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Justice for Syrian Victims Beyond Trials

The Need for New, Innovative Uses for Documentation of Human Rights Violations in Syria

When the Syrian people took to the streets in March 2011, nobody could have predicted that the ensuing crisis would become the largest international calamity in recent history. Syrians' calls for freedom and justice, which rode the wave of revolutions in neighboring countries, have become enmeshed in a violent, protracted conflict that has changed the face of Syria and the course of politics in dozens of other states, doubtlessly influencing the way the world will deal with political, social, and humanitarian crises in the future.

It is commonly said that the Syrian war is the most documented conflict in history. Thousands of pictures, videos, and testimonies of victims are fully accessible on the internet and through social networks. There have been at least 182,422 deaths verified by victim identification,¹ with some sources putting the number of total deaths closer to 500,000.² More than 11.5 million people have been displaced from their homes,³ and thousands have been forcibly disappeared and tortured, and suffered myriad other violations of their human rights. One in four schools has been damaged, destroyed, or used for shelter (and, therefore, left no longer fit for educational purposes),⁴ and at least 454 hospitals have been attacked.⁵

Dozens of different institutions and organizations both within Syria and outside have been collecting evidence of systematic breaches of international human rights and humanitarian law since the war began, originally for the purpose of one day bringing perpetrators on all sides to account. However, as that possibility has faded, information and stories have piled up unused in their databases and files.

The question becomes, are there justice measures complementary to the longer-term goal of criminal prosecution that can be implemented today using this data? And what role can Syrian victims and civil society play in such initiatives?

By looking at the response of the international community and the documentation efforts of Syrian civil society organizations, this paper challenges the notion that criminal prosecution is the sole avenue of justice available for alleged crimes in Syria. From 2016–17, ICTJ consulted with more than a dozen Syrian civil society organizations working on

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¹ Violations Documentation Center, *Monthly Statistical Report on Victims - November 2017*, http://vdc-sy.net/wp-content/uploads/2018/01/Monthly_Stat_Rep_November17_EN.pdf

² Reuters, "Syrian War Monitor Says 465,000 Killed in Six Years of Fighting," March 13, 2017, citing data of the Syrian Observatory for Human Rights.

³ UN High Commissioner for Refugees, webpage, "Syria Emergency," www.unhcr.org/en-us/syria-emergency.html

⁴ UN News Center, "With 4 Million Syrian Children Out of School, \$1.4 Billion Sought by UN to Save 'Lost Generation,'" February 2, 2016, www.un.org/apps/news/story.asp?NewsID=53145#.WgANPmhSxnl

⁵ The Syria Campaign, "Saving Lives Underground: The Case for Underground Hospitals in Syria," May 2017, <https://savinglivesunderground.thesyriacampaign.org/>

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issues related to transitional justice, with a specific focus on documentation, in order to understand their processes, use of documentation, and impact, as well as the challenges they face.⁶ It is clear that documentation could be used for important other avenues of justice, such as acknowledgement, fulfilling victims' right to truth, and informing and preparing future transitional justice processes. This paper makes several recommendations for what can be done with documentation to support victims in the face of continuing injustices in Syria.

1. Response of the International Community

Most of the international community has either turned a blind eye to the conflict's crimes and the humanitarian emergency Syrians are living through or formed a narrow and inaccurate understanding of the situation. When addressed, the issues of justice and victims' rights have been framed almost exclusively in terms of criminal prosecution. To this end, data about alleged violations has been collected mostly with the expectation that it would be used someday to prosecute those responsible for violations. Looking at the international response to the Syria crisis helps us to see the broader context that has shaped documentation work, but it is argued here that it should not limit the development of innovative approaches going forward.

A number of commissions and mechanisms have been created by the international community since the war began, with the mission of documenting alleged violations, identifying perpetrators, and eventually holding them to account. Additionally, avenues at the international level for pursuing criminal justice have also been tried and considered, including the International Criminal Court (ICC) and foreign domestic courts under the principle of universal jurisdiction. These are described in more detail below.

Independent International Commission of Inquiry

On August 22, 2011, the UN Human Rights Council established the Independent International Commission of Inquiry on the Syrian Arab Republic,⁷ "to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable." It has produced numerous reports exposing human rights violations committed throughout the country, based on interviews with witnesses and victims.

International Criminal Court

Throughout the war, the option of referring Syria to the ICC has been discussed, as many countries have felt frustration and impotence in the face of ongoing violations and the international community's general lack of response.⁸ These countries believe that crimes of this seriousness and magnitude have rarely been witnessed in recent history and that, in the absence of action in any other jurisdiction, it is the role of the ICC to investigate and prosecute them. Some in the international community have also felt that a referral to the ICC would send a message to the Syrian government that it will be held accountable for its actions. However, on May 22, 2014, a UN Security Council resolution that would

⁶ ICTJ conducted semi-structured interviews with organizations based in Turkey, Lebanon, and Europe in 2016 and 2017.

⁷ UN Human Rights Council, Resolution S-17/1, August 23, 2011, www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/ResS17_1.pdf

⁸ In January 2013 and May 2014, 58 States issued joint statements calling on the UN Security Council to adopt a French Resolution referring Syria to the International Criminal Court.

have referred the situation to the ICC failed to pass by a vote of 13 to 2, after China and the Russian Federation vetoed it. In reality, an ICC referral has never been possible, mainly because of Russia's unwavering support for the current Syrian government.

Ad Hoc Hybrid Tribunals

Setting up an ad hoc "hybrid" tribunal (with a mixture of international and domestic prosecutors and judges) to prosecute crimes in Syria has also been suggested.⁹ In 2013, a coalition of former international tribunal prosecutors and judges and leading academics made a strong push to set up such a tribunal. Convening at the Chautauqua Institution in New York, they introduced "The Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes," which proposed an institution that, following a change of regime, would prosecute those most responsible, alongside Syrian national courts, which would deal with lower-level perpetrators. However, as with other efforts to hold perpetrators accountable, the idea was not operationalized, at least in part because it would have relied on the fall or change of the current regime.

Indeed, any such tribunal would face deeply rooted challenges, starting with the difficulty of prosecuting individuals from all sides of the conflict, given that the conflict has involved so many different armed groups over the years and all the major players have indisputably committed serious violations that would be liable to prosecution.

Universal Jurisdiction

Despite such setbacks, the will of Syrians to pursue accountability remains unwavering, and many are now using the legal principle of universal jurisdiction to seek justice in foreign courts. This principle permits the national courts of any state to try individuals accused of committing serious crimes of international concern, including war crimes, crimes against humanity, genocide, torture, extrajudicial execution, and enforced disappearance, regardless of the nationality of the alleged perpetrators or victims and regardless of where the crimes were committed.¹⁰

In 2013, when a military defector smuggled out of Syria over 50,000 images depicting evidence of torture in Syrian prisons, it seemed that finally there was enough proof to pursue accountability for at least these actions. Shortly after the images were made public, a Spanish woman recognized her brother in one of the photographs and filed a case in the Spanish courts. A judge of the Spanish High Court agreed to investigate the case, the first from the conflict against Syrian security forces; however, a public prosecutor appealed, and the case was eventually dropped after it was decided the court did not have jurisdiction.¹¹

In Sweden, three cases involving alleged war crimes committed in Syria have gone to trial also under the principle of universal jurisdiction: two members of nonstate armed groups have been sentenced and one member of the Syrian armed forces was sentenced in late September 2017. In Germany, under universal jurisdiction, one member of Jabhat al-Nusra was sentenced in September 2017 and one member of the Free Syrian Army is on trial.¹²

9 See Mark Kersten, "Calls for Prosecuting War Crimes in Syria are Growing: Is International Justice Possible?," Monkey Cage (blog), *Washington Post*, October 14, 2016, www.washingtonpost.com/news/monkey-cage/wp/2016/10/14/calls-for-prosecuting-war-crimes-in-syria-are-growing-is-international-justice-possible/?utm_term=.61fb142437c9

10 See Yuna Han, *The Rebirth of Universal Jurisdiction*, Ethics and International Affairs Blog, Carnegie Council, May 4, 2017, www.ethicsandinternationalaffairs.org/2017/rebirth-universal-jurisdiction/

11 *Reuters*, "Spain Court Drops Complaint Against Syrian Security Forces," July 21, 2017, www.reuters.com/article/us-mideast-crisis-syria-spain/spain-court-drops-complaint-against-syrian-security-forces-idUSKBN1A61J1

12 Human Rights Watch, "These are the Crimes We are Fleeing: Justice for Syria in Swedish and German Courts," October 2017, 33–35.

The international attention that these cases have brought and their potential success have relied heavily on the involvement of Syrian civil society organizations, which have pushed to hold perpetrators accountable and sought international partners to help them do so. The cases have given a measure of hope to Syrian victims and organizations.

International Impartial and Independent Mechanism

On December 21, 2016, the UN General Assembly voted to create an independent panel that would assist in the investigation and prosecution of those responsible for serious crimes in Syria. The panel is formally referred to as the International Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in Syria since March 2011, under the auspices of the United Nations (IIIM). This mechanism, in close cooperation with the Independent International Commission of Inquiry on Syria, is mandated to collect, consolidate, preserve, and analyze evidence pertaining to violations of human rights and humanitarian law. It is also intended to prepare files to facilitate and accelerate fair and independent criminal proceedings in national, regional, or international courts or tribunals with jurisdiction over these crimes, in accordance with international law. The IIIM is seen as a way of someday bringing justice to victims of the Syrian conflict. If adapted correctly, it could be a positive initiative that allows the Syrian community to regain some trust in the international community, which until now has followed a path of inaction.



General Assembly Adopts Resolution Establishing International Mechanism Concerning Syria, December 21, 2016 (UN Photo/Evan Schneider)

Syrian organizations now see the IIIM as a potential response. Initially, however, there was some mistrust of the mechanism, as Syrian groups were not invited to play a role in the conversations leading up to the IIIM's establishment and there was a lack of clarity about how the mechanism would differ from the Commission of Inquiry—compounded by long-accumulated frustration with the international community and the United Nations. More recently, the relationship has improved, with a push from Syrian organizations and support from several international actors to cooperate more closely and to include the organizations more in conversations about the mechanism.

Some meetings have been held with the general goal of clarifying these issues and fostering a closer relationship between the IIIM and Syrian civil society. Today, the organizations feel more included and understand more clearly the role they can play. The conversation has become more technical, focusing on how to facilitate information sharing.

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2. Documentation Efforts of Syrian Civil Society

Since the start of the war, Syria's previously dormant civil society has come to life, bringing thousands of activists and organizations to the frontlines to try to resolve and respond to the ongoing crisis. In the early years of the conflict, when the fall of the al-Assad regime was expected, Syrian organizations advocating for victims' rights and profound institutional reforms discussed and crafted numerous transitional justice proposals and roadmaps, to help lay the groundwork for a new Syria. Some focused intensely on educating the Syrian public about transitional justice with trainings both inside and outside of Syria, creating a wave of momentum that made a smooth transition seem possible. However, these proposals all assumed that the conflict would be resolved quickly and that the future political arrangement would not include President Bashar al-Assad or his regime.

But when the conflict deteriorated, unleashing a stream of violence, dozens of organizations were formed with the core mission to document human rights abuses, rather than to push for a more comprehensive approach to transitional justice. Supported by the international community, they began documenting alleged violations committed by various actors in an effort to defend victims' rights. Dozens of organizations whose core mission was not documentation also began to document violations, with many seeing it as a primary way to assist victims, other than providing immediate humanitarian aid.

Yet, each of these organizations has a somewhat different mission, with the notion of documentation understood differently among them. For example, some focus on collecting quantitative data and qualitative analysis, while others work mainly on advocacy and creative approaches to storytelling. Their collection methodologies, level of detail, and the selection of violations for documentation also differ, depending, at least in part, on their organizational capacities and resources, access to information, security risks, and location. Some Syrian organizations have also sought to find allies and partners in new places in the form of international groups, foreign or third states, and independent international lawyers.

In addition to the great risk posed to those who undertake documentation, such efforts face a number of challenges, mostly related to politics, tensions and mistrust, low victim participation, and the perceived limited impact of their work. To a certain extent, these challenges are inherent to the difficult and dangerous nature of the work and

operating in a context as complex as Syria. They also relate to the fact that much of the documentation was originally intended for future criminal prosecutions.

First, the information and evidence that have been collected are generally underutilized, which leads to frustration with the lack of impact on the international community's stances and decisions towards Syria and reinforces the situation of impunity, giving perpetrators seeming *carte blanche* to continue committing violations. While Syrian organizations remain committed to documenting and highlighting abuses, the general lack of response by the international community has left not only Syrian organizations feeling ignored but also victims feeling like their pain and suffering do not matter.

Second, taking a clear political stance against the Syrian government has affected the priorities and focus of some documentation work, which should be carried out without preconceived notions or bias about suspected perpetrators. Organizations may be storing data on violations committed by different armed groups, but not using or sharing it if it does not pertain to a certain group (such as members of the regime or the Syrian military, for example).

Third, while opportunities for collaboration exist, decades of authoritarianism have left a legacy of mistrust among communities. This makes creating the level of cooperation needed to undertake documentation difficult. Further, certain organizations focus on criminal prosecutions, while others focus more on supporting victims and communities, which can lead to tensions and political disagreements, with each believing there is a certain "right way" to achieve accountability and viewing measures other than trials as "soft justice."

Fourth, while most organizations say they value victims' input and participation, in practice they have often failed to incorporate them in their own work. Not all have seen the need to be victim oriented, especially regarding the documentation of victims' personal stories of violations and establishing partnerships with organizations offering services such as psychosocial support or job-placement assistance. The Syrian organizations that ICTJ spoke with pointed to the difficulty of articulating the benefits and impact of continuing to document alleged cases of violations and getting victims to share their stories when there have been so few results for years.

It is crucial, therefore, that the international community at this stage work to both strengthen these organizations and facilitate innovative uses for their materials beyond criminal prosecution.

3. Innovative Use of Documentation

Some Syrian organizations no longer see criminal prosecutions as their main priority, nor do they believe there will be a regime change any time soon. They are open to conversations, desperately wanting to learn about and understand possible alternate uses and outlets for their data. Further, while some of the information they have gathered may not ever be used for criminal prosecutions (because of its lower quality or level of evidence), it can still be used today to address injustices in different ways, including through memorialization efforts, supporting victims' right to the truth, and acknowledgment of victims and violations.

Even if there is no transition or reform when the conflict ends, there will still be ways to share victims' stories and amplify their voices, in order to foster their right to truth, counter denial, and ensure that the crimes that have taken place since March 2011 are not completely disavowed or forgotten. Indeed, authoritarian regimes tend to manipulate

the truth, especially to maintain power after a conflict or period of violence. For example, in the 1980s, the Syrian regime suppressed the truth about the Hama Massacre,¹³ when then President Hafez al-Assad ordered the city of Hama to be razed in order to crush a Sunni rebellion, with an estimated 20,000 killed. To this day, it remains unclear what happened during the massacre, and victims have not received any form of justice.

Acknowledgment

Acknowledgement is an important part of accountability, and many victims see it as a priority in obtaining justice. Recognizing this and emphasizing the need for acknowledgement can alleviate the suffering experienced by victims, while opening the door for them to participate in other transitional justice processes, which their experiences and opinions can inform as well. Acknowledgement could also create an avenue for Syrian organizations and the international community to take immediate and meaningful action. Analyzing existing information with a new lens, taking into account victims' experiences and recording memories and sharing them, would ensure that what happened, and continues to happen, is not forgotten. It also ensures a role and voice for victims and Syrian organizations when circumstances have changed so drastically in Syria since 2012, which required their missions and specific goals to adapt as well.



Ain ajara school in western rural Aleppo, bombed on January 11, 2016 (Syrian Institute for Justice)

The combination and balance of hard data and storytelling can bring a new kind of attention to alleged crimes committed in Syria. Strategically packaging these facts, and presenting them in a compelling, even creative way, has the potential to deepen and broaden acknowledgement efforts that are already underway, opening up new opportunities to have a more sustainable impact on different communities. In addition, documentation by Syrian organizations, which deeply understand the context, are bound to attract more public attention and, most likely, more international support and recognition.

¹³ See Wendell Steavenson, "Assad's Hama Rules, Again," *The New Yorker*, February 4, 2012, www.newyorker.com/news/wendell-steavenson/assads-hama-rules-again; Amnesty International, "Syria: 30 Years On, Hama Survivors Recount the Horror," February 28, 2012, www.amnesty.org/en/latest/news/2012/02/syria-years-hama-survivors-recount-horror/

Syrian organizations and the international community should work together to develop innovative uses for existing and ongoing documentation records, including, but not limited to, criminal prosecution.

For example, ten organizations are currently participating in a project facilitated by ICTJ that sheds light on the destruction of and damage done to schools in Syria, emphasizing not only the legal implications, both domestically and internationally, but also the immediate and long-term impacts on Syrian communities. The strength of this effort relies on their existing data, networks, and knowledge. It allows them to develop products that can give victims an outlet to share their stories, reveal the truth, and encourage the international community to stand against attacks that endanger future generations.

Property, Civil Status, and the Missing and Forcibly Disappeared

Documentation carried out now may also be useful to justice-related processes in the future, particularly issues and claims related to housing, land, and property; civil status; and the missing and forcibly disappeared. The lack of documentation on property titles and transfers will be a major post-conflict challenge because property frequently changes hands both formally and informally during a conflict. It will also be a challenge specifically for women, who may lose economic rights related to marriage, divorce, and the death of a husband; and for children, who may face statelessness if nationality cannot transfer through the mother. Civil status documentation will continue to be a challenge both inside and outside of Syria, for example, with regard to birth registration. Work is being done among both Syrian and international groups on property and civil status, including collecting and safeguarding documents related to property; registering

property transfers in opposition-controlled areas; setting up centers for civil documentation; and gathering documentation outside Syria in the form of testimonies, photographs, and other documents—although these efforts could be improved by greater information sharing, clarity, and streamlining of processes.

Documentation of property and civil status is likely to have a bearing on the return of refugees if and when the conflict is resolved and repatriation becomes possible. Recent studies have shown that housing, land, and property issues are seen as a key condition for return among refugees in Lebanon,¹⁴ while civil documentation, like birth registration, could help to ensure that repatriation and reintegration processes are more comprehensive and easier to implement. Further dialogue with refugees, raising awareness about housing, land, and property issues, the digitalization of documents, and training local registries are all documentation-related steps that can be taken now to facilitate smoother return processes in the future.

Justice efforts related to the missing and forcibly disappeared of the Syrian conflict will also be affected by current documentation work. For example, information needs to be protected both legally and physically, and it needs to be centralized and exchanged among Syrian groups and international actors in improved ways. Activities such as creating family associations for the relatives of victims have emerged that both function as important information-sharing spaces now and create space for redress in the future. There are, of course, concerns about the tension between using information about the missing and forcibly disappeared for humanitarian and accountability purposes. Nevertheless, efforts that can begin now and have an impact down the road can include mapping and protecting burial places, empowering families through participation, advocating on detention, coordinating national and international level work, and providing psychological support for victims and their families.

¹⁴ Nour Shawaf and Francesca El Asmar, "We're Not There Yet . . ." *Voices of Refugees from Syria in Lebanon*, Oxfam Research Report, May 2017; Rim El Gantri and Karim El Mufti, ICTJ, *Not Without Dignity: Views of Syrian Refugees in Lebanon on Displacement, Conditions of Return, and Coexistence*, 2017.

Syrian organizations and the international community should work together to develop these and other innovative uses for existing and ongoing documentation records, including, but not limited to, criminal prosecution. Syrian organizations have a wide range of expertise and skill sets in documenting human rights abuses and other justice-related areas. Bringing together those proficient in storytelling and building narratives with those with a strong focus on documenting specific violations and incidents and other data could help to create the space and environment where documentation can be used to address injustices both now and in the future.

4. Conclusion

A critical challenge to pursuing justice for victims of serious human rights violations in Syria concerns the objectives of documentation. At the international level, the issue of justice has been framed almost exclusively in terms of criminal accountability, with a focus on the Commission of Inquiry, the IIIM, the ICC, possible ad hoc hybrid tribunals, and universal jurisdiction. At the national level, Syrian organizations formed since 2012 followed this lead, specifically training and building their missions around criminal prosecution objectives. With regime change now an unlikely outcome of the war and progress at the international level slow, however, these organizations have begun to reorient their documentation work toward new goals, which could complement the longer-term objective of holding perpetrators responsible.

Addressing its objectives, documentation's relationship to different transitional justice measures and possible use for purposes other than criminal prosecutions remain a difficult but critical challenge. Developing new and innovative uses for the material that Syrian organizations have documented and continue to document is key to achieving objectives related to acknowledgment, victims' right to truth, memory, property, civil status, and the missing and forcibly disappeared. Support from the international community for developing innovative approaches and uses for documentation is critical.

Recommendations

- 1. Clarify the role of different accountability mechanisms at the international level, such as the Independent International Commission of Inquiry, the IIIM, the ICC, and universal jurisdiction.** Ensure that Syrian organizations are included as key players and partners in discussions and decision-making processes concerning these mechanisms. Acknowledge the critical role that documentation by Syrian groups can play in these mechanisms, particularly universal jurisdiction and the IIIM.
- 2. Support Syrian organizations in their efforts to document human rights violations, international crimes, and other injustices committed during the conflict in Syria.** Tailor this support to the different approaches to existing documentation work, including quantitative data and qualitative analysis and advocacy and creative approaches to storytelling. Work with these organizations to address the challenges they face, including helping to foster cooperative and trusting relationships among them and increase their levels of victim participation.
- 3. Provide technical support to all Syrian organizations working on documentation, in order to improve their capacity to organize, archive, analyze, and understand their data, including the development of databases and other technical tools.** This can be an important step in ensuring that their data can serve different purposes.

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4. **Broaden the concept of justice for victims of human rights violations beyond criminal justice.** Work with Syrian organizations documenting injustices to see that prosecution is not the only, or even primary, avenue of justice supported by documentation. Advocate for the use of existing documentation for a range of alternative and complementary processes.
5. **Help to develop and support innovative uses for documentation that can facilitate acknowledgment, memory, and victims' right to truth,** given the unlikelihood that a resolution to the conflict in Syria will include a comprehensive approach to justice that allows for the recognition of all victims' experiences and rights.
6. **Help to ensure that documentation can facilitate justice processes linked to housing, land, and property claims; civil status; and the missing and forcibly disappeared.** Such initiatives have important implications not just for future transitional justice processes but also for the return and reintegration of millions of displaced Syrians one day.