool kit for dealing with mass violence.¹² No institution is a greater expression of aspirations for justice than the International Criminal Court (ICC) in The Hague. As much as the ICC specifically and the project of international criminal justice more broadly continuously face significant challenges, the paradigm has shifted, and demands for justice cannot be simply brushed away. In the case of Syria, an array of activists, advocates, and scholars are making sure of that.

Why Pursue Criminal Accountability?

Syria, and its neighbor Iraq, with which its security situation is bound, are the sites of some of the most egregious violations of international law on record. In face of a political crisis that offers no end to the hostilities, and a likely resistance by certain states to establish and fund judicial proceedings, why bother?¹³ The argument this chapter puts forward is that some form of criminal accountability must follow the brutality in Syria. If not, we are not only abandoning the victims that have suffered and continue to suffer but also failing to keep the promises made after the Holocaust. If we do nothing, a dangerous message will be sent to those contemplating using similar violence in the future: that laws the international community has been slowly creating are nothing but ink on paper. The erosion of respect for the law may be easily transformed into more brutality in conflicts world-wide.

This chapter analyzes possible approaches to provide *some* justice and accountability. “Some justice” and not “justice,” because that is, at best, what

these institutions can do. Victimization and trauma are complex and require more than a criminal justice approach to alleviate some of the consequences. Deeper problems well beyond the scope of criminal justice always exist in societies emerging from war. The focus here will, however, be on justice more narrowly—that is, justice as retribution. Ensuring that those most responsible for the crimes are held accountable is but one building block of a necessary comprehensive strategy for healing and rebuilding communities.

The past twenty years of trials at different judicial institutions offer insights into what courts can reasonably achieve in the aftermath of mass violence. They can (1) provide space for some survivors to testify in a formal setting, (2) remove officials from public office if credible allegations of criminal responsibility exist, (3) punish those who transgress established norms, (4) collect vast amounts of documents and evidence, (5) establish facts about past events, (6) find and identify missing persons (and return remains to families), and (7) support the rule of law.¹⁴ The problems we have witnessed in other institutions include, *inter alia*, (a) lengthy proceedings creating frustration among victims (and possibly violating rights of the accused), (b) challenges in conducting effective outreach to key communities (and presenting complex legal proceedings to the public), (c) investigating crimes in difficult circumstances and facing political pressure, (d) availability of resources for extensive investigations and prosecutions, (e) arresting suspects (international tribunals do not have their own police forces and depend on states for cooperation), and (f) limited number of cases that can be prosecuted (due to availability of resources).

Some of this necessary work can be done by nonjudicial institutions.¹⁵ One task, however, is for courts alone: the task of punishing those who violate the law. When lives are destroyed, and the sense of personal security and dignity removed for hundreds of thousands of people, mere silence cannot be the response. One of the purposes of law is to restrain brute force. In order for that fundamental principle to be upheld, law must be not only cited but actually applied. As Damaska argues, “the list of goals proclaimed by international criminal courts and their affiliates is very long.” They claim to pursue a number of short- and long-term goals: standard objectives of national criminal law such as retribution, deterrence,¹⁶ incapacitation, and rehabilitation, and an aim to produce a reliable historical record give voice to victims and propagate human rights values as well as contribute to peace and security. Those tasks are too enormous for any single institution, and the goals are sometimes incompatible.¹⁷

Trials are thus best assigned fewer goals and supported in trying to achieve them.¹⁸ Boas proposes a narrower, “forensic” purpose for trials: establishing the guilt or innocence of a particular individual for particular acts in light of the law and the evidence in impartial proceedings.¹⁹ For broader social change in the aftermath of mass violence, complementary mechanisms from the transitional justice “tool box” must be developed.

One fact that should be accepted from the outset is that out of all those who have committed crimes, many—probably most—will never end up in court. Historical examples show that courts deal with a fragment of crimes and that trials are often imperfect, long, expensive, and have limited impact on communities they were designed to serve. Even when reasonably successful, they often fail to influence broader social changes.²⁰ Contributing positively to the repair of communities is often simply out of reach for courts and tribunals. That, however, does not diminish the importance of pursuing criminal accountability in cases of mass atrocity.

Justice and accountability are something many Syrians want.²¹ Legal tools to hold perpetrators accountable should be used, argues Ziadeh, emphasizing that justice needs to be part of the wider peace solution, because if it is not, “Syria will remain entrenched in cycles of violence.”²² Van Hooydonk posits that “impunity for international crimes perpetuates human suffering, regional instability and undermines the human rights of all.”²³

Some scholars, however, call for caution when it comes to what transitional justice can do. Thoms, Ron, and Paris ask if transitional justice strengthens or threatens societal peace in transitional countries, stating that “given the dearth of reliable evidence, strong claims about TJ [transitional justice], which continue to pepper academic and policy writing, appear to be based more on faith than on fact.”²⁴ There are other issues with the suitability of dominant transitional justice approaches and the compatibility of international principles and practices post-transition with Islamic law.²⁵ Recognizing all those challenges, accountability is still a valid goal and a necessity.

Anja Mihr assessed the impact of different transitional justice measures on democratic institution building and argues that they can have significant effect on delegitimizing a former abusive regime.²⁶ Several measures, such as criminal justice, as well as building memorials, reparations, public hearings, and judicial reform can help a new regime legitimize itself and create distance from abusive policies of the past. The results are likely to be better if a cocktail of measures is applied, specifically designed for that

situation, and one that includes both retributive and reparative measures. What is important is to not make false promises, especially to the victims, about what can be done. What we have learned is that transitional justice takes time. It is incredibly important, argues Mihr, that measures are locally accepted as legitimate. If supported, transitional justice measures can increase the trust populations have in institutions.²⁷

Accountability for the crimes in Syria will be difficult to achieve. The political deadlock deepened as the conflict became more fragmented, during more than five years of war, with the growing number of actors involved. The indecisiveness and lack of leadership, political will, and resolve among the UN Security Council permanent members as well as regional actors to stop the war has been painfully apparent. The same lack of resolve will impede efforts to achieve a measure of justice once the conflict ends. Political conditions, both internationally and locally, will determine what kind of justice, if any, we can hope for once weapons go silent.²⁸

Even as peace remains a distant prospect, it is vital to discuss opportunities for justice.²⁹ Crimes we are witnessing in Syria do not have statutory limitations, and political circumstances change, even when it takes decades. In order to prepare for a future with a prospect for some accountability, we need to assess options. With that purpose, the assessment draws from the experiences of the past twenty years, from trials for the crimes committed in the former Yugoslavia, Rwanda, Cambodia, Sierra Leone, Guatemala, Chad, Iraq, and Lebanon. Those trials took place in a variety of institutions—international, hybrid, and domestic—across continents and provide valuable lessons for Syria.

On Crimes, Perpetrators, and Evidence

Many of the crimes that have been perpetrated in the six-year Syrian conflict are large scale and systematic and aim to seize territory and subjugate populations without regard for international criminal or humanitarian law. Those crimes include arbitrary arrests, detention, and torture in a vast network of prisons; besieging civilians and cutting access to food, water, and medical supplies; attacks on medical facilities; rape and enslavement; summary executions; use of barrel bombs and chemical weapons; and destruction of cultural and religious heritage. The UN Commission of Inquiry confirmed the use of chemical weapons, as in the case of the Syrian air

force dropping sarin on rebel-held Khan Shaykhun in April 2017, killing more than eighty people.³⁰ This was the thirty-third time the commission documented a chemical weapons attack.³¹

Syrian president Bashar al-Assad is the focus of many accountability efforts, as are the security apparatus and armed forces loyal to the regime. However, both the regime and the opposition are committing crimes.³² The U.S.-led coalition and Russia have been accused of violations.³³ Actors commit distinct crimes, resulting in different types of victimization. The Islamic State of Iraq and Syria (ISIS), although dominating the headlines with performative brutality, causes far fewer deaths than the Syrian regime.³⁴ Genocide and sexual slavery are alleged against ISIS members, referring in particular to their treatment of the Yazidi community.³⁵ In total, given the duration and brutality of the war, the plethora of forces involved, and the geographic spread of the hostilities, the number of perpetrators (i.e., potential future suspects) is in the thousands. Perpetrators are both Syrian and foreign.

Evidence has been collected and analyzed by a variety of civil society organizations, human rights groups, Syrian and non-Syrian scholars, institutions such as the United Nations, and government agencies of various states that conduct investigations. Potential evidence material, including from social media networks, is being collected and analyzed on an unprecedented scale.³⁶ Groups such as Forensic Architecture use the material to create innovative projects for documenting violations.³⁷ However, evidence against some perpetrators will be hard to acquire—that is, material demonstrating involvement of powerful states. With that in mind, proving responsibility of senior figures for crimes committed across borders, by proxy forces, will be anything but straightforward.³⁸

Prosecutors may use images, such as those smuggled out of the country by “Caesar,” a Syrian forensic photographer, depicting thousands of dead bodies in regime detention, many showing signs of torture.³⁹ Those have been accepted as credible by a panel of investigators and prosecutors.⁴⁰ Seized military, police, and security service reports, intercepted conversations and aerial imagery, as well as the testimony of insiders can be crucial evidence. Given the many civil society organizations and initiatives that are currently involved in documenting violations in Syria, one of the challenges will certainly be establishing authenticity and chain of custody.

Challenges for Prosecuting Crimes in Syria

The effects of the war on the population are devastating.⁴¹ Armed conflict persists in Iraq, with the military operations to defeat ISIS, the group that has challenged traditional Western responses by inspiring adherents in various countries.⁴² Failed negotiations to end hostilities have been further complicated by Security Council veto-holding members becoming directly involved in the conflict. The future of the Assad regime has not been determined yet and will depend both on his ability to secure backing of his allies, in particular Russia and Iran, and maintain support of allies at home. However, Assad's forces have made significant territorial gains, and his regime appears to be, for now, firmly in place.

Currently, there is a certain malaise in the international community, a lack of vision and optimism, burdening the pursuit of justice: from Brexit and immigration troubling the European Union, to the U.S. election results and their impact on international relations, to the political conflicts surrounding the ICC. None of those developments are beneficial to pursuing justice in Syria. However, in these difficult circumstances, and maybe even thanks to them, one peculiar institution was created—the IIIM, which will be further discussed in the following section.

If we look at examples from countries that pursued trials in the aftermath of mass atrocity, it is clear that prosecuting is difficult: the process is imperfect and accomplishments often humble. As elsewhere, many perpetrators of crimes in Syria will never be brought to court. The war has simply been too long and too brutal and we are faced with thousands of potential suspects. Judicial systems, international or national, normally cannot conduct hundreds or thousands of complex investigations and trials to the highest standards simultaneously. Seeking accountability requires making choices about which cases to prioritize. Establishing who commanded and controlled the variety of irregular units, operating throughout the territory, will be demanding, as evidence may be hard to obtain from uncooperative states. De jure and de facto control of units in the field might be too difficult to establish beyond a reasonable doubt. The complexities do not end there. As Stewart explains, “classifying the law applicable in the Syrian conflict may be even thornier than our debates to date have revealed.”⁴³

Given the current political landscape, the political support necessary to conduct independent, credible proceedings will be difficult to obtain, so it must be clear that criminal accountability for the most responsible

perpetrators is a long-term goal. International political will is necessary and that commitment must be followed by financial support. As many potential suspects may remain in positions of power, attempts at political meddling are almost guaranteed and will require decisive countering.

Whenever attempts are made to put perpetrators on trial in the aftermath of mass atrocity, the workload institutions face is immense and requires clear criteria for selection and prioritization of cases. The war will be followed by the population's deep lack of trust in institutions, both international and domestic, so communicating clearly about the scope, mandate, and limitations of trials is key. Particular effort will be required to obtain support from populations that may view any international involvement with suspicion. That is why any judicial engagement by the international community—that is, the UN and well-meaning states and institutions—must be independent and credible and must work to earn the trust of populations it serves.

That will not be a simple task but is one that presents itself in cases of transition and in the aftermath of mass violence. Lamont and Boduszyński discussed in the chapters on Libya and Iraq, respectively, different ways in which judicial interventions encounter challenges when dealing with crimes of repressive regimes in societies suffering significant fragmentation. For any future judicial intervention in Syria, examples such as the Iraqi High Tribunal (formerly the Iraqi Special Tribunal) provide lessons about approaches to avoid.

A key challenge will be prosecuting widespread sexual violence.⁴⁴ Experience from other courts suggests that physical evidence may be lacking and that some victims will be interviewed for the first time long after the attack. Working with victims of sexual violence requires understanding the culture of the victims. Particular taboos lie in addressing sexual violence against men. Vulnerable witnesses must be handled with particular care not to cause trauma. Some will want to testify and consider it beneficial, whereas others will not.⁴⁵ If victims testify, they must feel valued and have a sense of ownership over the process.

Some Reflections on Current Options

Justice options for Syria inspire passionate debates.⁴⁶ Should the ICC step in, or should a separate tribunal be established? Is a regional hybrid court a possibility? Who should the investigations focus on and what should the

priorities be? What role should the victims play? Would there be compensation? What legal tradition should be drawn from most for the conduct of proceedings? Are trials supposed to contribute to “reconciliation,” and if so, how? What accountability can we reasonably expect if there is no transition and regime change soon? What can the IIIM do?

Presently, the ICC has no comprehensive jurisdiction in Syria.⁴⁷ The country is not a state party to the ICC and there was no UN Security Council referral.⁴⁸ Even if there was a referral, which is politically unlikely, questions of resources emerge for the ICC prosecutor’s office, which is as busy as it has ever been. While referring Syria to the ICC would send an important message to the warring parties, it is clear that the court lacks the requisite capacity to fully address the vast needs for justice in Syria.

With the ICC unable to act, there have been calls to establish a separate institution, but those remain unanswered.⁴⁹ Practitioners and academics wrote a draft statute for an “internationalized domestic tribunal.”⁵⁰ Whether that would endanger the ICC has become a central point of disagreement.⁵¹ Protective advocates of international justice do not want the ICC undermined after it took so long to create it.⁵² Whiting posits that a “closer analysis shows that re-emergence of ad-hoc tribunals could represent a welcome development,” suggesting that “a continued multiplicity of approaches is good for international justice and the ICC itself.” Where the ICC lacks jurisdiction, ad hocs and hybrids are a way to fill the gaps.⁵³ Furthermore, the ICC can only ever focus on a few perpetrators from a given conflict. For a more substantial response, the ICC is not enough. Whiting convincingly argues that justice in Syria would be good for the ICC because “justice begets justice,” and “the development of precedents and norms of international justice will ultimately buttress the authority and the need for the ICC.”⁵⁴

Given the pace of proceedings, we cannot hope that the ICC would ever be enough to fully address the global needs for accountability after atrocity crimes. In more than a decade, the ICC has completed only a handful of trials and has done so at high financial cost.⁵⁵ There are multiple ongoing situations and proceedings, but the fact remains that it is incredibly slow.

A patchwork of different institutions, acting in concert, is needed to address the vast needs for justice in numerous conflicts, past and present. Domestic courts are a significant contribution to fighting impunity, but it may be a while before Syrian courts are willing and able to conduct impartial proceedings. States with functioning judicial systems and access to victims

and potential suspects are contributing, albeit in a limited way, to fighting impunity.⁵⁶ Limited possibilities are provided by universal jurisdiction exercised by national courts.⁵⁷ When exercised fairly and independently, universal jurisdiction provides an opportunity for some accountability. As Trahan states, it is important to start somewhere.⁵⁸

That start may have been with NGOs documenting violations and cases being pursued by various states, but it is being significantly advanced by the establishment of the IIIM in Geneva in December 2016.⁵⁹ This “independent panel” is not a court. It is a body established by the UN General Assembly after 105 states decided to fill the gap left by inaction of the Security Council.⁶⁰ The IIIM is a creative solution, born out of frustration and deadlock. Its mandate is to facilitate prosecutions in jurisdictions where they can happen and coordinate efforts to fight impunity. It will collect and analyze information and prepare files for future prosecutions. That will not be an easy task,⁶¹ but the IIIM is a step forward if it manages to cooperate with civil society organizations that hold the potential evidence and earns the trust of survivors, and Syrians more broadly. Several Syrian NGOs have already expressed their ambitions for the new institution and their hopes for cooperation.⁶² The IIIM is currently being set up, and results remain to be seen. The institution must act to provide some accountability in a situation saturated by injustice and suffering.

What the IIIM and the prosecutions it aims to support will face are problems that other efforts to fight impunity in other contexts faced, too. Trials for genocide, crimes against humanity, and war crimes deal with complex legal issues, procedurally and substantively. Challenges to present a manageable case, after the experience of the Slobodan Milošević trial at the ICTY, are likely to appear in future leadership cases for Syria, most notably if Assad is ever tried. If, as in the case of Milošević, the defendant dies before the judgment is delivered, there is disappointment and accusations that the case that was put forward was too expansive and ambitious. A narrower case, focusing on few events, would more likely reach judgment but may not be representative enough. Reasonable length of proceedings is central for successful trials, and it is no less important for the accused who has a right to the case being resolved.

Self-representation has the potential of significantly delaying proceedings, when the right is abused by uncooperative, bellicose defendants. This issue highlights the tension between the rights of the accused to present their case and the need for proceedings to be efficient. The role of victims,

their meaningful participation, and their possible compensation is another contentious issue, which will appear in future prosecutions for crimes in Syria. Should the victims participate in the proceedings beyond the role of witnesses? Should compensation be an option, and if so, should it be collective or individual, monetary or symbolic? Experiences from the ICC and Cambodia show that meaningful participation is hard to achieve.⁶³

Punishment and sentencing in criminal proceedings cause much frustration among victims and affected communities. One question is what the goals of punishment for international crimes are. According to Holá, this “needs much more exploration and debate.” In relation to possibly developing some guidelines for judges on sentencing, Holá posits that “the international crimes are usually extremely complicated, bulk crimes consisting of multiple offences and multiple perpetrators. It is hard to imagine that ‘simple enough’ guidelines would be able to capture all the complexity of international crimes.”⁶⁴

One potential limitation to prosecutions relates to amnesties included in peace negotiations.⁶⁵ Roth states that “since the early 1990s, the international community has rightly withheld its imprimatur from amnesties for mass atrocities.”⁶⁶ The UN’s Prince Zeid Ra’ad al-Hussein spoke out against amnesties being included in a deal.⁶⁷ The legality and legitimacy of amnesties are not yet settled, but it is widely held that genocide, torture, and grave breaches of the Geneva Convention require prosecution. It is important to recognize that even if formal amnesties are not introduced, just by the virtue of the potential caseload, there will be hundreds or thousands of perpetrators who will not end up in court. Studying the Rwandan *gacaca* proceedings sheds light on issues emerging from dealing with massive numbers of alleged perpetrators outside the confines of the courtroom.

Given the limited possibilities for seeking accountability, comfort can be found in the fact that a number of nonjudicial efforts to document crimes exist. The UN Commission of Inquiry, established in 2011, issued a number of reports and public statements after meticulous research and analysis.⁶⁸ NGOs and academic institutions took on responsibilities for developing documentation projects with the aim of preserving evidence for future prosecutions and assisting in efforts to establish facts.

Finally, the newest conundrum for professionals in the field emerges from the response to the need for justice: private efforts also filling the space left open by institutions. In this context, “private” means outside of institutions such as the UN or other international organizations. The Commission

for Justice and Accountability (CIJA) collects evidence, investigates, and prepares cases to be “trial ready.”⁶⁹ CIJA is an NGO funded by several European states and Canada. Many organizations document the violence, but only CIJA claims to uphold standards necessary for using that material in court.⁷⁰ A benefit, CIJA stresses, is its ability to act quickly, unburdened by the political deadlocks and bureaucracy of the UN. CIJA’s position allows it to have a higher tolerance for risk, which, according to the commission, is a benefit.⁷¹

The key criticism of such efforts concerns legitimacy and authority. Rohan wondered where the mandate to investigate comes from, stressing concerns over privatizing what is essentially a public function.⁷² Private efforts stepping in to fill the impunity gap left by paralyzed institutions may well be our best way forward in places where other options do not exist. However, those questions need to be openly discussed, and if this material ever reaches a courtroom, they will emerge. Now that the IIIM has been established, it remains to be seen how it will work with organizations such as CIJA.

An International Tribunal for Syria?

A viable response to the challenge of caseload is in establishing an international tribunal for Syria. While at the moment it is absolutely clear that there is no will at the UN Security Council to create a special tribunal for Syria, be it an ad hoc or a hybrid, it is clear that only a separate institution would have the capacity to deal with high-ranking defendants independently and efficiently, while observing the highest standards of fair trial. The ICC simply does not have the resources given everything it is dealing with, and national courts in various states, while useful, can address only a small segment of the vast needs.

At a specialized tribunal, the cases could be more representative of the conflict, deal with the most responsible perpetrators, and investigate more crimes. As seen in particular at the ICTY, that model, as imperfect as it is, has been reasonably successful.⁷³ Further down the line, the tribunal could facilitate domestic proceedings like in the case of the ICTY and courts in the former Yugoslavia, which continue prosecuting with some success.⁷⁴ That kind of “multilevel justice” is a suitable framework for Syria.⁷⁵ Domestic proceedings appear to be the option favored by, initial reports say, many Syrians.⁷⁶ Others call for caution and considering various pros and

cons before putting any mechanism in place.⁷⁷ A UN court, somewhere in the region, would be a solution that would be closer to the population, something that courts in The Hague lack. A separate international court employing a mixed staff, including Syrians, and using Arabic as one of the official languages, might provide the population with the important sense of ownership over proceedings.

A hybrid tribunal, with its flexibility in combining domestic and international law, is an option to consider, according to van Schaack.⁷⁸ Cooperation and institutional buy-in by (some future) Syrian government is desirable but for the moment untenable. However, the example of Cambodia testifies to problems over funding and political pressure, so government cooperation should be pursued with caution, as it can be a source of ongoing frustration. The process needs to be guided by genuine concern for victims and bringing a measure of justice. As Trahan notes, “it will be the international community’s responsibility to ensure that any hybrid, or other tribunal, that prosecutes crimes perpetrated in Syria (or Syria and Iraq) does not conduct one-sided prosecutions but prosecutes all key perpetrators of the most serious atrocity crimes.”⁷⁹

With no statutory limitations for genocide, crimes against humanity, and war crimes, perpetrators will always have to worry, wondering if they will be arrested. Rapp reminds us of the fact that political circumstances change, and safe havens may provide protection for a while but not forever. For him, it is incredibly important that justice mechanisms are put in place for Syria and that the international community consistently seeks to strengthen the emerging system of criminal justice. Often, the conflict needs to end before significant advances can be made in criminal justice, so it is imperative that pressure is sustained and that justice is demanded. According to Rapp, a good solution would be one in the region—an internationalized process with broad participation by Syrians.⁸⁰

The perception of impartiality of the institution will depend on numerous factors, some outside of the control of the institution itself. Does the local population need to accept and agree with judgments in order for the process to be regarded as successful and legitimate? From the experiences of the other courts, we see that buy-in from affected populations is not easy to achieve. The ability of the institution to communicate with the populations the trials concern will be crucial. That is especially the case when allegations of responsibility exist, but evidence is inconclusive or missing. There will be times when evidence exists, but there will be no trial because prosecutors

chose to pursue another case. The law and prosecutorial discretion must be explained to the public as much as possible. Failing to do so will significantly damage the perceived legitimacy and impact of proceedings. Another important aspect concerns the protection of vulnerable witnesses, victims, or insiders who are key for proceedings and the integrity of the process.

An important discussion concerns the need to prosecute “all sides.” While there is an obligation to investigate all actors with equal zest and follow the evidence wherever it may lead, setting some predetermined formula by which “all sides” must be *equally* prosecuted is misguided. Prosecution strategies must reflect the nature of the war and the conduct of warring parties as much as possible. Gravity should be a guiding principle along with the impact the crime has had on the affected community. Criticism of the Rwanda Tribunal has focused on the fact that it prosecuted only one “side,” while courts for Sierra Leone and the former Yugoslavia received praise for bringing cases against various actors in the conflict. In sum, the cases any future court for Syria hears must reflect the realities of the conflict and take on the gravest violations first.

Conclusion

Given the challenges of seeking accountability for crimes in Syria, establishing a special tribunal, possibly somewhere in the region, is the best path forward. Despite all their flaws, the ad hoc and hybrid models proved to be our most successful responses to seeking accountability for large-scale atrocity crimes. That model should be implemented for Syria in the future but with increased participation of those the trials are designed to serve—the Syrian people. In the more distant future, a transfer of cases to domestic courts could be contemplated, like they were in the former Yugoslavia. But make no mistake—no one court will transform society that has suffered such a brutal war, but a court will underscore the message that rules in war *do* exist and that there are consequences for breaking them. However, given the lack of prospect for such an institution in the near future, the IIIM must be supported in fighting impunity—now.

By not prosecuting individuals for crimes in Syria, the international community is undermining international criminal justice and failing not only victims of the Syrian conflict but also victims worldwide. Political leaders and military commanders of state armies and rebel groups will not respect the law if they perceive they can get away with anything.

Accountability on a larger scale is likely to be possible only in the case of regime change and the end of the conflict, but there are no statutory limitations for these crimes, and we have to do what we can—now—to bring a measure of justice to victims. Many powerful leaders such as Milošević, Charles Taylor, and Hissène Habré probably never expected to stand trial, and then they did. As political circumstances changed to allow them to be prosecuted, so can those that limit current options for justice in Syria. It may be a while, though. Advocacy must continue and, with it, the efforts to collect and preserve evidence. Any attempt to establish the rule of law must be paired with strengthening institutions that are responsive to the needs of citizens.

Expectations must be managed from the start, and it should be made clear that a court should not be expected to “reconcile” anyone. That is not its core function, and we do not expect reconciliation in murder trials in domestic criminal courts. Courts exist in order to establish guilt or innocence of an individual for a specific crime. Based on evidence and by applying the law, that narrow determination is about criminal responsibility. In the best of outcomes, courts encourage fact-based discussion about the past and, in doing so, narrow the space of denial. Historians and researchers can use the evidence to understand causes and consequences of the war and the suffering it brought.⁸¹ Outreach is crucial to include the community and communicate with them in a language they understand.⁸² With an entire institution dedicated to one conflict, building cases by starting with lower-level perpetrators and working their way up the chain of command, accountability efforts will have a higher chance of success.

Finally, it is important to consider some underlying questions that remain unresolved: Who is international justice for and in whose name is it pursued? What does a tribunal need to achieve to be “successful”? What is the purpose of punishing and sentencing? Clarifying these questions and adjusting our expectations will allow stronger institutions to be established. Judicial institutions function in highly politicized environments and must carve out space to act in accordance with the highest professional and ethical standards. Controversial judgments will happen: international justice must not be about convicting everyone if it is to be credible. A professionally conducted fair trial has value independent of its outcome in presenting evidence and testimony.

In order for international criminal justice to be credible, it needs to become universal. We cannot have courtrooms filled with only those who lose wars, far away from the global centers of power, without harming

international criminal justice and what it stands for. In order to deter, accountability has to become more systematic. It is time for a system of justice that will be responsive to particularities of each conflict and where multiple institutions—international, hybrid, and domestic—act in concert to uphold the rule of law. Sadly, there is enough work to do for more than one court. Paths to achieve accountability after mass atrocities are riddled with obstacles; changing the old practice of brutality in war is not easy and may take generations. As difficult as it is, the importance of succeeding cannot be overstated, so the efforts must continue.

Notes

1. Some sources put the number at around 470,000. Anne Barnard, “Death Toll from War in Syria Now 470,000, Group Finds,” *New York Times*, February 11, 2016. Other sources claim it is around 500,000. Charles Glass, “The U.S. and Russia Ensure a Balance of Terror in Syria,” *The Intercept*, October 29, 2016, <https://theintercept.com/2016/10/29/the-u-s-and-russia-ensure-a-balance-of-terror-in-syria/>. The UN stopped “updating” its death toll estimates in 2014. Abby Ohlheiser, “The U.N. Has Stopped Counting the Deaths in Syria,” *The Atlantic*, January 7, 2014. The precise numbers of dead and missing are difficult to establish reliably at this moment.

2. United Nations Office for the Coordination of Humanitarian Affairs, “About the Crisis,” accessed February 7, 2016, <http://www.unocha.org/syria>.

3. United Nations News Centre, “Syria: Ban Condemns Bombings in Damascus; Urges Progress at UN-Mediated Talks in Geneva,” accessed February 7, 2016, <http://www.un.org/apps/news/story.asp?NewsID=53137&Cr=syria&Cr1=>.

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