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# A Step towards Justice:

Current accountability options for crimes under international law committed in Syria







**Cover photo:**

Mother visits the grave of her son at 'Martyrs' Cemetery' in Dar'a al-Balad, Daraa, 6 March 2014.

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# Table of contents

	<b>Executive summary</b>	<b>4</b>
	<b>Introduction</b>	<b>8</b>
	The conflict and crimes under international law	9
<b>1</b>	<b>Available legal avenues</b>	<b>11</b>
	International courts	11
	The International Criminal Court	
	Hybrid tribunals	13
	Hybrid tribunal for Syria in a neighbouring state	
	'Buffer zone' jurisdiction for a hybrid tribunal for Syria	
	The Special Tribunal for Lebanon	
	Criminal prosecutions in foreign national courts	16
	Active nationality principle	
	Passive nationality principle	
	Protective principle	
	Universality principle	
	Treaty-based extraterritorial jurisdiction	
	Limitations on extraterritorial jurisdiction	
	Civil actions in foreign national courts	21
<b>2</b>	<b>Practical and ethical challenges</b>	<b>23</b>
	In absentia trials	23
	Investigative access	24
	Witness protection	24
	Ownership and capacity building	25
	Impartiality	25
	Double jeopardy	26
	Failure could cause disillusionment with justice	26
<b>3</b>	<b>Conclusions</b>	<b>28</b>
	<b>Endnotes</b>	<b>31</b>
	<b>Bibliography</b>	<b>33</b>

# Executive summary

As the war in Syria enters its fifth year, the urgency has increased for delivering some measure of justice to the victims of atrocities. This report aims to evaluate current accountability options by looking at the feasibility and potential impacts of each option. Analysis of the existing options helps shed light on whether it may be advisable to pursue justice while the conflict is ongoing and, if so, which methods are best suited for the current situation. By evaluating the positive and negative impacts as well as the practical and ethical concerns that could arise, this report aims to better inform the international community's role in justice and accountability for Syria.

## International Criminal Court

Located in The Hague, the Court has the jurisdiction to prosecute war crimes, crimes against humanity and genocide. However, Syria is not a state party and without a UN Security Council Resolution the Court's jurisdiction is limited. In May 2014, Russia and China vetoed a draft resolution to refer Syria's situation to the ICC. Nevertheless, the door has not completely closed. Acting on her own initiative or on a referral by a state party, the ICC Prosecutor can investigate crimes allegedly committed in Syria by the nationals of any state party. Many states parties have nationals fighting in Syria, so although the investigation would be limited in scope, ICC involvement is still theoretically possible.

**Feasibility** — *Under the policy of the Office of the Prosecutor, investigations are focused on those who bear the greatest responsibility for crimes. As a result, low-level foreign fighters who travel to Syria are unlikely to be prosecuted. In practice, unless a high-ranking foreign member of an extremist group or a senior Syrian official with dual nationality comes under the ICC's jurisdiction, the ICC is not a feasible forum currently for pursuing accountability in the Syrian context.*

**Impacts** — *Without jurisdiction over the entire Syrian situation, an ICC investigation could have a negative impact on the justice process in Syria if those most culpable are perceived to remain immune from prosecution. Syrians would lose confidence in the international justice system, thus eroding the impact the ICC could have in the post-conflict period. Even if a full referral were currently possible, President Assad and his officials could remain at large and the ICC's inability to affect the duration and severity of the conflict may cause disillusionment among Syrians.*

## Hybrid tribunals

Hybrid tribunals offer the flexibility to combine international and domestic laws and processes while also potentially allowing for the prosecution of a greater number of perpetrators. However, a hybrid tribunal requires consent of the host state or a UN Security Council resolution. Thus, the main options while the conflict is ongoing would be to establish the hybrid tribunal in a neighbouring state or within an internationally-protected buffer zone inside of Syria. A third option would be for the Special Tribunal for Lebanon to expand its investigation to high-level Syrian officials in so far as their cases related to the Hariri assassination of 2005.

**Feasibility** — *A hybrid tribunal is not a currently feasible route for achieving accountability for victims of the Syrian crisis. A hybrid tribunal in a neighbouring country would require consent from the host state, and Turkey and Jordan are unlikely to want to extend their criminal jurisdiction over Syrian matters. As for a buffer zone tribunal, the international community has taken no steps towards establishing a protected, no-fly zone in northern Syria. In either case, the security concerns and high costs of the tribunal may not be worth the limited application such a tribunal would have if it could not effectively function across the whole of Syria.*

**Impacts** — *A hybrid tribunal in the pre-transition period would lack impartiality given that both Syria's neighbours and the Syrian opposition authorities have political interests in the conflict. There is therefore a large risk that the tribunal would pursue a one-sided application of justice. Furthermore, the tribunal will have limited ability to access perpetrators, witnesses and other evidence inside Syria. As a result, most Syrians may not accept the decisions of the tribunal, particularly if there is no consensus on which law should be applied, decreasing confidence in the chances for comprehensive justice and accountability post-conflict.*

## Criminal prosecutions in foreign national courts

National prosecuting authorities in foreign countries may be able to pursue criminal investigations into crimes that occurred in Syria so long as they fall under one of several principles of extraterritorial jurisdiction. The active nationality principle would allow a state to prosecute its own nationals for crimes committed in Syria. In contrast, the passive nationality principle allows a state to prosecute individuals who commit-

ted crimes against its nationals. The protective principle enables a state to prosecute anyone, regardless of nationality, if the crime has a significant impact on its security or national interests. The universality principle, the most expansive of the four, requires no nexus between the prosecuting jurisdiction and the individual, in cases involving the most serious crimes of international concern. However, there are some limitations in applying these principles in relation to crimes committed in Syria. Extraterritorial jurisdiction is also established by multi-lateral treaties aiming at the suppression of particular crimes, including torture.

**Feasibility** — *Criminal prosecutions in foreign national courts are the most feasible option for pursuing accountability in Syria in the pre-transition period. Even though the scope of prosecutions would be limited, they provide a low-cost method of accountability that can be readily implemented. However, sovereign and state immunities create some obstacles for holding high-level officials accountable.*

**Impacts** — *If presented as a first step towards accountability, criminal prosecutions in foreign national courts can have a positive impact on Syria as long as investigations are not restricted only to opposition figures and counter-terrorism cases. The most impact would be achieved if several jurisdictions worked in coordination while also making public efforts at connecting Syrians with the process.*

## Civil actions in foreign national courts

Like criminal prosecutions, civil actions can be undertaken in other countries to provide monetary remedies to individuals who have been victimized during the conflict. A country's ability to try a tort claim will depend on its national legislation. The United States, for example, allows for torture claims under its Torture Victim Protection Act (TVPA).

**Feasibility** — *Civil actions face greater state immunity obstacles than criminal cases, but still could be potentially feasible, particularly if filed against individuals and not against the Syrian state itself. A large obstacle would be how to collect on the judgments, raising the question of whether accessing frozen assets would be an appropriate means for doing so.*

**Impacts** — *Without corresponding criminal accountability, the greatest risk of civil actions may be the potential perception that victims are being paid off with 'blood money'. However, if civil actions are undertaken in tandem with criminal prosecutions, they could have an overall positive impact – particularly if the judgments are for symbolically large amounts.*

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Both practical and ethical challenges hamper the application of the accountability mechanisms described above. For perpetrators that remain protected within Syria, trials would need to be carried out in absentia, which is not a uniformly accepted pro-

cedure under international standards. Moreover, if more than one jurisdiction decides to try a suspect, double jeopardy becomes an issue. In addition to limited access to perpetrators, the active conflict limits investigators' access to valuable forensic evidence and to witnesses. Relying on witness evidence also places a duty on the prosecuting jurisdiction to ensure protection for witnesses and their families, which may not be possible for those still residing in Syria. And although trials in the conflict period may promote accountability for Syria, they will do little in terms of national ownership or capacity building, two important aspects of any transitional justice process. Furthermore, the politicized nature of the conflict and the plethora of international actors involved would mean that few of the current options would be viewed as impartial by the majority of Syrians. Most importantly, any attempt to impose justice which failed to achieve fair convictions or to fulfil its promises may cause Syrians to become disillusioned with formal justice mechanisms, increasing the potential that they take justice into their own hands in the post-conflict period.

Several conclusions based on the analysis of current options should inform efforts to pursue accountability during the conflict:

***Postponing justice is preferable to a flawed process*** — Despite the urgency of pursuing accountability immediately, postponing justice is preferable to an inherently flawed process, even if it means waiting several years for Syrians to see justice for the atrocities they have suffered. A justice process that fails to meet the needs of victims and creates disillusionment with formal judicial processes will very likely damage long-term prospects for transitional justice in Syria.

***Prosecutions in foreign courts are most feasible currently*** — If steps are taken towards accountability in the pre-transition period, prosecutions in foreign national courts are the most feasible option. Such prosecutions may chip away at impunity, provide recourse to some victims, help maintain pressure internationally for broader accountability and prevent political rehabilitation of the highest-level perpetrators.

***Current accountability processes should try to connect with Syrians*** — Under any accountability mechanism, the process should include a way to connect and interact with Syrians who have been affected by the violence. This will help to ensure that the process can contribute to future mechanisms that address the rights of the Syrian people who have experienced violations, and forestall misconceptions about the international community's motivations.

***Impartiality of current processes will affect long-term prospects for justice*** — The impartiality of the justice process is very important for the prospects of long-term justice and accountability in Syria. Actual and perceived bias could prevent comprehensive justice in a post-conflict Syria, and provoke increased violence now. Accountability mechanisms should focus on delivering justice for the most serious crimes under international law, rather than targeting mere participation in the conflict or focusing exclusively on terrorist-related activity.

# Introduction

The war in Syria is entering its fifth year with no end in sight. Regular allegations of mass atrocities continue to be made against both Syrian government forces and armed opposition groups. With almost a year passed since the UN Security Council failed to pass a draft resolution to refer the Syrian situation to the International Criminal Court, the need to establish some form of accountability to address the widespread allegations of mass abuses remains pressing.

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This briefing paper considers the current options for seeking justice for crimes under international law committed in Syria. While the feasibility of the most prominent mechanisms for justice – the ICC and domestic courts – is currently limited, alternative possibilities for securing accountability exist absent a Security Council referral or a post-conflict transition in Syria. The purpose of this briefing is to outline the potential ‘pre-transition’ options for accountability and to discuss the feasibility and implications of each. Such options include: other methods of engaging ICC jurisdiction without a Security Council referral; the establishment of a special or mixed-law tribunal in a neighbouring state or in a ‘safe zone’ in Syria; prosecutions in foreign national courts under one of five forms of extraterritorial jurisdiction; and civil actions for damages in foreign national courts. The scope of this briefing is limited to establishing individual accountability for conduct amounting to war crimes, crimes against humanity, or other crimes under international law. Military or ‘humanitarian’ intervention and other coercive measures at the state level are not covered.

The options presented here are steps towards the path of justice and methods for achieving some limited accountability during conflict. They should not be interpreted as standalone measures to secure justice for Syrians. If the international community does not approach such measures as part of a larger, comprehensive justice process, any action could adversely affect perceptions of justice inside Syria.

Following a political transition, a wider range of transitional justice mechanisms may become possible, including Syria’s ratification of the Rome Statute of the ICC, the establishment in Damascus of a special tribunal to try past crimes, domestic prosecutions, judicial inquiries or truth commissions, national civil reparation programmes, memorialization projects, lustration or ‘de-Ba’athification’ programmes, and broad security sector reforms. A debate over which of these methods, or combination of them, is appropriate has already begun,<sup>1</sup> but they all depend on the outcomes of a future transition.<sup>2</sup> But the prolongation of the conflict raises the urgent question of which accountability options may be available



now, before any future transition of power. This briefing is therefore concerned with the specific issue of whether it is possible – or indeed advisable – to seek international justice for egregious crimes in Syria while conflict is ongoing.

## The conflict and crimes under international law

Syria has lived under Ba'ath Party rule since 1963, for most of that time under the leadership of Hafez al-Assad and, since 2000, his son Bashar al-Assad. As part of the 'Arab Spring', anti-government protests started in Syria early in 2011. Demonstrations in Damascus and Deraa in March were met with violence and, as the protests spread across the country, hundreds of protesters were killed and a number of towns were subjected to military blockades. Some opposition supporters joined with defectors from the Syrian armed forces to form the opposition Free Syrian Army at the end of July 2011. Since then the number of armed actors in the conflict has proliferated, including the active involvement of a number of states in the region, and the commencement in September 2014 of US-led airstrikes, triggered by the growing threat to the region posed by the Islamic State of Iraq and al-Sham (ISIS)<sup>3</sup> and other extremist Sunni groups.

The conflict is not only bloody, but multi-dimensional, engaging several areas of international law, including international human rights law, international humanitarian law and international

criminal law (including the law of the Rome Statute). A detailed account of the alleged crimes under international law committed by each party to the conflict both before and during the course of the Syrian war is beyond the scope of this briefing, but the scope of potential crimes encompasses almost every area of international criminal law. The Independent International Commission of Inquiry on the Syrian Arab Republic, established by the UN Human Rights Council, stated in its eighth report that government forces 'continued to perpetrate massacres and conduct widespread attacks on civilians, systematically committing murder, torture, rape and enforced disappearance amounting to crimes against humanity' and also committed 'the war crimes of murder, hostage-taking, torture, rape and sexual violence, recruiting and using children in hostilities and targeting civilians,' as well as the use of chemical weapons and 'indiscriminate and disproportionate aerial bombardment and shelling [that] led to mass civilian casualties.' The Commission of Inquiry stated that non-state armed groups, including ISIS, 'committed massacres and war crimes, including murder, execution without due process, torture, hostage-taking, violations of international humanitarian law tantamount to enforced disappearance, rape and sexual violence, recruiting and using children in hostilities and attacking protected objects' as well as forcible displacement and other conduct that could amount to crimes against humanity.<sup>4</sup>

These atrocities constitute a wide range of international crimes and implicate most of the parties fighting in Syria. The scale of the violence and the current political and military stalemate have made it urgent to pursue some form of justice prior to the

end of the conflict. The legal avenues for achieving justice presented below are possible ways to hold perpetrators of these crimes accountable without waiting for the end of the conflict. This report eval-

uates the feasibility of each mechanism, keeping in mind the realities of the conflict and the types of crimes punishable under international law.

# 1

## Available legal avenues

In theory, several legal avenues towards justice and accountability for violations of international human rights, humanitarian, and criminal law exist. These include the International Criminal Court, hybrid tribunals, and legal actions in foreign jurisdictions. However, a variety of factors such as the international political climate and ongoing conflict conditions influence the current feasibility of such avenues. Additionally, embarking upon these avenues could have many impacts on overall justice and accountability for Syria, both positive and negative, depending on how the proceedings are pursued.

Available legal avenues, their current feasibility, and their potential justice impacts are discussed below. One option that is not covered here is the use of Syrian national courts; although this is a desirable option post-conflict given sufficient judicial capacity and favourable security conditions, the option would be near impossible to implement currently.

### International courts

Of the several international courts now in existence, the International Criminal Court (ICC) is the only one that could potentially exercise criminal jurisdiction over perpetrators of international crimes committed in Syria. Although the International Court of Justice (ICJ) has been discussed as a possible forum for addressing the Syrian state's failure to meet international human rights obligations,<sup>5</sup> the ICJ has no criminal jurisdiction and cannot prosecute individuals, and is therefore outside the scope of this briefing.

### The International Criminal Court

On 22 May 2014, a draft resolution of the UN Security Council to refer the situation in Syria to the ICC was vetoed by two permanent members, Russia and China. Many saw the veto as a total block to the ICC's jurisdiction over Syria. However, a Security Council resolution is only one method of invoking ICC jurisdiction. Situations in which crimes appear to have occurred can also be referred to the Court by *any one* of the states parties to the ICC's Rome Statute, or be subject to investigation by the Prosecutor acting *in proprio motu* (under her own initiative).<sup>6</sup> However, unless the Security Council makes a referral, the ICC can only exercise jurisdiction in the territory of, or over the nationals of, those states that have ratified the Rome Statute or made a declaration accepting the Court's jurisdiction under Article 12(3). Therefore unless Syria decides to ratify the Rome Statute – an unlikely prospect – the ICC will have no territorial jurisdiction within Syria or over persons with only Syrian nationality.

But many of the combatants fighting in Syria – including those accused of committing crimes under international law – may be foreign nationals or Syrians with dual nationality. Over 20,000 foreign nationals from as many as 80 countries<sup>7</sup> are believed to have been involved in the conflict as of early 2015 and some of them are nationals of states parties, and therefore potentially subject to ICC jurisdiction. For example, as many as 400 British nationals may be fighting in Syria, according to the UK Foreign Secretary (including one national believed to be involved in the high-profile killings of US and British nationals).<sup>8</sup>

However, under the complementarity provisions in Article 17 of the Rome Statute, a case will be ruled inadmissible by the Court if it is, or has been, subject to a genuine investigation or prosecution by a state with jurisdiction. Many of the European states parties with nationals fighting in Syria may contend that they are willing and able to prosecute their own nationals accused of committing serious crimes (although this, of course, may not be accepted by the Court). Non-European states parties, including four that belong to the Arab League, may be better ICC candidates.<sup>9</sup> Tunisia, which became a state party in 2011, is believed to have at least 2,400 nationals fighting in Syria, according to Tunisia's Interior Minister,<sup>10</sup> most of them with ISIS.

Jordan is estimated to have over 1,500 nationals fighting in Syria.<sup>11</sup> It can be argued that Tunisia and Jordan may be unable or unwilling to pursue these individuals due to national security concerns or unwillingness to prosecute their own nationals, in which case the ICC could exercise jurisdiction.

Iraq is not currently a state party, but the involvement of Iraqi nationals in the Syrian conflict has grown with the rise of ISIS. The Iraqi government is keen on ridding the country of the prevalent ISIS threat, increasing the prospect that Iraq accedes to the Rome Statute. Again, however, the ICC would only have jurisdiction over Iraqi nationals or Iraqi territory, thus focusing any deterrent effect primarily on Iraq rather than on Syria more broadly.

Even if the ICC initiates a preliminary investigation into crimes allegedly committed in Syria by foreign nationals of states parties, this may be able to target only low-level perpetrators. The ICC, however, was established to try those with the greatest responsibility for atrocities. So while an investigation may be a useful signal of intent and have some deterrent effect, the Office of the Prosecutor is unlikely to move forward unless the ICC can exercise jurisdiction over state party nationals who have acted as regime or opposition leaders.

## ICC: Potential impacts on justice and accountability

An ICC process could have positive impacts on justice and accountability for Syria only if the Court had jurisdiction over the entire Syrian situation, including over high-level perpetrators – which is unlikely at this time. Without territorial jurisdiction in Syria, the

ICC option risks the prospect of those most responsible continuing to avoid accountability, being seen to benefit from impunity and damaging Syrians' confidence in international justice. The Court would in practice only be able to investigate or prosecute foreign nationals involved with ISIS or related groups, which would harm the credibility and neutrality of the process in the eyes of Syrians. More broadly, such a limited process could negatively affect worldwide perceptions of the international criminal justice system as impartial and effective.

Even if a full referral were currently possible, whether an ICC investigation or indictment would deter President Assad and his officials is an open question, especially given the likelihood that they would remain at large for some time. In either case, Syrians would need to consider and establish other domestic justice mechanisms to complement the ICC process, given the prolonged timeline and the limited number of individuals the Court would prosecute.



## Hybrid tribunals

Following the establishment in the 1990s of the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and for Rwanda, and then the International Criminal Court, the trend in international criminal law at the turn of the millennium moved to the creation of hybrid or mixed-law tribunals, focusing on a particular state and combining national and international elements. Hybrid tribunals typically apply international criminal law and due process standards in conjunction with the domestic law of the state, and include both international and local jurists. Moreover, such tribunals tend to offer the possibility of trying a wider range of cases than the ICC could manage, while also encouraging greater national ownership of the process. Thus, mid- or low-level combatants that ordered or participated in atrocities could also be targeted by the hybrid tribunal system. Examples of hybrid tribunals include the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon,<sup>12</sup> all of which were established with the active consent of the state concerned, following an agreement with the United Nations.

International legal experts have already approached the idea of establishing a hybrid tribunal in Syria. In August 2013 a group of jurists, including former chief prosecutors of international tribunals, drafted the 'Chautauqua Blueprint,' which was intended for a Syrian Extraordinary Tribunal 'to prosecute those most responsible for atrocity crimes committed in Syria by all sides of the conflict.'<sup>13</sup> However, the document acknowledges that the tribunal could only operate within Syria 'when the political situation permits, presumably following a change in government.' Similarly to ICC jurisdiction, the establishment of an *ad hoc* or hybrid tribunal requires either consent by the state or a UN Security Council resolution. However, the current Syrian government would not consent to a hybrid tribunal operating on its territory and the Security Council will not be able to pass a resolution on the matter while Russia remains aligned with the regime.

However, a debate has grown about other bases for establishing a special tribunal that would not require Syrian government consent, including the possibility of locating it in a neighbouring state or in a 'buffer zone,' options discussed below.

### Hybrid tribunal for Syria in a neighbouring state

The idea of a tribunal created by the Arab League was suggested at least as far back as early 2012,<sup>14</sup> but the Arab League has not taken any action to advance the idea despite its vocal condemnation of the situation in Syria. The former US Ambassador-at-Large for War Crimes Issues, David Scheffer, has argued in favour of a tribunal which could cover both Syria and Iraq, explaining that, absent a Security Council resolution, this 'would require a treaty between the United Nations (acting by General Assembly vote) and a government committed to justice for the victims... [which] would consent to the extraterritorial reach of its own law.'<sup>15</sup> Scheffer's former deputy at the US State Department, Beth Van Schaak, elaborated that such a tribunal could be based on two principles: first, the principle of universal jurisdiction, by which any state can prosecute anyone alleged to have committed crimes under international law; second, the extraterritorial application of a state's domestic jurisdiction under the effects doctrine and the protective principle.<sup>16</sup> (The bases of extraterritorial jurisdiction are covered in more detail below, but these international law principles might be argued by a neighbouring state given the substantial *effect* that the Syrian conflict has produced within its own territory and the need to *protect* its own security or vital interests.)<sup>17</sup>

Nonetheless, convincing one of Syria's neighbours of the benefits of taking on this role would likely be a considerable challenge, because of the enormous political commitment it would entail plus the financial and logistical burden it would impose. Even assuming that a neighbouring state, such as Jordan or Turkey, could be convinced that its jurisdiction should have extraterritorial reach, it is arguable whether such an initiative is possible as a matter of international law. Article 22 of the UN Charter does not go so far as to allow the General Assembly to establish a subsidiary institution that extends beyond the power of the General Assembly itself, which, by carrying out criminal prosecutions, a hybrid tribunal would do.<sup>18</sup> Under the 'Uniting for Peace' Resolution,<sup>19</sup> the General Assembly can act to maintain international peace and security when the Security Council is deadlocked. While this resolution provides a theoretical mechanism for the General Assembly to circumvent a veto at the Se-

curity Council, using it to impose a criminal jurisdiction over the territory of a member state without Security Council authorization would send the General Assembly into uncharted waters. Moreover, the permanent members of the Security Council will likely oppose such an action because of the groundbreaking precedent it would set.<sup>20</sup>

In addition to the logistical hurdles to establishing a hybrid tribunal, many stakeholders have argued that initiating transitional justice through a tribunal prior to the end of the conflict is neither desirable nor prudent. The UN Commission of Inquiry has argued that a tribunal would be costly, beset by delays and potentially subject to external influence.<sup>21</sup> Furthermore, none of Syria's neighbours would be appropriate hosts, as none are considered to be impartial due to the significant national and security interests they have at stake with their intimate involvement in the Syrian conflict. Even European states that may be perceived as more neutral and impartial are unlikely to be willing to host a tribunal during the ongoing conflict, with the political risk that that entails. Hybrid tribunals also require large financial support from donor countries; the funding mechanism for a hybrid tribunal for Syria would affect its impartiality if donors include states that have intervened in the conflict, even if the host state is perceived as neutral. Thus, the two main attractions of a hybrid tribunal – national ownership in conjunction with internationally-guaranteed independence – are not at the moment achievable. It is also questionable whether a hybrid tribunal would receive European support since many European governments promote the ICC as the preferable international justice option.

### **'Buffer zone' jurisdiction for a hybrid tribunal for Syria**

Rather than locate a hybrid tribunal in a neighbouring state, another option would be to base it in Syria itself under the auspices of an interim administration. Since the current government in Syria no longer controls large parts of Syrian territory and has lost legitimacy in many parts of the country, an argument can be made for forming a tribunal on Syrian territory. Given the prevailing instability in much of rebel-held Syria, the only realistic current prospects might be in Syria's north or an internationally-guaranteed 'buffer zone' adjacent

to the Turkish border. The government of Turkey has long advocated for the creation of a no-fly zone to provide security to Syrians in opposition-held areas in the north. Furthermore, the UN Under-Secretary-General for Humanitarian Affairs has stated that the United Nations would offer humanitarian assistance inside such areas even if they were created without a UN Security Council resolution.<sup>22</sup> But for now, the international community has not moved forward with establishing a buffer zone, and the United States has resisted the idea outright.

An early attempt to establish such a hybrid tribunal on Syrian territory may also be premature due to a lack of governance authority and legitimacy. If an international coalition is able to establish and protect a buffer zone, Syrians might begin to formulate what sort of laws they would like to implement and an Syrian interim leadership could gradually build legitimacy through the provision of services and governance. In theory, a Syrian interim government and local councils could then govern within Syrian territory and could also consent to the establishment of a hybrid tribunal. International security assistance would also need to produce at least minimal conditions of peace and security for a hybrid tribunal to be able to operate – a difficult task given the number of armed opposition groups currently operating. This process would take time but has the potential to be a viable option if the Syrian conflict continues for several years. It is unlikely, however, that any Syrian authority could presently command sufficient legitimacy from the buffer zone to create a special criminal jurisdiction over Syrian territory as a whole.<sup>23</sup> Rather, such a buffer zone tribunal established under current conditions will more likely be perceived as fundamentally controlled by outside powers and less than impartial.

The other issue is which law the tribunal would apply: Syria has no domestic criminal code that is widely accepted throughout the population. If a hybrid tribunal were to be established in a neighbouring state, that state's laws would complement the relevant international laws, but in Syria, the acceptable domestic codes are in controversy. In most of rebel-held Syria, judicial structures are *ad hoc* and have rejected the existing Syrian criminal code; which law they apply depends largely on the identity of the armed group controlling the area. Some courts implement the *shari'a*-based Uni-

fied Arab Code, while others – including those in Salafist-held areas – apply an uncodified version of *shari'a*.

Under Kurdish leadership, courts in the north of Syria have been implementing a constitutional ‘social contract’ in the ‘Democratic Autonomous Regions of Afrin, Jazeera and Kobane’ since early 2014. According to its preamble, the social contract establishes ‘a political system and civil administration . . . that reconciles the rich mosaic of Syria through a transitional phase from dictatorship, civil war and destruction, to a new democratic society where civic life and social justice are preserved.’ Chapter III on rights and liberties includes fair trial guarantees and outlaws the death penalty, and Article 88 provides that ‘Syrian criminal and civil legislation is applicable in the Autonomous Regions except where it contradicts provisions of this Charter.’ Article 14 stipulates that the Autonomous Regions ‘shall seek to implement a framework of transitional justice measures’ but is silent on criminal sanctions, mentioning only civil redress to victims in those regions. Although the Kurdish charter is the most in line with democratic norms and international standards, it is questionable whether a Kurdish-initiated code would gain favour in the rest of Syria. Moreover, the Kurdish-controlled autonomous regions in northern Syria currently have enough security issues to confront without seeking to become a centre for trying senior Syrian war criminals.

### The Special Tribunal for Lebanon

Another legal avenue for justice in Syria is the potential prosecution of senior Syrian officials under the existing mandate of the Special Tribunal for Lebanon. The Lebanese government in cooperation with the United Nations set up the tribunal to prosecute those responsible for the February 2005 attack that killed the former Lebanese Prime Minister Rafiq Hariri and others as well as for other attacks that could potentially be connected to the assassination. The tribunal also has the unusual power to conduct trials *in absentia* (in the absence of the accused).<sup>24</sup> The initial UN investigation uncovered evidence of high-level Syrian involvement in the Hariri assassination.<sup>25</sup> During the ongoing trial of five Hezbollah members,<sup>26</sup> the tribunal heard evidence in December 2014 which implicated senior Syrian officials, including the Syrian

President. It is uncertain, however, whether any further indictments will follow.

Despite the attraction of targeting President Assad and other high-level officials through an existing international tribunal, there are several reasons the Special Tribunal may not be a feasible path to accountability for Syria. For one, the volatile security situation in Lebanon needs to be taken into consideration. It has been argued that the delicate balance of power that currently keeps Lebanon away from another civil war could be jeopardized if the Special Tribunal extends its authority into Syria. In addition, given the challenges the Special Tribunal has faced investigating and prosecuting Lebanese suspects, it might be reluctant to expand the scope of its work to Syrian officials and/or unable to gather sufficient evidence to issue indictments.

Because the Special Tribunal’s mandate only allows prosecution of crimes related to the Hariri assassination, even if it has jurisdiction to indict high-level Syrian officials, its ability to deliver justice to Syrian victims is nonexistent. The accused would likely be tried *in absentia* as they probably could not be apprehended (like the current Lebanese accused). Moreover, in common with other international and hybrid tribunals, the Special Tribunal moves very slowly.<sup>27</sup> In the short term, the most that Syrian suspects would suffer is restricted travel (although even those Lebanese who have been indicted are known to be present in Lebanon but out of the reach of law enforcement).

Given Hezbollah’s involvement in the fighting in Syria, there are some expectations that any Hezbollah leaders detained in the course of the conflict will be referred to a court. However, the limited mandate of the Special Tribunal would preclude it from pursuing accountability for violations that occurred in this context.

## Hybrid tribunals: potential impacts on justice and accountability

A hybrid tribunal located in a neighbouring country or buffer zone would be dismissed by many, if not most, Syrians – and probably stymie the prospects for the establishment of a more credible tribunal in the post-conflict period. Any hybrid tribunal established currently would suffer from a lack of impartiality, whether in fact or as a matter of Syrian perceptions, creating a nearly unsurmountable obstacle for national ownership in the justice process. If a hybrid tribunal was established with the consent and even support of an alternative Syrian interim administration or ‘government-in-exile,’ which is likely to seek justice against its opponents rather than impartially against all perpetrators – this would lead to something like ‘victor’s justice’ (but in the absence of a clear victory). Countries in the region (especially

Turkey in the case of a buffer zone tribunal) would try to exert as much influence as possible over the tribunal, seeking to shelter individuals under their protection; donor countries that support the opposition would also be perceived to exert influence. The one-sided application of justice by such a tribunal would represent a repudiation of the impartial vision of accountability for all perpetrators and justice for all victims.

As for the Special Tribunal, it could only hold perpetrators responsible if their crimes relate to the Hariri assassination. This would confuse the goal of accountability for violations committed against Syrians and possibly spark resentment among Syrians who might conclude that the international community views the Hariri assassination as a matter of greater international concern than the victimization of an entire country.

Practical issues should also be considered. In addition to the challenge of apprehending the accused (shared by all current justice options), hybrid tribunals are relatively costly and slow. At a time when the conflict

rages and the population remains in dire humanitarian need, Syrians may reject such high costs, especially if the tribunal is managed or supported by the political opposition, which has already been accused of corruption and misuse of funds. In a region that is already highly volatile, the tribunal could even become a target of violence and spark tensions within the buffer zone or within the refugee community in a neighbouring country. Without a sense of ownership, or trust in the competence of the tribunal, Syrians’ already-low confidence in the prospect of comprehensive justice arrangements may decrease, resulting in a greater likelihood of revenge killings and retaliation.

By contrast, a hybrid tribunal established post-conflict, under more favourable conditions, could be a powerful mechanism for pursuing overall justice and accountability in Syria. Planning documents like the Chautauqua Blueprint can provide a viable framework for a Syrian tribunal, but effective implementation would first require the restoration of peace and a democratic transition.

## Criminal prosecutions in foreign national courts

Non-Syrian – particularly European – courts are also forums that could potentially try those suspected of committing crimes under international law. These courts are established institutions that provide a low cost alternative to creating a special tribunal in Syria or a neighbouring country. How-

ever, courts are generally limited in their jurisdiction over crimes that occurred outside of their territory. According to the territoriality principle, a suspect is tried in the same state as that in which the crime occurred, even if the suspect or the victim is a national of another state. But while the territoriality principle is the most widely accepted basis under international law for criminal jurisdiction, it is by no means the only one; international law has long accepted the concept of extraterritorial jurisdiction. Examples of principles that allow for extraterritorial jurisdiction are the active national-



ity principle, the passive nationality principle, the protective principle and the universality principle.

The following section outlines these principles as well as extraterritorial jurisdictions over specific crimes created by treaty, and explains how they might be applied to individuals involved in the Syrian conflict. The combination of jurisdictional bases discussed below provides extensive potential for the prosecution in foreign national courts of those responsible for serious crimes in Syria. This will be of particular interest in relation to countries where many Syrian nationals are now resident, or who may host dual Syrian nationals, and also to countries who may have a significant number of nationals in Syria, including countries in Europe, North America and the Arab world. Additionally, these types of proceedings would likely not require extensive political commitments, either by the international community or by the individual states in which prosecutions take place. They would also require minimal resources in comparison with some of the other justice mechanisms discussed in this report.

### Active nationality principle

According to the active nationality principle, states may provide in their domestic law for jurisdiction over crimes committed abroad by their own nationals. The principle (often referred to simply as the nationality principle or the active personality principle) is widely accepted in international law and civil law courts frequently apply it in their decisions. Common law states – United Kingdom, United States, Canada, etc. – provide for active nationality sparingly, and the extraterritorial application of the law must be explicitly defined in the law before a court will apply it. One area in which numerous states have codified active nationality is in the area of terrorism. In September 2014, the UN Security Council adopted a resolution on foreign terrorist fighters, deciding that all states shall ensure that their legal systems provide for the prosecution, as serious criminal offences, of travel for terrorism or related training as well as the financing or facilitation of such activities.<sup>28</sup>

Due to the large number of European nationals fighting in Syria, European courts could apply the active nationality principle to prosecute them for their involvement in terrorist networks – such as

ISIS or Jabhat al-Nusra – or for other crimes committed while in Syria. France, the UK, and other states have already begun to use anti-terrorism legislation to apply penal sanctions to those travelling to Syria to take part in the conflict. As more foreign nationals come home from Syria, the number of prosecutions under the active nationality principle is set to increase and could act as a deterrent for others thinking about joining the fight.

Terrorism is not the only area of law in which active nationality can be applied. Civil law countries generally allow for the prosecution of their nationals when they have committed serious crimes abroad, including murder and sexual offences. Thus, the active nationality principle provides a strong basis for pursuing individuals who have committed crimes in Syria, although only in respect of those who possess non-Syrian or dual citizenship. This limits the potential of the principle for securing accountability and deterrence in respect of the vast majority of those who are fighting in Syria.

In some cases, the principle has been extended to include not just nationals but also aliens resident in a country, either at the time of the crime or subsequently, thereby increasing its relevance to the situation in Syria. The UK's International Criminal Court Act 2001, for example, provides for jurisdiction over genocide, crimes against humanity and war crimes committed outside the UK by UK nationals or residents (see further below under 'Treaty-based extraterritorial jurisdiction').

### Passive nationality principle

In contrast to active nationality, the passive nationality principle (or passive personality principle) enables states to prosecute those responsible for crimes committed *against* their nationals, regardless of the nationality of the accused. Passive nationality jurisdiction is a controversial topic in international law and those states that have legislated for it generally require at a minimum that the conduct penalized is also recognised as a crime in the state in which the conduct occurred. However, the legitimacy of the principle is more widely recognized in cases where the conduct is seen to constitute a serious crime against a state's representatives or nationals *as such*. For example, the *Restatement (Third) of the Foreign Relations Law of the US* comments:

*The principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials.*<sup>29</sup>

Many instances of hostage-taking and torture could similarly fall under this category, and states have increasingly used passive nationality to assert jurisdiction, indicating that there is sufficient precedent for it to be used in the cases of foreign nationals who have been victimized in Syria. Recently, the US Federal Bureau of Investigations has been analysing over 55,000 pictures of torture and abuse from Syrian prisons taken by a former Syrian official, known as Caesar. If any of the victims in the pictures are found to be citizens of another state, the alleged perpetrators – including high-level Syrian government officials – could be prosecuted if they are caught in that state's territory or potentially *in absentia*. Similarly, there are many Western journalists and aid workers or Syrian dual-nationals who have been taken hostage by an extremist rebel group or unjustly detained by the Syrian government. Victims who manage to escape Syria to return to their own country could file a complaint and pursue justice against their abusers.

Therefore, the passive nationality principle provides an additional basis for prosecuting perpetrators in Syria and broadens the scope of those who can be targeted. Whereas the potential for applying the active nationality principle primarily covers foreign fighters in ISIS and other extremist opposition groups, passive nationality jurisdiction could widen the net to encompass Syrian government officials for prosecution. However, the passive nationality principle is less widely accepted in international law. Moreover, passive nationality still requires that the alleged abuse have a nexus with the prosecuting state, which again limits the potential for the principle to be used to pursue overall justice and deterrence in Syria.

### Protective principle

Unlike active or passive nationality, the protective principle does not depend for its application on the nationality of either the victim or the accused. The protective principle covers cases in which the state acts against those abroad who endanger its security or other national interests. Forgery of

official documents and counterfeiting currency are common examples, but the principle has also been invoked in cases involving espionage and the violation of immigration rules. It could be argued that the security situation in Syria has become so extreme and the refugee outflow so massive – one in four of the population in Lebanon for example is now a Syrian refugee – that neighbouring states might invoke the protective principle to justify prosecutions, and other states are only now beginning to realize the potential magnitude of the security threat they face. Critics of the protective principle argue that national interests can be interpreted widely and such an ambiguous concept should not be a basis for jurisdiction. Thus, the challenge in any particular case would be to demonstrate a sufficient nexus between this generalized security threat and the alleged crime. In practice, the potential for prosecutions will be greatest for those specific offences, including terrorist offences, whose clear threat to national security has made them the subject of multilateral treaties (see below).

### Universality principle

Unlike the aforementioned principles, universal jurisdiction does not require any nexus between the prosecuting state and the crime. Instead, the principle of universal jurisdiction holds that some crimes are of such gravity they concern humanity as a whole. This principle was originally applied to the crime of piracy – the pirate traditionally being held as *hostis humani generis*, or the enemy of humankind. Universal jurisdiction has also been recognized for genocide, crimes against humanity, and war crimes.<sup>30</sup> Christopher Hall points out that 'universal jurisdiction has been an accepted part of international law since the Middle Ages' and that approximately three-fifths of all countries have incorporated the principle in their national legislation.<sup>31</sup> The high water mark in the use of the universality principle is often taken to be the *Pinochet* case, in which five European states<sup>32</sup> claimed jurisdiction over the former Chilean head of state for crimes committed in Chile (although some of the judicial instances appeared to found their judgments in treaty law rather than the universality principle as such).<sup>33</sup>

According to the UN Commission of Inquiry and other human rights monitors, the Assad government has committed crimes against humanity and

war crimes, including systematic torture, sexual violence, extrajudicial executions and the indiscriminate bombing of civilian areas. Such crimes can be seen as concerning humanity as a whole. Furthermore, some rebel groups – most notoriously, ISIS – have committed atrocities in Syria that have shocked the world because of their level of depravity. These crimes could be prosecuted in a foreign court under the principle of universal jurisdiction even if neither the victim nor the perpetrator is connected to the forum state. In fact, Sweden recently applied universal jurisdiction to the Syria conflict, convicting a Syrian rebel fighter of war crimes.<sup>34</sup>

It is precisely the potentially broad scope of universal jurisdiction and the lack of a required nexus with the forum state that has perhaps limited its application. A number of countries, including the United States, have proved hostile towards universal jurisdiction on the grounds that it encroaches upon state sovereignty. It has been argued that universal jurisdiction could result in conduct in one state being prosecuted even if it had absolutely no connection with the forum state. Under this rubric, a state would find it difficult to predict where and for what reasons its officials may be targeted in a foreign court. In Belgium, for example, prosecutors increasingly used a domestic law on universal jurisdiction to assert their authority over crimes committed by leaders in several countries, but under international pressure amending legislation was passed to limit the scope of application.

Despite resistance in applying universal jurisdiction, foreign courts may feel compelled to use it in the case of Syria where the atrocities are so significant in magnitude and no current forum exists to address them. It could be argued in a foreign court that a claim of sovereignty cannot defeat universal jurisdiction where a government has lost all legitimacy and is manifestly unable or unwilling to protect its own people.

### **Treaty-based extraterritorial jurisdiction**

Since World War II, particular crimes of international concern have become the subject of multilateral treaties aiming at their suppression, including through the provision of extraterritorial criminal jurisdiction. This includes grave breaches of the

Geneva Conventions (war crimes), torture, and a growing number of terrorism-related offences. The obligation *aut dedere aut judicare* (extradite or punish) that applies to grave breaches of the Geneva Conventions<sup>35</sup> is also imposed by conventions focusing on the suppression of specific crimes, such as torture, hostage-taking and enforced disappearance. Syria is not a state party to the International Convention against the Taking of Hostages, but acceded to the UN Convention against Torture in 2004. It is notable that such conventions cover even individual acts of torture or hostage-taking that may not meet the gravity threshold for the ICC.

In many cases, treaties conferring extraterritorial jurisdiction can be seen to embody other jurisdictional principles discussed above. The growing number of treaties aiming at the suppression of terrorist conduct could thus be seen as a manifestation of the protective principle, while universal ratification of the Geneva Conventions has perhaps rendered moot whether the extraterritorial jurisdiction over war crimes in international armed conflict technically derives from the universality principle or from the treaties themselves. In other cases, as noted above, domestic legislation implementing treaty obligations may limit the exercise of jurisdiction to crimes committed *by* the state's nationals or residents (active nationality principle) or *against* its nationals (passive nationality principle). Both the seriousness of the crimes concerned and the scope of extraterritoriality often lead treaty-based extraterritorial jurisdiction to be compared – or confused – with universal jurisdiction. However, rather than applying universally to acts that are accepted as international crimes, the jurisdiction extends only over states party to the treaty and over the crime(s) specified in the treaty. But the fact that a state has explicitly consented to the jurisdiction through ratifying the treaty means that a foreign court is less likely to entertain objections on sovereignty grounds.

### **Limitations on extraterritorial jurisdiction**

While international law allows for different forms of extraterritorial jurisdiction, it also places significant limits on its exercise, including a range of sovereign and diplomatic immunities. Heads of state and foreign ministers, at a minimum,

enjoy absolute sovereign immunity while in office, although once they leave office, immunity remains only for acts that were performed in an official capacity.<sup>36</sup> Another limitation occurs when states pass legislation to restrict the exercise of universal jurisdiction and other forms of extraterritorial jurisdiction on grounds of public policy and international comity, seeking to avoid becoming a forum for prosecuting crimes where no nexus to the state exists.<sup>37</sup>

Even if extraterritorial jurisdiction is recognized under international law, therefore, whether a particular crime can be prosecuted will likely depend on the relevant national implementing legislation, the applicable domestic criminal law, and the status of any immunities enjoyed by the accused. A strategic approach to case selection would take into account the factors noted above, the desirabil-

ity of targeting perpetrators from more than one side of the conflict, and *the need to avoid damaging future prospects for transitional justice*. A particular danger arises from the *ne bis in idem* or double jeopardy rule against defendants being repeatedly tried for the same offence; this is a general principle of criminal law and enshrined in the statutes of most international criminal tribunals (including the ICC).<sup>38</sup> A seriously mishandled investigation or trial may enable a defendant to avoid future attempts to bring him or her to justice by claiming double jeopardy.

Other challenges associated with extraterritorial jurisdiction include the difficulty of complicated extradition arrangements (for example, with countries neighbouring Syria) and apprehending accused persons. Additionally, if multiple foreign jurisdictions prosecute persons for violating inter-

## Criminal prosecutions in foreign national courts: potential impacts on justice and accountability

Criminal prosecutions in foreign national courts could be a significant step towards justice for Syria. First, such cases could send a message to Syrians that the international community is still committed to accountability, so long as foreign jurisdictions undertake investigations without bias and prosecute crimes under international law as broadly as possible. However, there is a potential that these cases could have a negative impact on Syrians' perceptions of jus-

tice if prosecutions are only pursued against opposition figures – even if they are affiliated with groups such as ISIS. Solely focusing on counter-terrorism cases would risk being viewed by Syrians as a message that the international community is only concerned with national security and will turn a blind eye to atrocities committed by all parties during the conflict to date.

Second, such prosecutions could prepare the ground for, or be presented as first steps towards, prosecutions in Syria of the highest-level perpetrators, in the post-conflict future. The impact would be maximized if several countries conducted domestic legal proceedings in parallel, particularly if national prosecuting authorities were able to coordinate investigations as part of a limited but targeted strategy for pursuing overall justice.

While a series of extraterritorial cases are feasible in the short- to medium-term, they should not be regarded as providing a solution to the challenge of transitional justice in Syria. Prosecutions in foreign national courts would necessarily involve a piecemeal approach, and expectations should be modest. For instance, such cases will likely be limited to lower-level perpetrators, as the most senior Syrian state officials are inaccessible and may still benefit from immunity before foreign courts. These limitations should be openly acknowledged to avoid sending the wrong message to Syrians. Nonetheless, such cases hold the potential for delivering a measure of accountability in individual cases, while helping to advance a wider process of justice for Syria overall.



national laws, each will apply and interpret the laws differently, potentially leading to inconsistent application of principles for similar crimes.

## Civil actions in foreign national courts

Civil actions provide an alternative further potential legal avenue for victims to obtain redress for the abuses they have suffered. Rather than facing a prison sentence or other punishment, the defendant in a successful civil action is ordered to pay compensation to the plaintiff. Civil actions do not prevent a separate criminal prosecution and may make an attractive short-term alternative until a longer-term criminal process is established.

Since the 1980s, activists have pioneered the use of civil actions against those responsible for committing human rights abuses abroad. Perhaps the best-known cases have been brought in the United States under the Alien Tort Statute<sup>39</sup> and the Torture Victim Protection Act (TVPA).<sup>40</sup> For example, the family of a young man tortured to death in Paraguay successfully sued the senior policy officer responsible after he moved to New York, obtaining a judgement for over \$10 million.<sup>41</sup> A number of such cases have relied on so-called 'tag jurisdiction,' meaning the defendant was served with process during a brief presence on US territory.<sup>42</sup>

The ability to pursue civil actions for conduct committed abroad, however, has been significantly limited by several recent judgements which have had the effect of buttressing the rule that gives states immunity from process in foreign jurisdictions. In the *Jurisdictional Immunities (Germany v. Italy)* case, the International Court of Justice stated that state immunity was applicable even in a case of an alleged violation of a peremptory norm (*jus cogens*)<sup>43</sup> of international law.<sup>44</sup> The ICJ made clear that that it was addressing 'only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether and to what extent immunity might apply in criminal proceedings against an official of the State is not in issue in the present case'.<sup>45</sup> However, the European Court of Human Rights (ECtHR) later extended the ICJ's logic.<sup>46</sup> In *Jones and Others v. the United Kingdom*, a

case involving British nationals who had been imprisoned in Saudi Arabia, the ECtHR upheld a state's ability to extend immunity from civil proceedings not only to other states themselves but also to state officials, even in a case alleging torture.<sup>47</sup> However, the Court created a distinction between immunity for civil and criminal cases, noting that state practise on the question of state immunity and claims of torture was 'in a state of flux' and is a matter which Contracting States should keep 'under review'.<sup>48</sup> The uncertainty is perhaps particularly apposite in those civil law countries which have a *partie civile* system. In these countries, a victim can apply as a *partie civile* to an investigating judge (*juge d'instruction*) to open a criminal investigation and attach a claim for damages to a criminal prosecution. In such situations, even if states or state officials enjoy immunity from civil process, victims may be able to pursue redress by attaching their claims to criminal cases.

As for the United States, the US Supreme Court has similarly limited the ability of victims to pursue civil litigation in certain situations. In *Mohamad v. Palestinian Authority*, the Court held that the Torture Victim Protection Act does not permit actions against corporations or political organizations such as the Palestine Liberation Organization, but only against individuals. Justice Sotomayor wrote for the unanimous court that 'the text of the TVPA convinces us that Congress did not extend liability to organizations, sovereign or not.' Then in *Kiobel v. Royal Dutch Petroleum Co.*, a majority Supreme Court, working on the presumption that federal laws do not apply extraterritorially, ruled that the Alien Tort Statute does not allow civil actions for conduct committed on the territory of a foreign sovereign.<sup>49</sup> The Court's reasoning in *Kiobel* leaves open the question of whether the presumption against extraterritoriality would apply in the case of failed states where there is no effective sovereign authority (arguably the case in Syria). But more immediately, the court recognized that civil actions against foreigners for conduct committed abroad were still possible under US statutes that expressly permitted such litigation, the primary example being the TVPA which explicitly provides for the liability in civil actions of individuals who, 'under actual or apparent authority, or color of law, of any foreign nation,' subject an individual to torture or extrajudicial killing.<sup>50</sup>

Overall, civil actions in foreign courts are likely to face greater obstacles under rules of immunity than criminal cases, and may also be less appropriate than prosecutions given the scale of criminality involved in the Syrian conflict. However, criminal cases in foreign jurisdictions can be supplemented

with civil claims for redress, either under the *partie civile* system, or in the US under the Torture Victim Protection Act. Another obstacle would be collecting on the judgments, raising the question of whether use of frozen assets would be an appropriate means for doing so.

### Civil actions in foreign national courts: potential impacts on justice and accountability

As with criminal prosecutions in foreign jurisdictions, civil actions could have limited but positive impacts on justice and accountability for Syria, so long as they are complementary to, or prepare the ground for, other mechanisms. Unless they are undertaken as part of a holistic justice strategy designed for long-term effects,

such cases, even if successful, would be perceived as isolated incidents and have little impact on Syrians' perceptions of justice overall. However, large, symbolic judgements could contribute to a wider recognition for harms suffered, especially if combined with equitable remedies.

These types of actions also carry particular risks. Even cases in which victims obtained full satisfaction could be perceived as unjust if defendants with financial resources – more likely to be high-level officials – are able to 'pay off' claims of victims while avoiding criminal responsibility. This is a particularly problematic issue because corruption is endemic in Syria,

so Assad government officials may use ill-gotten gains to settle claims.

These risks should not prevent civil actions, however, in cases where perpetrators reside in the foreign jurisdiction. If persons who could be liable are not brought to trial after long periods of residence in foreign jurisdictions, this could contribute to a perception among Syrians that they are being protected by the host country.<sup>51</sup> Concerted efforts to increase the capacity of Syrians abroad who may be eligible to bring civil claims may help mitigate these risks.

# 2

## Practical and ethical challenges

Mechanisms for securing justice internationally, such as those outlined above, may be available as a matter of law, but practical and ethical constraints might make them undesirable options in the Syrian context. These constraints require careful evaluation.

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The UN Commission of Inquiry on Syria concluded in 2013 that ‘given the protracted and increasingly sectarian nature of the conflict, it seems highly improbable that effective and independent prosecutions that meet essential international standards could be carried out in Syria anytime in the near future.’<sup>52</sup> The situation has since deteriorated.

Although many Syrians and members of the international community are eager to bring the perpetrators of human rights abuses to justice, such steps should not be taken if they harm the potential for a holistic and legitimate transitional justice process once the conflict ends. Furthermore, certain justice mechanisms may seem feasible in theory, but should not be pursued if they cannot be properly and effectively implemented. This section outlines the most pertinent challenges to pursuing justice for victims during the ongoing conflict and aims to explore the potential consequences of implementing justice mechanisms too hastily.

### *In absentia* trials

Prosecutions and civil actions generally require that the defendant be present at trial to put forth a defence and face

punishment if convicted. However, many of the perpetrators of violations remain in Syria, which is largely inaccessible to international actors. Even neutral humanitarian organizations face difficulties in reaching civilians in need of food, water, and medical supplies, so it is unlikely that investigators seeking to bring a regime or opposition figure to justice would be able to do so.

Therefore, many of the options for prosecutions mentioned above rely on the perpetrator of atrocities leaving Syria on travel, for resettlement, or to return to their domicile abroad. For those perpetrators who have no intention of leaving Syria, the only current option for bringing them to justice may be to try them *in absentia*, meaning without their presence at trial.

Despite their use at the Special Tribunal for Lebanon, *in absentia* trials are controversial and are usually altogether prohibited or their use strictly limited. According to the International Covenant on Civil and Political Rights, ‘everyone shall be entitled . . . to be tried in his presence, and to defend himself in person through legal assistance of his own choosing.’<sup>53</sup> This right can be waived, but the issue of what constitutes a waiver differs from country to country. The United

States and other common law countries only recognize a waiver if the accused flees or becomes too disruptive to attend *after* the trial has begun. Trials can never begin without the presence of the accused.<sup>54</sup>

Civil law countries are much more tolerant of *in absentia* trials and some countries consider the absence of the accused at his or her trial date to be a waiver of the right to be present at trial. According to the ECtHR, the accused must 1) receive proper notification; 2) explicitly waive the right to a trial; 3) be given the opportunity to appoint representation; and 4) be allowed a retrial if he or she appears in the prosecuting jurisdiction following the conviction. Germany does not allow *in absentia* trials for serious crimes and France allows them in theory but not in practice. Italy is the most permissive jurisdiction for *in absentia* trials and allows them frequently.

However, the unresolved debate on the issue means that a perpetrator can object to an *in absentia* trial by citing the ICCPR or can demand another trial once he or she has been apprehended, meaning that an *in absentia* conviction, even if upheld on appeal, is not the final say of the court and could be overturned during retrial. Despite the legal hurdles and due process implications of trying a suspect *in absentia*, proponents of the concept argue that these types of trials serve justice better by preserving the quality of evidence, which has a tendency to lose value over time. Also, the trial could demonstrate the seriousness of the international community's resolve to hold perpetrators accountable, wherever their locations, and could serve some deterrent purpose. Without *in absentia* authority, a non-Syrian court could only pursue perpetrators who can be physically apprehended, thus greatly limiting the application of justice mechanisms during the ongoing conflict.

## Investigative access

Apprehending suspects is not the only challenge to carrying out prosecutions during war. Interviewing victims and witnesses still living in Syria is also problematic. Moreover, a prosecutor would need access to documentary and physical evidence, which may also be beyond the reach of expert investigators and forensic analysts.

This is not to say that prosecutions are impossible. Many of the victims and witnesses to atrocities have fled Syria and are currently living in neighbouring countries, in Europe or in North America. The UN Commission of Inquiry has stated that it holds a growing store of evidence related to named individuals which it will make available to any credible justice initiative. The 'Caesar' dossier of 55,000 photographs, showing the bodies of some 11,000 Syrian detainees, was taken by a former military photographer who defected in August 2013. Three former leading international prosecutors have found that the photographs provide evidence of systematic torture and killing by agents of the Syrian government 'capable of being believed by a tribunal of fact in a court of law.'<sup>55</sup> The Syrian Justice and Accountability Centre (SJAC) is also building a comprehensive data store from a wide range of available sources, documenting violations by all sides in the conflict.

Thus, some evidence is immediately accessible to international actors, but the question remains whether such collections of photographs, videos and witness testimonies will be enough to garner a conviction without further corroboration. Prosecutors move forward with trials only when the evidence has a sufficient likelihood of securing a conviction.

## Witness protection

The Rome Statute and the codes of many foreign jurisdictions require that witnesses who come forward to testify in a criminal trial be protected, but a lack of access to Syrian territory also makes victim and witness protection much more difficult. Witness protection cannot be taken lightly – the murder or kidnapping of witnesses is a potential risk and threats or other forms of witness intimidation are common. The ICC, for example, had recurrent issues with witness intimidation in the *Lubanga* trial, where it was compounded by problems of territorial access, as well as in the Kenyan cases. Even in closed sessions, the ICC has had problems with leaks that put witnesses' lives in jeopardy. The problem is particularly acute for victims and witnesses still living in areas under the control of hostile parties.

But the duty to witnesses encompasses more than protecting them from threats or retribution. Sur-

vivors of torture and sexual violence who provide testimony or other evidence at trial may need additional support services, including medical or psychosocial support to address the physical and psychological trauma of abuse. Protection and economic support can also be required by rape survivors who, after speaking out, may be abandoned or threatened by their families because of the perceived shame. The prosecuting jurisdiction should be cognizant of service needs and have the capacity to address them even if the witness is out of reach in Syria. Without a plan for dealing with witness protection in a particular case, tribunals might be breaching an ethical duty by moving forward with prosecutions.

## Ownership and capacity building

Syrian ownership over current justice processes could help feed into the foundations for future justice and accountability mechanisms in a post-conflict Syria. The ICC's complementarity principle, by which international prosecutions can occur in tandem with domestic prosecutions, has the potential for promoting a feeling of national ownership among Syrians, as does a hybrid tribunal that employs both Syrian and international judges and lawyers. However, the ICC and a hybrid tribunal are perhaps the two least feasible options for Syria at the moment. Prosecutions in foreign national courts are currently more feasible but offer very limited means for including Syrian voices or input. Such prosecutions, even if initiated on the suit of individual victims, are based in the law of the foreign state and managed by that state's judges and lawyers. However, without a feeling of ownership among Syrians, prosecutions in foreign national courts may be ignored or at worst completely rejected by the majority of the local population. As such, these prosecutions may not have the desired positive impact on future transitional justice processes in Syria.

Another problem with foreign prosecutions is the lost potential for capacity building among Syrian lawyers, judges, and institutions. The prevailing impunity for serious crimes in Syria is first and foremost a failure of its national justice system.<sup>56</sup> This failure is not only evident in the government's

official justice system and courts, but also in rebel-held areas, where due process has been replaced with extrajudicial executions and revenge killings. Thus, the need for capacity building is great. The ICC and hybrid tribunals have some potential for capacity building, but foreign national judicial systems do not include a means of training or providing technical assistance during the progress of a trial. The lack of capacity building may be another lost opportunity for helping build a Syrian-led process after the conflict ends.

Syrians seem to be in agreement that justice and accountability should be a priority. Interviews with a diverse group of Syrians commissioned by SJAC revealed polarized views on many issues but strong support for 'the notion that those who committed abuses on both sides should be prosecuted.' Furthermore:

*Pro- and anti-regime interviewees differed on whether the trials should occur in the existing courts or in new ones, but most in both camps favoured Syrian courts and rejected international participation.<sup>57</sup>*

Given that the conflict has already seen extensive foreign involvement by states and other actors both within the region and across the world, the desire for a Syrian-led approach is perhaps hardly surprising. The conundrum posed by the current situation is that substantial Syrian ownership is at once impossible but essential, while international involvement is both necessary but unlikely to be embraced by Syrians. This challenge is not going to be easily overcome, but should at least be understood by international and foreign actors seeking to pursue justice during the ongoing conflict.

## Impartiality

According to multiple sources of documentation, the Assad regime is responsible for the great majority of atrocities committed in the conflict to date. Many sources also blame the Syrian government for escalating what were peaceful protests into a violent conflict, exacerbating the humanitarian crisis, and enabling the rise of extremism. As a result, international actors including UN agencies, Western and Arab states, and many NGOs have expressed heavy criticism of Assad and his adminis-



tration. ISIS receives even stronger scorn. While the condemnation may be deserved, it makes the international community appear partisan and makes it difficult for it to be seen as an impartial broker of justice in what is already a highly politicized and divisive conflict. Syrians are nowhere near a consensus on their opinion of the Assad regime or the multitude of other armed groups (with perhaps the exception of ISIS, for which most show a uniform disdain). It is therefore possible that a significant proportion of the Syrian population may not view any convictions derived from a Western or Arab court as legitimate.

At the same time, the logistical and legal hurdles mentioned above mean that foreign jurisdictions are far more likely to target their own nationals and residents for prosecution, with a focus on national security concerns and countering terrorism. Many of the foreign or dual nationals entering Syria are fighting for rebel or extremist groups. Thus, foreign national courts are most likely to exercise jurisdiction over a certain type of perpetrator – opposition fighters, particularly those with links to terrorism. The resulting convictions could support the already prevalent view that the West no longer cares about pursuing justice against Assad or his allies and could negatively affect the perceptions of Syrians when it comes to the agenda of the international community and what accountability means for their country. Sweden’s conviction of a former Free Syrian Army rebel for mistreating a prisoner is an example of the potential backlash prompted by these types of prosecutions. Sweden used extraterritorial jurisdiction over war crimes to try Mouhannad Droubi after a Facebook video was discovered that depicted him beating a man who was tied up and defenceless.<sup>58</sup> Since this was the first time someone had been convicted of a war crime in the Syrian conflict, many Syrians decried the conviction and claimed that it ignored the biggest perpetrator of atrocities, the Assad regime. If European countries continue to prosecute former rebels, the outcry may increase.

## Double jeopardy

The variety of possible jurisdictions available for extraterritorial prosecutions exposes the accused person to the risk that two or more states hold concurrent jurisdiction over his/her crimes. If more

than one jurisdiction moves forward with a trial, the issue of double jeopardy arises. Although double jeopardy is prohibited in the constitutions and laws of many states, it is not clearly prohibited on the transnational level, meaning that a suspect accused of committing crimes in Syria could potentially be charged in more than one state and could face a period of sentencing in each.<sup>59</sup> An argument can be made that multiple prosecutions for the same crime are an abuse of the suspect’s rights and creates an ethical dilemma for those eager to seek justice against war criminals. The principal protection against prosecutions in multiple states is a state’s refusal to extradite the suspect on the grounds that he or she has already been tried. Since each state has its own rules on both double jeopardy and extradition, there is quite a bit of uncertainty for accused persons in the field of extraterritorial prosecutions.

Double jeopardy is not limited to extraterritorial trials. If Syria initiates prosecutions as part of its own transitional justice process in the post-conflict period, Syrians may demand the ability to prosecute individuals who have already been tried abroad – particularly if the foreign prosecution failed on due process grounds or was seen as too detached from the local context and did nothing to contribute to a national healing process. A decision on whether to extradite the accused back to Syria would need to balance the legitimate right of Syrians to seek justice for crimes committed on their territory and the accused’s right to fair treatment under the law.

## Failure could cause disillusionment with justice

Syrians are eager for retribution both for redress and for the current stalemate to end. Thus, they will carefully scrutinize and also attach hope to any action taken by international or foreign tribunals with regards to crimes committed during the conflict. If these actions fail to garner prosecutions, fail to secure guilty verdicts, or if the sentences are perceived as too lenient, Syrians may lose faith in international standards of due process and instead turn to vigilante justice to achieve their desire for

retribution. Moreover, many international and Syrian actors are calling for immediate prosecutions because they believe guilty verdicts could act as a deterrent against further atrocities. However, there are few indications that the Assad regime or extremist rebel groups will be deterred by interna-

tional judicial action. Another failed attempt by the international community to exert a positive influence in Syria could result in increased hopelessness among Syrians. Disillusionment with formal systems of justice will not bode well for a future transitional justice process in Syria.



# 3

## Conclusions

Reviewing pre-transition accountability options for Syria reveals a rich variety of potential legal avenues, but complex practical obstacles and ethical challenges to achieving justice. This briefing has sought to identify which international justice mechanisms would actually be feasible to apply in the current Syrian context, while bearing in mind their limitations. Most importantly, the likely and possible impacts on the current situation in Syria and future prospects for transitional justice should be carefully weighed before any mechanisms are employed. The following recommendations are therefore advanced to guide implementation.

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### **Postponing justice is preferable to a flawed process**

As the Syrian conflict continues without an end in sight, the argument for immediately pursuing some form of accountability, beyond the simple documentation of violations, has become pressing. Limiting the culture of impunity that currently prevails in Syria and demonstrating a commitment to justice for the Syrian people are two strong arguments against delaying accountability. It is also possible that neither the transition itself nor future transitional justice mechanisms will ever become a reality. If the Syrian regime falls, the new leaders may not necessarily favour democratization or a transitional justice process that conforms to international human rights standards. Moreover, victims of human rights violations have the right to an effective remedy under

international law,<sup>60</sup> such that a prolonged wait for the implementation of justice could itself be a serious violation of their human rights.

Current avenues for accountability, however, should be followed with adequate regard for their impact on the prospects for establishing a comprehensive transitional justice process, and should abide by the principle of ‘do no harm.’ The scale of the practical and ethical challenges is such that it would clearly be easier to wait for a transition of power before pursuing justice for past atrocities, when the political climate in Syria may be more conducive to a wider range of options and to implementing a more comprehensive approach to accountability. Recent history also includes a number of instances where leaders accused of international crimes have remained in power for years, placing a question over the effectiveness of international justice. After over a decade of atrocities in Darfur, for example, President Omar al-Bashir of Sudan remains in power out of the reach of the

ICC, despite his indictment. While efforts to secure some form of accountability for gross abuses committed in Syria should not be endlessly postponed, postponement is therefore preferable to an inherently flawed process that fails to meet the needs of victims and creates disillusionment with formal judicial processes, damaging the long-term prospects for transitional justice in Syria.

## **Prosecutions in foreign courts are the most feasible options currently**

This report has put forth several options for pursuing justice against the perpetrators of crimes under international law committed in Syria, and has evaluated the feasibility and impacts of each. The analysis demonstrates that international mechanisms, including the ICC or a hybrid tribunal, will be difficult to establish in the current political climate. The premature creation of a hybrid tribunal is also likely to be highly politicized and denounced as illegitimate by a significant portion of the Syrian population. Thus, strategic criminal prosecutions and civil litigation in foreign national courts will likely have the greatest short-term impact out of the range of options discussed.

The options should be evaluated strategically, bearing in mind, for example, the need to protect the rights of victims and witnesses, the value of maintaining Syrian ‘ownership’ of justice mechanisms, and the importance of not damaging future prospects for more comprehensive transitional justice

arrangements after a change of government in Syria. While prosecutions in foreign national courts do not address the issue of ownership, they may chip away at impunity in Syria, provide recourse to some victims, and even have a positive effect in maintaining pressure internationally for broader accountability measures. At a time when geo-political alliances may be shifting in the Syrian conflict, such an approach may also help forestall the political rehabilitation of, or award of amnesties to, those responsible for crimes against humanity.

## **Current accountability processes should try to connect with Syrians**

Any justice mechanism that is implemented outside of Syria will be, to some extent, disconnected from the realities on the ground. However, this disconnect can be mitigated if the court or prosecuting authority in question strives clearly and openly to explain its processes and decisions to ensure that Syrians can understand why certain actions are being taken, and how they might lead to a more comprehensive justice process post-conflict. These interactions can happen through satellite radio, social media, and leafleting in refugee camps, and judicial decisions could be translated or summarized in Arabic and published online. In particular, current accountability actions should accord with the interests of the Syrian people who have experienced violations of their rights and should be driven by the legitimate claims of Syrian victims. By doing so, the justice mechanism, whether a foreign court or international tribunal, can give voice to

Syrian concerns and help forestall misconceptions about the international community's motivations.

## **Impartiality of current processes will affect long-term prospects for justice**

Accountability mechanisms should, as a priority, focus on delivering justice for the most serious crimes under international law, including torture, war crimes and crimes against humanity, rather than targeting mere participation in the conflict or focusing solely on terrorist-related activity. While

individual cases may necessarily target an individual perpetrator, accountability mechanisms as a whole should be non-partisan and consider the potential culpability of all actors in the conflict, including members of the Syrian government. If national prosecutors in foreign jurisdictions solely target designated terrorist groups or only prosecute individuals from the opposition, the Assad supporters will feel bolstered while opposition supporters, including moderates, may grow resentful of foreign judicial intervention and reject international legal standards if a transition eventually transpires. It is, therefore, important for current justice mechanisms to take a holistic view of accountability in Syria even as they target individual perpetrators.



## Endnotes

- 1 Eg UN Commission of Inquiry, 2013, Annex IV, pp 124-128.
- 2 There is already a large and growing literature on transitional justice and its place in peace-building; see eg. Stan and Nedelsky. For the role of international criminal justice in transitional justice, see special issue 7 (3) (2013) of the *International Journal of Transitional Justice*.
- 3 An Iraqi-Syrian rebel group, formerly known as the Islamic State in Iraq, which is widely known in Syria by its Arabic acronym *Da-ash*. The group changed its name in June 2014 to the Islamic State (IS).
- 4 UN Commission of Inquiry, 2014.
- 5 For example, under Article 30 of the UN Convention against Torture, to which Syria is a party, other states parties can refer a dispute over the interpretation or application of the Convention to the ICJ, following exhaustion of negotiation or arbitration; see Lichtenstein Institute of Self-Determination.
- 6 Rome Statute of the International Criminal Court, 2187 UNTS 90, Art. 13. Most of the ICC's initial case-load derived from 'self-referrals' but under the Rome Statute states parties are not limited only to referring their *own* situation to the court.
- 7 Peter R Neumann, 'Foreign fighter total in Iraq/Syria now exceeds 20,000; surpasses Afghanistan conflict in the 1980s', *International Center for the Study of Radicalization and Political Violence*, 26 January 2015. Retrieved from <http://icsr.info/2015/01/foreign-fighter-total-syriairaq-now-exceeds-20000-surpasses-afghanistan-conflict-1980s/>; see also UN Security Council, Sixteenth report of the Analytical Support and Sanctions Monitoring Team, §14.
- 8 Statement of Foreign Secretary William Hague to the UK House of Commons, 16 June 2014.
- 9 Jordan, Tunisia, Djibouti, the Comoros, and most recently Palestine are States Parties to the ICC.
- 10 'Ministry: around 2,400 Tunisians fighting in Syria,' *AFP*, 23 June 2014
- 11 See Neumann, *supra* n7.
- 12 UN-administered hybrid courts were also established in Kosovo and East Timor.
- 13 See Chautauqua Blueprint.
- 14 See Aryeh Neier, 'An Arab War-Crimes Court for Syria', *New York Times*, 4 April 2012.
- 15 David Scheffer, 'Let justice be served in Syria and Iraq', *LA Times*, 5 July 2014.
- 16 See Van Schaak.
- 17 *Restatement (Third) of the Foreign Relations Law of the United States*, American Law Institute, 1987, § 402-3
- 18 See International Court of Justice, *Effect of Awards of Compensation Made by the UN Administrative Tribunal*, Advisory Opinion, 13 July 1954.
- 19 The 'Uniting for Peace' resolution was steered by the United States at the start of the Korean war and has since been used, for example, to authorize UN intervention in the Suez crisis in 1956, and to authorize sanctions against South Africa in 1981 over its occupation of Namibia.
- 20 The establishment of tribunals for Gaza and for North Korea have also recently been mooted.
- 21 UN Commission of Inquiry, 2013, p125.
- 22 'UN would offer humanitarian support in Syria safe zones – Amos', *Reuters*, 20 October 2014.
- 23 To date, the external political opposition, such as the Syrian Opposition Coalition and its interim government, have been unable to establish governance infrastructure, control territory, or claim that their composition or selection processes are representative of Syrians.
- 24 Statute of the Special Tribunal for Lebanon, UN Security Council, S/RES/1757 (2007).
- 25 UN International Independent Investigation Commission (UNIICC).
- 26 *Ayyash et al.*, Special Tribunal for Lebanon, STL-11-01.
- 27 The Special Tribunal released indictments six years after the Hariri assassination occurred and the first trial started after a further three years.
- 28 S/RES/2178 (2014), 24 September 2014.
- 29 *Restatement (Third)*, *supra* n17, §402, Comment g, Reporter's note 3.
- 30 See Princeton Principles.
- 31 Lattimer and Sands, p47. For details of state practise see Amnesty International, *Universal Jurisdiction*; see also International Committee of the Red Cross, Practice Relating to Rule 157, Jurisdiction over War Crimes, and Practice relating to Rule 159, Prosecution of War Crimes, in *Customary International Humanitarian Law Database*, accessible at [www.icrc.org/customary-ihl/eng/docs/home](http://www.icrc.org/customary-ihl/eng/docs/home)
- 32 Spain, the UK, Belgium, France and Switzerland. For the judgements in Spain and the UK, see *The Pinochet Papers*.
- 33 This was certainly the approach that the majority of judges appeared to take in the final *Pinochet* case before the UK House of Lords; see *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (Pinochet No 3)* (HL(E)) [2001] 1 AC 147.
- 34 Neither the victim nor perpetrator were Swedish nationals. See 'Sweden sentences Syrian rebel to five years for war crime', *BBC*, 26 February 2015. Retrieved from <http://www.bbc.com/news/world-middle-east-31639378>
- 35 Eg. Geneva Convention IV, Art. 146.
- 36 International Court of Justice, *Arrest Warrant of 11 April 2000 (DRC v Belgium)*, Judgement, 14 February 2002, §54-61. However, courts have held that official acts do not include international crimes; see *Pinochet No. 3*, *supra* n33.
- 37 Thus the UK now requires approval for such cases from the Director of Public Prosecutions, and Belgium requires state prosecutor approval in all cases other than those where the accused is a Belgium national or long-term resident.
- 38 See Rome Statute, Art. 20; see also Bockel.
- 39 28 U.S.C. § 1350; ATS.
- 40 Pub L 102-256, 106 Stat 73; TVPA.

- 41 *Filártiga v. Peña-Irala*, 639 F 2d 876 (2<sup>nd</sup> Circuit 1980).
- 42 Eg. *Kadić v. Karadžić*, 70 F 3d 232, § 247.
- 43 A peremptory norm of international law is a fundamental principle of international law that is accepted by the international community of states as a norm from which no derogation is permitted. Examples include prohibitions on the use of aggressive force, genocide, crimes against humanity, and slavery or other human trafficking.
- 44 *Jurisdictional Immunities (Germany v. Italy)*, Judgement, 3 February 2012.
- 45 Ibid. § 91.
- 46 Ibid. § 91.
- 47 ECtHR, *Jones and Others v the United Kingdom*, Application nos 34356/06 and 40528/06, Judgement, 14 January 2014.
- 48 Ibid. §§ 212-215.
- 49 *Kiobel v. Royal Dutch Petroleum Company*, 133 S.Ct. 1659 (2013).
- 50 TVPA, section 2(a). Under 2(b) a court can decline to hear a claim if the claimant 'has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred'.
- 51 This is the case, for example, in relation to Rifaat al-Assad, the uncle of Bashar al-Assad who is widely recognized as responsible for atrocities in Hama during the 1980s. Rifaat resides in Spain and owns extensive properties in France, but has so far avoided litigation.
- 52 UN Commission of Inquiry, 2013, p124.
- 53 ICCPR, Art. 14(3).
- 54 See Human Rights Watch, [http://www.hrw.org/sites/default/files/related\\_material/Letter%20Cambodia-HRW-ECCC%20Rules%2011.17.06\\_0.pdf](http://www.hrw.org/sites/default/files/related_material/Letter%20Cambodia-HRW-ECCC%20Rules%2011.17.06_0.pdf)
- 55 De Silva et al, p21.
- 56 Eg. The UN Commission of Inquiry tersely states that the national justice system is 'not a viable option to ensure accountability', 2013, p124.
- 57 Charney and Quirk, p7.
- 58 See *supra* n34.
- 59 See Ireland-Piper. But see also Rome Statute, Article 20.
- 60 See International Covenant on Civil and Political Rights, Art. 2(3); Arab Charter on Human Rights, Art. 23.

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- , *Eighth Report of the independent, international commission of inquiry on the Syrian Arab Republic*, UN Human Rights Council, 13 August 2014, A/HRC/27/60
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