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Imagining justice for Syria : water always finds its way

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Civil Suits: The Utility of State Responsibility and the Law of Tort

*What distinguishes a criminal from a civil sanction ... is the judgment of community condemnation which accompanies and justifies its imposition.*¹

The prior chapters all discuss legal and institutional proposals for attributing criminal responsibility to those individuals answerable for the many international crimes being committed in Syria. Other forms of liability exist. Civil suits—suits for money damages—present another route to accountability. There are several pathways for achieving Syrian *state* responsibility under international law, some of which have been under-explored when it comes to Syria. In addition to proceedings before human rights treaty bodies and the International Court of Justice (ICJ), jurisdiction over sovereign states exists within domestic courts under limited circumstances, notwithstanding long-standing principles of foreign sovereign immunity. Suits against individual perpetrators sounding in tort offer another accountability option with the potential to contribute a form of restorative justice for victims and to jumpstart criminal processes. In the interests of completeness, this chapter canvasses these various options. Although they are no substitute for vigorous criminal liability, these suits extend victims some benefits that may not accrue with participation in a criminal process, even as a *partie civile*. For one, they may better contribute to one express goal of the human rights law edifice: the rehabilitation of survivors of human rights abuses.

Options for State Responsibility

A number of options exist for according state responsibility for the commission of international crimes. Although there is no notion of state criminality in international law for reasons discussed below, states can be held civilly liable before the ICJ and, to a certain degree, in domestic courts. There is also a network of treaty-based human rights bodies in which victims can lodge claims. Jurisdiction before a majority of these fora, however, is premised on an exercise of state consent, which is often withheld by the very states that are most deserving of censure.

State Criminality

International law does not recognize the concept of state criminality. During the drafting of the International Law Commission's Articles on State Responsibility, an early version of Article 19 introduced the concept of state crimes.² These were defined as breaches of an international obligation "so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the community as a whole."³ The concept, and even the notion of extracting punitive damages from a state,⁴ could not overcome the attendant controversy and so was eventually dropped from the project.⁵ Instead, the draft Articles attached surplus

¹ Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958).

² James R. Crawford, *State Responsibility*, OXFORD PUBLIC INTERNATIONAL LAW (Sept. 2006), at ¶¶ 8, 13.

³ International Law Commission, 1996 Draft Articles on State Responsibility, adopted by the Drafting Committee on first reading at the forty-eighth session, U.N. Doc A/51/10, 125, at Art. 19.

⁴ MATERIALS ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, U.N. Doc. ST/LEG/SER.B/25 (2012), at 261 ("the award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms.").

⁵ Crawford, *supra* note 2, ¶¶ 32-33.

consequences to serious breaches of peremptory norms of international law,⁶ namely that states not recognize as lawful a situation created by such a breach or otherwise render assistance in maintaining such a situation.⁷ The International Criminal Tribunal for the Former Yugoslavia has thus observed: “Under present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems.”⁸ As a result, state responsibility is limited to civil liability, although punitive damages may be available in some circumstances under domestic law⁹—a feature of U.S. law in particular that is not without its detractors.¹⁰

Treaty-Based Human Rights Bodies

The first, and arguably least robust, option for achieving some measure of state responsibility involves proceedings before the various human rights treaty and multilateral bodies. As yet there is no regional human rights court governing the Middle East that is akin to the European Court of Human Rights or the Inter-American Court of Human Rights that can exercise jurisdiction over Syria. The closest analog is the Arab Human Rights Committee, which was established in 2009 to oversee states’ compliance with the Arab Charter on Human Rights (which Syria ratified in 2007).¹¹ There is no individual complaints mechanism; rather, the Committee reviews state reports, which are submitted triennially, and makes recommendations.¹² (It does not appear that Syria has submitted any reports.)¹³ Although the League of Arab States has approved a Statute of an Arab Court of Human Rights, it is not yet in force.¹⁴ In any case, there is no provision for the future Court to hear individual petitions; it will only be empowered to entertain interstate disputes.¹⁵

Syria has ratified a number of human rights treaties, some of which contain enforcement and dispute resolution mechanisms that might be of use.¹⁶ Most promising is the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), to

⁶ INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, WITH COMMENTARIES (2001), at Art. 40-41.

⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 159 (July 9)

⁸ Prosecutor v. Blaškić, Case No. IT-95-14-AR108bis, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 25 (Oct. 29, 1997).

⁹ 28 U.S.C. § 1605A(c)(4) (allowing for punitive damages against state sponsors of terrorism); 28 U.S.C. § 1606 (allowing for punitive damages against agencies or instrumentalities of a state but not the state itself).

¹⁰ Haim Abraham, *Awarding Punitive Damages Against Foreign States Is Dangerous and Counterproductive*, LAWFARE (Mar. 1, 2019). See also Crawford, *supra* note 2, at ¶ 33 (“The general view is that punitive damages have no application to States.”)

¹¹ League of Arab States, Arab Charter on Human Rights, May 22, 2004, *entered into force* March 15, 2008; Ratification and Signature Status of the Arab Charter on Human Rights (2004), <http://unipd-centrodirittumani.it/en/spilli/Ratification-and-signature-status-of-the-Arab-Charter-on-Human-Rights-2004/147>.

¹² See Mervat Rishmawi, *The Arab Charter on Human Rights and the League of Arab States: An Update*, 10(1) HUM. RTS. L. REV. 169 (2010).

¹³ League of Arab States, Syrian Arab Republic, <http://www.lasportal.org/ar/humanrights/Committee/Pages/Reports.aspx>.

¹⁴ The Statute of the Arab Court of Justice, LAS Res 7790, Ministerial Council, 142nd Regular Sess., E.A (142) C 3, (2014), available at https://aci.hl.org/article.htm?article_id=44.

¹⁵ *Id.* at art. 4. See generally Konstantinos Magliveras & Gino Naldi, *The Arab Court of Human Rights: A Study in Impotence*, 29(2) REVUE QUÉBÉCOISE DE DROIT INT’L 147 (2016) (discussing Arab human rights mechanisms).

¹⁶ Univ. Minnesota, Human Rights Library, *Ratification of International Human Rights Treaties—Syria*, <http://hrlibrary.umn.edu/research/ratification-syria.html>.

which Syria acceded in 2004.¹⁷ The CAT requires states parties to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”¹⁸ The treaty is clear that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹⁹ Notwithstanding these treaty obligations to prevent and punish acts of torture within its jurisdiction, torture remains institutionalized in Syria, as confirmed by the United Nations,²⁰ human rights organizations,²¹ and the chilling Caesar photos.²² In one of its reports, the Syrian Commission of Inquiry (COI) stated “[t]orture is endemic across detention centers and prisons”²³ such that its use rose to the level of a crime against humanity.²⁴ Although some victims have escaped to tell their stories,²⁵ many torture victims are ultimately summarily executed by the regime.²⁶

The CAT envisions several enforcement mechanisms. These include an individual complaint procedure before the Committee Against Torture, an expert body charged with examining state parties’ compliance with the treaty.²⁷ The Committee can also conduct independent inquiries into well-founded indications that torture is being systematically practiced in the territory of state parties²⁸ and entertain communications from a state party that another state party is not fulfilling its treaty obligations.²⁹ These procedures are unavailing against Syria, however, because Syria has not consented to, or has opted out of, them.³⁰ As a result, the CAT Committee can only comment upon reports on treaty compliance submitted by Syria itself and so-

¹⁷ [Convention Against Torture](#) and other Cruel, Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

¹⁸ *Id.* at art. 2(1).

¹⁹ *Id.* at art. 2(2).

²⁰ OHCHR, OPEN WOUNDS: TORTURE AND ILL-TREATMENT IN THE SYRIAN ARAB REPUBLIC (Apr. 14, 2014). The United Nations has also recorded torture and ill-treatment by opposition groups, particularly ISIL and the Nusra Front, which run their own detention centers. *Id.* at 3-4.

²¹ HUMAN RIGHTS WATCH, IF THE DEAD COULD SPEAK: MASS DEATHS AND TORTURE IN SYRIA’S DETENTION FACILITIES (Dec. 16, 2015).

²² Sara Afshar, Opinion, *Assad’s Syria Recorded its own Atrocities. The World Can’t Ignore them*, THE GUARDIAN, Aug. 27, 2018.

²³ Hum. Rts. Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/23/58 ¶ 82 (June 4, 2013); Hum. Rts. Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/25/65, Annex 5 (Feb. 12, 2014) (listing places of detention where torture has been committed).

²⁴ *Id.* ¶ 87.

²⁵ Hans von der Brelie, *Syrian Torture Survivors Speak Out*, EURONEWS, Dec. 21, 2017.

²⁶ See AMNESTY INTERNATIONAL, HUMAN SLAUGHTERHOUSE: MASS HANGINGS AND EXTERMINATION AT SAYDNAYA PRISON, SYRIA (2016).

²⁷ Convention Against Torture, *supra* note 17, at art. 22 (“A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.”).

²⁸ *Id.* at art. 20.

²⁹ *Id.* at art. 21 (“A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention.”).

³⁰ See OHCHR, Reporting Status for Syrian Arab Republic, https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=SYR&Lang=EN.

called “shadow reports” provided by non-governmental organizations.³¹ The Committee’s last set of Concluding Observations devoted to Syria (issued following a request for a special report in 2012) reveal the degree to which Syria has utterly and habitually flouted its treaty obligations under the CAT.³² Not surprisingly, Syria is currently in arrears in responding to the Committee and on its reporting requirements.³³ Likewise, the Working Group on Enforced or Involuntary Disappearances has also concluded that the practice of enforced disappearances in Syria constitutes a policy of crimes against humanity and requested the Security Council to consider an ICC referral.³⁴ Syria has generally ignored, rebuffed, or only evasively responded to the overtures and criticism of the U.N. Human Rights Council’s special procedures.³⁵

The International Court of Justice

The International Court of Justice has both contentious and advisory jurisdiction. Like many multilateral treaties, the CAT contains a resolution mechanism for disputes between state parties concerning the “interpretation or application” of the treaty.³⁶ The concept of a “dispute” has been expansively defined. According to the Permanent Court of International Justice—a precursor to the ICJ—a dispute is “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”³⁷ The ICJ later elaborated that:

Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence. ... There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen.³⁸

Under the system contained within Article 30 of the treaty, the parties concerned must first try to settle their dispute through negotiation and arbitration, if the latter is requested by a state party.³⁹

³¹ Torture Convention, *supra* note 17, at art. 19.

³² See Consideration by the Committee against Torture of the implementation of the Convention in the Syrian Arab Republic in the absence of a special report requested pursuant to article 19, paragraph 1, *in fine*, Concluding observations of the Committee against Torture, U.N. Doc. CAT/C/SYR/CO/1/Add.2 (June 29, 2012). Similar concerns were raised even prior to the revolution. See Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Syrian Arab Republic, U.N. Doc. CAT/C/SYR/CO/1, ¶ 7 (May 25, 2010) (critically assessing the prevalence of torture in Syria).

³³ OHCHR, Felice D. Gaer, Rapporteur for Follow-up on Concluding Observations of the CAT Committee, to His Excellency Faysal Khabbaz Hamoui (Jan. 22, 2014) (noting additional potential CAT violations and requesting follow-up).

³⁴ See Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. A/HRC/27/49, ¶¶ 32, 54, 99 (Aug. 4, 2014).

³⁵ See Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons on his Mission to the Syrian Arab Republic, U.N. Doc. A/HRC/32/35/Add.2 (Apr. 5, 2016), at ¶ 5 (detailing access issues).

³⁶ Torture Convention, *supra* note 17, at art. 30 (“Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration.”).

³⁷ The Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. B) No. 3, (Aug. 30), at ¶19.

³⁸ Interpretation of Peace Treaties, Advisory Opinion, 1950 I.C.J. 65, 74 (Mar. 30).

³⁹ This precondition is satisfied if negotiations have failed or if they have become futile. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, Judgment, 2011 I.C.J. 70, ¶ 159 (April 1) (finding that Georgia had not attempted to negotiate a solution to its dispute with Russia).

This arbitral mechanism has never been activated.⁴⁰ Indeed, although international arbitrations (intra-state and between states and private entities) are on the rise generally, they do not tend to focus on human rights issues.⁴¹ The most prominent recent precedents are state-to-state and include the arbitration between Eritrea and Ethiopia that settled war-related claims between the two countries.⁴² The Permanent Court of Arbitration (PCA) established one such panel (a second panel dealt with a boundary dispute) as part of the 2000 peace agreement between the two countries. After years of litigation, the arbitral panel completed its work in 2009, awarding almost equivalent damages to the two countries.⁴³

According to the CAT regime, if an arbitral tribunal cannot be convened within six months, then state parties have the option of recourse to *the* ICJ in The Hague.⁴⁴ The ICJ has no criminal jurisdiction, but it can entertain proceedings between sovereign states so long as they have consented to its jurisdiction, either by way of a declaration accepting the compulsory jurisdiction of the Court⁴⁵ or through compromissory clauses contained in other treaties, such as the one in the CAT.⁴⁶ Syria has not consented to the ICJ's jurisdiction to hear just any contentious dispute, but it is a party to the CAT and is thus bound by that treaty's compromissory clause. Unlike other states, including the United States, Syria did not avail itself of the option to opt out of ICJ jurisdiction at the time of ratification.⁴⁷

It is rare for states to bring suit against other states before the ICJ absent compelling sovereign interests. Perhaps for this reason, the ICJ has not historically been a forum for states to challenge the human rights practices of other states; this reluctance, however, may be changing.⁴⁸ One of the first efforts to invoke the ICJ in the human rights context involved the ultimately unsuccessful campaign to identify a state willing to bring suit against Cambodia in the 1970s under the Convention on the Prevention and Punishment of the Crime of Genocide.⁴⁹ Article 9 envisions ICJ jurisdiction over suits arising out of the "interpretation, application or fulfilment" of the Convention—a formulation that differs slightly from the CAT.⁵⁰ Human Rights Watch subsequently attempted to encourage states to bring a case against Iraq under the Genocide

⁴⁰ See Nicole M. Hogan, *Arbitration and Protection under the UN Convention Against Torture and other Cruel, Inhuman, Degrading Treatment, or Punishment*, 18 PEPP. DISP. RESOL. L.J. 1 (2018).

⁴¹ See ICC Announced 2017 Figures Confirming Global Reach and Leading Position for Complex, High-Value Disputes (March 7, 2018), <https://iccwbo.org/media-wall/news-speeches/icc-announces-2017-figures-confirming-global-reach-leading-position-complex-high-value-disputes/>.

⁴² See Permanent Court of Arbitration, Eritrea-Ethiopia Claims Commission, <https://pca-cpa.org/en/cases/71/>; Won Kidane, *Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of The Ethiopia-Eritrea Claims Tribunal in The Hague*, 25 WIS. INT'L L. J. 23 (2007).

⁴³ See Michael J. Matheson, *Eritrea-Ethiopia Claims Commission: Damage Awards*, ASIL INSIGHTS (Sept. 4, 2009).
⁴⁴ Torture Convention, *supra* note 17, at art. 30

⁴⁵ United Nations, Statute of the International Court of Justice art. 36(2), 33 U.N.T.S. 993, April 18, 1946.

⁴⁶ See *id.* at arts. 36(2), 36(1), and 37. See Jonathan I. Charney, *Compromissory Clauses and the Jurisdiction of the International Court of Justice*, 81 AM. J. INT'L L. 855 (1987).

⁴⁷ U.N. Treaty Collection, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV.9&chapter=4&lang=en#EndDec.

⁴⁸ See Rosalyn Higgins, *Human Rights in the International Court of Justice*, 20 LEIDEN J. INT'L L. 745 (2007).

⁴⁹ *Campaign Seeks Genocide Trial of Khmer Rouge*, N.Y. TIMES, April 13, 1987; Gregory H. Stanton, *Seeking Justice in Cambodia*, GENOCIDE WATCH, <http://www.genocidewatch.org/seekingjusticecambodia.html>.

⁵⁰ Convention on the Prevention and Punishment of the Crime of Genocide art. 9, 78 U.N.T.S. 277, Jan. 12, 1951.

Convention in connection with the Anfal campaign against Iraqi Kurds in the 1980s.⁵¹ The dissolution of the former Yugoslavia later generated two cases against Serbia and Montenegro, first by Bosnia and Hercegovina and then by Croatia. The ICJ ultimately ruled that while genocide was committed in Bosnia and Hercegovina (but not Croatia),⁵² Serbia was liable only for failing to prevent acts of genocide committed by Bosnian Serb forces in Srebrenica.⁵³ There has been an uptick in such cases in recent years, as evidenced by the claims by Ukraine against Russia under the Convention on the Elimination of All Forms of Racial Discrimination⁵⁴ and the suit by The Gambia against Myanmar under the Convention on the Prevention and Punishment of the Crime of Genocide.⁵⁵

As a useful precedent for the Syria situation, Belgium initiated proceedings against Senegal under the CAT challenging Senegal's failure to prosecute or extradite former Chadian dictator Hissène Habré, who was enjoying safe haven on Senegalese territory.⁵⁶ This was the first opportunity the ICJ has had to entertain a dispute under the CAT.⁵⁷ In its 2012 judgment, the ICJ ruled that Belgium's claims under the CAT were admissible because all state parties have standing to enforce these obligations *erga omnes partes*.⁵⁸ In particular, the Court stated "The States parties to the Convention have a common interest to ensure, in view of their shared values that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity."⁵⁹ In this regard, the Court made a distinction between obligations *erga omnes*, which are owed to the international community as a whole,⁶⁰ and obligations *erga omnes partes*, which are owed to a group of state parties to a treaty.⁶¹ It was thus of no moment that no Belgian citizens were harmed under Habré's

⁵¹ See HUMAN RIGHTS WATCH, HUMAN RIGHTS REPORT: IRAQ AND IRAQI KURDISTAN (1994) (discussing proposals to invoke the ICJ).

⁵² Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgement, 2007 I.C.J. 43 (Feb. 26).

⁵³ *Id.* § 434

⁵⁴ Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukr. v. Russ.), Judgment, 2019 I.C.J. 1 (Nov. 8).

⁵⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gamb. v. Myan.), Order, 2020 I.C.J. 1 (Jan. 23) (authorizing provision measures).

⁵⁶ Questions Concerning the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422 (July 20). Belgium attempted to advance claims with respect to Senegal's failure to prosecute other international crimes under customary international law, but the Court found that these claims were foreclosed because Belgium had not sufficiently advanced them in its prior diplomatic exchanges; as such, they did not form part of the dispute referred to the Court. *Id.* ¶ 54. See generally Cindy Galway Buys, *Belgium v. Senegal: The International Court of Justice Affirms the Obligation to Prosecute or Extradite Hissène Habré Under the Convention Against Torture*, 16 ASIL INSIGHTS (Sept. 11, 2012).

⁵⁷ In its jurisdictional phase, the ICJ also concluded that the requirements of Article 30 of the CAT had been satisfied because the dispute had not been settled through negotiations and Senegal did not respond to Belgium's request for activate the arbitration provision. Questions Concerning, *supra* note 56, ¶ 63. In a previous case, the ICJ found that the CAT's compromissory clause was not properly activated. See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, 2006 I.C.J. 6, ¶ 16 (Feb. 3).

⁵⁸ Questions Concerning, *supra* note 56, ¶¶ 68-69.

⁵⁹ *Id.* ¶ 68.

⁶⁰ Case Concerning the Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain), Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5).

⁶¹ Questions Concerning, *supra* note 56, ¶ 68. See generally Inna Uchkunova, *Belgium v. Senegal: Did the Court End the Dispute between the Parties?*, EJIL: TALK! (July 25, 2012).

regime (though one of the complainants had become a Belgian national) or that Belgium lacked any other “special interest” in Senegal’s adherence to the treaty.⁶²

On the merits, the ICJ determined that Senegal had breached several obligations under the CAT to investigate allegations of torture by way of a preliminary inquiry and either prosecute or extradite the offenders.⁶³ With respect to the latter obligation, the Court found that Article 7(1) of the CAT requires the State to submit the case “without delay”⁶⁴ to “its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the subject.”⁶⁵ This ruling helped to galvanize the establishment of the Extraordinary African Chambers, which ultimately sentenced Habré to life in prison.⁶⁶

Given the above precedent, any state party to the CAT could bring a contentious case against Syria before the ICJ alleging its failure to adhere to its treaty obligations, which include the obligation to desist from torture and to investigate allegations that acts of torture were committed within its territory, including by non-state actors.⁶⁷ The complainant state could also seek provisional measures⁶⁸—the equivalent of interim injunctive relief—which can be achieved relatively expeditiously so long as it can be shown that the measures requested are linked to the claims on the merits and that there is a real and imminent risk of irreparable prejudice in the absence of such relief.⁶⁹ After some uncertainty premised on the anodyne wording of Article 41 of the ICJ Statute, the Court has indicated that such orders are binding and that their breach gives rise to state responsibility.⁷⁰

Unless there is another basis to invoke the ICJ’s jurisdiction, premising jurisdiction on the CAT would limit the Court to considering Syria’s responsibility for acts of torture within its territory.⁷¹ Although torture is a war crime when committed within the context of an armed conflict and is an enumerated crime against humanity, Syria’s responsibility for the commission of other

⁶² Questions Concerning, *supra* note 56, ¶ 65.

⁶³ *Id.* ¶¶ 79-177.

⁶⁴ *Id.* ¶ 115.

⁶⁵ *Id.* ¶ 94.

⁶⁶ See HUMAN RIGHTS WATCH, Q&A: THE CASE OF HISSÈNE HABRÉ BEFORE THE EXTRAORDINARY AFRICAN CHAMBERS IN SENEGAL (MAY 3, 2016).

⁶⁷ Convention Against Torture, *supra* note 17, at art. 6(2) (requiring states parties to conduct a preliminary inquiry into the facts when it takes a suspect into custody).

⁶⁸ ICJ Statute, *supra* note 45, at art. 41(1) (“the Court shall have the power to indicate provision measures which ought to be taken.”).

⁶⁹ See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Request for the Indication of Provisional Measures, Order (July 23, 2018). In addition, the Court must be satisfied that it has *prima facie* jurisdiction and the claims are at least plausible. Massimo Lando, *Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice*, 31(3) LEIDEN J. INT’L L. 641 (2018).

⁷⁰ LaGrand Case (Germ. v. U.S.), Judgment, 2001 I.C.J. 466, ¶¶ 101-2 (27 June) (“the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court.”).

⁷¹ At the time it ratified the Genocide Convention in 1955, Syria did not opt out of the ICJ’s jurisdiction over breaches of that treaty either. U.N. Treaty Collection, Convention on the Prevention and Punishment of the Crime of Genocide, Declarations and Reservations,

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en. Although governmental violence is clearly sectarian, there have been fewer allegations that it rises to the level of genocide.

But see Genocide Watch, *Genocide and Mass Atrocities Alert: Syria* (April 23, 2013),

<http://www.genocidewatch.org/syria.html>.

war crimes and crimes against humanity would only tangentially adjudged.⁷² The challenge is to find a state willing to initiate such a proceeding, either in defense of the anti-torture norm or because they have nationals who have been victimized. The state would have to be a party to the CAT that has recognized the ICJ's jurisdiction over treaty disputes. Although a contentious case would not likely enjoin the Syrian regime, it would establish the facts, develop the law, order a remedy, contribute "to a change of consciousness," and potentially catalyze new international responses.⁷³

In addition to these inter-state contentious cases, the ICJ can also exercise a form of advisory jurisdiction enabling it to rule on international law questions presented to it, including the legal consequences of state action and the nature of states' obligations under treaties they have ratified and customary international law.⁷⁴ Among other options, the General Assembly by majority vote⁷⁵ could request an advisory opinion on Syria's responsibility for its radical breaches of international law and its human rights obligations, beyond the prohibition against torture.⁷⁶ The General Assembly made just such a request in 2003 seeking a determination of the legal consequences of Israel's construction of a security wall in Occupied Palestinian Territory.⁷⁷ Theoretically, the Court could opine on the responsibility of non-state actors as well, although this is an untested proposition.⁷⁸

Assuming that the General Assembly would issue such a request, the ICJ is unlikely to decline jurisdiction.⁷⁹ Such advisory opinions are not technically binding on the target state, but they would carry great moral authority and provide legal clarity, offer a forum in which to consolidate and present evidence collected by the COI and other documentarians, identify responsible parties, make it more difficult for states to deny the prevalence of the practice of torture in Syria, and recommend remedies for victims.⁸⁰ Jurisprudence from the ICJ could also help build momentum towards an ICC referral or litigation elsewhere, including potential criminal suits. Notwithstanding some efforts from civil society, no states have proven willing to bring a contentious case before the ICJ or initiate the process for seeking an advisory opinion.

⁷² See William A. Schabas, *The Crime of Torture and the International Criminal Tribunals*, 37 CASE WESTERN RES. J. INT'L L. 349 (2006).

⁷³ Philippe Sands, QC, Professor of Law, University College London, *Climate Change and the Rule of Law: Adjudicating the Future in International Law*, U.K. Supreme Court (Sept. 17, 2015).

⁷⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16 (June 21).

⁷⁵ ICJ Statute, *supra* note 45, at art. 18.

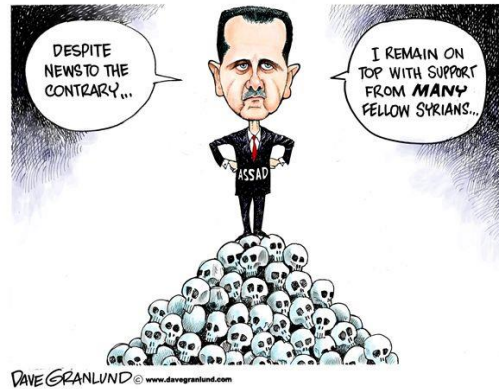
⁷⁶ *Id.* at art. 96. In addition to the General Assembly, other U.N. organs and agencies can request advisory opinions "on legal questions arising within the scope of their activities." See ICJ, *Organs and Agencies Authorized to Request Advisory Opinions*, <https://www.icj-cij.org/en/organs-agencies-authorized>.

⁷⁷ G.A. Res. ES-10/14, U.N. Doc. A/RES/ES-10/14 (A/ES-10/L.16) (Dec. 8, 2003).

⁷⁸ See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 219 (June 27) (discussing the law applicable to the *Contras*); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 403, ¶ 1 (July 22) (determining whether the unilateral declaration of independence by the Provisional Self-Government of Kosovo was in accordance with international law).

⁷⁹ *Legal Consequences*, *supra* note 74, at ¶ 44 ("Given its responsibilities as the 'principal judicial organ of the United Nations' (Article 92 of the Charter), the Court should in principle not decline to give an advisory opinion" absent "compelling reasons").

⁸⁰ See Aaron Matta & Anda Scarlat, *Malaysia Airlines Flight MH-17—Possible Legal Avenues for Redress (Part 1)*, OPINIOJURIS (Aug. 27, 2015).



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Civil Cases in Domestic Courts

Civil suits offer another option for pursuing accountability for the commission for international crimes.⁸¹ Civil human rights litigation in domestic courts can have a profound impact on victims of human rights violations and their communities.⁸² Because the victim controls the essential decisions about the case, participating as a plaintiff in human rights litigation can restore and promote a sense of agency—the impression that we exercise some control over the events that affect us—especially when that sense was destroyed by the very conduct that is the subject of the suit. Beyond physical harm, the human rights abuses at issue typically involve protracted denials of dignity, liberty, choice, personal integrity, and autonomy, and the mere act of re-conceptualizing oneself as a holder of rights can offer a sense of empowerment.⁸³ Such litigation presents opportunities for corrective justice and an exercise in self-determination that inverts the status of victim and perpetrator.⁸⁴ By contrast, pervasive impunity can exacerbate the dignitary harm caused by torture and other abuses by perpetuating feelings of injustice, fear, and vulnerability, especially where abusers live in the same communities as their victims.⁸⁵ Tort rhetoric in particular invites the attribution of legal responsibility and moral blameworthiness, thus contributing to the alleviation of feelings of guilt that may arise from past participation in political activities, “allowing” oneself to be captured, capitulating under interrogation, and ultimately surviving.

⁸¹ See generally Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN’S L. J. 1 (2004) (discussing advantages of civil suits over criminal suits for victims of trafficking); Gilat J. Bachar, *Collateral Damages: Monetary Compensation for Civilians in Asymmetric Conflict*, 19(2) CHIC. J. INT’L L. 375 (2019).

⁸² For a fuller discussion of the impact of litigation on plaintiffs, see Brief of The Center for Justice and Accountability et al. at 7-13, *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004) (No. 03-339) (compiling statements by plaintiffs in ATCA-style suits), available at https://cja.org/downloads/Sosa_v_Alvarez_Survivors_Brief.pdf. See generally Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. REV. 2305 (2004).

⁸³ Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 661-62 (1987-88); see also Jan Gorecki, *Human Rights: Explaining the Power of a Moral and Legal Idea*, 32 AM. J. JURIS. 153, 154-55 (1987) (conceptualizing the driving power of rights).

⁸⁴ Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL ED. 49, 50 (2004).

⁸⁵ Mary Fabri, *Torture and Impunity: Legal Recourse May Lead to Healing*, 16(2) STRESSPOINTS (2002) (“The effects of torture are compounded by impunity. Impunity for human rights atrocities contributes to the ongoing state of fear that survivors live with day to day. The unpunished crimes of the perpetrators continue to violate survivors’ personal sense of integrity and freedom.”).

These discursive processes of “naming, blaming, and claiming”⁸⁶ are important features of civil litigation (as compared with criminal prosecutions).⁸⁷ The very process of a court determining the validity of a claim will force an examination of the historical record,⁸⁸ even if the outcome is ultimately not successful.⁸⁹ And, tort suits generally proceed under less rigorous burdens of proof and more generous evidentiary rules than criminal suits.⁹⁰ In this way, civil suits may allow plaintiffs to receive more information about what happened to them or their loved ones through the process of discovery, which is often a key motivation for bringing suit.

Taking the perspective of a plaintiff’s community, while individual suits involve the allegations of only the named plaintiffs, civil litigation often manifests a representational quality. As such, it may accommodate a more contextual and comprehensive consideration of harm to the body politic as well as to the survivor’s body. This is particularly true where the plaintiff can present evidence that she was harmed as part of a policy or practice of human rights violations against similarly situated individuals or where large-scale human rights abuses amounting to genocide or crimes against humanity were committed and are proved. A favorable judgment or verdict in such situations offers a public and official acknowledgement of rights, the stigmatization of violations, a measure of accountability, and a symbolic break with the past. Other victims—of the incident or regime in question and beyond—can experience these dignitary functions of litigation vicariously and can enjoy the reordering of social relations brought about by a finding of liability in an ostensibly bilateral case.

Civil suits involving events in Syria can take a number of forms. The United States boasts several statutes—including the Alien Tort Statute (ATS),⁹¹ the Torture Victim Protection Act (TVPA),⁹² the Anti-Terrorism Act (ATA),⁹³ and the Trafficking Victims Protection Reauthorization Act (TVPRRA)⁹⁴—that allow victims to bring civil claims in federal court to seek redress for international law violations. Such claims could also be pled as ordinary torts in federal courts under principles of diversity or in state courts (e.g., assault, kidnapping, and wrongful death)

⁸⁶ William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 LAW & SOC. REV. 631 (1980-81).

⁸⁷ Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT’L L.J. 141, 156-59, 195 (2001) (noting different role of victims in civil and criminal processes).

⁸⁸ Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 383 (1987).

⁸⁹ See generally JULES LOBEL, *SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA* (2003) (discussing the impact of failed cases on processes of social change).

⁹⁰ Kim & Hreshchyshyn, *supra* note 81, at 17.

⁹¹ 28 U.S.C. § 1350.

⁹² 28 U.S.C. § 1350 note. The TVPA creates a cause of action for torture and extrajudicial killing (including attempt) without regard to the nationality of the plaintiff or defendant. *Id.* Sec. 2(a).

⁹³ 28 U.S.C. § 2333 (1992). The ATA requires that the victim be a U.S. national, although there are no limitations on the nationality of the plaintiff, who may be an heir. *Id.* at § 2333(a) (“Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.”).

⁹⁴ 18 U.S.C. § 1595 (2005). Plaintiffs can be foreign nationals. *Id.* at § 1595(a) (“An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.”).

as is done in Israel.⁹⁵ To be sure, the ATS has been significantly truncated by the U.S. Supreme Court when it comes to claims that have a strong extraterritorial dimension, particularly in so-called “foreign-cubed” cases: cases in which a foreign defendant committed an offense extraterritorially against a foreign victim.⁹⁶ The TVPA and TVPRA (and the ATA to a lesser extent) remain available for a range of claims that might emerge from the war in Syria. One precondition of civil suits against individuals in the United States that has proven so far to be unsurmountable is the need to assert personal jurisdiction over the defendant. Because a willing plaintiff has yet to identify a Syrian perpetrator in the United States, and very few victims have been able to gain access to the United States, these tort statutes have not been a fruitful avenue of accountability.

Beyond the United States, many other legal systems draw the line between “public law” and “private law” differently and permit victims to constitute themselves as *parties civiles* to initiate and join criminal proceedings as civil parties. This allows them certain procedural advantages, including the right to seek damages in the context of a criminal prosecution.⁹⁷ A handful of cases proceeding in Europe have invoked this species of civil liability. For example, the European Center for Constitutional and Human Rights and Sherpa have joined a case against Lafarge (now LafargeHolcim) as civil parties, alleging the company financed terrorism by doing business with ISIL.⁹⁸ In addition, some national courts recognize the idea of “jurisdiction by necessity” within the “residual forum.”⁹⁹ This allows for the assertion of jurisdiction over civil claims even absent ordinary connections to the forum state in order to avoid the risk of a denial of justice.¹⁰⁰ In many European systems, the concept is being developed as a response to Article 6(1) of the European Convention on Human Rights, which indicates that “[i]n the determination of his civil rights and obligations . . . , everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”¹⁰¹ This concept has been infrequently invoked,¹⁰² and is alien to U.S. law,¹⁰³ but might provide the basis for civil jurisdiction over events in Syria given that access to Syrian courts is foreclosed.

⁹⁵ Bachar, *supra* note 81, at 398-99.

⁹⁶ See *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108 (2013).

⁹⁷ RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 407, rptr’s note 5 (AM. LAW INST. 2018) (listing legal regimes).

⁹⁸ *Important Step in the “Lafarge in Syria” case: Nomination of Three Investigative Judges*, SHERPA (June 13, 2017).

⁹⁹ Chiljenje Nwapi, *A Necessary Look at Necessity Jurisdiction*, 47 U.B.C. L. REV. 211 (2014) (surveying national jurisdictions). *But see* Sagi Peari, *Three Objections to Forum of Necessity: Global Access to Justice, International Criminal Law, and Proper Party*, 55 OSGOODE HALL L. J. 225 (2018) (critiquing the incorporation of the concept into Canadian law).

¹⁰⁰ Lucas Roorda & Cedric Ryngaert, *Business and Human Rights Litigation in Europe: The Promises Held by Forum of Necessity-based Jurisdiction*, UNIJURIS (UNIVERSITEIT UTRECHT) (discussing the concept of the forum of necessity to address corporate malfeasance).

¹⁰¹ European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, ETS No. 005. See *Markovic & Others v. Italy*, Appl. No. 1398/03, Judgment of 14 December 2006, ¶¶ 54, 92.

¹⁰² See, e.g., *Bouzari v. Bahremani*, [2011] O.J. No. 5009, ¶ 5 (S.C.J.) (Can.) (finding “no reasonable basis upon which [the plaintiffs could be] required to commence the action in a foreign jurisdiction, particularly, the state where the torture took place, Iran”). On appeal, however, the court determined that the case could proceed in England, where the defendant resided. *Bouzari v. Bahremani*, 2015 ONCA 275 (Can.).

¹⁰³ See *Helicopteros Nacionales de Colombia SA v. Hall*, 466 U.S. 408, 419 n.13 (1984) (“We decline to consider adoption of a doctrine of jurisdiction by necessity—a potentially far-reaching modification of existing law—in the absence of a more complete record.”).

In addition, some legal systems have incorporated no-fault victims-of-crime schemes that may allow remedies (either from the public fisc or a perpetrator's assets) absent an adversarial process. Such statutes may offer limited relief, however, as they often cover only harm committed domestically. It was on this ground that a Civil and Administrative Tribunal dismissed a case in New South Wales. A group of Yezidi women had sought compensation from frozen assets in the estate of Khaled Sharrouf, an Australian who joined ISIL in Raqqa, was later stripped of his nationality, and is presumed dead.¹⁰⁴ The Court ruled that the Victims Rights and Support Act of 2013 applies only to "acts of violence committed in New South Wales;" the survivors were all allegedly abducted, trafficked, and kept as slaves by Sharrouf in Raqqa and none has resided in Australia.¹⁰⁵

The legal frameworks discussed above involve natural or legal persons as defendants. National courts can, under certain circumstances, adjudicate claims against sovereign entities, although such domestic jurisdiction is circumscribed by principles of foreign sovereign immunity: "the right of a State not to be the subject of judicial proceedings in the courts of another State."¹⁰⁶ Foreign sovereign immunity is governed in the United States by the Foreign Sovereign Immunities Act (FSIA),¹⁰⁷ which offers the exclusive basis to assert jurisdiction over foreign sovereigns in U.S. courts.¹⁰⁸ Under the FSIA, foreign sovereigns enjoy presumptive immunity from suit unless one of the statutory exceptions applies.¹⁰⁹ By way of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),¹¹⁰ Congress expanded the list of exceptions to sovereign immunity and opened the door to suits involving a range of violations of international law. After some subsequent congressional tweaking, the relevant exception now reads:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.¹¹¹

Three additional requirements must be met for a plaintiff to proceed under this exception: the foreign state must be designated a state sponsor of terrorism; the foreign state must be given a reasonable opportunity to arbitrate the claim if the conduct in question occurred within the United

¹⁰⁴ Danuta Kozaki, *Terrorist Khaled Sharrouf's Frozen Assets Sought by 'Enslaved' Iraqi Women*, ABC (Mar. 12, 2019).

¹⁰⁵ *DRJ et al. v. Commissioner of Victims Rights*, [2019] NSWCATAD 195 (Sept. 20, 2019).

¹⁰⁶ *Jurisdictional Immunities of the State (Germ. v. It.)*, 2012 I.C.J. 97, 147 (Feb. 3) (discussing the rules of state immunity).

¹⁰⁷ 18 U.S.C. § 1602 et seq. See generally Joseph W. Glannon & Jeffrey Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 87 GEO. L.J. 675 (1999).

¹⁰⁸ *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992). See generally Beth Van Schaack, *Judge (Justice?) Merrick Garland & International Law*, JUST SECURITY (July 12, 2016) (discussing operation of FSIA).

¹⁰⁹ *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (a foreign state is presumptively immune from the jurisdiction of United States courts").

¹¹⁰ Antiterrorism And Effective Death Penalty Act Of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

¹¹¹ 28 U.S.C. § 1605A(a)(1). A similar exception exists for acts of terrorism within the United States, but does not require the state to be designated as a state sponsor of terrorism. 28 U.S.C. § 1605B.

States;¹¹² and the claimant or victim must be a U.S. national.¹¹³ State sponsors of terrorism are designated by the Secretary of State under Section 6(j) of the Export Administration Act and other statutory authorities.¹¹⁴ Syria has been on the list since 1979; in fact, it was the inaugural designee. This has become a bit of a shrinking pool over the years; at the moment, only Iran, Sudan, and Syria are so designated.¹¹⁵ (Cuba was removed from the list in May 2015 with the normalization of bilateral relations, and Iraq has also been delisted.) Personal jurisdiction over the sovereign state is achieved by service of process and the exercise of subject matter jurisdiction.¹¹⁶

Several FSIA cases have emerged in connection with the war in Syria. The family of journalist Steven Sotloff, who was captured in 2013 by ISIL and later beheaded,¹¹⁷ filed the first FSIA case in 2016.¹¹⁸ A similar suit was filed on behalf of the family of James Foley by the same set of lawyers.¹¹⁹ As is contemplated by the FSIA, service of process can be effectuated by mail on Foreign Minister Walid al-Mualem in Damascus or through diplomatic channels (the Czech Republic is the United States' Protecting Power in the absence of a U.S. embassy in Syria).¹²⁰ All such suits are filed in the District Court of the District of Columbia.¹²¹ Both suits allege that ISIL was operating with the material support of Syria. The Foley complaint, for example, alleges that "Syrian President Bashar al-Assad ... deliberately took steps to help create and thereafter greatly assisted Daesh in its terrorist operations, which it used as a sham opponent in the Syrian civil war to bolster Syria's negotiating power against Western powers."¹²² This linkage, essential to hold Syria liable for the acts of ISIL, runs counter to the orthodox mapping of the conflict.

The Center for Justice & Accountability (CJA), a human rights legal organization in San Francisco, with pro bono counsel Sherman & Sterling, also brought suit against Syria under the FSIA for the assassination of war correspondent Marie Colvin during the siege of Homs—an

¹¹² See *Colvin v. Syrian Arab Republic*, Case 1:16-cv-01423, Offer to Arbitrate (July 9, 2016), <https://www.justsecurity.org/wp-content/uploads/2016/07/Colvin-v-Syria-Offer-to-Arbitrate-20160709.pdf>.

¹¹³ 28 U.S.C. § 1605A(a)(2)(A). Non-nationals can assert claims for solatium damages based on injuries "suffered by victims who meet the statute's requirements." *Worley v. Islamic Republic of Iran*, 75 F.Supp.3d 311, 327 (D.D.C. 2014).

¹¹⁴ 50 U.S.C. § 2405.

¹¹⁵ *State Sponsors of Terrorism*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/j/ct/list/c14151.htm> (last visited Feb. 27, 2020).

¹¹⁶ Alexis Haller, "Head of the Foreign Ministry" is Strictly Construed Under Section 1608(a), FSIA LAW: A COMMENTARY ON FSIA JURISPRUDENCE (Oct. 8, 2014). See, e.g., *Stern v. Islamic Republic of Iran*, 271 F. Supp. 2d 286, 298 (D.D.C. 2003) ("The FSIA . . . provides that personal jurisdiction over defendants will exist where service of process has been accomplished pursuant 28 U.S.C. § 1608 and plaintiff establishes the applicability of an exception to immunity pursuant to 28 U.S.C. § 1605.").

¹¹⁷ Dan Lamothe, *Steven Sotloff, Journalist Held Captive by the Islamic State, Went Missing in Syria*, WASH. POST, Aug. 20, 2014; *Steven Sotloff Beheaded by ISIS, Becoming 70th Journalist Killed Covering Syria Conflict*, DEMOCRACY NOW! (Sept. 3, 2014).

¹¹⁸ Complaint, *Arthur Barry Sotloff, et al. v. Syrian Arab Republic*, Case: 1:16-cv-00725 (Apr. 8, 2016), available at <https://www.courtlistener.com/recap/gov.uscourts.dcd.178406.1.0.pdf>; Associated Press, *Family of Steven Sotloff, Journalist Slain by ISIS, Sues Syria Over His Death*, NBS NEWS, Apr. 19, 2016.

¹¹⁹ Britan Eakin, *Syria Sued Over Islamic State Slaying of Journalist Foley*, COURTHOUSE NEWS SERVICE, July 1, 2018.

¹²⁰ 28 U.S.C. § 1608; *Czech Republic as the United States' Protecting Power in Syria*, EMBASSY OF THE CZECH REPUBLIC IN WASHINGTON, D.C. (Jan. 1, 2014).

¹²¹ 28 U.S.C. § 1391(f)(4).

¹²² Complaint, *Diane Maria Foley, et al. v. Syrian Arab Republic*, Case 1:18-cv-01625 (July 10, 2018), ¶ 1, available at <https://www.courthousenews.com/wp-content/uploads/2018/07/Foley.pdf>.

opposition stronghold—on February 22, 2012.¹²³ A federal district judge certified that the Syrian government was properly served with the complaint in February 2017 through diplomatic channels, and plaintiffs moved for a quasi-default judgment.¹²⁴ As true default judgments are not available against a sovereign under U.S. law, plaintiffs’ were obliged to establish their claim “by evidence satisfactory to the court” to prevail.¹²⁵ Although, not surprisingly, Syria did not formally participate in the litigation, it denied the allegations through its Minister of Information Ramez Turgeman.¹²⁶ Plaintiffs sought compensatory and punitive damages, both of which are available under the FSIA.¹²⁷

Colvin was killed in an artillery attack on the Baba Amr Media Center where she and other journalists were billeted.¹²⁸ The Media Center had become the heart of the independent media movement, broadcasting from within the Baba Amr district of Homs while the city was placed under siege by the regime.¹²⁹ In their submissions, Plaintiffs presented a damning array of evidence against the regime, much of it provided by documentation centers that have been collecting information since the start of the conflict. This includes over 200 documents from the Commission for International Justice & Accountability (CIJA). The plaintiffs argued that Syria was responsible for the extrajudicial killing of Colvin,¹³⁰ a careful claim that did not require proof that an armed conflict existed in Homs at the time of the attack.¹³¹ The complaint alleged that the government of Bashar al-Assad used informants and signals intercepts to track Syrian and foreign journalists who were publishing stories that were critical of the regime or exposing the commission of war crimes by state actors.¹³² The plaintiffs further alleged that the Syrian regime deliberately targeted the media center in Homs and assassinated Colvin because her broadcasts were calling the world’s attention to the deliberate and indiscriminate attacks against civilians.¹³³ Indeed, the night before she was killed, Colvin gave a live interview to the BBC and CNN via a portable satellite dish that

¹²³ Colvin’s remarkable career and untimely death are depicted in the film, *A Private War* (Aviron Pictures 2018).

¹²⁴ Memorandum of Law in Support of Plaintiffs’ Motion for Default Judgment, *Colvin et al. v. Syrian Arab Republic*, Case 1:16-cv-01423-ABJ (March 22, 2018). All the *Colvin* pleadings are available here: <https://cja.org/what-we-do/litigation/colvin-v-syria/pleadings/>.

¹²⁵ 28 U.S.C. § 1608(e). See *Han Kim v. Democratic People’s Republic of Korea*, 774 F.3d 1044, 1047-8 (D.C. Cir. 2014) (noting that while “the FSIA leaves it to the court to determine precisely how much and what kinds of evidence the plaintiff must provide” courts should be mindful that Congress enacted the terrorism exception to sovereign immunity with the aim of “prevent[ing] state sponsors of terrorism . . . from escaping liability for their sins.”).

¹²⁶ Dana Priest, *War Reporter Marie Colvin Was Tracked, Targeted and Killed by Assad’s Forces, Family Says*, WASH. POST, July 9, 2016.

¹²⁷ Complaint, *Colvin et al. v. Syrian Arab Republic*, Case 1:16-cv-01423 (July 9, 2016).

¹²⁸ Beth Van Schaack, *Syria, J’Accuse! Syrian State Responsibility for War Crimes*, JUST SECURITY (July 13, 2016).

¹²⁹ AFP, *US Reporter Killed in Syria Targeted By Regime, Lawsuit Claims*, AL-MONITOR, July 10, 2016.

¹³⁰ Extrajudicial killing under U.S. law is defined as “a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Torture Victim Protection Act, 18 U.S.C. § 1350 note, § 3(a). See *Letelier v. Republic of Chile*, 488 F.Supp. 665, 673 (D.D.C. 1980) (“Whatever policy options exist for a foreign country, it has no ‘discretion’ to perpetuate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national or international law.”).

¹³¹ See Beth Van Schaack, *Mapping the Law That Applies to War Crimes in Syria*, JUST SECURITY (Feb. 1, 2016).

¹³² Colvin Complaint, *supra* note 125; Deborah Amos, *Lawsuit Targets Syrian Regime in Journalist’s Killing*, NPR, July 9, 2016; Marie Colvin, *Final Dispatch from Homs, the Battered City*, SUNDAY TIMES, Feb. 19, 2012.

¹³³ *President Assad Delivers Speech at People’s Assembly*, SYRIAN ARAB NEWS AGENCY, Mar. 20, 2011; Dana Priest, *War Reporter Marie Colvin Was Tracked, Targeted and Killed by Assad’s Forces, Family Says*, WASH. POST, July 9, 2016.

asserted: “[t]here are rockets, shells, tank shells, antiaircraft being fired in parallel lines into the city. ... The Syrian Army is simply shelling a city of cold, starving civilians.”¹³⁴

The complaint alleged that this call and others were intercepted by the Assad regime, enabling it to target the makeshift media center. The complaint further alleged that: “The rocket attack was the object of a conspiracy formed by senior members of the regime of Syrian President Bashar al-Assad ... to surveil, target, and ultimately kill civilian journalists in order to silence local and international media as part of its effort to crush political opposition.”¹³⁵ According to evidence produced in the suit, government officials believed that the country was the target of a “media-led” conspiracy to undermine the regime. Forces throughout the country were ordered to launch joint military and intelligence campaigns to “cleanse” those who “communicate with people abroad to keep demonstrations on going,” those who “tarnish the image of Syria in foreign media and international organizations,” and other enemies of the state.¹³⁶ Evidence also revealed that the regime utilized informants and satellite intercepts to geo-locate opponents.¹³⁷

The plaintiffs’ evidence also included proof that the regime celebrated Colvin’s death. A defector testified that Major General Rafiq Shahadah (head of military intelligence and subject to a raft of sanctions)¹³⁸ announced, “Marie Colvin was a dog and now she’s dead. Let the Americans help her now.”¹³⁹ President Bashar Al-Assad later said in an interview that Colvin was “responsible for her own death” because she entered the country illegally and worked with “terrorists.”¹⁴⁰ However, and not surprisingly, he denied targeting her directly. Plaintiffs’ allegations draw upon information from insiders, informants, and leaked government documents, some of which have been obtained by CIJA.¹⁴¹ Ewan Brown, a seasoned CIJA war crimes analyst and investigator, painstakingly reconstructed the command and control system of the Syrian military and intelligence services.¹⁴² His testimony revealed the role played by senior regime figures in the crackdown against protesters and the journalists giving them voice in the early days of the conflict. Documents attached to his expert report also proved that the regime was intercepting communications in order to track the movements and activity of journalists and monitor opposition websites and Facebook accounts. A Syrian intelligence defector (code named Ulysses) provided a chilling insider account of Al-Assad’s efforts to surveil, capture, and eliminate journalists and media activists in Homs.¹⁴³ Another defector—Abdel Majid Barakat, former head of information for the Central Crisis Management Cell (Assad’s War Cabinet)—smuggled hundreds of meeting minutes and reports out of the country that detailed high-level military and

¹³⁴ Anderson Cooper, *Video: Marie Colvin’s Last Call to CNN*, CNN, Feb. 22, 2012.

¹³⁵ Colvin Complaint, *supra* note 125, at ¶ 2.

¹³⁶ Exhibit A, JUST SECURITY (2016), available at <https://www.justsecurity.org/wp-content/uploads/2016/07/Exhibit-A.pdf>.

¹³⁷ Expert Report of Ewan Brown, *Cathleen Colvin v. Syrian Arab Republic*, No. 1:16cv-01423-ABJ (D.D.C. 2018).

¹³⁸ See E.U. Council Reg. No. 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011, Official J. Europ. Union L 16/1 (Jan. 19, 2012); *Bashar al-Assad’s Inner Circle*, BBC NEWS, July 30, 2012.

¹³⁹ Declaration of “Ulysses”, *Colvin et al. v. Syrian Arab Republic*, Case 1:16-cv-01423-ABJ, Doc. 39-2 (March 22, 2018), ¶ 65.

¹⁴⁰ AFP, *Journalist Colvin ‘Responsible’ For Own Death, Says Syria’s Assad*, YAHOO NEWS, July 14, 2016.

¹⁴¹ Anne Barnard, *Family of Marie Colvin, Slain U.S. Journalist, Sues Syria*, N.Y. TIMES, July 9, 2016.

¹⁴² Brown Report, *supra* note 135.

¹⁴³ Ulysses testimony, *supra* note 137.

security operations against the media—deemed “the highest level of threat” against the state.¹⁴⁴ The court awarded plaintiffs \$302 million against the Syrian government.¹⁴⁵

This case brings to light the degree to which the conflict in Syria has been marked by deliberate attacks against, and the kidnapping and execution of, journalists who might counter the regime’s narrative of the war. Indeed, Syria has been designated the most dangerous place to do this work for several years running according to the Committee to Protect Journalists.¹⁴⁶ The *Colvin* complaint included a long list of attacks on journalists who were also reporting on the regime’s repression of peaceful demonstrations and responsibility for civilian casualties. In his affidavit, Annouar Nouar Malek, a former member of the Arab League monitoring mission who quit in disgust, detailed a conversation with regime officials who admitted that reporters entering Syria without authorization are military targets.¹⁴⁷ (The mission was later suspended as the situation deteriorated and monitors were under threat.)¹⁴⁸ U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, prepared a declaration devoted to the regime’s use of media censorship and the persecution of media workers to silence dissent.¹⁴⁹ A number of former colleagues of Colvin also provided declarations. This included her Syrian interpreter/activist Wael al-Omar and fellow journalist Paul Conroy, who survived the attack on Homs (which he described as a “systematic massacre”) and was smuggled out of the country.¹⁵⁰

The *Colvin* civil litigation might yet catalyze criminal charges to be filed in the United States. Indeed, because Colvin is a U.S. citizen, the U.S. Department of Justice could also seek to prosecute individual perpetrators and their co-conspirators under the U.S. War Crimes Act.¹⁵¹ So far, however, this has not come to pass. But additional suits are proceeding elsewhere. Colvin was killed along with French freelance photographer Rémi Ochlik. Ochlik’s colleague, Edith Bouvier, was also injured in the attack and was trapped in Homs for over a week in desperate need of medical care.¹⁵² In 2012, Bouvier and Ochlik’s mother filed a criminal complaint in France against the unknown perpetrators of the attack. After the case languished for several years, the complainants moved to transfer it to the specialized War Crimes Unit in the *Tribunal de Grande Instance de Paris*.¹⁵³ The United States is considering whether war crimes (murder, attempted murder,

¹⁴⁴ Ian Black, *Syria: Leaked Documents Reveal Bashar al-Assad’s Role in Crushing Protests*, THE GUARDIAN, Mar. 19, 2012; *Several Tons of Documents Reportedly Point to War Crimes for Syria’s Assad*, FOX NEWS, April 13, 2016.

¹⁴⁵ *Colvin v. Syrian Arab Republic*, Order, Civ. Action No. 16-1423 (ABJ) (Dec. 12, 2018).

¹⁴⁶ Catherine A. Traywick, *Why Syria Is The Most Dangerous Place To Be a Journalist*, FOREIGN POLICY, Dec. 20, 2013.

¹⁴⁷ Declaration of Abdelmalek Nouar, *Colvin et al. v. Syrian Arab Republic*, Case 1:16-cv-01423-ABJ, Doc. 42-8 (March 22, 2018).

¹⁴⁸ Conal Urquhart, *Arab League Suspends Syria Monitoring Mission*, THE GUARDIAN, Jan. 28, 2012; Nabila Ramdani, *‘I Was Threatened With Death for Doing My Job’, Says Arab League Observer to Syria*, THE TELEGRAPH, Jan. 14, 2012.

¹⁴⁹ Expert Report, *Colvin et al. v. Syrian Arab Republic*, Case 1:16-cv-01423-ABJ, Doc. 42-15 (March 22, 2018).

¹⁵⁰ *Rescued Journalist Paul Conroy Describes the Situation in the Syrian City of Homs as ‘Systematic Slaughter’*, THE TELEGRAPH, Mar. 2, 2012; *Journalist Paul Conroy ‘In Good Spirits’ After Syria Rescue*, INDEPENDENT, Feb. 28, 2012.

¹⁵¹ 18 U.S.C. § 2441.

¹⁵² *French Reporter Bouvier Safe in Lebanon after Homs Siege*, FRANCE 24, Mar. 2, 2012; Peter Beaumont, *Syria: French Journalist Edith Bouvier Pleads for Evacuation from Homs*, THE GUARDIAN, Feb. 23, 2012.

¹⁵³ Frank Petit, *International Crimes: Spotlight on France’s War Crimes Unit*, JUSTICEINFO.NET (Dec. 17, 2018).

conspiracy, and attacks on civilians) were committed in the Baba Amr attack.¹⁵⁴ France has declassified files in support of the investigation.¹⁵⁵ In 2016, the French law firm Vigo, with support from CJA, successfully filed civil party complaints expanding the jurisdiction of the French judicial investigation to encompass non-French victims, including Marie Colvin’s family, British photographer Paul Conroy, and Syrian media activist Wael al-Omar. Several witnesses, including insiders, have testified; charges, however, have yet to be filed against named defendants.¹⁵⁶ The original Investigating Judge, Emmanuelle Ducos, was assigned to the Special Criminal Court in the Central African Republic and the case was reassigned in October 2017.

Syria has been sued in the past under the FSIA’s state sponsor of terrorism exception for acts of terrorism.¹⁵⁷ Syria has not always defended such suits against it, or has defended late in the process,¹⁵⁸ resulting in several quasi-default judgments against it that may ultimately deplete assets within the United States.¹⁵⁹ Collecting from any sovereign presents its own challenges, which operates as a constraint on recovery.¹⁶⁰ Obstacles include finding and liquidating non-immune assets¹⁶¹ and gaining the enforcement of judgments in the courts of states where the sovereign defendant may own property¹⁶² (assuming enforcement will be impossible in the target state’s own courts).¹⁶³ Although many victims who seek justice are not motivated by the possibility of receiving money damages, there is no question that executing upon a judgment can greatly assist in the process of rehabilitation. It remains to be seen whether the plaintiffs in the *Colvin* case are able to find Syrian assets in the United States or elsewhere to satisfy their tremendous judgment.

Conclusion

While no substitute for robust criminal accountability, civil human rights suits—against sovereign entities, legal persons, or individuals—can empower individual survivors and provide a form of legal redress even while they may not necessarily constrain individual perpetrators. As one component of a multifaceted legal strategy, such litigation can contribute to a wider movement toward accountability for rights violations and international crimes involving complementary state and international institutions. In many respects, an enduring value of civil litigation is its

¹⁵⁴ *Satisfaction de RSF après la Saisine du “Pôle Crimes de Guerre” du TGI de Paris dans le Dossier Ochlick-Bouvier*, RSF, Jan. 20, 2016; CODE PENALE [C. PEN.] art. 462-10 (Fr.).

¹⁵⁵ Commission Consultative du Secret de la Défense Nationale, June 16, 2016, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], June 30, 2016.

¹⁵⁶ Press Release, FIDH, *War Crimes Against Journalists in Homs: FIDH and Victims’ Families Call for Charges to Be Brought* (Dec. 3, 2018).

¹⁵⁷ See *List of Foreign Sovereign Immunities Cases*, AMERICAN LEGAL ENCYCLOPEDIA, <https://lawi.us/list-of-foreign-sovereign-immunities-cases/>. See, e.g., *Thuneibat v. Syrian Arab Republic*, 167 F.Supp.3d 22 (D.D.C. 2016) (suit finding Syria liable for terrorist attack in Jordan that killed two U.S. citizens).

¹⁵⁸ See *Wyatt v. Syria*, 800 F.3d 331, 334-5 (7th Cir. 2015) (noting appeals by Syria in two FSIA cases against it).

¹⁵⁹ Bryan Koenig, *\$347M Default Judgment Against Syria for Terror Attack*, LAW360 (Mar. 1, 2016). See *Gates v. Syrian Arab Republic*, 755 F.3d 568, 571 (7th Cir. 2014) (noting that the “FSIA does not provide a mechanism for distributing equitably among different victims any Syrian assets in the United States that are subject to attachment” creating a “winner-take-all” system).

¹⁶⁰ See generally George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments against States and Their Instrumentalities, and Some Proposals for Its Reform*, 25 ARIZ. J. INT’L & COMP. L. 665 (2008).

¹⁶¹ See, e.g., 28 U.S.C. § 1610 (denying immunity if the property is used for commercial activity or if the agency or instrumentality of the state that owns the property is engaged in commercial activity).

¹⁶² See generally Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT’L L. J. 141 (2001).

¹⁶³ Foster, *supra* note 158, at 670.

transformative potential for individual participants. From the perspective of the parties, this includes the rehabilitation of victims and the establishment of a measure of accountability for rights violations. In terms of second order effects, such suits contribute to the empowerment of victimized communities. They can also articulate enforceable expectations of behavior, operate as a denunciation of violations, contribute to the clarification of applicable norms and the reinforcement of social values, and exert a deterrence pressure. Ultimately, the hope is that such suits will help to strengthen the worldwide human rights movement as part of a multifaceted system of accountability.