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OVERCOMING THE CHALLENGES TO ACHIEVING JUSTICE FOR SYRIA

*Stephen J. Rapp**

Mass atrocities began to be committed in Syria in March 2011. They were launched by the Syrian regime in response to peaceful protests by members of the civilian population. Initially, the situation appeared to replicate the one that arose in Libya the previous month. Unarmed citizens in the streets were met with lethal firepower of a repressive regime, protesters were pursued by the security forces into their neighborhoods, and those captured alive were imprisoned and brutalized.

In Libya, it was most famously marches of worshipers exiting Friday prayers whose shouted words were met by snipers. It was a regime whose supreme leader, Muammar Gaddafi, called the protesters “rats” and “cockroaches” and threatened to hunt them down without mercy.¹ “We will come *zenga* [neighborhood] by *zenga*, house by house, room by room. We will find you in your closets.”² In Syria, it was the arrest and torture of fifteen school children for painting political slogans on a wall followed by demonstrations for their release that were met by security forces opening fire on the protestors leaving some dead in the streets.³ At the top of the regime, President Bashar al-Assad rejected any accommodation, calling the peaceful demonstrators “conspirators” who were planning “sedition.”⁴

In both situations, the governments’ repression led to the rise of armed opposition groups that eventually controlled territory and turned the situations into “non-international armed conflicts.” But even after there were armed

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¹ John-Paul Ford Rojas, *Muammar Gaddafi in His Own Words*, TELEGRAPH (Oct. 20, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8838644/Muammar-Gaddafi-in-his-own-words.html>.

² *Id.*

³ Joe Sterling, *Daraa: The Spark that Lit the Syrian Flame*, CNN (Mar. 1, 2012), <http://www.cnn.com/2012/03/01/world/meast/syria-crisis-beginnings/>.

⁴ *Id.*

rebels to fight, the governments continued to bombard civilians who were believed to support the rebellions. By the definitions of international criminal law, this targeted and indiscriminate violence against civilians became not only crimes against humanity but also crimes of war. These acts inevitably led to brutality by opposition forces against captured government soldiers or against civilian populations thought to be sympathetic to the regimes—acts which could also be war crimes, and, if sufficiently systematic or widespread, crimes against humanity.

But the response to the situations in Libya and Syria could not have been more different, at least as represented by the United Nations (U.N.) Security Council, the one body with the legal authority to take effective action. Within fifteen days of the beginning of the protests and repression in Libya the Security Council voted 15-0 to adopt Resolution 1970 in order to freeze the assets and restrict the travel of the leaders of the Libyan regime and to refer the situation to the International Criminal Court (ICC) for possible prosecution.⁵ The ICC Prosecutor immediately launched an investigation and within three months requested warrants of arrest against Muammar Gaddafi, the head of state; his son Saif Gaddafi, as *de facto* Prime Minister; and Abdullah al-Senussi, the Director of Military Intelligence—all for alleged crimes against humanity committed before the situation morphed into an armed conflict.⁶ In late June 2011, barely four months after the Security Council referred the situation, the ICC Pre-Trial Chamber issued warrants for the arrest of the three individuals.⁷

Well before the ICC warrants were issued, it became apparent that the threat of prosecution was not going to deter the Libyan regime. The opposition had been able to drive Libyan government forces out of Benghazi and from several towns in eastern Libya, but by mid-March there was a successful counter-offensive by the Libyan government that threatened to retake Benghazi and hunt down its civilian enemies “house-to-house” and “room-to-room.”⁸ The response was U.N. Security Council Resolution (UNSCR) 1973 that was adopted on March 17, 2011, with ten affirmative votes and five abstentions, to authorize a “no-fly zone” and “all necessary measures . . . to protect civilians

⁵ S.C. Res. 1970, ¶¶ 15, 17 (Feb. 26, 2011).

⁶ Prosecutor v. Gaddafi, Case No. ICC-01/11, Warrant of Arrest, ¶¶ 2, 4 (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1101337.pdf>.

⁷ *Id.* ¶¶ 95, 99, 102.

⁸ Rojas, *supra* note 1.

and civilian populated areas.”⁹ Under authority of the resolution, a NATO air campaign began with French planes soon in the air targeting the Libyan government’s counter-offensive. Over the ensuing months civilians were protected, but the operation as a whole was criticized for providing air support for opposition forces and having “regime change” as its true goal.¹⁰ By November, the opposition had won, Gaddafi was dead, and a new government was in place. This did not bring stability or security in Libya and the alleged “over-reach” of UNSCR 1973 has been a stated reason for opposition to any effective action by the U.N. Security Council in Syria.¹¹

According to a 2013 survey by the Libyan government, about 4,700 rebel supporters, armed and civilian, were killed during the 2011 conflict.¹² Final figures of deaths on the government side have not yet been determined, but are unlikely to be greater. About 2,100 are missing on both sides.¹³ By contrast, the Syrian Observatory for Human Rights estimated that the number of dead in the Syria conflict reached 250,000 in mid-October 2015, after four and a half years of conflict and with no end in sight.¹⁴ This has not moved the U.N. Security Council. Russian vetoes, cast or threatened, have prevented even the approval of targeted economic sanctions or travel bans. After a chemical weapons attack in August 2013 in Ghouta, Syria, that cost the lives of about 1,300 men, women, and children,¹⁵ the need to avoid a Russian veto resulted in UNSCR 2118 that expressed the “strong conviction” that the responsible individuals “should be held accountable,” but did not provide a mechanism for doing so.¹⁶

⁹ Press Release, Security Council, Security Council Approves ‘No-Fly Zone’ Over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011), <http://www.un.org/press/en/2011/sc10200.doc.htm>; S.C. Res. 1973, ¶¶ 4, 6–12 (Mar. 17, 2011).

¹⁰ See, e.g., *Coalition Forces Report Progress in Libya Strikes*, NAT’L PUBLIC RADIO (Mar. 21, 2011, 1:00 PM), <http://www.npr.org/2011/03/21/134738870/Coalition-Forces-Report-Progress-In-Libya-Strikes>.

¹¹ See, e.g., Daniel Larison, *The Brewing Proxy War in Syria*, WEEK (Feb. 6, 2012), <http://theweek.com/articles/478350/brewing-proxy-war-syria>.

¹² Ian Black, *Libyan Revolution Casualties Lower Than Expected, Says New Government*, GUARDIAN (Jan. 8, 2013), <http://www.theguardian.com/world/2013/jan/08/libyan-revolution-casualties-lower-expected-government>.

¹³ *Id.*

¹⁴ *More than 250,000 People Killed in Syria War*, i24NEWS (Oct. 17, 2015), <http://www.i24news.tv/en/news/international/middle-east/89266-151017-more-than-250-000-people-killed-in-syria-war>.

¹⁵ *Syrian Opposition; 1,300 Killed in Chemical Attack on Ghouta Region*, AL ARABIYA NEWS (Aug. 21, 2013), <http://english.alarabiya.net/en/News/middle-east/2013/08/21/Syrian-activists-at-least-500-killed-in-chemical-attack-on-Eastern-Ghouta.html>.

¹⁶ S.C. Res. 2118, ¶ 15 (Sept. 27, 2013).

The idea of referring the Syria situation to the ICC was not put to vote during the first three years of the conflict, largely because it was viewed as pointless as it would certainly be met by a Russian veto. Finally, in May 2014, the French Ambassador to the U.N. formally proposed an ICC referral resolution. It attracted thirteen affirmative votes, but was rejected because of the vetoes of Russia and China.¹⁷ An agreement was reached to eliminate the Syrian government's chemical weapons program and its supply of the lethal chemicals was substantially removed and destroyed. However, it was credibly reported that the government continued to use poison chlorine gas in the barrel bombs that it was dropping on neighborhoods that it believed harbored rebel fighters. Without finding anyone responsible, this use of chlorine was condemned by the Security Council in UNSCR 2209 adopted in March 2015.¹⁸ Nevertheless, the Syrian government remained incorrigible, and images of children dying from chlorine poisoning were brought to the U.N. Security Council. Finally, in August 2015, the Council adopted UNSCR 2235 authorizing an investigation to identify those responsible for the use of chemical weapons in Syria.¹⁹ Even then, there was no certainty that the identified individuals would be subjected to any independent judicial or administrative proceeding.²⁰

By contrast, in the Geneva-based U.N. Human Rights Council (UNHRC), the international community acted similarly as to Libya and Syria in mandating for each an independent Commission of Inquiry (CoI) to investigate serious violations of international human rights law and related crimes. For Libya, the first CoI mandate came in a special session of the UNHRC on February 25, 2011, the day before the UNSC adopted Resolution 1970 referring the Libya situation to the ICC.²¹ The CoI reported to the UNHRC on June 17, 2011.²² As

¹⁷ Press Release, Security Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, U.N. Press Release SC/11407 (May 22, 2014), <http://www.un.org/press/en/2014/sc11407.doc.htm>.

¹⁸ Press Release, Security Council, Adopting Resolution 2209 (2015), Security Council Condemns Use of Chlorine Gas as Weapon in Syria, U.N. Press Release SC/11810 (Mar. 6, 2015), <http://www.un.org/press/en/2015/sc11810.doc.htm>.

¹⁹ S.C. Res. 2235, ¶ 5 (Aug. 7, 2015).

²⁰ Louis Charbonneau, *U.N. Chief Sets Out Framework for Syria Poison Gas Investigation*, REUTERS (Aug. 27, 2015), <http://www.reuters.com/article/2015/08/27/us-mideast-crisis-syria-chemicalweapons-idUSKCN0QW2M420150827>.

²¹ Situation of Human Rights in the Libyan Arab Jamahiriya, Rep. of the Human Rights Council on its Seventeenth Session, U.N. Doc. No. A/66/53, at 25–27 (June 17, 2011).

²² *Id.* at 170–71.

the conflict and violations were then continuing, it was re-mandated, and after the end of the conflict, the Libya CoI filed its final report in February 2012.²³

For Syria, the UNHRC, acting in a special session in April 2011, first mandated an investigative mission by the Office of the High Commissioner for Human Rights (OHCHR).²⁴ In a subsequent special session in August 2011, a formal CoI was created, and its mandate has been renewed an unprecedented seven times.²⁵ Chaired by Paulo Pinheiro of Brazil, the CoI has made numerous requests to the Syrian government for cooperation with its investigations, in particular to permit it to investigate in Syria. All of the requests have been denied. It has performed its investigation largely through oral interviews conducted from outside Syria, and completed 3,840 such interviews from September 2011 through August 2015.²⁶ It has reported to the UNHRC ten times.²⁷ The length of its reports was regulated by U.N. rules that limited them to about twenty-three printed pages.²⁸ However, its reports are often appended with extensive annexes detailing its findings as to the multiplicity of violations, victims, and perpetrators. For example, its February 2013 report included eighty pages of annexes describing ten different ways in which the Syrian people were suffering and dying: “Unlawful killing: massacres,” “Other unlawful killing,” “Arbitrary arrest and detention,” “Enforced disappearance,” “Torture and other forms of ill-treatment,” “Sexual violence,” “Violations of children’s rights,” “Unlawful attacks,” “Specifically protected persons and objects,” and “Pillaging and destruction of property.”²⁹

The policy of the U.S. government in the Syria crisis has often been criticized for failing to act to protect civilians as it did it in Libya. This was particularly the case after the Obama administration decided not to conduct a military strike in Syria in response to the Syrian government having crossed a

²³ Rep. of the Int’l Comm’n of Inquiry on Libya to the Human Rights Council at its Nineteenth Session, U.N. Doc. A/HRC/19/68 (Mar. 2, 2012).

²⁴ Human Rights Council Res. S-16/1, U.N. Doc. A/HRC/RES/S-16/1, ¶ 7 (Apr. 29, 2011).

²⁵ See *Independent International Commission of Inquiry on the Syrian Arab Republic: About the Commission of Inquiry*, OFF. HIGH COMMISSIONER FOR HUM. RTS., <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx> (last visited Nov. 4, 2015).

²⁶ Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic to the Human Rights Council at its Thirteenth Session, U.N. Doc. A/HRC/30/48, ¶ 4 (Aug. 13, 2015) [hereinafter Report on the Syrian Arab Republic 2015].

²⁷ *Crying Out for Justice: The Continued Plight of Syrian Civilians*, HUM. RTS. COUNCIL (Sept. 22, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/CryingOutforJusticeSyrianCivilians.aspx>.

²⁸ See generally Report on the Syrian Arab Republic 2015, *supra* note 26.

²⁹ Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic to the Human Rights Council at its Twenty-Second Session, U.N. Doc. A/HRC/22/59, at 3–4 (Feb. 5, 2013).

“red-line” by its undoubted use of chemical weapons in the attack on Ghouta in August 2013. But such a strike would have had to be undertaken without international legal authorization, as Russia would certainly have vetoed any U.N. Security Council resolution similar to UNSCR 1973. President Obama was also faulted by his critics for rejecting a 2012 plan, supported by Secretary of State Hillary Clinton and Secretary of Defense Leon Panetta, to provide the “moderate” Syrian armed opposition with substantial training and weaponry.³⁰ Even when the decision was finally made in 2014 to “train and equip” such groups, it was only to fight the forces of the Islamic State in Iraq and the Levant (ISIL), with no assistance provided to fight the forces of the Assad regime. Indeed, there was no assurance that they would be protected if attacked by Assad forces—a fatal flaw as Assad’s forces were far more vigorously targeting the “moderate” groups than they were ISIL. By September 2015, General Lloyd Austin, the head of U.S. Central Command, testified in Congress that there were only “four or five” such trained and equipped individuals remaining in the fight.³¹

But the U.S. has been strong and consistent in pushing for judicial accountability on every currently available avenue and in laying the groundwork for future trials in national, hybrid, or international courts. The U.S. supported the French resolution in May 2014 to refer the Syria situation to the ICC and actively encouraged other Security Council members to vote in the affirmative helping achieve thirteen “yes” votes in the face of the Russian and Chinese vetoes. At the same time, it most strongly advocated for consideration of a hybrid court believing that such an institution would have stronger support among the Syrian people and a better chance of success in bringing high-level perpetrators to account in a region where only two states (Jordan and Tunisia) were ICC members. Of course, such hybrid courts have only been established by agreements between the host states and the U.N. or other multilateral organizations, and the creation of one would have to await the transition to a Syrian government willing to accept independent justice.

³⁰ Jon Swaine, *Leon Panetta Supports Hillary Clinton Plan to Arm Syrian Rebels*, TELEGRAPH (Feb. 7, 2013, 8:54 PM), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9856382/Leon-Panetta-supports-Hillary-Clinton-plan-to-arm-Syrian-rebels.html>.

³¹ Nabih Bulos, *US-Trained Division 30 Rebels 'betray US and hands weapons over to al-Qaeda's affiliate in Syria'*, TELEGRAPH (Sept. 22, 2015, 5:22 PM), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/11882195/US-trained-Division-30-rebels-betrayed-US-and-hand-weapons-over-to-al-Qaedas-affiliate-in-Syria.html>.

In the absence of independent courts with present jurisdiction, the U.S. has placed the greatest emphasis on strengthening efforts to document the ongoing crimes so that the evidence will be available on the day that justice becomes possible. This was underlined by its consistent support in the UNHRC of the Syria CoI, and of its co-sponsorship of all of the eight resolutions that mandated continuing investigations. But the U.S. also led efforts to go above and beyond these Geneva-based inquiries. This was born of the recognition that while the Syria CoI was filing excellent narrative reports, it was not in the business of preserving evidence for future prosecutions. As with other UNHRC-mandated inquiries, it relied largely on interviews of witnesses who were promised confidentiality because it was unable to provide continuing protection. The Syria CoI did not have the capacity to capture and analyze the hundreds of thousands of pages of regime documents that had become available in Syria or to do similar work on the enormous numbers of mobile-phone videos of scenes of carnage in Syria that were accessible on the internet and on social media.

This is why Secretary Hillary Clinton launched the initiative to create a Syria Justice and Accountability Center (SJAC) in a speech to a meeting of the Friends of the Syrian People in Istanbul in April 2012.³² This center was to serve as a hub for efforts to engage Syrians in the collection, preservation, and analysis of documentation to ensure that there would be abundant credible evidence for future accountability processes. A donors' conference was held in Rabat, Morocco, in September 2012 in which more than forty governments participated.³³ By February 2013, the U.S. State Department was able to report that the SJAC was up and running and to describe its work as follows:

The Syria Justice and Accountability Center (SJAC) is an independent entity that focuses on: 1) Collection and analysis of documentation related to ongoing violations of human rights and international humanitarian law (IHL) in Syria; 2) Coordination of Syrian and international actors working on documentation and transitional justice efforts; and 3) Education and outreach on transitional justice concepts and processes.

The SJAC has built a network of nearly 70 Syrian human rights activists largely within Syria working on documentation of human rights and IHL abuses.

³² See *Fact Sheet: The Syria Justice & Accountability Center*, U.S. DEP'T STATE (Feb. 20, 2013), <http://www.state.gov/r/pa/prs/ps/2013/02/205031.htm>.

³³ *Id.*

The SJAC has signed agreements with 10 local and international organizations, such as the Center for Documentation of Violations in Syria (VCD) and the Syria Commission on Justice and Accountability to provide information and document abuses and violations of international law.³⁴

Under the terms of one of the agreements, SJAC provided the Syria Commission on Justice and Accountability (now known as the Commission on International Justice and Accountability, or CIJA) with one million dollars to bring out of Syria up to one million pages of documents, to download 470,000 videos, and to begin the analysis of this material to determine individual criminal responsibility.³⁵ The early success of this project led to direct funding of CIJA from other donors that by 2014 allowed the CIJA annual budget to rise to almost six million dollars.³⁶ This funding permitted the hiring and deployment of a staff of 135, most of them Syrians, to build solid cases for future prosecution. By late 2015, CIJA had prepared cases against more than two dozen senior officials of the Syrian regime.³⁷ At the same time, a search capacity was developed that was being shared with those national prosecutors in Europe or North America who had begun to look for suspects over whom they had jurisdiction.³⁸

The U.S. has also provided support to efforts to analyze and make available the evidence of a military police photographer, code-named “Caesar,” who defected in August 2013.³⁹ He had been part of a team of up to eleven photographers that were required to take more than 55,000 photos of the bodies of persons tortured to death in Syrian government custody after which those bodies were delivered to a military hospital in Damascus.⁴⁰ Using digital memory sticks he smuggled the photos out of the hospital, and eventually out of Syria. The images show humans starved and eviscerated, their skin carved

³⁴ *State Dept. Fact Sheet on Syria Justice and Accountability Center*, U.S. EMBASSY: LONDON, UK (Feb. 20, 2013), <http://london.usembassy.gov/midest272.html>.

³⁵ Julian Borger, *Syria's Truth Smugglers*, *GUARDIAN* (May 12, 2015, 3:10 PM), <http://www.theguardian.com/world/2015/may/12/syria-truth-smugglers-bashar-al-assad-war-crimes>.

³⁶ See Colum Lynch, *Exclusive: Washington Cuts Funds for Investigating Bashar al-Assad's War Crimes*, *FOREIGN POL'Y* (Nov. 3, 2014, 10:18 PM), <http://foreignpolicy.com/2014/11/03/exclusive-washington-cuts-funds-for-investigating-bashar-al-assads-war-crimes/>.

³⁷ Borger, *supra* note 35.

³⁸ *Id.*

³⁹ MARK LATTIMER, SHABNAM MOJTAHEDI & LEE ANNA TUCKER, *CEASEFIRE & SYRIA JUST. & ACCOUNTABILITY CTR., A STEP TOWARDS JUSTICE: CURRENT ACCOUNTABILITY OPTIONS FOR CRIMES UNDER INTERNATIONAL LAW COMMITTED IN SYRIA* 24 (2015), <http://33bjc3l8q7dpgn6j1rg637f.wpengine.netdna-cdn.com/wp-content/uploads/A-Step-towards-Justice1.pdf>.

⁴⁰ *Id.*

with knives and burned by chemical agents, their eyes gauged and bones broken—horrendous acts done to people with the horror of the last hours of their lives still on their faces. The photos were taken of at least 11,000 humans who were tortured in the prisons of the Syrian state security services, with the number of the facility marked on the body and on a white card held next to the body for each photograph.⁴¹

Together with his family, Caesar was provided with refuge and protection in a third country in June 2014, and was hosted in Washington between July 27 and August 2, 2014, where he met with senior officials of the U.S. government and with the House Foreign Affairs Committee. The FBI analyzed all of the metadata accompanying Caesar’s digital images and prepared a forensic report. It further permitted disclosure of its findings as to the images that “there were no artifacts or inconsistencies indicating that they had been manipulated” and that they “appear to depict real people and events.”⁴² The U.S. State Department’s Office of Global Criminal Justice (formerly known as the Office of War Crimes Issues) became a custodian of the Caesar material as allowed by 22 U.S.C. § 8213, which authorizes it to “collect information regarding incidents that may constitute crimes against humanity, genocide, slavery, or other violations of international humanitarian law.”⁴³ It has since made the Caesar photos and the FBI report available to the Syria CoI and to national prosecution authorities in Europe that may have jurisdiction to prosecute those responsible for the crimes evidenced by the material.

Indeed, it is at the national level in third countries where the opportunity may first arise for credible investigations, prosecutions, and adjudications of criminal responsibility. Since 1999 there have been successful prosecutions of persons charged with the extraterritorial commission of atrocity crimes by authorities in at least thirteen countries, including Switzerland, Belgium, the Netherlands, the United Kingdom (U.K.), Norway, Sweden, Finland, Denmark, Germany, France, Spain, Canada, and the U.S.⁴⁴ These cases have invariably involved a suspect that came to live in the prosecuting country,

⁴¹ *Id.*

⁴² Stav Ziv, *Syria Torture Photos ‘Depict Real People and Events’: FBI Report*, NEWSWEEK (July 22, 2015, 5:55 AM), <http://www.newsweek.com/syria-torture-photos-depict-real-people-and-events-fbi-report-356057>.

⁴³ Investigations of Violations of International Humanitarian Law, 22 U.S.C. § 8213(a) (2007).

⁴⁴ REDRESS & INT’L FED’N FOR HUMAN RIGHTS, STRATEGIES FOR THE EFFECTIVE INVESTIGATION AND PROSECUTION OF SERIOUS INTERNATIONAL CRIMES: THE PRACTICE OF SPECIALISED WAR CRIMES UNITS 5 (2010), http://www.redress.org/downloads/publications/The_Practice_of_Specialised_War_Crimes_Units_Dec_2010.pdf.

often claiming refugee status as a victim of atrocities, but later identified as a possible perpetrator. The legal basis for these prosecutions has been “universal jurisdiction”⁴⁵ but the domestic laws invariably required a significant interest or connection to the prosecuting state, usually that the defendant was “present in” its territory, though some required that the individual have obtained some kind of resident status.

To date, only Sweden has prosecuted a case involving an alleged atrocity committed in Syria, and that was of a former member of the Free Syrian Army (FSA) who had been shown on a video made in 2012 mistreating and threatening a soldier of the Syrian regular army that the FSA had taken prisoner.⁴⁶ The defendant, Mohannad Droubi, was given refugee status in Sweden in 2013 and arrested about ten months later.⁴⁷ On conviction in 2015, he received a sentence of five years in prison.⁴⁸

But officials of the Syrian regime who have committed atrocities during their fight to dominate and survive are unlikely to be found outside Syria while that fight continues. If an international court like the ICC were to have jurisdiction of the Syrian crimes, one could envision that arrest warrants would issue and wanted posters would circulate but actual arrests would take a long time. This could in-and-of-itself be useful, as it would be a warning to others to stop or even to desert in order to avoid becoming internationally wanted men for the rest of their lives. National prosecution authorities could perform the same role if their domestic laws allowed prosecution of persons still in Syria. Most of their laws would permit prosecutions of extra-territorial crimes if the victim were a citizen or national of the prosecuting state, basing jurisdiction on the “passive personality” principle.

The U.K. has one such possible case in the torture-murder of its citizen Dr. Abbas Khan, an orthopedic surgeon who went to Syria in 2012 to treat patients in a hospital in a rebel-held area.⁴⁹ He was soon arrested by the regime and reportedly tortured and starved in several prisons before dying just before he

⁴⁵ *Id.*

⁴⁶ Dennis Lynch, *Syrian Rebel Mouhannad Droubi Sentenced to 5 Years in Swedish Prison for War Crimes*, INT'L BUS. TIMES (Feb. 26, 2015, 10:42 AM), <http://www.ibtimes.com/syrian-rebel-mouhannad-droubi-sentenced-5-years-swedish-prison-war-crimes-1829388>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Mark Tran, *British Doctor Abbas Khan Unlawfully Killed in Syrian Prison, Jury Says*, GUARDIAN (Oct. 27, 2014), <http://www.theguardian.com/world/2014/oct/27/british-doctor-abbas-khan-unlawfully-killed-syria-jury-inquest>.

was purportedly to be released.⁵⁰ Under diplomatic pressure, his embalmed body was returned to the U.K., where a jury found that he was “deliberately and intentionally killed without any legal justification.”⁵¹ British authorities are investigating to determine whether to prosecute any responsible individuals.⁵² But who should be the defendant(s) that would be charged in the U.K.? The doctor’s mother and another witness testified that he had been tortured in Prison 235, the so-called “Palestine branch”⁵³ of the Syrian security services. Dr. Khan died in December 2013, four months after Caesar defected, but Caesar’s photos can prove that torture was being committed in Prison 235 based on the photos of fresh bodies that arrived at the military hospital during the period when Dr. Khan was in custody in Prison 235. The identity of the officers in charge of Prison 235 and its operations may be found in the documents gathered and analyzed by CIJA or discovered by interviewing persons who survived torture in the prison and who are now among the tens of thousands of refugees that have reached Europe.

The presence of those refugees and the pressures on public services that they create also now give European authorities a solid public interest basis to exercise universal jurisdiction for the crime of torture that is recognized under international law as embodied in the Convention Against Torture of 1984,⁵⁴ to the extent that the prosecutions meet conditions required under their domestic statutes. On September 30, 2015, Laurent Fabius, the Foreign Minister of France, announced that French authorities had opened such an investigation into torture committed in Syria as revealed in the Caesar photographs.⁵⁵ The applicable French law, Penal Code Article 689-2, would appear to permit a full investigation to be undertaken in France, but actual prosecutions would require the defendant(s) be found in France.⁵⁶

⁵⁰ *Id.*

⁵¹ Lynch, *supra* note 46.

⁵² Tran, *supra* note 49.

⁵³ *Amnesty International Report 2014/15*, AMNESTY INT’L, <https://www.amnesty.org/en/countries/middle-east-and-north-africa/syria/report-syria/> (last visited Nov. 7, 2015).

⁵⁴ *See generally* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

⁵⁵ Adam Nossiter, *France Opens Criminal Investigation of Torture in Syria Under Assad*, N.Y. TIMES (Sept. 30, 2015), http://www.nytimes.com/2015/10/01/world/europe/france-investigates-syria-torture-bashar-assad.html?_r=0.

⁵⁶ *See* The Scope and Application of the Principle of Universal Jurisdiction, Rep. of the Permanent Mission of France to the Secretariat of the United Nations, U.N. Doc. AT/SEC214 (Apr. 27, 2010), http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/France_E.pdf.

The criminal law in Germany allows for full exercise of universal jurisdiction in cases of torture. This means that German authorities could prosecute officials⁵⁷ in Syria responsible for acts of torture without a victim or perpetrator needing to be present in Germany. Such prosecutions are at the discretion of the German Federal Prosecutor.⁵⁸ Factors weighing in favor of such a prosecution would be the absence of any credible prosecutions in other national or international courts and the impact on Germany of the tens of thousands of Syrian refugees who have been driven to flight by the torture and other atrocities perpetrated by officers of the Syrian regime. In fact, Germany will be the country most affected by the influx of Syrian refugees given Chancellor Angela Merkel's vow that it will remain a haven for refugees and her government's expectation that 800,000 will arrive in 2015 with Syria the largest source of the migrants.⁵⁹

Of course, bringing significant numbers of major perpetrators to justice will require the end of the Syrian conflict and the arrival of a regime that would enable the establishment of credible courts. There are those that argue that this cannot happen because peace will require the present leader of Syria to be allowed to stay in power, in the face of abundant credible evidence that he was the most responsible for the massive atrocities committed by his regime. In intensive engagement with numerous actors who are seeking solutions to the suffering in Syria, I have heard this argument only from non-Syrians. I have not heard this line being spoken by any of the survivors of the hundreds of thousands of victims of the crimes in Syria. In the Syrian case, peace cannot come without justice. Given the massive crimes committed by Assad against his own people, particularly against the Sunni majority, it is impossible to see him remaining leader of the whole country and his criminal responsibility being ignored. Of course, it is difficult to reach a peace agreement with a leader who by the terms of the accord could face prosecution. But what survivor could accept a peace that leaves a major alleged perpetrator in power free to torture and kill again?

⁵⁷ Such officials could not include the present Syrian President, Bashar al-Assad, or other high-level ministers involved in foreign relations under the "Arrest Warrant Case" decided by the ICJ in 2002. *See generally* Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3 (Feb. 14).

⁵⁸ HUMAN RIGHTS WATCH, THE LEGAL FRAMEWORK FOR UNIVERSAL JURISDICTION IN GERMANY 4–7 (2014), http://www.hrw.org/sites/default/files/related_material/IJ0914German.pdf.

⁵⁹ Stefan Wagstyl, *Angela Merkel Stands by Refugees Decision Despite Polls*, FIN. TIMES (Oct. 4, 2015, 5:14 PM), <http://www.ft.com/intl/cms/s/0/0e2aeb36-6a90-11e5-8171-ba1968cf791a.html#axzz3ozBVT8HI>.

By 2015, major crimes had been committed on all sides, with the atrocities of the jihadists of ISIL becoming the most notorious. The crimes of ISIL and other extremists have been further enabled by Assad's repression of ISIL's enemies in the moderate opposition. But there were also factions in Syria, including many Christians, who tolerated Assad because they feared that his defeat would strengthen the extremists.

This is why it is so important to include in any peace agreement the framework for a judicial process that includes all communities—the independence of which can be aided by international participation. It should focus on the most responsible, and offer ways to rehabilitate and reconcile with those who were drafted into the crimes. But most importantly, it must be a system where cases are decided solely on the evidence and not on the basis of who comes out on top at the end of the conflict. Thanks to unprecedented documentation efforts, largely performed by Syrians with international support, the evidence and human capacity will be ready for the day when it will become possible to achieve justice for the victims and survivors of the mass atrocities committed in Syria.