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Imagining justice for Syria : water always finds its way

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Innovations in International Criminal Law Documentation Methodologies and Institutions

*Documentation keeps the issue of justice in Syria alive.*¹

The conflict in Syria has become the most documented crime base in human history. Although the outside world was largely ignorant of the 1982 Hama massacre, information about today's events on and off the Syrian battlefield is instantaneously disseminated around the globe through formal and informal media and social networks. From the beginning of the uprising, and in real-time, citizen journalists wielding smartphones from the grassroots began uploading videos and photographs of the revolution, the government's crackdown, and the ensuing armed conflict at a rate never before seen in previous conflicts.² The degree of citizen activity is particularly remarkable given the heretofore autarkic nature of the Syrian state. And, the amount of information available is overwhelming. Google has estimated that there are "more hours of footage of the Syrian civil war on YouTube than there actually are hours of the war in real life."³

These civil society efforts—led by non-governmental organizations (NGOs), human rights activists, and ordinary citizens—became all the more crucial once foreign journalists and U.N. representatives experienced difficulties entering and operating in the country. Because the current information environment is increasingly internet-based and digital, human rights advocates have had to update their collection, storage, authentication, and analytical protocols.⁴ NGOs are thus exfiltrating regime documents, taking witness/victim testimonials remotely on new communications platforms, scrubbing social media sites for potential open-source evidence, digitizing gigabytes of data that are then subjected to big-data and statistical analytical techniques, improving optical character recognition (OCR) software (no easy feat with Arabic script), and securing potential evidence in encrypted digital vaults. These data are supporting classic human rights advocacy tools—naming and shaming exercises and the dissemination of damning human rights reports based upon moving accounts by victims. At the same time, new human rights outputs are emerging or being produced with greater sophistication, such as statistical analyses, three-dimensional crime scene recreations and other forms of data visualization, and detailed dossiers and proto-indictments on potential defendants for future prosecutions. Added to these non-governmental efforts are governmental intelligence collections amassed for sovereign national security and foreign policy purposes. States will occasionally declassify this information for their own objectives, which may range from enhancing their strategic messaging to applying diplomatic pressure to promoting accountability. In the multilateral sphere, multiple United Nations fact-

¹ See Noha Aboueldahab, *Writing Atrocities: Syrian Civil Society and Transitional Justice*, Brookings Doha Center Analysis Paper No. 21, at 1 (May 7, 2018).

² See Rebecca J. Hamilton, *User-Generated Evidence*, 57 COLUM. J. TRANSNAT'L L. 1, 5 (2018) (arguing that user-generated evidence is "the most visible sign yet of the fundamental disruption underway within the investigatory ecosystem" of international criminal law).

³ Armin Rosen, *Erasing History: YouTube's Deletion of Syria War Videos Concerns Human Rights Groups*, FAST COMPANY, Mar. 7, 2018 (quoting Google executive).

⁴ See Brianne McGonigle Leyh, *Changing Landscapes in Documentation Efforts: Civil Society Documentation of Serious Human Rights Violations*, 33(84) UTRECHT J. INT'L & EUR. L. 44 (2017); Els De Busser, *Open Source Data and Criminal Investigations: Anything You Publish Can and Will be Used Against You*, Vol 2(2) GRONINGEN J. INT'L L. 90, 91 (2014); Lindsay Freeman, *Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Investigations and Trials*, 41 FORDHAM INT'L L.J. 283 (2018).

finding efforts are also underway, at times with overlapping substantive mandates and employing varying methodologies. All told, the Fourth Industrial Revolution has brought about a transformation in human rights technology and documentation.

Together, these documentation projects have catalogued the commission in Syria of almost every type of war crime and crime against humanity known to humankind. The assumption is that this information will lay the groundwork for a whole range of transitional justice mechanisms—in the event that there is ever a transition. From the perspective of promoting more comprehensive criminal accountability, the challenge that awaits will be to transform these raw data into more structured information and then, ultimately, into admissible evidence. This process of gradual refinement can be conceptualized as a pyramid, with the mass of raw data at the base eventually being honed into useful analytical information up the pyramid.⁵ Only the apex of the pyramid will be usable as evidence in court, but the bulk of the material collected remains vitally important for lead and background purposes as well as for other transitional justice processes of truth-telling, vetting/lustration, restitution, reparation, and institutional reform. Because far-reaching justice may be years—or even decades—in the making, it is imperative that evidence of crimes being committed now is amassed in real time and preserved for when the time is ripe for justice and accountability in Syria. In the short term, all this documentation is contributing to episodic cases that are beginning to materialize extraterritorially in domestic courts around the globe. Indeed, these national efforts have emerged as the most promising avenue for justice—the subject of the previous chapter of this volume.

This chapter surveys current documentation efforts devoted to Syria and the various types of information being generated, preserved, and analyzed. It then profiles a number of new organizations—from the multilateral to the most local—that have taken up the collection mantle, employing new technologies to amass and exploit these data in support of future justice processes, broadly defined. Given its centrality to any transitional justice response, the preservation of potential evidence has received extensive international support in the Syrian context given that it is an activity that can be pursued and capacitated pre-transition, while a conflict is ongoing and even without a clear path to justice. Indeed, it is crucial to collect such potential evidence as quickly as possible before it can be hidden, tampered with, or deliberately or inadvertently destroyed. Given the evolution of the conflict, and the degree to which territory has changed hands and reverted to regime control, certain sources of information that were available early in the conflict are no longer accessible. The imperative of launching a documentation strategy immediately once a conflict is underway, and maintaining a continuous process throughout, as best as possible, has emerged as a sound lesson learned from the Syrian conflict. Notwithstanding these groundbreaking efforts, there remains an acute risk that activists and others lose faith in the promise of accountability given the paucity of options to hold perpetrators accountable as proof of atrocities continues to mount.

⁵ Keith Hiatt, Vice President of Human Rights, Benetech, Panel Discussion at Stanford University (Feb. 13, 2018).



“The Syrian Correspondent” © Comics4Syria

The Imperative of Documentation

The documentation of abuses such as those efforts underway in Syria serve a number of key imperatives when it comes to the system of international justice. In real time, these objectives include deterring abuses, encouraging defections, isolating bad actors, and mobilizing the international community to act. Beyond accountability, these documentation efforts are useful for a range of other purposes, including undergirding predictive analytics about the ebb and flow of a conflict, mapping the ever-changing alliances among armed groups, facilitating the delivery of humanitarian aid through contested regions, and tracking ceasefire compliance. Documentation by the Carter Center, for example, is not undertaken with accountability in mind; rather, it informs multi-track outreach and negotiations by enabling predictions about the evolution of the conflict. As a conflict wears on, prospective applications become more important, such as enabling trials and other transitional justice mechanisms and laying the groundwork for systemic reforms. Furthermore, documentation is important for posterity, to teach future generations about the causes and consequences of a conflict with an eye towards truth-telling and reconciliation. Finally, good documentation can help academics and others to write a more accurate history of the conflict in a way that will discourage revisionism.

Deterrence

Starting with the *a priori* goal of preventing further atrocities, there is no question that documentation efforts are often pursued with an eye towards deterring the perpetration of crimes, whether in the particular target forum or elsewhere in the future. The theory is that exposing criminal acts and laying the groundwork for future accountability will dissuade at least some would-be perpetrators from joining in the commission of abuses. Some deterrent effect may operate early in an unfolding situation, but the deterrence claim becomes less credible as atrocities mount and no justice response is forthcoming. All that said, it cannot be gainsaid that proving

deterrence is an inherently fraught exercise, even in well-established domestic criminal justice systems.⁶

Naming & Shaming

Documentation can lay the groundwork for a naming and shaming exercise by non-governmental organizations, multilateral bodies, and individual governments. Naming and shaming governments and armed groups accused of abusive practices is an essential tool deployed by many human rights organizations.⁷ At times, and not without some controversy, organizations will go further and identify specific suspects by name when there exists credible, corroborated, and verifiable information that such individuals are responsible for atrocity crimes. In the transitional justice context, a handful of truth commissions—e.g., in El Salvador⁸ and Liberia⁹—have also named names, some pursuant to a mandate that envisioned this function, others more spontaneously.¹⁰ The Salvadoran truth commission, for example, determined that it could not merely identify responsible institutions but rather should establish responsibility by naming names:

The Commission believes that responsibility for anything that happened during the period of the conflict could not and should not be laid at the door of the institution, but rather of those who ordered the procedures for operating in the way that members of the institution did and also of those who, having been in a position to prevent such procedures, were compromised by the degree of tolerance and permissiveness with which they acted from their positions of authority or leadership or by the fact that they covered up incidents which came to their knowledge or themselves gave the order which led to the action in question.¹¹

Individuals involved with truth commissions indicate this practice served as a form of “public recognition,” a “fundamental aspect of truth,” and a “form of symbolic justice.”¹² When doing so, truth commissions often, and appropriately, invite those to be named to respond to the evidence against them.

This is a human rights tool that can be more systematically adapted by states mid-conflict as a derivative of a human rights documentation program. Although never fully utilized in the Syrian context, likely out of concern that it would further alienate key interlocutors for any peace negotiations, naming and shaming can serve a number of purposes that might reinforce other

⁶ Raymond Paternoster, *How Much Do We Really Know about Criminal Deterrence?*, 100(3) J. CRIM. L. & CRIMINOLOGY 765 (2010).

⁷ See Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT’L ORG. 689 (Fall 2008).

⁸ FROM MADNESS TO HOPE: THE 12-YEAR WAR IN EL SALVADOR: REPORT OF THE COMMISSION ON TRUTH FOR EL SALVADOR, U.N. DOC. S/25500, ANNEX (Apr. 1, 1993).

⁹ REPUBLIC OF LIBERIA TRUTH & RECONCILIATION COMMISSION, II CONSOLIDATED FINAL REPORT 349-52 (June 30, 2009).

¹⁰ PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 121-22 (2d ed. 2011) (noting that different commissions had different mandates, but the issue was ever-controversial).

¹¹ FROM MADNESS TO HOPE, *supra* note 8, at 14. See also *id.* at 18 (setting forth formal mandate to “clarify and put an end to any indication of impunity on the part of officers of the armed forces, particularly in cases where respect for human rights is jeopardized.”).

¹² Association for the Prevention of Torture, *Truth Commissions: Can they Prevent Further Violations?* at 7, https://www.apt.ch/content/files_res/truth_commissions_executive_summaries.pdf.

foreign policy objectives in a mass atrocity situation. Publicly associating identified perpetrators with abuses denies them the ability to enjoy the privilege of anonymity, individuates responsibility, and demonstrates that the world is watching and has possession of robust sources of information about the originators of abuse. It may also offer some solace to victims. Cracking the veneer of impunity by publicly identifying perpetrators provides some measure of accountability where other avenues are foreclosed. At a minimum, it signals a commitment to document abuses and eventually hold perpetrators responsible and bolsters “morally valuable international norms and laws”¹³ in response to transgressions. There may be diplomatic benefits as well. Calling out perpetrators can build confidence in, or placate, an opposition movement that is anxious for multilateral support and international legitimacy. It can also damage the target’s reputation externally, making it more difficult for other states to continue to support murderous regime.

Although this is more speculative, a system of naming names may even impose a deterrent effect on actors on the ground. Research suggests that naming and shaming campaigns do, under certain circumstances, reduce the commission of abuses.¹⁴ Singling out perpetrators can isolate them internally and encourage defections among confederates who are not yet publicly identified and might be inspired to break ranks. Any naming and shaming program can be accompanied by public messaging praising defectors and tracking defection counts. For example, *Al Jazeera*, with support from Google Ideas (now Jigsaw), established a defection tracking system for Syria that showed the number of defections of cabinet members, members of parliament, generals, and colonels plateauing in June 2013.¹⁵ To be sure, any defection strategy may be strongest early in a conflict, before everyone left standing has blood on their hands. Such a naming-and-shaming campaign may be less effective at inducing defections later in the conflict as regime insiders become entrenched and ideologically committed to the prevailing course of action, or are too terrified of the risk of retaliation (by the opposition or the regime) to consider bailing out. In Libya, by contrast, defections spiked after the passage U.N. Security Council Resolution 1970, although there are many variables at play including the beginning of a full-scale civil war, rising violations, an increased sense of international isolation.¹⁶ Likewise, the program aimed at encouraging defections from the Lord’s Resistance Army has been ongoing for years and continues to bear fruit. All told, naming perpetrators is a tool that is most easily deployed against a single bad actor. In situations in which where all sides have been accused of violations, the naming of names may lose some effect and—perversely—even normalize abuses.

The United States most famously engaged in a naming-and-shaming campaign in Iraq when it issued a deck of cards with those “most wanted.”¹⁷ Logistically, the naming of names by states could be done a number of additional ways, including through a public advocacy campaign or a quieter confrontation with relevant authorities or allies. States have access to multiple vectors

¹³ James Pattison, *The Ethics of Diplomatic Criticism: The Responsibility to Protect, Just War Theory and Presumptive Last Resort*, 21(4) EUR. J. INT’L RELATIONS 935, 940 (2015) (arguing that states have a moral duty to criticize other states and their agents in response to mass atrocities).

¹⁴ Matthew Krain, *J’accuse! Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politicides?* 56(3) INT’L STUD. Q. 574 (2012).

¹⁵ See *Tracking Syria’s Defections*, AL JAZEERA (July 30, 2012).

¹⁶ Ian Black, *Libya: Defections leave Muammar Gaddafi isolated in Tripoli Bolthole*, THE GUARDIAN, Feb. 23, 2011.

¹⁷ Joel Christie, *Dead Hand: Deck of 52 Most-Wanted Iraqi Playing Cards given to Soldiers at the Start of the War Shows the Fall of Saddam ‘The Ace of Spades’ Hussein’s Army*, Daily Mail, Oct. 18, 2014.

with which to disseminate such information, including psyops, social and old-fashioned media, online portals (such as the United States' humanrights.gov website), official spokespersons, etc. Fliers (akin to wanted posters) could be posted at borders, smuggled into the country through activists, and shared with allied countries where perpetrators are likely to flee. Individuals could also be identified in paid advertisements in newspapers or broadcast on local television stations. A government spokesperson could make a weekly designation as part of a normal press briefing or release an organogram showing the chain of command. A state taking the lead in developing lists of names could share information with allies to amplify the message.

Foreign governments could also partner with human rights organizations in this endeavor by selectively sharing their intelligence on particular perpetrators with NGOs undertaking similar investigations, allowing these groups to take the lead on exposing perpetrators or to confirm their own analysis. Or, governments could “bless” the findings of human rights organizations that themselves name names. For example, early in the Syrian conflict, Human Rights Watch issued an important and chilling report on custodial abuses in Syrian prisons that identified individual commanders of those facilities.¹⁸ Governments with relevant information could verify the conclusions contained in such a report, thus magnifying the degree of censure towards individual perpetrators. This offers a way of putting solid foreign intelligence to work without going through the often cumbersome and internally controversial process of a full declassification. Working in collaboration or in parallel with NGOs could lessen the state's fingerprint on the process and respond to situations in which governments lack credibility with target audiences. NGOs, however, bear some risk of being sued for libel if they make accusations against an identifiable individual. By contrast, sovereign immunity generally protects governments from such retaliation.

States have no monopoly on naming and shaming. Civil society organizations can adopt this tactic in their own spheres in order to socially ostracize or condemn perpetrators. In Argentina, for example, the children of the disappeared—many of whom had been “given” to military families—working through a new organization, *Hijos e Hijas por la Identidad y la Justicia Contra el Olvido y el Silencio* (H.I.J.O.S.), created *Mesas de Escrache* (“working groups to make evident or visible”) that identify perpetrators from the dirty war era. Their tactics include fliers with photographs of the perpetrator, street signs in the target's neighborhoods (“*In [500] metres – Rafael Jorge Videla – genocida – Cabildo 639*”), and marches in front of the perpetrators' homes. Performing the *Escrache* has been described as “a politics of memory and self-empowerment” and a form of social, if informal, justice.¹⁹ This movement gradually wound up once Argentina's amnesty law was declared unconstitutional, which opened the door to renewed prosecutions.

A “do no harm” ethos should guide any naming-and-shaming program, which requires the development of a careful protocol and set of criteria to credibly name names on a case-by-case basis. The process is not dissimilar to the compilation of dossiers on individuals for the purpose of making sanctions designations. Information underlying the identification of responsible individuals must be reliable, verifiable, and corroborated through multiple sources to ensure maximum credibility, particularly if incomplete or contradictory information emerges. The Salvadoran truth commission for example established a two-source rule and only named names

¹⁸ OLE SOLVANG, ANNA NEISTAT & HUMAN RIGHTS WATCH, TORTURE ARCHIPELAGO: ARBITRARY ARRESTS, TORTURE, AND ENFORCED DISAPPEARANCES IN SYRIA'S UNDERGROUND PRISONS SINCE MARCH 2011 (July 2012).

¹⁹ See Katja Seidel, *Practising Justice in Argentina: Social Condemnation, Legal Punishment, and the Local Articulations of Genocide*, in XXVII(3) J. FÜR ENTWICKLUNGSPOLITIK: BEYOND TRANSITIONAL JUSTICE 64, 72 (Stefan Khittel ed., 2011).

when “it was absolutely convinced by the evidence.”²⁰ Ideally, any public pronouncement would be based on direct evidence and information gleaned from percipient witnesses, recognized experts, or trustworthy domestic or foreign intelligence. Once information is gathered, it is prudent to undertake a risk assessment analysis to consider the impact of going public on different stakeholders, including victims and witnesses, human intelligence sources, and the perpetrators or their families (who may be vulnerable to acts of retaliatory vigilantism). And, actors deploying this tool should remain ever vigilant against potential false accusations.

In any case, any public statement naming a putative perpetrator could include appropriate caveats, such as “reportedly” or “allegedly,” and could simultaneously acknowledge the presumption of innocence. Moreover, such statements could be framed so as to not constitute a determination of guilt, but rather to indicate the existence of credible information linking the individual to criminal conduct as a direct perpetrator, an accomplice, a superior, or a participant in collective criminality and call for additional investigation and potential prosecution as a matter of public importance. Or individualized references could be more oblique. For example, a statement could indicate that a particular unit or battalion—headed by a particular commander—was reportedly present in a particular area where abuses occurred.

In terms of counter-arguments, there will inevitably be concerns raised that naming names outside of a formal judicial process violates the presumption of innocence and other due process rights by unfairly prejudging the guilt of those identified. However, many deterrence and accountability tools—including financial sanctions programs, commissions of inquiry, truth commissions, and immigration restrictions—involve identifying responsible individuals under standards of proof that fall well short of a judicial determination of criminal guilt. Indeed, criminal indictments are a form of naming names that are issued under a diminished standard of proof well in advance of the presentation of evidence meeting the penal law standard. Even in those systems in which there is a presumption against naming unindicted co-conspirators, this reticence can be overcome if for some reason the person cannot be prosecuted directly or if the public right to know is overwhelming. In any case, these fairness concerns can be managed with appropriate protocols, standards of proof, corroboration requirements, caveats, etc.

Under certain circumstances, releasing information about a particular perpetrator might risk revealing means and methods of intelligence gathering; this concern could be dealt with on a case-by-case basis to ensure that multiple sources of inculpatory information point to the same individual so that it is not necessary to rely upon a single source of intelligence. Classified atrocity reporting can also be appropriately “scrubbed” for public consumption to eliminate clues to the relevant agency’s sources, means, and methods.²¹ There is a very real concern that naming names will lead to violent vigilante acts against perpetrators themselves or even retribution against his or her family members. This risk exists even absent a naming and shaming program, however, since insiders and local actors will know those responsible. In any case, it may be difficult to retaliate against commanders in the armed forces, who are largely insulated.

Finally, there is a concern that identifying particular suspects will harden the resolve of regime elements and their loyalists, generating a form of counter-deterrence. At a certain point in the conflict, the top leadership will have largely made their choices and dug in. Naming and

²⁰ Haynor, *supra* note 10, at 142-43.

²¹ See, e.g., Statement from Ambassador Nikki Haley on Atrocities Committed by the Assad Regime in Syria (May 15, 2017) (announcing release of declassified reporting on atrocities committed in Syria).

shaming them may have a greater impact on mid-level personnel, without whom a repressive regime cannot function. Such individuals may be ambivalent about the course of oppression; revealing the risk of staying on the fence may be what is needed to tip them toward the side of virtue. Of course, a campaign of naming and shaming cannot be expected to do all the work of deterrence, but it can be one among many techniques to weaken an oppressive regime. All told, the point is to signal that the international community is aware of who is responsible for abuses so as to remove the cloak of anonymity and signal the feasibility of a future accountability process.

Mobilize Action

Real-time documentation can also help to mobilize international actors with the capacity—and will—to intervene. Unimpeachable documentation can raise international awareness of atrocities, increase the political will to do *something* to stop ongoing harms, and make it harder to stonewall accountability. In January 2014, a number of media outlets circulated gruesome photographs that had been exfiltrated by a former military photographer from the Department of Forensic Evidence who worked in the 601 Military Hospital (a.k.a. Martyr Youssef Al Azama Hospital) and Tishreen Military Hospital in Damascus. The defector, code-named “Caesar” to protect his identity, had smuggled over 50,000 images depicting more than 11,000 victims out of the country on thumb drives and his phone—an extraordinary cache of government-generated proof of human rights abuses. Half of the photos depicted cadavers showing signs of torture, starvation, and mistreatment (the other half are likely battlefield deaths).²² Caesar explained that he had been tasked with photographing the victims after their death, in part as an anti-corruption exercise in order to prevent guards from extorting the victims’ families to secure a detainee’s release. In many cases, falsified death certificates were issued indicating that the victim had died after their “heart and breathing stopped,” factual statements implying natural causes such as respiratory or cardiac failure. The photos told another story and revealed horrific evidence of systematic starvation, mutilation, and death-by-torture on an industrial scale.

The Caesar photos helped to galvanize the international community, which had become stalemated over how to respond to the crisis in Syria. Indeed, France and Australia cited these files in their explanations of vote in connection with France’s thwarted draft ICC referral resolution. The U.S. Congress held hearings in which Caesar testified with protective measures to conceal his identity. The Caesar photos have been on display around the world: in the United Nations, at the European Parliament, in the U.S. Holocaust Memorial Museum (USHMM), at universities, and elsewhere in a tour organized by the Syria Emergency Task Force (SETF) and United for a Free Syria. Such displays respond to the behavioral psychology research on the “picture superiority effect,” which teaches that humans respond to photos more viscerally than to text.²³

Given the uncertainty around deterrence and the political realities blocking effective multilateral activity, the justifications for supporting rigorous documentation shift to future transitional justice efforts. It has been argued that human rights documentation should be considered a transitional justice mechanism in its own right on the theory that “writing atrocities is, in and of itself, a healing process, as it ensures that victimization is acknowledged, recorded,

²² PRIYANKA MOTAPARTHY, NADIM HOURY & HUMAN RIGHTS WATCH, *IF THE DEAD COULD SPEAK: MASS DEATH AND TORTURE IN SYRIA’S PRISON FACILITIES* (Dec. 16, 2015).

²³ See Margaret Anne Defeyter, Riccardo Russo & Pamela Louise McPartlin, *The Picture Superiority Effect in Recognition Memory: A Developmental Study Using the Respond Signal Procedure*, 24 *COGNITIVE DEV’T* 265 (2009).

and remembered.”²⁴ Good documentation will also undergird any number of accountability, truth-telling, and restorative mechanisms, including trials, lustrations/vetting, reparation and restitution regimes, other forms of social rehabilitation, and institutional reform. Many kinds of documentation—including written and electronic documents, photographs and videos, witness statements, statistical analyses, and physical artifacts—can contribute to these various post-conflict interventions.

Systemic Reforms

Systematic documentation can also demonstrate the way in which a regime used violence to institutionalize repression and marginalize certain target populations. In the transitional or post-transition period, fostering this understanding can help to counteract nostalgic longings for an *ancien régime* or the emergence of revisionist narratives. It can also lay the groundwork for systemic structural reforms. This can include the repeal of discriminatory legislation, the dissolution of repressive security forces, the establishment of new standard operating procedures, the redistribution or return of land, and the lustration of individuals associated with abuses.

Educational Materials

Beyond formal accountability processes, documentation—and particularly victim narratives—can also be transformed into educational resources, media campaigns, and memorials to promote reconciliation, social cohesion, conflict prevention, and generally instill human rights principles within a post-conflict society. The International Coalition of Sites of Conscience works with grassroots and local organizations to undertake effective and multi-disciplinary memory and memorialization programs in the aftermath of conflict or repression. Certain such educational initiatives devoted to Syria are already underway. The quasi-governmental USHMM, for example, had on display scraps of fabric on which Syrian prisoners wrote their names in a mixture of rust and blood. These artifacts were smuggled out of a military intelligence prison by Mansour Al-Omari, a fellow detainee, in order to inform their families of their whereabouts. Omari was detained precisely because he had been keeping lists of disappeared political activists for the Violations Documentation Center. His ordeal is the subject of a film, *Syria’s Disappeared: The Case Against Assad*, which also recounts the personal stories of two other activists who tried to document the commission of international crimes as well as the work of war crimes investigators with the Commission of International Justice & Accountability and Guernica 37 International Justice Chambers.

History Writing

Finally, the importance of preserving the historical record should not be understated. To be sure, investigators and lawyers are not historians, although many international courts will begin their opinions with a long discussion of the history predating the events in question.²⁵ However, creating an archive ensures that scholars will one day be able to write more accurate and detailed histories of the conflict. These accounts often persist long after any trials have concluded.

The Myriad Forms of Documentation

²⁴ See Aboueldahab, *supra* note 1, at 1.

²⁵ See Richard Wilson, WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS 22 (2011) (noting that historical testimony is often central to international trials).

Potential evidence can come in multiple forms. There is no question that witness testimony remains crucial to international justice processes. While compelling from an advocacy and accountability perspective, an investigation with an excessive focus on interviewing victims can raise concerns. For one, multiple interviews risks witness and survivor retraumatization. It can also lead to disappointment when there is an insufficient justice response. If witness testimony is used in court, written statements also open witnesses up to impeachment challenges on cross-examination if inconsistencies or conflicting statements come to light,²⁶ even though there may be many reasons why discrepancies exist within a witness’s account that do not diminish the veracity of the underlying testimony.²⁷ Finally, creating witness statements that fall into the wrong hands can put declarants at physical risk of retaliation in the absence of appropriate security protocols in terms of anonymization etc. Having a genuine and fully transparent informed consent protocol—which carefully explains the risks inherent to making a statement, how information will be used, and with whom it can be shared—is crucial to any such exercise. It is also necessary to avoid the pitfalls of “over-documentation,” when witnesses and victims are interviewed again and again in environments with multiple collectors operating simultaneously. All told, a “do no harm” approach is warranted when it comes to engaging with victims, survivors, and witnesses.²⁸

In today’s ubiquitous digital environments, open-source information—defined as information that can be obtained without the necessity of a formal judicial warrant or the use of clandestine or potentially unlawful collection practices, such as hacking²⁹—is progressively important. For one, it can lessen the dependence on witness testimony by offering corroborating evidence and eliminating the need to call multiple witnesses.³⁰ There are efforts afoot to render international trials less dependent on *viva voce* testimony, including through the use of probabilistic methods and other social science research tools.³¹ This reflects the worrisome reality that witnesses are the soft underbelly of any criminal prosecution.³² In particular, “a lone witness is a vulnerable witness.”³³ In the Syrian context, videos of the government’s response to peaceful protests or attacks on civilians and civilian objects have been captured by those witnessing these events.

²⁶ See Priya Gopalan et al., *Proving Crimes of Sexual Violence*, in PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY 140 (Serge Brammertz & Michelle Jarvis eds. 2016).

²⁷ For a discussion of how trauma can affect the ability of survivors to recall and recount traumatic events, see Juliet Cohen, *Questions of Credibility: Omissions, Discrepancies, and Errors of Recall in the Testimony of Asylum Seekers*, 13(3) INT’L J. REFUGEE L. 293 (July 2001).

²⁸ See Rob Grace & Claude Bruderlein, *On Monitoring, Reporting, and Fact-Finding Mechanisms*, 1(2) ESIL REFLECTIONS (July 15, 2012).

²⁹ U.S. Office of the Director of National Intelligence, Intelligence Community Directive No. 301, National Open Source Enterprise (Effective: July 11, 2006). It is distinct from other forms of intelligence, such as signals intercepts or human intelligence. See U.S. Office of the Director of National Intelligence, *What is Intelligence?* (outlining the six categories of intelligence).

³⁰ See generally Keith Hiatt, *Open Source Evidence on Trial*, 125 YALE L. J. F. 323 (2016) (discussing the promise and perils of open source investigations).

³¹ See Anne-Marie de Brouwer, *Cases of Mass Sexual Violence Can be Proven without Direct Victim Testimony*, in CONTEMPORARY ISSUES FACING THE INTERNATIONAL CRIMINAL COURT 282 (Richard H. Steinberg ed., 2016); John Hagan, *The Use of Sample Survey Interviews as Evidence of Mass Rape*, in CONTEMPORARY ISSUES FACING THE INTERNATIONAL CRIMINAL COURT 295 (Richard H. Steinberg ed., 2016).

³² The Kenyan cases before the ICC collapsed due to unprecedented witness tampering and intimidation. See *Why Kenyan Cases at the ICC Collapsed*, by Bensouda, JOURNALISTS FOR JUSTICE (July 13, 2016).

³³ Hiatt, *supra* note 30, at 325.

These alternative sources of evidence are not a panacea to the problem of witness vulnerability, however. For example, proving inhumane prison conditions or more intimate violence will likely remain dependent upon witness testimony. Unfortunately, witness protection programs remain embryonic in the international field. Although many individual states have developed such programs domestically, the international community has not done enough to create a reliable protection system in support of international justice efforts.³⁴ This is due in part to the decentralization of international justice institutions and the existence of still rudimentary transnational law enforcement arrangements. There is also an issue of practicality given the sheer expense of relocating witnesses and their families in light of the budgetary pressures and competing imperatives faced by international institutions. Even within the International Criminal Court (ICC), witness protection responsibilities are fragmented, which leads to gaps and confusion.³⁵

In terms of criminal accountability, certain types of information will be more useful than others. When it comes to user-generated content, many citizen journalists and civil society organizations pay disproportionate attention to collecting “crime base” evidence—i.e., information tending to show the commission of international crimes—by photographing the graphic results of attacks and collecting moving accounts from witnesses and victims. For example, millions of videos purporting to show the targeting of civilians and civilian objects, the execution of captured combatants and perceived opponents, the use of chemical and other indiscriminate weapons, and further international offenses have been uploaded onto YouTube and other social media platforms since the Syrian conflict began.

The current obsession with “big data” finds expression in human rights documentation practices.³⁶ Groups focused on Syria have attempted to tally all civilian deaths³⁷ or collect information about the identity and location of all prisoners or clandestine detention centers.³⁸ To aid in this former effort, Every Casualty Worldwide has created a protocol on the practice and procedures for coding the casualties of armed violence. The American Schools of Oriental Research’s Cultural Heritage Initiatives is a collaboration of scholars and institutions that are recording threats to cultural property in Syria and Iraq with U.S. government and other funding. Paradoxically, such atrocity figures tend to drop during extreme violence due to the death or incapacitation of witnesses and reporters.

Although these collection efforts are valuable, when it comes to legal accountability, it is equally—if not more—important to collect potential evidence that speaks to individual responsibility. It is thus crucial to search for, preserve, and authenticate linkage evidence—

³⁴ See Karen Kramer, *Witness Protection as a Key Tool in Addressing Serious and Organized Crime* 11-12, http://www.unafei.or.jp/english/pdf/PDF_GG4_Seminar/Fourth_GGSeminar_P3-19.pdf (discussing challenges of witness protection faced by international courts and tribunals).

³⁵ See Markus Eikel, *Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice*, 23 CRIM. L. FORUM 97 (2012).

³⁶ See, e.g., Sayaka Ri, et al., *Attacks on Healthcare Facilities as an Indicator of Violence against Civilians in Syria: An Exploratory Analysis of Open-Source Data*, 14(6) PLOS ONE (2019) (using open source-data on attacks on healthcare facilities to “add granularity to traditional indicators of violence (e.g., such as civilian casualties) to develop a more nuanced understanding of the warring tactics used”).

³⁷ See, e.g., Syrian Observatory for Human Rights, <http://www.syriahr.com/en/>. At least seven organizations are tracking fatalities in the conflict—the most of any conflict worldwide. See Irene Pavesi, *Tracking Conflict-Related Deaths: A Preliminary Overview of Monitoring Systems* 6 SMALL ARMS SURVEY (Feb. 2017).

³⁸ Human Rights Data Analysis Group, <https://hrdag.org/syria/> (collecting data on torture in prison); Syrian Network for Human Rights, <http://sn4hr.org/> (reporting on deaths, detentions, and disappearances).

evidence that connects the commission of a crime to a particular culprit or set of actors. Linkage evidence can help identify not only the direct perpetrator(s), but also his or her confederates, co-conspirators, superiors, subordinates, and enablers, all of who may be equally liable through doctrines of complicity, aiding and abetting, conspiracy, joint criminal enterprise, common plan, instigation, and superior responsibility, depending on the operative legal framework. Such evidence can take the form of documents, intercepts, or testimony (from witnesses, insiders, defectors, or experts) explicating the order of battle and the objectives of military operations; the functioning of a regime's political, military, police or paramilitary structures; the procurement and movement of arms; communication patterns and logistical support; and chains of command and command structures, such as the Syrian Central Crisis Management Cell. Several of the Syrian cases moving forward in domestic courts have relied heavily upon such insider declarations.³⁹

Although often viewed as less vital or glamorous from a mandate perspective, any documentation effort should also seek to preserve the local press and public archives—from such as birth/death certificates, land registries, and personnel and payroll records of key institutions. As his victory began to look more assured, Assad started releasing death certificates of detainees who died in custody, indicating that they had perished of “natural causes.” Such documents confirm that the decedents were last in Syrian government custody, although claimants will no doubt dispute the stated cause of death. These and other types of government files can be crucial for accountability purposes (e.g., for facilitating restitution and reparations), but also in resolving property disputes in the transition period, creating a defensible vetting/lustration program, identifying missing persons, and enabling the voluntary return and/or resettlement of the internally displaced and refugee populations. For example, close to half of the pre-war Syrian population is internally or externally displaced and may find it difficult to prove prior property ownership. Indeed, the allocation of land in Syria has been biased and politically-motivated for generations. More recently, President Assad passed legislation (Law No. 10 of 2018) that results in land expropriations and has destroyed real property records,⁴⁰ making it difficult for individuals who are outside the country to protect their property rights.⁴¹

Preserving mass grave sites—generally defined as a location where three or more victims of an extrajudicial killing are buried—against destruction or informal exhumations and undertaking forensic analyses of human remains are additional documentation efforts that will be crucial to any comprehensive transitional justice response. Mass graves are particularly vulnerable to destruction as they provide strong evidence of crimes against humanity and other international crimes. Assuming physical access can be secured, some of this work can be initiated pre-transition, such as in liberated areas. A number of specialized organizations now exist that are devoted to undertaking, and to training others to undertake, mass atrocity forensics.⁴² Several—such as the Guatemalan Forensic Anthropology Foundation (FAFG) and the Argentine Forensic Anthropology Team (EAAF)—have their roots in the conflicts and formerly authoritarian regimes

³⁹ See Decl. of “Ulysses”, Cathleen Colvin v. Syrian Arab Republic, No. 1:16-cv-01423 (ABJ) (D.D.C. Mar. 22, 2018) (anonymous declaration of Syrian regime insider).

⁴⁰ See Deyaa Alrishdi & Rebecca Hamilton, *Paying Attention to Land Rights in Syria Negotiations*, JUST SECURITY (Apr. 12, 2018) (noting the importance of resolving housing, land and property rights in any post-conflict settlement); The Day After, *Papers on Decree No. 10/2018*, <http://tda-sy.org/en/content/228/592/reports-&-research/research-papers-on-law-no-10>.

⁴¹ HUMAN RIGHTS WATCH, Q & A: SYRIA'S NEW PROPERTY LAW (May 29, 2018) (noting that the law will serve to punish anyone who has left the country during the war).

⁴² See ADAM ROSENBLATT, *DIGGING FOR THE DISAPPEARED* (2015).

of the Southern Cone. Along with the International Commission on Missing Persons (ICMP), which manages a DNA identification system and specialized missing persons database, these organizations now work globally. They serve as expert witnesses, develop new tools and forensic instruments, and act as technical consultants during the exhumation of mass graves produced during political violence.

Sometimes focusing on the identification of missing persons, ensuring victims enjoy a proper burial, and bringing some measure of closure to family members offers a less contentious initiative for transitional governments that are wary of addressing past violence too vigorously.⁴³ Indeed, Additional Protocol I to the Geneva Convention makes this imperative.⁴⁴ Such activities may actually respond to the priorities of families, who often place a high value on the ability to undertake formal burial rites. Pursuing these forensic options allows progress to be made on rehabilitation while postponing more sensitive demands for retribution. In Sri Lanka, for example, the formation of an Office of Missing Persons was the first initiative to move forward from a package of mechanisms that the government ostensibly pledged to implement following an intense campaign at the U.N. Human Rights Council in Geneva (HRC).⁴⁵

In Syria, the prospects of undertaking forensic work are limited at the moment, except in areas liberated from the Islamic State in Iraq and the Levant (ISIL) where activists are desperate for technical assistance.⁴⁶ Particularly in regime- and ISIL-controlled areas in Syria and Iraq, opposition forces and victim advocates have identified dozens of mass graves. A mapping conducted in 2016 identified over 70 such sites using interviews and satellite imagery. These gravesites contain the remains of the victims of multiple mass atrocities, including an August 2014 massacre of members of the Shaitat tribe in eastern Syria as well as individuals killed in Syrian custody, who are often buried *en masse* on military land.⁴⁷ In 2017, the U.S. government released intelligence indicating that the Assad regime had built a crematory outside of Damascus to dispose of the remains of summarily executed inmates.⁴⁸ Properly preserving these mass graves to avoid DNA contamination or the destruction of evidence has been difficult given that most organizations with the technical expertise do not have secure access.⁴⁹ NGOs have asked for assistance from the United States to preserve mass graves in order to enable independent experts to conduct forensics research. In part on the basis of forensic evidence from mass graves, Iraq has managed to prosecute some perpetrators for a massacre of upwards of 1,700 Shia army cadets billeted at Camp Speicher in Iraq, but there have been no parallel results in Syria so far.

⁴³ See Mytili Bala, *Transitional Justice & The Right to Know: Investigating Sri Lanka's Mass Graves*, in *TRANSITIONAL JUSTICE IN SRI LANKA: MOVING BEYOND PROMISES* 253 (Bhavani Fonseka ed., 2017).

⁴⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 33, June 8, 1977, 1125 U.N.T.S. 3.

⁴⁵ Report of the Office of the United Nations High Commissioner for Human Rights on Promoting Reconciliation, Accountability and Human Rights in Sri Lanka, at ¶¶ 72-73, U.N. Doc. No. A/HRC/30/61 (Sept. 16, 2015) (among other proposals, calling for the provision of international technical assistance in the forensic field (forensic anthropology and archaeology) to ensure proper preservation and investigation of mass graves and to help families trace the missing).

⁴⁶ HUMAN RIGHTS WATCH, SYRIA: MASS GRAVES IN FORMER ISIS AREAS (July 3, 2018), <https://www.hrw.org/news/2018/07/03/syria-mass-graves-former-isis-areas>.

⁴⁷ AMNESTY INTERNATIONAL, HUMAN SLAUGHTERHOUSE: MASS HANGINGS AND EXTERMINATION AT SAYDNAYA PRISON, SYRIA 28-30 (2017).

⁴⁸ Dina Fine Maron, *How Satellite Images Can Confirm Human Rights Abuses*, *SCIENTIFIC AMERICAN*, May 16, 2017.

⁴⁹ See Syria Justice & Accountability Centre, *The Importance of Protecting Mass Graves in Syria*, June 30, 2017.

For many forms of documentation to constitute formal evidence in a court of law, advocates will need be to authenticate even the most basic details of these atrocity artifacts and to satisfy chain-of-custody requirements. While documentation efforts are underway, operators must be cognizant of the prevailing evidentiary standards. These vary depending on the jurisdiction. Many common law courts are governed by strict admissibility rules that categorically exclude many forms of evidence, such as hearsay.⁵⁰ By contrast, many civil law systems (such as Syria) and international criminal courts take a more liberal approach to the introduction of evidence, admitting any informational sources that are relevant, but then according different degrees of weight based upon whether the material bears sufficient indicia of credibility. Other transitional justice mechanisms have more relaxed conventions around the introduction of evidence, since they do not necessarily lead to individualized punishments and may be more focused on storytelling and history writing. This variation requires documenters to undertake collections with an eye towards the admissibility rules of multiple potential jurisdictions, especially the most inflexible.

As an added complication, most courts will require prosecutors to disclose exculpatory information to defendants. So-called *Brady* obligations—as they are known under U.S. law—require prosecutors to disclose evidence favorable to an accused, including evidence that might negate an element of the charged offense, undermine the credibility of a witness, or reduce a potential sentence. These prosecutorial obligations exist within international criminal law as well.⁵¹ Such disclosure rules are not necessarily binding on non-governmental organizations or citizen activists, however. That said, and from a practical perspective if not an ethical one, documentarians must be mindful in their collection pursuits of the disclosure and other evidentiary obligations of their anticipated end users. They should thus endeavor to collect to the highest possible standard to ensure the widest possible use of their collections.

All told, the documentation of international crimes will be a necessary, though not sufficient, step for any comprehensive transitional justice program. In the Syrian context, documentation efforts have proceeded on a number of fronts, even with no transition in sight. The multilateral, governmental, and non-governmental sectors have all produced institutional innovations whose work has been enhanced by the use of new technologies and techniques of documentation, as discussed in the sections that follow.

Mechanisms and Sources of Documentation Devoted to Syria

Documentation work can be initiated on multiple fronts across the international scene, including by multilateral and regional organizations, individual states, civil society actors with or without donor support, professional and citizen-journalists, and ordinary people. By now, Syria has been the subject of multiple fact-gathering exercises by internationally-mandated organizations. Besides a U.N. Commission of Inquiry devoted to Syria, an innovative new mechanism created by the U.N. General Assembly—the International, Impartial and Independent Mechanism (IIIM)—has been tasked with consolidating existing documentation with an eye towards supporting future criminal trials. A similar body is focused on assisting with domestic prosecutions of ISIL members in Iraq. The Syrian conflict has prompted the emergence of a new

⁵⁰ See generally Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973) (comparing common and civil law evidentiary rules).

⁵¹ See, e.g., *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised on the Status Conference on 10 June 2008, ¶¶ 59, 73 (June 13, 2008).

model of “privatized” investigations (in the sense of not being sanctioned by any sovereign entity rather than the sense of being profit-making) of captured regime and ISIL documents with a focus on linking horrific crimes to specific perpetrators. Within civil society, a broad array of Syrian groups are compiling and crowdsourcing information from various sources and using data visualization techniques to convey the horror of the conflict.

And yet, notwithstanding the emergence of a number of best practice protocols, these efforts are proceeding with little coordination, pursuant to different collection methodologies, without a clear sense of the end to which this information will be put or the evidentiary standards under which it will be evaluated, and—at times—at great risk to participants.⁵² It remains to be seen whether these disparate documentation groups will be willing, and technologically able, to share their databases to create a truly universal evidentiary clearinghouse devoted to Syria.⁵³ All of these efforts are prompting, and benefiting from, innovations in human rights technology around data management, secure storage and communication, authentication, and digital forensics. This includes technologies to de-duplicate, code, and organize reams of data but also to make sense of such information at scale. The challenge will be to develop and/or deploy technological solutions to the myriad of problems posed by the sheer quantity of the documentation collected, described as an exercise of “looking for a needle in a pile of needles.”⁵⁴ This section discusses many of these institutional and technological innovations in light of these emergent challenges.

Multilateral Documentation Efforts Devoted to Syria

Since the early 1990s, various subsidiary bodies of the United Nations—including the Secretary General, General Assembly, Security Council, High Commissioner for Human Rights, and Human Rights Council—have established fact-finding missions (FFMs), Panels of Experts (PoEs), and international commissions of inquiry (COIs) to investigate potential human rights violations and abuses around the world, including in the former Yugoslavia, in the Darfur region of Sudan, and now in the ongoing crisis in the Syrian Arab Republic. The difference between these various types of bodies is somewhat elusive. COIs generally include the appointment of three or more high profile “commissioners,” who lead the effort with the support of professional staff and a Secretariat. The Office of the High Commissioner for Human Rights (OHCHR) often serves this function for bodies mandated by the Human Rights Council. FFMs tend to be composed of more technical personnel whereas a PoE often does not have an expansive support staff. Creating such a body to undertake documentation has become a common international response to atrocities. That said, there is no standardized threshold for the quantity or severity of violations that necessitates or generates a COI; mandates have ranged from investigating a single incident to monitoring ongoing governmental repression to tracking situations of full-scale armed conflict. Nor are such bodies governed by standard operating procedures or burdens of proof, although there are movements afoot to consolidate best practices in this regard.⁵⁵

⁵² See Andras Vamos-Goldman, *The Importance of Professional Expertise in Gathering Evidence of Mass Atrocities*, JUST SECURITY (Oct. 27, 2017).

⁵³ See Josh Macey, Paul Strauch, Mitzi Steiner & Nathaniel Zelinsky, *A War Crimes “Wiki”: The Need for an Open Database to Ensure Syrian Accountability*, YALE J. INT’L L. FORUM (Dec. 4, 2017) (arguing for the creation of a war crimes wiki to consolidate all evidence of war crimes compiled to date, which is siloed in different NGO archives).

⁵⁴ Hiatt, *supra* note 30.

⁵⁵ See Stephen Wilkinson, *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions*, Geneva Acad. of Int’l Humanitarian Law and Human Rights, available online at

COIs can be empowered to pursue a number of intersecting objectives: to document and report on human rights abuses and violations of international humanitarian and criminal law, to assess a state's capacity to appropriately respond to such violations, to endeavor to prevent abuses or mitigate their impact, to identify perpetrators, and to make recommendations aimed at promoting transitional justice and accountability.⁵⁶ More cynically, sometimes they are established or operate as a substitute for more robust accountability mechanisms, to forestall calls for justice, to further political agendas, or to muddy the evidentiary waters. For example, the International Independent Investigative Commission (IIIC) convened following the assassination of former Lebanese Prime Minister Rafiq Hariri came under criticism for being politically-motivated, relying upon biased sources, and utilizing weak investigative methodologies.⁵⁷

Increasingly, COIs and other such bodies are considered waypoints to more robust forms of criminal sanction⁵⁸ and are expected to contribute to accountability for violations and ensure that those responsible are brought to justice.⁵⁹ For example, the mandate for the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea states that the COI was to "investigate the systematic, widespread and grave violations of human rights in the Democratic People's Republic of Korea ... with a view to ensuring full accountability, in particular where these violations may amount to crimes against humanity."⁶⁰ This imperative of language of "full accountability" is also found in the mandates for the Fact-finding Mission to the Syrian Arab Republic and the Investigation Mission to Iraq, convened by the OHCHR in 2011 and 2014, respectively.⁶¹ As such, they are being designed to be "interoperable" with both international and national accountability efforts.⁶² Absent an assist from the Security Council, however, such bodies lack any judicial or coercive powers, so they cannot compel testimony or the submission of material evidence; nor can they operate without the consent of the target state. Rather, they must rely on the voluntary cooperation of states, witnesses, and those in possession of relevant information. Many have been denied access to the relevant conflict area, either by the government itself or due to security concerns.

That said, even where no tribunal is established, commissions of inquiry can serve other worthwhile purposes. At a minimum, they preserve the possibility of future accountability by protecting potential evidence from loss, degradation, or destruction, assuming they are empowered to hand over such evidence to prosecutorial authorities. They can also initiate analyses of the

<https://www.geneva-academy.ch/joomlatools-files/docman-files/Standards%20of%20Proof%20in%20Fact-Finding.pdf>.

⁵⁶ See Larissa J. van den Herik, *An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law*, 13 CHINESE J. INT'L L. 507 (2014).

⁵⁷ See Melia Amal Bouhabib, *Power & Perception: The Special Tribunal for Lebanon*, 3 BERKELEY J. MIDDLE EASTERN & ISLAMIC L. 173, 178-85 (2010) (compiling criticism of the IIIC).

⁵⁸ See generally Micaela Frulli, *Fact-Finding or Paving the Road to Criminal Justice?: Some Reflections on United Nations Commissions of Inquiry*, 10(5) J. INT'L CRIM. JUST. 1323 (2012).

⁵⁹ *The UN Human Rights Council: Commissions of Inquiry Conference Brief*, Dec. 1, 2011, at 2.

⁶⁰ Situation of Human Rights in the Democratic People's Republic of Korea, U.N. Doc. A/HRC/RES/22/13, ¶ 5 (Apr. 9, 2013).

⁶¹ See, e.g., The Human Rights Situation in Iraq in Light of the Abuses Committed by the so-called Islamic State in Iraq and the Levant and Associated Groups, U.N. Doc. A/HRC/RES/S-22/1, ¶ 10 (Sept. 3, 2014).

⁶² Rob Grace & Jill Coster Van Voorhout, *From Isolation to Interoperability: The Interaction of Monitoring, Reporting, and Fact-finding Missions and International Criminal Courts and Tribunals*, HARV. INST. GLOBAL JUSTICE, Working Paper (Dec. 4, 2014); David Mandel-Anthony, *Hardwiring Accountability for Mass Atrocities*, 11 DREXEL L. REV. 903 (2019).

information gathered with reference to the *chapeau* elements of international crimes as well as the responsibility of individual perpetrators. Beyond these contributions to prospective accountability processes, COIs can operate as a sort of roving truth commission, giving voice to victims, and elucidating patterns of violence and the structures of power that drove and sustained the conflict. In theory, they offer an impartial account of events and an external validation of abuses that might weed out misreporting and biases that can be present in the media, propaganda, and other partisan sources of information. In practice, however, empirical research suggests that their conclusions on contested events may be rejected by domestic supporters of a regime.⁶³ Finally, COIs can be designed to build a more united international coalition against a regime or persuade would-be spoilers to abandon their support for a government or armed group. States may find it increasingly difficult to resist more forceful multilateral responses in the face of clear and internationally-sanctioned evidence that an ally is committing crimes against humanity or other grave international offenses.

The Syrian Fact-Finding Mechanism

Turning to the Syrian context, and proceeding roughly chronologically, after the arrival of the Arab Spring in Syria provoked the regime crackdown, the U.N. Human Rights Council in April 2011 called upon the High Commissioner for Human Rights to “urgently dispatch a mission to the Syrian Arab Republic to investigate all alleged violations of international human rights law and to establish the facts and circumstances of such violations and of the crimes perpetrated, with a view to avoiding impunity and ensuring full accountability” and to report back to the next session of the Council.⁶⁴ Notwithstanding Terms of Reference calling upon the Syrian authorities to give the fifteen-member Fact Finding Mechanism (FFM) freedom of movement and access to sources of information and witnesses throughout Syria,⁶⁵ the FFM received virtually no cooperation from Syria when it came to access to the country (which is the case with many such bodies operating without the state’s consent). Instead, the regime conveyed a series of *notes verbale* attesting to a number of reforms underway, complained of fabricated media reports and nefarious efforts to overthrow the regime, and responded in writing to questions posed by the FFM.⁶⁶ In September 2011, the FFM issued a report detailing the deterioration of the situation in Syria from the early protests through the commission of systematic disappearances, deprivations of liberty, murder, and torture.

The Syria Commission of Inquiry

As the situation moved from one marked by lethal attacks on unarmed protesters to the emergence of an organized armed opposition, the HRC upgraded its response by forming an International Independent Commission of Inquiry on Syria (COI) in August 2011. The latter has been renewed annually and continues to operate pursuant to a mandate

to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may

⁶³ Shiri Krebs, *The Legalization of Truth in International Fact-Finding*, 18(1) CHICAGO J. INT’L L. UNBOUND (2017); Brendan Nyhan & Jason Reifler, *Displacing Misinformation About Events: An Experimental Test of Causal Corrections*, 2(1) J. EXPERIMENTAL POL. SCI. 81 (2015).

⁶⁴ U.N. Doc. A/HRC/S-16/1, ¶ 7 (Apr. 29, 2011).

⁶⁵ See OHCHR Fact-Finding Mission to Syria, *Terms of Reference*.

⁶⁶ Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in the Syrian Arab Republic, U.N. Doc. No. A/HRC/18/53, at 3-4, 26-117 (Sept. 15, 2011) (indicating lack of response to requests for cooperation and reproducing *notes verbale*).

amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable...⁶⁷

The COI must be satisfied that it has “reasonable grounds to believe” an incident happened before making a finding.⁶⁸ When the COI was renewed in 2016, the HRC subtly enhanced its mandate to empower it to assist national prosecutions,⁶⁹ given that this is where cases are proceeding at the moment.⁷⁰

The COI has had only minimal access to Syrian territory and was limited to closely supervised visits in Damascus and *environs*. As such, it has relied upon Skype calls into Syria and interviews with refugees, defectors, and other Syrians in the diaspora to conduct more penetrating and far-reaching inquiries. It also has reviewed secreted documents, social media posts, information from national authorities, satellite imagery, documentation from civil society organizations, and forensic and medical reports.⁷¹ Not without controversy, the COI was somewhat hesitant to pursue all lines of inquiry. It will only accept first-hand information from direct witnesses and victims, which might hinder the ability to follow all potential leads.⁷² That said, there were some indications that it was willing to accept second-hand information from the U.N. Supervisory Mission in Syria, UNSMIS, particularly with respect to May 25, 2012, El-Houleh massacre. The HRC authorized a special mission in June 2012 to “conduct a comprehensive, independent and unfettered special inquiry” on the massacre and “publicly identify those who appear responsible for these atrocities, and to preserve the evidence of crimes for possible future criminal prosecutions or a future justice process, with a view to hold to account those responsible.”⁷³ The COI also allows for participant anonymity, which limits the ability to use these statements in a criminal process.

Since its inception, the COI has produced report after report—some broad-spectrum, some thematic, all harrowing—tracing the dramatic deterioration of the situation in Syria. In addition to describing the patterns of violence, the COI has provided a sealed list of the names of suspected perpetrators to the Office of the Prosecutor of the International Criminal Court and the U.N. High Commissioner for Human Rights. It continues to generate subsequent rosters of suspects. As

⁶⁷ Situation of Human Rights in the Syrian Arab Republic, U.N. Doc. A/HRC/S-17/1, ¶ 13 (Aug. 22, 2011).

⁶⁸ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/37/72, 3 (Feb. 1, 2018) (setting forth methodology).

⁶⁹ The 2013 mandate authorized the COI to “identify those responsible *with a view of ensuring* that perpetrators ... are held accountable.” A/HRC/S-17/1, *supra* note 67, ¶ 13 (emphasis added). In 2016, the COI was empowered to “*support efforts to ensure* that perpetrators ... are held accountable.” Human Rights Council, The Human Rights Situation in the Syrian Arab Republic, U.N. Doc. A/HRC/RES/31/17, ¶ 4 (Apr. 8, 2016) (emphasis added).

⁷⁰ Human Rights Council, The Human Rights Situation in the Syrian Arab Republic, U.N. Doc. A/HRC/34/L.37, ¶ 2 (Mar. 20, 2017) (noting “the importance of the work of the Commission of Inquiry and the information it has collected in support of future accountability efforts”).

⁷¹ *See, e.g.*, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/21/50, at 11 (Aug. 10, 2012) (discussing satellite imagery of the El-Houleh massacre).

⁷² *See* U.N. Human Rights Council, Independent International Commission of Inquiry on the Syrian Arab Republic, *About the Commission of Inquiry*, <https://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/AboutCoI.aspx>.

⁷³ Human Rights Council, The Deteriorating Situation of Human Rights in the Syrian Arab Republic, and the Recent Killings in El-Houleh, U.N. Doc. A/HRC/RES/S-19/1, ¶ 8 (June 4, 2012).

frustration with the Council mounted, members of the COI threatened to go public with its lists.⁷⁴ In one of its many reports, it noted:

140. The long-standing position of the Commission has been that its investigation methodology does not meet the normal requirements of due process, and consequently, alleged perpetrators of war crimes and crimes against humanity should not be named. After four years of intensive monitoring and the submission of four confidential lists of perpetrators, however, not to publish names at this juncture of the investigation would be to reinforce the impunity that the Commission was mandated to combat.

141. The Commission deems that it should interpret its mandate in a way that is most conducive to the protection of the victims of the conflict and their right to the truth. It is the Commission's hope that putting alleged perpetrators on notice will serve to maximize the potential deterrent effect of the findings of the Commission and help to protect people at risk of abuse.⁷⁵

So far, however, it has only shared these names with national prosecutorial authorities.

Since its inception, the COI has suffered from a bit of an identity crisis, with its staff segmenting themselves according to the two elements of its mandate: some have prioritized classic human rights documentation methods (with a focus on giving voice to victims and documenting the patterns of violence on a macro scale) whereas others have sought to pursue an inquiry more akin to a criminal investigation (with the aim of generating information that could inform indictments against individual perpetrators).⁷⁶ These two methodologies are not identical and are at times in tension with each other.⁷⁷ It is politically difficult to terminate such a body, and so the Syrian COI continues its work, slicing the information it has gathered in different ways and expanding its lens to cover elements of the crossover conflict in Iraq.⁷⁸ Although the COI remains functional, several commissioners have made noisy exits, including most recently Swiss Prosecutor Carla Del Ponte, who indicated upon her departure: "I am quitting this commission, which is not backed by any political will. ... I have no power as long as the [UN] Security Council does nothing. There is no justice for Syria."⁷⁹

The Chemical Weapons Investigatory Mechanisms

⁷⁴ Somini Sengupta, *U.N. Panel Threatens to Name Those It Accuses of War Crimes in Syria*, N.Y. TIMES, Feb. 20, 2015.

⁷⁵ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/28/69 (Feb. 5, 2015).

⁷⁶ See generally David A. Kaye, *Human Rights Prosecutors? The United Nations High Commissioner for Human Rights, International Justice, and the Example of Syria* (U.C. Irvine School of Law Research Paper No. 2013-83), <https://ssrn.com/abstract=2196550> (noting the different methodologies of human rights lawyers and international prosecutors).

⁷⁷ See Morten Bergsmo & William H. Willey, *Human Rights Professional and the Criminal Investigation and Prosecution of Core International Crimes*, in MANUAL ON HUMAN RIGHTS MONITORING: AN INTRODUCTION FOR HUMAN RIGHTS FIELD OFFICERS, Chap. 10 (Siri Skåre, Ingvild Burkey and Hege Mørk eds., 3d ed., 2008) (3rd edn, Norwegian Centre for Human Rights 2008).

⁷⁸ See The Independent Int'l Commission of Inquiry on the Syrian Arab Republic, "*They Came to Destroy*": *Isis Crimes Against the Yazidis*, U.N. Doc. A/HRC/32/CRP.2 (2016).

⁷⁹ Carla Del Ponte, *War Crimes Expert Quits UN Syria Inquiry*, BBC, Aug. 6, 2017.

Chemical weapons have been utilized in the Syrian war on a scale not seen since the Iran-Iraq War. Elements of the international community—including individual states, the United Nations, and the Organization for the Prohibition of Chemical Weapons (OPCW)—have launched several additional mandated entities in response to the utilization of chemical weapons in the Syrian battlespace.⁸⁰ The war-time use of all such substances is contrary to customary international law⁸¹ but also to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (“Chemical Weapons Convention”),⁸² whose implementing body is the OPCW. Syria ratified this treaty on September 14, 2013, as part of a Russia-United States brokered deal to eliminate Syria’s chemical weapons reserves.⁸³ Nonetheless, chemical weapons remained in use—the first confirmed use by a Chemical Weapons Convention signatory ever.

In 2014, the international community convened a FFM under the auspices of the OPCW,⁸⁴ but with blessings from the Security Council⁸⁵ and the grudging acquiescence of the Assad government. This entity has been tasked with an ongoing mandate to gather information about alleged chemical weapon use in Syria following the implementation of the Framework Agreement.⁸⁶ Although mission members were granted limited access to Syrian territory given the precarious security situation, they have been able to attend autopsies; collect bio-medical specimens; examine weapons fragments; interview medical professionals, victims, and witnesses; review open source information and satellite imagery; and collect soil and other environmental samples at or near sites where chemical weapon use was suspected. Among other incidents, the FFM confirmed, for example, the use of chlorine gas in various rebel-held areas in 2014; the use of sulfur mustard in Um-Housh (Aleppo Province) on September 16, 2016; and the aerial dissemination of the nerve agent sarin in rebel-held Khan Sheikhoun, Idlib Province, on April 4, 2017. But, the Mission was not empowered to attribute responsibility for such incidents, and so its reports stop short of identifying which parties to the conflict orchestrated the attacks.

In the wake of new allegations that chemical weapons had been used in Syria in 2015, the Security Council tasked the Secretary-General and OPCW Director-General with creating an OPCW-United Nations Joint Investigative Mechanism (JIM). Resolution 2235 was unanimous, marking a rare display of unity in the Council when it comes to the situation in Syria.⁸⁷ The Council charged the JIM with identifying:

⁸⁰ Those under the auspices of the OPCW are discussed here: <https://www.opcw.org/media-centre/featured-topics/syria-and-opcw>.

⁸¹ INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL LAW STUDY, Rule 74 (“The use of chemical weapons is prohibited.”).

⁸² Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 317.

⁸³ See Framework for Elimination of Syrian Chemical Weapons, Annex to the letter dated 19 September 2013 from the Permanent Representatives of the Russian Federation and the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. A/68/398 S/2013/565 (Sept. 24, 2013). This diplomatic achievement is discussed in chapter 3.

⁸⁴ See OPCW, Fact-Finding Mission, <https://www.opcw.org/fact-finding-mission>.

⁸⁵ S.C. Res. 2118, ¶¶ 7-8, U.N. Doc. S/RES/2118 (Sept. 27, 2013). See, e.g., Executive Council, OPCW, *Reports of the OPCW Fact-Finding Mission in Syria*, EC-M-48/DEC.1 (Feb. 4, 2015).

⁸⁶ See OPCW, Summary Report of the Work of the OPCW Fact-Finding Mission in Syria Covering the Period from 3 to 31 May 2014, S/1191/2014, ¶ 1 (June 16, 2014).

⁸⁷ See S.C. Res. 2235, U.N. Doc. S/RES/2235 (Aug. 7, 2015).

to the greatest extent feasible individuals, entities, groups, or governments who were perpetrators, organisers, sponsors or otherwise involved in the use of chemicals as weapons, including chlorine or any other toxic chemical...⁸⁸

Because it enjoyed a Chapter VII provenance, the JIM had readier and expanded access to Syrian territory. Moreover, all states had U.N. Charter-based obligations to cooperate with the JIM in terms of information sharing and otherwise. Building upon the work of the OPCW FFM, the JIM identified “sufficient evidence” that multiple parties to the conflict have used chemical weapons upwards of 48 times. In its seventh and final report, for example, the JIM attributed responsibility for the use of sulfur-mustard gas in Um-Housh to ISIL and blamed the Syrian government for the sarin attack in Khan Sheikhoun, a conclusion that remained controversial. This attribution remained at the level of the party to the conflict rather than individual perpetrators.

The JIM marked one of the few initiatives that Russia allowed to move forward in the Security Council and a rare instance of multilateral cooperation. After the Security Council renewed the JIM once in 2016,⁸⁹ however, Russia vetoed two 2017 resolutions that would have extended its mandate for another year.⁹⁰ This brought the number of Russian vetoes in connection with Syria to ten since 2011, with four in 2017 alone. In withdrawing its support from this initiative, the Russian permanent representative claimed that the JIM was a “puppet” of the West that was drawing its conclusions without first-hand evidence.⁹¹ It seems more likely, however, that Russia did not welcome the JIM’s conclusions on Syrian regime responsibility.

The FFM and JIM had been working in parallel for several years. With the demise of the JIM, states parties to the OPCW in June 2018 voted to grant the OPCW itself the power to go beyond its technical mandate and attribute responsibility for chemical weapons attacks.⁹² Incidentally, the British-led resolution within the OPCW came on the heels of the nerve agent attack on a former Russian spy and his daughter in England. As such, the OPCW is also empowered to facilitate attribution of chemical weapons attacks worldwide. In Syria, this new Investigation & Identification Team (IIT) is focused on chemical weapon attacks confirmed by the FFM or left unaddressed by the JIM, as well as new incidents that had not received attention, such as the April 2018 attack in Douma involving chlorine.⁹³ In the face of a deadlock at the Security Council, these developments reflect a new trend of mandating institutions that would not normally contribute to international criminal justice efforts to do so. In this way, the classic verification function of the

⁸⁸ *Id.* ¶ 5.

⁸⁹ S.C. Res. 2319, ¶ 1, U.N. Doc. S/RES/2319 (Nov. 17, 2016).

⁹⁰ *Security Council Fails to Renew Mandate of Joint Investigative Mechanism on Chemical Weapons Use in Syria, as Permanent Member Casts Veto*, U.N. Doc. SC/13040 (Oct. 24, 2017).

⁹¹ *See Russia Vetoes U.S. Proposal To Extend UN Chemical-Weapons Inquiry In Syria*, RADIO FREE EUROPE, Nov. 17, 2017.

⁹² OPCW, Decision Addressing the Threat from Chemical Weapons Use, C-SS-4/DEC.3, ¶ 10 (June 27, 2018) (deciding to put in place “arrangements to identify the perpetrators of the use of chemical weapons in the Syrian Arab Republic”).

⁹³ Note by the Technical Secretariat, Interim Report of the OPCW Fact-Finding Mission in Syria Regarding the Incident of Alleged Use of Toxic Chemicals as a Weapon in Douma, Syria Arab Republic, on 7 April 2018, S/1645/2018 (July 6, 2018); *Syria War: What we Know about Douma ‘Chemical Attack’*, BBC, July 10, 2018.

OPCW has been “operationalized” by virtue of its arrangement with the IIM.⁹⁴ This evolution from a more technical role to a more political one remains controversial.⁹⁵

Discrete Investigations

Another more discrete investigation was undertaken by a U.N. Board of Inquiry established by the U.N. Secretary-General. It was mandated to examine the incident involving the bombing of a U.N.-Syrian Arab Red Crescent relief operation heading to Urum al-Kubra, Syria, on September 19, 2016.⁹⁶ Several draft Security Council resolutions made mention of the Board. One, put forward by a number of states, urged all parties concerned to “cooperate fully with the Board and [underlined] the importance of completing the investigation without delay with a view to hold the perpetrators accountable.”⁹⁷ However, these supportive remarks were met with tit-for-tat P-5 vetoes and so the Board’s work never received formal blessing from the Council. The full report was not released, but an executive summary concluded that the convoy was destroyed by an air attack (which only the Coalition, Russia, or Syria could have mounted) and was most likely attributed to pro-government forces.⁹⁸

The International, Impartial and Independent Mechanism

Prompted by paralysis at the Security Council, and eager to take the work of the COI a step further, the U.N. General Assembly stepped forward with a new quasi-prosecutorial initiative.⁹⁹ It created, by way of a resolution that did not enjoy consensus, an International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIM).¹⁰⁰ The concept was first proposed by Liechtenstein and Qatar, in consultation with civil society organizations. In introducing the measure, Liechtenstein stated:

The situation in Syria is the defining crisis of our time, both with respect to human suffering and to the inability of the Security Council to take effective action to address the unfolding humanitarian tragedy. Nothing illustrates the political paralysis in the Council more starkly than the repeated use of the veto in connection with moderate resolutions that pursue the primary goal of alleviating the suffering of the civilian population in the country. ... Since the referral of the situation to the International Criminal Court was vetoed in the Council more than two years ago, there has been no serious effort in the Council to ensure accountability and end impunity. It is therefore imperative that the General Assembly steps in and enables

⁹⁴ Matt Cannock, *International Justice Trends in Microcosm at the OPCW—Three Observations as States Adopt ‘Attribution Mechanism,’* AMNESTY INTERNATIONAL (July 27, 2018).

⁹⁵ Mirko Sossai, *Identifying Perpetrators of Chemical Attacks in Syria*, 17 INT’L CRIM. L. J. 211, 218-19 (2019).

⁹⁶ Summary by the Secretary-General of the Report of the United Nations Headquarters Board of Inquiry into the Incident involving a Relief Operation to Urum al-Kubra, Syrian Arab Republic, on 19 September 2016, U.N. Doc. S/2016/1093, Annex (Dec. 21, 2016).

⁹⁷ Andorra et al.: draft resolution, U.N. Doc. S/2016/846, pmb1 (Oct. 8, 2016); *see also* Russian Federation: draft resolution, U.N. Doc. S/2016/847, pmb1 (Oct. 8, 2016).

⁹⁸ Summary by the Secretary-General of the Report of the United Nations Headquarters Board of Inquiry into the Incident Involving A Relief Operation to Urem al-Kubra, Syrian Arab Republic, on 19 September 2016, ¶¶ 27, 36, 37.

⁹⁹ The UNGA debates are available here: U.N. GAOR, 71st Sess., 66th plen. mtg., at 20, U.N. Doc. A/71/PV.66 (Dec. 21, 2016) [hereinafter *IIM Explanations of Vote*].

¹⁰⁰ G.A. Res. 71/248, ¶ 4, U.N. Doc. A/Res/71/248 (Dec. 21, 2016). *See generally* Alex Whiting, *An Investigation Mechanism for Syria: The General Assembly Steps into the Breach*, 15(2) J. INT’L CRIM. JUSTICE 231 (May 1, 2017).

the international community to at least take one decisive step forward in this respect: to prepare files that can serve as the basis for criminal proceedings in a court or tribunal that may in the future be able to exercise jurisdiction.¹⁰¹

The vote was 105 in favor, 15 against (Algeria, Belarus, Bolivia, Burundi, China, Cuba, Democratic People's Republic of Korea, Iran, Kyrgyzstan, Nicaragua, Russian Federation, South Sudan, Syrian Arab Republic, Venezuela, and Zimbabwe), and 52 abstentions.¹⁰² The Human Rights Council welcomed the creation of the IIIM and encouraged states cooperation.¹⁰³

The IIIM is meant to operate partially as a clearinghouse of information produced over the years by other entities—including the COI, civil society actors, and governments—but also as a proto-investigative team gathering its own information to fill gaps in the evidentiary record and prepare files for future prosecutions before whichever court—international, regional, hybrid, or domestic—may eventually assert jurisdiction. Specifically, the General Assembly empowered the IIIM to:

collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.¹⁰⁴

The IIIM's inaugural head, French jurist Catherine Marchi-Uhel, aims to be in a position to assist a “multiplication of judicial channels,”¹⁰⁵ also described as the “mystery of the ultimate forum.”¹⁰⁶ In this incarnation, the IIIM has been described as a “prosecutor without a tribunal.”¹⁰⁷ Although it can follow the evidence where it leads, the IIIM has some limitations on its ability to share its holdings with judicial processes that do not adhere to fair trial standards or that allow the death penalty, which might limit its ability to contribute to localized trials in the region. Specifically, the Terms of Reference state: “The Mechanism shall share its information only with those jurisdictions that respect international human rights law and standards, including the right to a fair trial, and where the application of the death penalty would not apply for the offences under consideration.”¹⁰⁸

Marking an enhancement of the work of the COI, the IIIM will collect information to a criminal law standard using investigative methodologies, with careful attention to preserving the chain of custody and ensuring the authenticity of the amassed materials. In this way, it sees itself as bridging the divide between traditional fact-finding mechanisms and criminal trials. As

¹⁰¹ PERMANENT MISSION OF THE PRINCIPALITY OF LIECHTENSTEIN TO THE UNITED NATION: STATEMENT BY H.E. AMBASSADOR CHRISTIAN WENAWESER (Dec. 9, 2016).

¹⁰² IIIM Explanations of Vote, *supra* note 98, at 29-30.

¹⁰³ A/HRC/34/L.37, *supra* note 70, ¶ 40.

¹⁰⁴ A/Res/71/248, *supra* note 99, at ¶ 4.

¹⁰⁵ Frédéric Burnand, *Catherine Marchi-Uhel: A Strong Signal To Those Committing Crimes In Syria*, JUSTICEINFO.NET (Jan. 25, 2019).

¹⁰⁶ Mandel-Anthony, *supra* note 62, at 926.

¹⁰⁷ James Reinl, *Could Syria's 'Prosecutor without a Tribunal' Work?*, AL JAZEERA, May 31, 2017.

¹⁰⁸ Report of the Secretary-General, Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, U.N. Doc. No. A/71/755, Annex, ¶ 14 (Jan. 19, 2017).

indicated by its mandate and Terms of Reference, the IIIM will prioritize the collection of linkage evidence tending to connect individual perpetrators to the crimes committed under all modes of liability, rather than gathering ever more crime-base data. That said, it will also collect information that is both inculpatory and exculpatory.¹⁰⁹ The OPCW's IIT and the IIIM have signed a Memorandum of Understanding indicating their intent to collaborate.¹¹⁰

Although an international tribunal has proven to be a bridge too far when it comes to Syria, national prosecutorial authorities—and particularly their dedicated war crimes units such as the European Union's Judicial Cooperation Unit¹¹¹—are already proving to be avid consumers of the IIIM's work. The IIIM has plugged into the European Genocide Network and other institutions focused on facilitating the greater integration of European penal processes. Indeed, the IIIM is poised to launch Joint Investigative Teams (JITs) with states, especially within the European Union. To be sure, prosecutors are not likely to adopt IIIM work product in whole cloth, but its analytical contributions will facilitate local efforts when suspects are within reach. In particular, the IIIM can undertake the sort of deep historical and cultural research that is necessary to launch a successful war crimes prosecution but that might be difficult for multiple national prosecutors to undertake. This would include gathering proof of the *chapeau* (or circumstantial) elements of war crimes and crimes against humanity, such as the existence of an armed conflict or a widespread and systematic attack against a civilian population.

From the start, Russia objected to this initiative as *ultra vires*, arguing that the U.N. Charter does not authorize the General Assembly to create anything akin to a prosecutorial body, particularly in the absence of Syrian consent. Not surprisingly, Syria echoed these remarks and also condemned the proposal as an infringement on its national sovereignty. Several states that are normally critical of the Security Council suddenly expressed concerns that the Assembly was encroaching upon the Council's mandate. Other states—including some that voted for the IIIM resolution—raised a number of disparate critiques. These include the lack of transparency in the process by which the resolution was drafted and tabled; confusion over the proposed terms of reference and specifically how the new mechanism would interact with the COI and the ICC; and the risk that a prosecution-oriented Mechanism might threaten efforts to negotiate peace among the warring parties. Also deemed problematic was the Mechanism's dependence, at least initially, on voluntary financial contributions (to the tune of \$14 million *per annum*) in lieu of dedicated U.N. funding. In addition to forcing the Mechanism's staff to engage in constant fundraising, an excessive reliance on any one donor might undermine the IIIM's impartiality, as noted by several delegates during the debates. Finally, Argentina—which has been on the receiving end of universal jurisdiction prosecutions in Europe—argued that the IIIM should not support prosecutions on the basis of universal jurisdiction *in absentia*. Argentina argued that “the mechanism should not cooperate with national courts, which may attempt to exercise criminal jurisdiction without sufficient ties to alleged events” and “should not be instrumentalized to enable trial in absentia based on questionably claims regarding universal jurisdiction.”

Unlike the COI, the IIIM's work will not necessarily be made public (although it will issue periodic reports). In the IIIM's reports to the General Assembly, Marchi-Uhel has outlined her

¹⁰⁹ *Id.* ¶ 12.

¹¹⁰ OPCW, Progress on the Implementation of Decision C-SS-4/DEC.3 on Addressing the Threat from Chemical Weapon Use, EC-89/DG.29, ¶ 6 (Oct. 4, 2018).

¹¹¹ See Council Decision of 13 June 2002 setting up a European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, 2002/494/JHA; Eurojust, Genocide Network.

proposed methodology and investigative strategy, updated states on her progress, and identified both opportunities and challenges.¹¹² The IIM has opened several casefiles, put a state-of-the-art case management system in place, expanded its holdings to over a million records, built cooperative relationships with a number of interlocutors, and responded to requests from more than a dozen national prosecutors.¹¹³ To date, the Syrian government has not responded to the IIM's overtures.

Although influential U.N. actors insist that the two bodies are complementary to each other, it may eventually become necessary to more formally deconflict the COI's and IIM's activities and mandates. The COI was reluctant to share its information with NGOs, but it has entered into an information-sharing agreement with the IIM given their shared U.N. provenance. In fact, the establishment of the IIM may provide cover for an eventual winding down of the COI. That said, the IIM will not fully duplicate the activities of the COI, which is devoted to public reporting of its findings.

Many civil society documentation groups have expressed support for the IIM, although there was some initial criticism that they were not adequately consulted in the drafting of the Mechanism's Terms of Reference. Responding to these concerns, the IIM and donor governments made efforts to increase communication with upstream civil society organizations. This resulted in the Mechanism initiating a contributor survey and signing a "protocol of cooperation"¹¹⁴ in Lausanne, Switzerland, with more than twenty Syrian civil society organizations with an eye towards "outlin[ing] a set of overarching principles" to guide future institutional engagement and "ensure mutual understanding regarding opportunities for collaboration, for fulfilling common goals of ensuring justice, accountability, and redress for victims of war crimes committed in Syria."¹¹⁵ The IIM now meets regularly in Lausanne with Syrian civil society organizations with funding from the Dutch and the Swiss. To avoid the problems faced by the International Criminal Court, the IIM has also generated an information governance strategy on data procurement and integrity in conversation with domestic war crimes units.¹¹⁶ Not all documentation organizations are willing to share their information with the IIM, or with any criminal investigators for that matter.

¹¹² See, e.g., Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, U.N. Doc. A/72/764 (Feb. 28, 2018); Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, U.N. Doc. A/73/295 (Aug. 3, 2018).

¹¹³ See Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, U.N. Doc. A/73/741 (Feb. 13, 2019).

¹¹⁴ Protocol of Cooperation between the International, Independent and Impartial Mechanism and Syrian Civil Society Organizations participating in the Lausanne Platform, https://iiim.un.org/wp-content/uploads/2018/04/Protocol_IIIM_-_Syrian_NGOs_English.pdf.

¹¹⁵ Violations Documentation Center, *Syrian Civil Society Organisations Sign Protocol of Cooperation with IIM* (Apr. 5, 2015), <http://vdc-sy.net/syrian-civil-society-organisations-sign-protocol-cooperation-iiim/>. See also SJAC, *Responding to Misconceptions Regarding the IIM* (Aug. 2, 2017) (noting areas of cooperation between civil society groups and the IIM and the ability of the IIM to enter into agreements with outside sources).

¹¹⁶ Catherine Marchi-Uhel, Head of the IIM, *Accountability for the Most Serious Crimes Committed in Syria*, Stanford University (Feb. 12, 2018), <https://handacenter.stanford.edu/events/accountability-most-serious-crimes-committed-syria> [hereinafter *Marchi-Uhel Stanford Speech*].

The IIIM has indicated that its intention is not to try to vacuum up all documentation from all sources, which might overwhelm the IIIM but also threaten smaller documentation efforts whose holdings are akin to their intellectual property. Rather, it will endeavor to operate more as a hub between multiple stakeholders to index or catalogue what potential evidence is out there and cross-reference it to the information it gathers directly in a gap-filling role. Every piece of evidence will be given a unique alphanumeric identifier (a “hash”), which will allow anyone to locate it from the main catalog and identify the “cleanest” version of any particular image or video (e.g., the version devoid of logos, tampering, watermarks, etc.). Cryptographic hashing is like a digital pixel fingerprint that will reveal whether there have been any changes to, or corruption of, the information and metadata and also help establish the chain of custody. This cataloging and hashing system also reflects the fact that the IIIM might be overwhelmed and paralyzed if it did try to physically collect the entire corpus of available evidence.

The IIIM is working with the Connected Civil Society project of Benetech, a non-profit that helps to develop software solutions to shared social problems, and other technology experts to build a state-of-the art knowledge management system from scratch to house its collection and to apply machine learning to organize and analyze open source data generated from the Syrian conflict, particularly the thousands of hours of digital video footage. This initiative is inspired by the recognition that it will be impossible to manually analyze all 5 million YouTube Syrian videos, for example. One goal of this partnership is to deduplicate the millions of images and videos of the conflict through automated image matching and evaluation software and other forms of machine learning first developed to detect child pornography online.

Although the IIIM will study the research generated by other organizations, its principals plan to undertake their own analytical work and even issue proto-indictments. Developing conflict, cultural, and historical expertise (captured within white papers, chronologies, maps, charts, and other refined outputs) will enable the IIIM to support national and international prosecutions in ways that go beyond the sharing of raw evidence. National war crimes units may not have the capacity to develop such detailed conflict-specific resources, which will enhance their structural and targeted investigations.



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States have begun the process of funding the Mechanism, and there is a movement afoot—led by Liechtenstein—to ensure U.N.-assessed funding by 2020,¹¹⁷ as originally contemplated.

¹¹⁷ Human Rights Council, Situation of Human Rights in the Syrian Arab Republic, U.N. Doc. A/RES/72/191, ¶ 35 (Jan. 23, 2018) (calling upon the Secretary-General to “include the necessary funding for the Mechanism in his next budget proposal”).

The European Union and the United States, for example, have provided both financial and diplomatic support to this new initiative. So far, however, some of the usual funders for justice initiatives have been less generous than expected, in part due to other pressing humanitarian commitments in Syria.¹¹⁸ Civil society actors also organized a crowd-funding campaign for the Mechanism. It is hoped that national governments will be willing to share information with the IIIM (including potentially from their intelligence agencies), given its United Nations origins. Without a Security Council mandate, however, the IIIM will be dependent on voluntary cooperation in all aspects of its work. Syria has alleged that the IIIM cannot be independent in light of its dependence on voluntary contributions from states that have sponsored terrorism in Syria and Iraq.

Although this marks the first time the General Assembly has created such a body, U.N. member states have been involved in the past in consolidating norms around accountability and building justice institutions.¹¹⁹ That said, the IIIM is significantly more operational and coercive than any COI previously created except perhaps the IIC for Lebanon, which enjoyed a Security Council provenance. Nonetheless, it remains the case that “[o]nly the Security Council has the authority under the UN Charter to establish tribunals with compulsory legal authority over individuals or states” in light of Article 103 of the U.N. Charter.¹²⁰ The HRC recently adopted the IIIM model for Myanmar.¹²¹

United Nations Investigative Team to Promote Accountability for Da’esh/ISIL Crimes

The newest innovation in this space has been created in neighboring Iraq, although its work will have implications for Syria given ISIL’s depredations in both countries. In August 2017, following the liberation of Mosul, the Government of Iraq requested assistance from the Security Council in ensuring accountability for international crimes committed by the Islamic State/Da’esh. The letter indicated a preference for criminal proceedings under Iraqi law out of respect for its national sovereignty.¹²² The Security Council complied on the basis of a resolution drafted by the United Kingdom and asked the Secretary-General to establish an “Investigative Team” to:

support domestic efforts to hold ISIL (Da’esh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Da’esh) in Iraq, to the highest possible standards ... to ensure the broadest possible use before national courts, and complementing investigations being carried out by the Iraqi authorities, or investigations carried out by authorities in third countries at their request...¹²³

¹¹⁸ Teri Schultz, *EU States Pledge Aid Money for Syria, but Fail to Fund War Crimes Investigation*, DEUTSCHE WELLE, Apr. 5, 2017.

¹¹⁹ See Beth Van Schaack, *The General Assembly & Accountability for International Crimes*, JUST SECURITY (Feb. 17, 2017).

¹²⁰ Whiting, *supra* note 99, at 232.

¹²¹ Situation of Human Rights of Rohingya Muslims and other Minorities in Myanmar, U.N. Doc. A/HRC/RES/39/2, ¶ 22 (Oct. 3, 2018).

¹²² Letter dated 14 August 2017 from the Chargé d’affaires a.i. of the Permanent Mission of Iraq to the United Nations addressed to the President of the Security Council, U.N. Doc. S/710/2017 (Aug. 16, 2017).

¹²³ S.C. Res. 2379, ¶ 2, U.N. Doc. S/Res/2379 (Sep. 21, 2017) (asking the Secretary-General to establish an “Investigative Team,” headed by a Special Adviser, to: “support domestic efforts to hold ISIL (Da’esh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Da’esh) in Iraq, to the highest possible standards”).

The United Nations Investigative Team to Promote Accountability for Da'esh/ISIL Crimes (UNITAD), as it has now been called, is headed by international criminal law expert Karim Asad Ahmad Khan QC. In keeping with the principle of positive complementarity, it will include Iraqi investigative judges and other criminal law experts “on an equal footing alongside international experts”¹²⁴ and offer opportunities for capacity building.

In some respects, UNITAD’s mandate is more limited than the IIIM’s; in other respects, it has fewer constraints on its ability to make its holdings useful. The resolution has a singular focus on crimes committed by ISIL, with no mandate to look into crimes associated with other actors, including governmental forces, at the federal or regional level (e.g., Kurdistan Regional forces); militia, such as the Popular Mobilization Forces; or international forces for that matter. The resolution suggests that while Iraqi domestic proceedings will be the *primary* recipient of UNITAD’s work, it may also contribute to potential trials elsewhere. That said, Iraq will be in a position to dictate “any other uses” of the evidence generated “on a case by case basis.”¹²⁵ The Terms of Reference of the Investigative Team mandate cooperation on the part of the relevant Iraqi authorities, whose justice deficits are legion¹²⁶ (although some derogations of fair trial rights might be allowed in an armed conflict situation).¹²⁷ To be sure, having Baghdad’s consent will be crucial to the Investigative Team’s ability to operate in the country. However, it comes at the expense of an impartial investigation that follows the evidence and has resulted in investigations that focus on a single armed group, albeit a particularly heinous one. Like the IIIM, UNITAD is ultimately only an investigative body; it has no prosecutorial powers or formal ability to level formal charges or influence the criminal justice process writ large. If the authorities in Iraq are unable to host genuine trials, and the authorities in Europe are unwilling to take back their nationals, there is a risk that UNITAD will find no ready outlet for its investigations.

U.N. Supervisory Mission in Syria

Notwithstanding these many multilateral mechanisms devoted to Syria, one additional option has not been fully employed. Peacekeeping missions are increasingly empowered to contribute to justice initiatives, including engaging in the documentation of abuses in their areas of operation. For example, the Democratic Republic of Congo’s peacekeeping mission, MONUSCO, has a memorandum of understanding with the International Criminal Court enabling it to collect information, documents, and interviews in keeping with its Security Council mandate.¹²⁸ Peacekeeping missions are generally deployed with the consent of the host state, which has not been forthcoming when it comes to Syria. Besides a small unit that has been overseeing the Golan Heights since Israel’s 1974 occupation, the only U.N. mission dedicated to the Syrian conflict, UNSMIS, was not granted any sort of documentation role at first.¹²⁹ It was,

¹²⁴ *Id.* ¶ 5.

¹²⁵ *Id.* (“with the relevant Iraqi authorities as the primary intended recipient as specified in the Terms of Reference, and with any other uses to be determined in agreement with the Government of Iraq on a case by case basis.”).

¹²⁶ Alice Wickens, *GCIJ’s submission on Iraq*, GENEVA INTERNATIONAL CENTRE FOR JUSTICE (June 2017).

¹²⁷ Nehal Bhuta, *Joint Series on International Law and Armed Conflict: Fair Trial Guarantees in Armed Conflict*, *EJIL: Talk!* (Sept. 22, 2016).

¹²⁸ See S.C. Res. 1565, ¶ 5(g), U.N. Doc. S/RES/1565 (Oct. 1, 2004) (empowering the mission to investigate abuses to put an end to impunity).

¹²⁹ The United Nations has also had a small mission overseeing the Golan Heights since 1974 following Israel’s occupation. See U.N. Disengagement Observer Force (UNDOF), Mandate, <https://undof.unmissions.org/mandate>; S.C. Res. 350, ¶ 3, U.N. Doc. S/RES/350 (May 31, 1974).

however, asked by the Council to investigate the May 2012 El-Houleh massacre; its report was never released publicly but seems to have informed the COI's special inquiry.¹³⁰

So far, without the political will to pursue justice, these various bodies have proved to be an accountability dead-end when it comes to multilateral initiatives, although they have advanced some domestic accountability processes as discussed in chapter 7. Nor have they been effective at peeling Russian support from the Assad regime, particularly as Russian actors became more and more implicated in the violence. Rather, Russia has been impervious to such unassailable and overwhelming proof of the government's international crimes. All told, the full impact of these multilateral initiatives remains to be seen.

Documentation by Individual States

Individual states can launch their own documentation exercises to collect qualitatively different information than other fact-gathering entities (like COIs and human rights organizations). States have access to unique collection tools and disciplines, including intelligence assets and covert capabilities, and can draw upon diversified inter-agency expertise, such as law enforcement elements—who are adept at criminal investigatory techniques and individuating responsibility—and military analysts—who can undertake battlefield forensics, assemble a chain of command, and recreate an order of battle. In this way, any state-led study could be complementary to, but not duplicative of, the work of other fact-finding bodies. Individual states can leverage their bilateral relationships to negotiate better access to victims and defectors scattered around the globe. Lebanon, for example, has not always allowed NGOs easy access to refugees within its borders, many of whom are dispersed in urban areas rather than concentrated in traditional refugee camps; Turkey and Jordan have been more open to civil society investigations. As compared with classic human rights advocates, state actors may be more comfortable engaging with defectors and even insiders in an effort to understand the way a target regime functions. That said, any engagement with these latter populations risks interactions with perpetrators and may raise particular sensitivities with the host state. Jordan, for example, reportedly eventually restricted access to Syrian defectors, ostensibly for their own protection.

Satellite Imagery & Other Intelligence

For a long time, satellite and other forms of remote sensing imagery or geospatial data were sources of proof uniquely associated with governments' intelligence gathering, military planning, and other sovereign purposes. The utility of such information for international justice purposes first emerged with respect to the crimes committed in the former Yugoslavia. In a closed session of the U.N. Security Council, for example, the U.S. government endeavored to mobilize international action by displaying imagery demonstrating that Bosnian Serbs were likely digging and then attempting to conceal mass graves. It later shared such evidence with prosecutors before the International Criminal Tribunal for the Former Yugoslavia (ICTY),¹³¹ which deemed such information admissible.¹³² Similar imagery has been used to locate the estimated 9,000 people still missing from the conflicts borne of the dissolution of the former Yugoslavia in the 1990s, to

¹³⁰ Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/20/CRP.1 (June 26, 2012).

¹³¹ Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Judgment, ¶¶ 222-238, 250-58 (Aug. 2, 2001) (discussing aerial images showing the creation of mass graves that were later disturbed).

¹³² See generally Ana Cristina Núñez, *Admissibility of Remote Sensing Evidence Before International and Regional Tribunals*, AMNESTY INTERNATIONAL (2012) (noting that aerial images have been admitted by tribunals, but usually accompanied by conventional corroborating evidence).

support war crimes and crimes against humanity prosecutions before the ICC,¹³³ to document violations of international humanitarian law committed by Ethiopia during attacks on and the occupation of Eritrea in an arbitration between the two countries,¹³⁴ and to prove the destruction of villages in the conflict in Georgia. Before the ICC, the Prosecution in partnership with SITU Research created an interactive digital platform that combined geospatial information with historic satellite imagery and other site documentation showing the destruction of the mosques and mausoleums in question. Because al-Mahdi offered a guilty plea, the defense did not challenge the admissibility of any of this evidence.¹³⁵ Sharing such sensitive national intelligence data has a political dimension, and governments will not always be responsive to requests for such assistance if there are countervailing concerns, including the risk that intelligence gathering means and methods will be revealed or compromised.¹³⁶

The United States and other states have, on occasion, declassified such information for diplomatic, strategic messaging, or other purposes. In the Syrian context, the Obama Administration posted satellite imagery of attacks on civilians on the now-defunct www.humanrights.gov, and Ambassador Robert Ford set up a dedicated Facebook page. The United States also released information showing chemical weapon use in Syria in connection with air strikes on the airfield from which the chemical weapon attack was thought to have been launched and declassified satellite imagery information showing that bodies are being burned in a crematorium to cover up mass killings in Syria. France also declassified intelligence on Syria gas attacks.

On the multilateral level, in 2003, the United Nations created the U.N. Operational Satellite Applications Programme (UNOSAT) as part of the U.N. Institute for Training and Research to help monitor humanitarian disasters and promote human rights and sustainable development. It has monitored the human suffering and damage wrought by the war in Syria, including Assad's claimed destruction of chemical weapons facilities, harm to civilians caused by airstrikes by the regime and outside powers, and damage to the civilian infrastructure.¹³⁷

Empirical Research

In addition to conventional intelligence gathering, states can also conduct empirical studies into the nature and extent of the violence. Drawing on both qualitative and quantitative research methods (such as population-based survey instruments), such a study could seek to produce results that enjoy statistical significance; richer anecdotal portraits of victims or massacre events; a mapping of atrocity sites (including clandestine detention centers); or individual dossiers using classic penal investigative techniques. As an important precedent, the United States launched a

¹³³ See, e.g., Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15-171, Judgment and Sentence (Sept. 27, 2016).

¹³⁴ American Association for the Advancement of Science, Ethiopian Occupation of the Border Region of Eritrea Case Study Summary (2002), <https://www.aaas.org/page/ethiopian-occupation-border-region-eritrea-case-study-summary>.

¹³⁵ See <http://icc-mali.situplatform.com/>; Liz Stinson, *The Hague Convicts a Tomb-Destroying Extremist with Smart Design*, WIREd, Aug. 25, 2016.

¹³⁶ Ulric Shannon, *Blue Eyes: Surveillance Satellites and UN Peacekeeping*, in COMMERCIAL SATELLITE IMAGERY AND UNITED NATIONS PEACEKEEPING: A VIEW FROM ABOVE 179, 186 (James F. Keeley & Rob Huebert eds., 2004) (noting that the ICTY was “a passive consumer of satellite imagery” that relied “on whatever contribution of data western governments [were] prepared to make” and did not receive U.S. images taken during a 1995 Croatian bombing offensive or Serb mass murders in Brčko).

¹³⁷ *Syria's Suffering Revealed in Satellite Images*, BBC, Mar. 18, 2015 (displaying before-and-after UNITAR imagery of Homs, Deir Ezzor, and elsewhere).

field investigation in 2004 into the situation in Darfur, Sudan: the Darfur Atrocities Documentation Project (ADP).¹³⁸ The ADP was staffed by international investigators from the now defunct Coalition for International Justice tasked with undertaking semi-structured interviews with a random sampling of displaced Darfuris in neighboring Chad. (ADP investigators had no direct access in Darfur itself). Various non-governmental organizations (including the American Bar Association) and the State Department's Bureau of Intelligence and Research (INR) developed the survey instrument.¹³⁹ The Darfur study sought to determine specifically whether a genocide was underway, a finding that hinged on identifying the existence of genocidal intent—the decisive element of the crime of genocide—at either the individual or state policy level.

The ADP approached the question with a degree of analytical rigor missing from prior genocide determinations, including those emerging from elsewhere in the U.S. government and a COI launched by the Security Council. The survey results ultimately undergirded the Bush administration's announcement of the commission of genocide in Darfur—one of the first time a government formally accused another of attempting to eliminate a protected group in whole or in part. It was hoped that the genocide determination would “act as a spur to the international community to take immediate and forceful actions to respond to ongoing atrocities.”¹⁴⁰ Undertaking the study also responded to very focused advocacy by the Christian evangelical community in the United States and student groups, such as STAND and the Save Darfur Coalition, which took a special interest in Darfur. Ultimately, the ICC indicted then-President Omar Al-Bashir of Sudan for genocide and other international crimes, although he remains at large. Besides support to the African Union Mission in Sudan (AMIS), the international community did not otherwise mobilize in any concrete way to stop the genocide underway. It remains to be seen whether the ADP will feature in any prosecution that goes forward before the ICC or elsewhere.

More recently, the U.S. government conducted a similar survey exercise with Rohingya Muslims who have fled Myanmar into neighboring Bangladesh.¹⁴¹ Although the results of the survey have been posted online, so far no genocide determination has been forthcoming, although discussions are apparently underway.¹⁴² These results coincide with the authorization by the ICC of a preliminary examination into the atrocities based upon Bangladesh's ratification of the Rome Statute.¹⁴³ The existence and results of other such empirical studies undertaken by the United States have not been publicly released.

Obviously, it would have been difficult for the majority of individual states to launch any investigative mission within Syria given the complications posed by physical access and security. The United States, for example, suspended diplomatic operations, relocated staff, and closed its

¹³⁸ See Samuel Totten, *The US Investigation into the Darfur Crisis and the US Government's Determination of Genocide*, 1:1 GENOCIDE STUDIES & PREVENTION, AN INT'L J. 57 (2006). See also Rebecca Hamilton, *Inside Colin Powell's Decision to Declare Genocide in Darfur*, THE ATLANTIC, Aug. 17, 2011.

¹³⁹ GENOCIDE IN DARFUR: INVESTIGATING THE ATROCITIES IN THE SUDAN 241 (Samuel Totten & Eric Markusen eds., 2006) (reproducing survey instrument).

¹⁴⁰ Declassified Information Memo, Genocide and Darfur (June 25, 2004), <https://cdn.theatlantic.com/static/mt/assets/international/Darfur%20genocide%20advice.pdf>.

¹⁴¹ U.S. State Department, *Documentation of Atrocities in Northern Rakhine State*, Aug. 2018, <https://reliefweb.int/sites/reliefweb.int/files/resources/286307.pdf>.

¹⁴² See Beth Van Schaack, *Why What's Happening to the Rohingya is Genocide*, JUST SECURITY, Oct. 1, 2018.

¹⁴³ Decision on the “Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,” Case No. ICC-RoC46(3)-01/18-37 (Sept. 6, 2018).

embassy in 2012 as the violence escalated. Even if a state were committed to researching violations remotely, any such inquiry would need to address a number of obstacles in order for it to be viable and effective. Negotiating access to neighboring states and refugee encampments might overtax already stretched diplomatic resources. Such a study would need to account for the impact of the conflict on neighboring countries upon which any investigation would be dependent. Over and above the refugee crisis on its borders, Turkey has been over-extended as the primary platform for the international community's activities in Syria and—as a matter of policy—only granted the UN's COI access to refugee camps. Jordan, by contrast, insisted on even less visible engagement. That said, the COI was able to operate remotely, using Skype and other mechanisms to collect information from inside the country, and so governments could presumably do the same.

Authentication of Information

In an interesting development, the government of Qatar through the British law firm Carter-Ruck commissioned a team of international criminal lawyers and investigators to confirm the authenticity and credibility of the photographs exfiltrated by Caesar, who had been tasked with photographing victims after their death.¹⁴⁴ The Carter-Ruck team undertook a digital forensic examination of the imagery to ensure that it had not been altered. Experts also examined the injuries portrayed in an effort to determine whether or not it could be determined if they were the result of physical assault, engagement in combat, or other forms of injury. The results suggested that at least 20% of the photographs depicted evidence of inflicted trauma—strangulation, electrocution, beating, tramline injuries, or burning—and 42% showed emaciation, suggesting the deceased were starved while in detention.¹⁴⁵ In an interview with *Foreign Affairs* magazine, President Assad rejected this study on the grounds that it had been funded by Qatar, which has supported the armed opposition, and the report was released days before peace talks scheduled for Geneva in an effort to influence those negotiations.¹⁴⁶ The U.S. Federal Bureau of Investigations' Digital Evidence Laboratory later undertook its own authenticity exercise of the Caesar files at the behest of the U.S. government in 2014-15 and agreed that the photographs were indeed genuine.¹⁴⁷ Human Rights Watch and Physicians for Human Rights reached similar conclusions.¹⁴⁸

States may achieve a number of benefits by launching their own investigations, including establishing a direct and trusted source of information about what is happening on the ground. Having more accurate and complete insights into the commission of abuses can inform policy and allow states to adjust their diplomatic efforts and public stance toward the conflict and the parties involved. It can also enrich targeted sanctions regimes, sharpen public and strategic messaging about responsible units and individuals, serve as the basis for a naming and shaming campaign, enable states to populate immigration watch lists, and inform criminal indictments. Such an information gathering exercise would also provide a basis for ratcheting up the rhetoric about the extent and nature of crimes being committed and enhance the ability to build a united diplomatic front against an abhorrent regime or armed group. Finally, in addition to having foreign policy

¹⁴⁴ *A Report into the Credibility of Certain Evidence with regard to Torture and Execution of Persons Incarcerated by the Current Syrian Regime*, <http://i2.cdn.turner.com/cnn/2014/images/01/20/syria-board.of.inquiry.doha.jan.2014.18.1.version.x.to.print.pdf>.

¹⁴⁵ *Id.*

¹⁴⁶ *Syria's President Speaks: A Conversation with Bashar al-Assad*, FOREIGN AFFAIRS, Mar./Apr. 2015.

¹⁴⁷ Stav Ziv, *Syria Torture Photos 'Depict Real People and Events': FBI Report*, NEWSWEEK, July 22, 2015.

¹⁴⁸ HUMAN RIGHTS WATCH, SYRIA: STORIES BEHIND PHOTOS OF KILLED DETAINEES (Dec. 16, 2015) (quoting researcher as saying “‘We have meticulously verified dozens of stories, and we are confident the Caesar photographs present authentic—and damning—evidence of crimes against humanity in Syria.’”).

relevance, such a study could respond to, and help shape, the attitudes of a nation's citizens toward a particular conflict. All that said, such exercises can be condemned or rejected as politicized if they originate in a state that is seen as favoring one side or another in the conflict.

Civil Society Documentation

The conflict in Syria has given rise to a veritable cottage industry of international and domestic groups undertaking human rights documentation and gathering user-generated content using different data collection and analysis methods. These include in no particular order the Syrian Observatory for Human Rights, the Syrian Center for Legal Research and Studies, the Syrian Justice and Accountability Centre (SJAC), the Syrian Association of Missing and Conscience Detainees (SAFMCD), the Commission for International Justice & Accountability, the Syrian Violations Documentation Center (VDC), Airwars, Bellçngcat, the Damascus Center for Human Rights Studies, Syrians for Truth and Justice (STJ), the Syrian Archive, the Syrian Center for Statistics and Research, the Syrian Shuhada Martyr Database, Adalmaz: Justice for the Oppressed, and the Syrian Network for Human Rights (SNHR). In addition, the major human rights organizations—Human Rights Watch and Amnesty International—routinely partner with more local organizations to cover the conflict. HRW, for example, relies upon the statistics gathered by the SNHR in its excellent reporting on the Syrian conflict.

Some of these smaller organizations are primarily Syrian-run, whereas others were stood up by outsiders, often by persons with substantive expertise in other mass atrocity situations or in academic centers, such as I Am Syria. Likewise, some operate in exile, whereas others remain undercover in the country, at great personal risk to their members. The Violations Documentation Center in Syria, for instance, has staff in all governorates and most cities per its website. There is always the risk that documentation initiatives can become politicized, for example when groups focus on one set of perpetrators or push one narrative and seek to suppress others.¹⁴⁹ While many of these Syrian groups operate independently with no political affiliation, others are aligned with the opposition, including a coalition of such organizations, the TJ Coordinating Group. As a counterpart to the pro-Assad Syrian Electronic Army, the Hackers of the Syrian Revolution have defaced government websites and published the names and particulars of regime insiders. Coordination among these organizations remains a challenge, especially because all civil society groups are not necessarily on the same “side” of the conflict, which complicates cooperation. In addition, they are often in competition for the same funding.

Members of the international community have been instrumental in standing up and supporting (with seed and core funding) many members of this civil society community. The European Union, for example, has adopted a Union-wide policy of underwriting organizations that undertake open source and digital investigations.¹⁵⁰ The challenge to donors, including sovereign entities, is to capacitate such organizations without giving the appearance of influencing their work. In light of this risk, some organizations (such as the Syrian Archive) will generally not take government funding for fear of jeopardizing their independence. In addition, donors tend to fund individualized initiatives, rather than projects that prioritize coordination. This creates competition among organizations that could be working together toward shared ends.

¹⁴⁹ See generally, Don A. Habibi, *Human Rights and Politicized Human Rights: A Utilitarian Critique*, 6 J. HUM. RTS. 3 (2007).

¹⁵⁰ See European Parliament, *Addressing Human Rights Violations in the Context of War Crimes, and Crimes Against Humanity, Including Genocide*, Doc. No. P8_TA(2017)0288, ¶47 (July 4, 2017).

In the Syria context, the United States helped to spur the establishment of the SJAC. The organization was conceptualized by the U.S. State Department after Secretary of State Hillary Rodham Clinton announced the creation of an accountability mechanism at the second meeting of the Friends of the Syrian People (FOSP) in Istanbul in April 2012.¹⁵¹ The United States hosted a donors' conference in Rabat, Morocco, in September 2012 to raise multilateral funds and in-kind support for the effort. Another NGO, the International Research and Exchange Board (IREX), was chosen as implementing partner to launch the new Center. The SJAC received funding from the United States (through the Bureau of Democracy, Human Rights, and Labor (DRL)) as well as a number of other states. In addition to conducting its own documentation and promoting victim-centered justice, the SJAC also operated as a pass-through to fund additional worthy projects.

As originally conceptualized, the SJAC was to serve as an umbrella organization and clearinghouse of information generated by other sources. As it turned out, other documentation groups were reluctant to give up their information to a perceived "competitor," had made certain promises around confidentiality and informed consent that prevented such information sharing, or had security concerns about releasing their holdings. SJAC personnel also resisted this role, although the organization has many data source partners that share information on the basis of mutual understanding and cooperation. As a result, this coordination role has fallen to other institutions. The SJAC hopes to eventually use its documentation repository to help inform the design and creation of a whole range of transitional justice processes, including the identification of missing persons and property restitution.

For a period of time, SJAC helped fund the document extraction and analysis work of the Commission on International Justice and Accountability (CIJA).¹⁵² CIJA is staffed by veterans of international courts and military intelligence units who are focused less on amassing information about the Syrian crime base and more on collecting linkage evidence to the highest criminal law standard to ensure its maximum utility.¹⁵³ In the words of its director, Bill Wiley, it starts "with the organization, not the incidents" and focuses on the 3 Cs: "the structure of command, control and communication."¹⁵⁴ It produces prosecution-ready files, proto-indictments, and evidentiary briefs on responsible individuals and units, particular crimes, and the structure and functioning of the Assad regime writ large. CIJA later turned its attention to collecting information about ISIL.

CIJA has trained a number of Syrian investigators who have succeeded in exfiltrating documentary evidence (including copies of government records, hard drives and SD cards, and mobile phones) from Syria by—among other means—following opposition forces into liberated areas and seizing regime records found in abandoned government buildings, such as police stations and prisons. Members of the opposition agreed not to destroy documents they encounter, but rather to allow investigators to first collect what they deem relevant. Seizing what amounts to found or

¹⁵¹ See U.S. Department of State, *Syria Justice & Accountability Center*, Fact Sheet (Feb. 20, 2013).

¹⁵² See generally Melinda Rankin, *The Future of International Criminal Evidence in New Wars? The Evolution of the Commission for International Justice and Accountability (CIJA)*, 20(3) J. GENOCIDE RES. 392 (2018) (discussing origins and operations of CIJA) [hereinafter, Rankin, *The Future*].

¹⁵³ See generally Melinda Rankin, *Investigating Crimes against Humanity in Syria and Iraq: The Commission for International Justice and Accountability*, 9(4) GLOBAL RESPONSIBILITY TO PROTECT 395 (2017) (recounting history of CIJA).

¹⁵⁴ Marlise Simons, *Investigators in Syria Seek Paper Trails that Could Prove War Crimes*, N.Y. TIMES, Oct. 7, 2014.

abandoned documents in accessible or liberated territories also avoids the inevitable destruction, whether accidental or intentional, of important evidence of the commission of international crimes.

In addition to these hard copy collections, CIJA also takes witness statements to supplement the documentary record and captures open source information, particularly emanating from ISIL. CIJA lawyers prepare legal analyses and international criminal law briefs of relevance to the wars in Syria and Iraq to assist with national level prosecutions and help jump start accountability processes until there is an international or hybrid court capable of exercising jurisdiction. All documents are subjected to an information management process involving digital scanning using sophisticated OCR software, Bates-stamping, and extensive coding for ease of sorting and analysis. In what will become an interesting model for public-private partnership in this space, CIJA plans to convey its entire holdings to the IIMM once the databases can be integrated. In the absence of an ICC mandate, most of CIJA's work has focused on supporting domestic law enforcement and legal cases in Europe and the United States. For example, a CIJA investigator submitted an expert declaration detailing the regime's security operations against journalists in a case in a U.S. court under the Foreign Sovereign Immunities Act against the state of Syria and involving the death of a U.S. war correspondent, Maria Colvin.¹⁵⁵ CIJA documents have also appeared in numerous cases proceeding in European courts that were triggered by the work of Syrian human rights groups,¹⁵⁶ such as Syrian Centre for Media and Freedom of Expression and Syrian Center for Legal Research and Studies.

The CIJA model of “entrepreneurial justice”¹⁵⁷ is not without its detractors. As a point of some criticism, CIJA focuses primarily on regime and ISIL crimes because it maintains that it is dependent on members of the opposition in order to operate within Syria. Not being under any obligation to investigate all sides of the conflict, as a prosecutor ordinarily would be, CIJA has left the documentation of opposition crimes to other collectors on the theory that CIJA should do something even if they cannot do everything. There is also the question of to whom is CIJA—and other NGOs for that matter—accountable? An obvious answer is its donors, which tend to be sovereign entities that are reliant on CIJA to help identify, prosecute, exclude, or deport potential perpetrators in their midst. At times, states are motivated by a countering violent extremism (CVE) imperative as opposed to the human rights framework. In another point of departure from other NGOs, CIJA does not engage in advocacy, which is a principle activity of traditional human rights groups. Indeed, CIJA has been in stealth mode for years, even keeping the location of its European headquarters a secret for security reasons and relying on the occasional media exposé as the only public information about the organization in circulation. As compared to other civil society organizations, CIJA is less integrated within the Syrian NGO community, whose members see themselves as accountable to Syrian communities and victims. In addition, there is the problem of

¹⁵⁵ Expert Report of Ewan Brown, *Cathleen Colvin et al., v. Syrian Arab Republic*, Case 1:16-cv-01423-ABJ (D.D.C. 2018).

¹⁵⁶ See, e.g., *Prosecutor v. Harun P.*, Oberlandesgerichte München [OLG München] [Higher State Court Munich] July 15, 2015, Urteil 7 St 7/14 (4), (Ger.) <http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2015-N-13419>.

¹⁵⁷ Michelle Burgis-Kasthala, *Entrepreneurial Justice: Syria, the Commission for International Justice & Accountability and the Renewal of International Criminal Justice*, 30 EUR. J. INT'L L. (forthcoming 2020) (defining entrepreneurial justice as “entail[ing] the identification of a gap or weakness in existing (usually public) accountability fora and the creation of a new organisation and/or approach that seeks to address (at least part of) this gap.”).

the privatization of international criminal investigations given CIJA's lack of any formal sovereign or multilateral mandate.¹⁵⁸

CIJA's methods also fall outside the comfort zone of other human rights actors engaged in documentation. CIJA personnel argue that their risk profile is more conducive to conducting this work in country as compared to traditional human rights organizations or to U.N. entities and member states that are beholden to the non-intervention norm. Although some observers would argue that it has essentially stolen sovereign documents, CIJA considers itself to be holding these in trust for the Syrian people.¹⁵⁹ Most established human rights organizations are squeamish about such methods and will not generally take custody of records without the state's consent. As compared with other human rights groups, CIJA is also more willing to speak with defectors and insiders, who may themselves have participated in abuses. It can be expected that defense counsel will challenge the legality of these collection processes (especially if done in breach of Syrian law) and the admissibility of the results when prosecutors seek to enter any documents into the record. That said, this is perhaps an argument better raised by Syria than any particular defendant whose rights will not necessarily have been violated during the collection process in a way that would trigger the exclusionary rule.¹⁶⁰ So far, domestic courts have admitted these files without incident.

At one point, DRL (the U.S. State Department's human rights bureau), decided that CIJA's funding should not be continued, not without some controversy. There was speculation that this decision was due in part to concerns about CIJA's methods and its principal focus on criminal accountability, but it also perhaps reflected a concession by the Obama Administration toward the Assad regime to lay the groundwork for a more united front against ISIL.¹⁶¹ European states, which are benefiting from CIJA's holdings, continue to fund the organization. Later, the Office of Global Criminal Justice resumed funding CIJA out of funds appropriated by Congress to advance accountability.

Individuals working with many of these documentation centers are in grave personal danger at any given moment. For example, VDC began in June 2011 as a clandestine project of the Syrian Centre for Media and Freedom of Expression (SCM) to document instances of arbitrary detention, disappearances, summary execution, political arrests, the persecution of journalists, torture, and other abuses through a network of activists and researchers located around the country with an eye towards providing information for foreign media coverage and international organizations. It became an independent entity after the Syrian Intelligence raided the offices of the SCM in February 2012 and arrested 14 journalists and human rights lawyers, including Mazen Darwish, a well-known human rights defender. Darwish was finally released in 2015 after being

¹⁵⁸ Canada, *Subcommittee on International Human Rights Committee*, 42nd Parliament (Nov. 22, 2016) (question by Cheryl Hardcastle) ("We do know in the international community that some people have criticized the privatizing of international criminal investigations."), <https://openparliament.ca/committees/international-human-rights/42-1/33/william-wiley-1/?singlepage=1>.

¹⁵⁹ In prior situations, particularly in the region, regime documents have been seized and never returned. *See, e.g.*, Bruce P. Montgomery, *Saddam Hussein's Records of Atrocity: Seizure, Removal, and Restitution*, 75 THE AMERICAN ARCHIVIST 326 (2012).

¹⁶⁰ *See* Natalia Krapiva, *The United Nations Mechanism on Syria: Will the Syrian Crimes Evidence Be Admissible in European Courts?*, 107 CAL. L. REV. 1101 (2019) (noting that evidence obtained in violation of law or through improper methods, including rights to privacy, may be deemed inadmissible within some European systems).

¹⁶¹ Colum Lynch, *Exclusive: Washington Cuts Funds for Investigating Bashar al-Assad's War Crimes*, FOREIGN POLICY, Nov. 3, 2014.

charged with “publicizing terrorist acts.”¹⁶² Several prominent members of SCM remain missing. Like many documentation centers, VDC has contributed to cases in Europe involving events in Syria.¹⁶³ Darwish, for example, has filed a complaint in Germany against Syria’s Air Force chief, Jamil Hassan, alleging his responsibility for the torture and sexual violence committed within Syria’s detention centers. This led to the issuance of an arrest warrant against Hassan—the most senior regime official indicted to date. VDC has also helped to concretize the scale of the violence by providing datasets for statistical analysis by academics.¹⁶⁴

NGOs working in country, such as those profiled above, have the advantage of sharing sources of proof with organizations and authorities that are not able to undertake direct collection exercises. A reliance upon intermediaries to prove international crimes is not without its challenges and drawbacks, however. In the early days of the ICC, the Office of the Prosecutor (OTP), for example, outsourced much of its investigative work to NGOs in the field. This over-reliance on intermediaries to source and liaise with witnesses gave rise to allegations that witnesses were being paid to give testimony or were otherwise unreliable.¹⁶⁵ As a result, the Court promulgated Guidelines for Intermediaries to help regulate the involvement of outside entities in its criminal investigations.¹⁶⁶ Intermediaries will be essential to accountability efforts given their proximity to crime scenes and ability to interact with victims. It is essential that they undertake their work with care so as not to jeopardize future accountability exercises.

The Efforts of Ordinary People

The ubiquity of the smartphone has enabled ordinary citizens to become human rights documentarians. Throughout the conflict, Syrians have uploaded millions of photographs and videos purporting to show the commission of international crimes. These efforts are often informal and conscience-driven. *The Raqqa Diaries* offer a poignant example. These began as a series of radio broadcasts from ISIL’s *de facto* capital in Syria depicting the harsh reality of life within the would-be caliphate. The horror in Raqqa also inspired the creation of another NGO, Raqqa is Being Slaughtered Silently (RBSS)—that similarly documented the occupation of Raqqa and the depravity of ISIL through photographs and videos smuggled out of the country to advocates living in exile. At one point, RBSS—which is depicted in the film *City of Ghosts*—was virtually the only source of information about events transpiring in Raqqa.

Unfortunately, although such endeavors have an immediacy and authenticity to them, ordinary people are not well-versed in international criminal law doctrine or investigative strategies and so often record details of atrocities without capturing equally valuable linkage evidence (such as vehicles used in attacks or the directionality of shelling). NGOs are increasingly creating training materials to help citizen documentarians ensure that their photographs and videos achieve maximum utility in any criminal prosecution or transitional justice process.¹⁶⁷

In addition to ordinary people wielding cell phones, defectors and insiders can be significant sources of information. Mention has already been made of the “Caesar” files—

¹⁶² HUMAN RIGHTS WATCH, SYRIA: MAZEN DARWISH RELEASED (Aug. 17, 2015).

¹⁶³ See Trial International, *Make Way for Justice #4: Momentum Towards Accountability* (2018).

¹⁶⁴ Debarti Guha-Sapir et al., *Patterns of Civilian and Child Deaths Due to War-Related Violence in Syria: A Comparative Analysis from the Violation Documentation Center Dataset, 2011-2016*, THE LANCET, Dec. 6, 2017.

¹⁶⁵ See Caroline Buisman, *Delegating Investigations: Lessons to be Learned from the Lubanga Judgment*, 11(3) NORTHWESTERN J. INT’L HUM. RTS. 30 (2013).

¹⁶⁶ INT’L CRIMINAL COURT, CODE OF CONDUCT FOR INTERMEDIARIES (Mar. 2014).

¹⁶⁷ See, e.g., WITNESS, VIDEO AS EVIDENCE FIELD GUIDE, <https://vae.witness.org/video-as-evidencefield-guide/>.

undoubtedly the most famous and consequential example of an ordinary person doing extraordinary documentation work. In many cases, the photographs were of sufficient resolution that they could be subjected to facial recognition software and the victims' cause of death inferred.¹⁶⁸ The Syrian Association for Missing and Conscience Detainees¹⁶⁹ originally posted the entire collection online so that people whose loved ones had disappeared could search for and identify the victims and potentially gain some closure.¹⁷⁰ This approach generated some controversy given the privacy rights of victims and the risk of traumatization to family members.¹⁷¹ Other Syrian NGOs, such as the Syrian Network of Human Rights, notified the families if they were able to identify the victims.¹⁷² The Caesar photos have inspired several legal cases around the world, as detailed in chapter 7. For example, a Spanish citizen recognized her brother among the trove of photographs and initiated a criminal investigation in Spain under that country's international crimes legislation. Nine officers in the intelligence and security services were named under seal.¹⁷³ The case ultimately failed on standing grounds.



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Like Caesar, the White Helmets—also known as the Syrian Civil Defense forces—have become inadvertent documentarians.¹⁷⁴ As neutral first responders, they often arrive in the immediate aftermath of an attack when physical evidence remains fresh and unmolested.¹⁷⁵ White

¹⁶⁸ Syrian Network for Human Rights, *Analytical Study About the Leaked Pictures of Torture Victims in Syrian Military Hospitals: “The Photographed Holocaust”* 4-5 (Oct. 15, 2015) [hereinafter *SNHR Analytical Study*].

¹⁶⁹ The Syrian Association for Missing and Conscience Detainees, <https://www.safmcd.com/>.

¹⁷⁰ SNHR Analytical Study, *supra* note 167, at 4.

¹⁷¹ SJAC, *The Publication of Victims’ Photographs Online Jeopardizes Security and Accountability in Syria*, Mar. 26, 2015.

¹⁷² SNHR Analytical Study, *supra* note 167, at 5.

¹⁷³ Adam Entous, *A Photo of her Brother’s Corpse Popped up on her Phone. Now Syrian Officials could be put on Trial for War Crimes*, WASH. POST (Feb. 2, 2017) (discussing Spanish case).

¹⁷⁴ <https://www.whitehelmets.org/en>. Netflix produced a documentary, *The White Helmets*, about these rescue workers.

¹⁷⁵ See U.C. BERKELEY HUMAN RIGHTS CENTER, *FIRST RESPONDERS: AN INTERNATIONAL WORKSHOP ON COLLECTING AND ANALYZING EVIDENCE OF INTERNATIONAL CRIMES* (Sept. 2014).

Helmet volunteers have testified before the Security Council and in capitals,¹⁷⁶ and elsewhere and provided photographs and videos of the aftermath of attacks that have helped to shed light on chemical weapon use.¹⁷⁷ They have also described so-called “double taps,” whereby the Syrian Air Force return minutes after an initial attack to target first responders.¹⁷⁸ The Syria Campaign, an advocacy group that works to humanize the conflict and keep it in the public consciousness, has accused Russia of spreading disinformation about humanitarian workers in order to cover up its complicity in war crimes in Syria.¹⁷⁹

New Technology & Techniques in Human Rights Documentation & Analysis

New technologies and documentation techniques have revolutionized human rights documentation and reporting.¹⁸⁰ Indeed, the ICC has already issued an arrest warrant based upon information collected from social media platforms.¹⁸¹ These new means of collection offer both opportunities and challenges when it comes to promoting accountability. While many organizations remain in “preservation” mode, others are increasingly using new software tools to help sift through and prioritize their holdings. The SJAC and the Syrian Archive, for example, hold over 3 million pieces of potential evidence between them. Only about a fraction of these have been analyzed, and many may be duplicates, irrelevant, unhelpful, or fakes. Indeed, the Syrian government has been accused of falsifying or manufacturing information.¹⁸² Technologists at organizations like Benetech are working to develop tools to expedite and mechanize processes of collection, verification, prioritization, and analysis. This will enable NGOs to compare data and avoid duplication of efforts if they hold copies of the same material. Eventually, however, there can be no doubt that this digital triage will need to be followed by manual analysis by experts to maximize the utility of information gathered for the whole range of transitional justice processes.

As an example, the Syrian Archive began as an offshoot of the Tactical Technology Collective¹⁸³ with the simple goal of providing a safe information repository for people monitoring peaceful protests in Syria. It now works to support citizen documentarians through the use and dissemination of open source tools and replicable methodologies for collecting, authenticating, and preserving user-generated visual documentation.¹⁸⁴ It maintains public databases of information on a range of international crimes being committed in Syria, including chemical and cluster munition attacks, disappearances, and airstrikes. Each video is given a unique hash value or fingerprint to help with de-duplication, geo-location, and authentication.¹⁸⁵ The Archive is also

¹⁷⁶ In an “Arria” formula briefing in June 2015 on the impact of barrel bombs, Raed Saleh of the White Helmets testified before the Security Council. See Raed Saleh, <https://diary.thesyriacampaign.org/as-a-patriotic-syrian-i-never-imagined-i-would-do-this/>.

¹⁷⁷ Pamela Falk, *U.N. Security Council to Meet over Alleged Chemical Attack in Syria*, CBS NEWS, Apr. 9, 2018.

¹⁷⁸ Saleh, *supra* note 175.

¹⁷⁹ The Syria Campaign, *Killing the Truth: How Russia is Fueling a Disinformation Campaign to Cover Up War Crimes in Syria*, <http://thesyriacampaign.org/wp-content/uploads/2017/12/KillingtheTruth.pdf>.

¹⁸⁰ Eric Reidy, *Technology Exposed Syrian War Crimes Over and Over. Was it for nothing?*, TechReview (Oct. 19, 2019).

¹⁸¹ The arrest warrant of Mahmoud Mustafa Busayf in the Libyan situation involves videos of executions found on social media websites. *Prosecutor v. Al-Werfalli*, Case No. ICC-01-11-01/17-2, Public Warrant of Arrest, ¶¶ 11-22 (Aug. 15, 2017).

¹⁸² *Regime Wages War of Documents on Syrians*, OPENDEMOCRACY, Apr. 1, 2017.

¹⁸³ TACTICAL TECHNOLOGY, <https://tacticaltech.org/>.

¹⁸⁴ Research Methodology—Syrian Archive, https://syrianarchive.org/en/tools_methods/methodology/.

¹⁸⁵ Forensic Protection, Douglas Carner, *Detecting and Preventing File Tampering*, http://forensicprotection.com/Education_Authenticate.html.

using machine learning with a purpose-built program developed by VFRAME to identify munitions.¹⁸⁶ In addition to supporting future transitional justice efforts, the Archive also aims to contribute to humanitarian response planning, legal compliance, the protection of civilians, and the creation of a digital memory of the conflict.¹⁸⁷ In the words of one of its founders, Hadi Al-Khatib, the Syrian Archive is making history in two senses: it is both doing something new and also preserving information about the conflict that can be used by journalists, historians, and lawyers in the future to understand the causes and consequences of the conflict.¹⁸⁸ The Archive has partnered with U.C. Berkeley's new Human Rights Investigations Lab and Amnesty International's Digital Verification Corps to harness student energy around the conflict and train the next generation of human rights advocates.¹⁸⁹

Another emergent human rights technique involves the application of statistical methods to the enormous caches of data being produced by the eight-year Syrian conflict.¹⁹⁰ The OHCHR commissioned the San Francisco-based Human Rights and Data Analysis Group (HRDAG) to conduct a series of statistical analyses¹⁹¹ of the killings in Syrian based upon aggregations of data from four other civil society organizations: the Syrian Center for Statistics and Research, the Syrian Violations Documentation Centre, the Syrian Network for Human Rights, and the Syrian Observatory for Human Rights (which declined to share data for 2014). To conduct this study, HRDAG—which has pioneered the statistical evaluation of human rights data—either scraped the websites of these organizations or received data directly from them.¹⁹² HRDAG also included data received by the United Nations from the Syrian government, which covered the period from March 2011 to March 2012 (the government refused to provide data for 2013 or 2014).¹⁹³ By verifying, collating, and de-duplicating records from these various sources, HRDAG identified 191,368 unique casualties in the period in question, which only includes data where it was possible to identify the name of the victim coupled with the date and place of death.¹⁹⁴ HRDAG acknowledges that many deaths remained undocumented and that its conclusions suffer from selection and reporting biases as well as gaps in the documentary record.¹⁹⁵ Eventually, the OHCHR¹⁹⁶ and many other monitoring groups¹⁹⁷ stopped collecting casualty figures because they could not verify

¹⁸⁶ VFRAME: Visual Forensics and Metadata Extraction, <https://ahprojects.com/vframe/>.

¹⁸⁷ <https://syrianarchive.org/en/about>.

¹⁸⁸ Hadi Al Khatib, Stanford University (Feb. 13, 2018).

¹⁸⁹ See Anna Banchik et al., *Chemical Strikes on Al-Lataminah* (Oct.-Dec. 2017) (analyzing open source visual content regarding attacks in March 2017).

¹⁹⁰ See generally Langford M. Fukuda-Parr S., *The Turn to Metrics*, 30 NORDIC J. HUM. RTS 222 (2012); T. LANDMAN & E. CARVALHO, *MEASURING HUMAN RIGHTS* (2010).

¹⁹¹ Megan Price, Anita Gohdes & Patrick Ball, *Updated Statistical Analysis of Documentation of Killings in the Syrian Arab Republic* (Aug. 2014).

¹⁹² *Id.* at 19.

¹⁹³ *Id.* at 1.

¹⁹⁴ *Id.* 85% were male; combatant status was not assessed for lack of information. *Id.* at 1-2.

¹⁹⁵ *Id.* at 6. See generally Meghan Price & Patrick Ball, *Big Data, Selection Bias, and the Statistical Patterns of Mortality in Conflict*, 34 SAIS REV. INT'L AFFAIRS 9, 10 (2014) (noting that in the human rights field, researchers must proceed with incomplete data).

¹⁹⁶ Abby Ohlheiser, *The U.N. Has Stopped Counting the Deaths in Syria*, THE ATLANTIC, Jan. 7, 2014.

¹⁹⁷ Megan Specia, *How Syria's Death Toll is Lost in the Fog of War*, N.Y. TIMES, Apr. 13, 2018. The last official count set the number of people killed at 400,000, but this preceded the siege of Aleppo and other major operations. *Id.* The Syrian Observatory puts the number at over 500,000. *Syrian Observatory Says War has Killed more than Half a Million*, REUTERS, Mar. 12, 2018.

sources of information (mainly NGOs in the region) used to produce its death toll estimates. Regardless, the casualty data—even if incomplete—tell a story of a humanitarian catastrophe.

Bellıngcat has undertaken sophisticated open-source investigations to confirm the existence of chemical weapon attacks, opine upon their origins, and counter disinformation campaigns blaming the opposition.¹⁹⁸ These reports often triangulate the information gathered by local documentation groups, such as the VDC and the SNHR, with that of other purveyors of information, such as the White Helmets or the Syrian American Medical Society, alongside YouTube videos and other anonymous sources.¹⁹⁹ These digital artifacts can help recreate events and identify perpetrators through geo-location, munitions and remnants analysis, and the analysis of cylinder remnants and vehicles. Human rights organizations have developed verification laboratories to help ensure the authenticity of citizen media documentation and certify the absence of manipulation or tampering.

Individuals in Syria who are collecting information are risking arrest and death, and a number of groups have lost members to these twin hazards.²⁰⁰ Additional organizations have been established to help citizen documentarians operate as securely and effectively as possible, so that their efforts bear fruit and unavoidable risks are not undertaken in vain.²⁰¹ For example, *Videre est Credere* (“To See is To Believe”) has created covert cameras that can be worn to capture human rights violations and corruption. Rather than simply disseminating this technology, *Videre* works closely with advocates to train them to use these tools safely and effectively.²⁰² Similarly, eyeWitness, which is affiliated with the International Bar Association, has created a smartphone application that helps users structure the gathering of evidence of atrocity crimes.²⁰³ The app creates a digital fingerprint that renders the data uneditable. The information assembled using the app is automatically uploaded into a secure evidence vault, which creates a certifiable chain of custody. The platform also allows for verification and analysis by international lawyers with an eye towards its enhancing utility in accountability processes.²⁰⁴ Physicians for Human Rights has created MediCapt, a similar mobile solution that helps convert a standardized medical intake form into potential forensic documentation to secure evidence of rape and other forms of sexual assault on an encrypted and high fidelity digital platform. A secure mobile camera facilitates the preservation of evidence of physical injuries, and a mapping feature tracks trends.²⁰⁵ With all these

¹⁹⁸ See, e.g., Bellıngcat, *Chemical Weapons and Absurdity: The Disinformation Campaign Against the White Helmets* (Dec. 18, 2018).

¹⁹⁹ See, e.g., Bellıngcat, *Open Source Survey of Alleged Chemical Attacks in Douma on 7th April 2018*, Apr. 11, 2018.

²⁰⁰ International Media Support, *Human Rights Organizations Call on Syrian Government to Implement UN Resolution* (Nov. 20, 2014), <https://www.mediasupport.org/human-rights-organisations-call-on-syrian-government-to-implement-the-un-resolution/> (discussing campaign for the release of human rights defenders detained for covering the war in Syria).

²⁰¹ See SalamaTech, <https://en.salamatech.org/about-the-project/> (protecting Syrian civil society organizations’ access to the internet).

²⁰² See David James Smith, *Videre: The Secretive Group on a Mission to Film Human-Rights Abuses*, WIRED, Aug. 29, 2013. Security First also provides comprehensive physical and digital security training to NGOs. <https://secfirst.org/training.html>. One of the co-founders also helped to found *Videre*.

²⁰³ See Mark S. Ellis, *Shifting the Paradigm—Bringing to Justice Those Who Commit Human Rights Atrocities*, 47 CASE W. RES. J. INT’L L. 265 (2015) (discussing the app’s origins).

²⁰⁴ EYE WITNESS PROJECT, <http://www.eyewitnessproject.org/>.

²⁰⁵ Physicians for Human Rights, *PHR’s Mobile App MediCapt Puts Cutting Edge Technology in the Service of Preventing Sexual Violence*, <https://phr.org/issues/sexual-violence/medicapt-innovation-2/>.

tools, it is hoped that much of this evidence will be considered self-authenticating such that the source will not need to testify (let alone be identified).²⁰⁶

Witness is another capacity-building organization that trains human rights defenders to use video effectively to expose injustices and maximize the potential for their footage to be used in a court of law. Witness's Media Lab curates stories developed from this footage to raise awareness of human rights crises.²⁰⁷ The Institute for International Criminal Investigations (IICI) trains investigators in the best practices of such investigations with an eye towards doing no harm.²⁰⁸ IICI will be launching a new program in Syria in partnership with the Center for Justice & Accountability, a human rights organization, with money from the U.S. State Department. Because of the high security risks, many of these organizations have not tried or been able to operate systematically in Syria.

The escalating privatization of satellites and the increased availability of other forms of remote sensing (such as unmanned or remotely-piloted aircraft/drones)²⁰⁹ means that governments no longer have a monopoly on such investigative tools and sources of proof.²¹⁰ Indeed, the largest suppliers of satellite imagery are now private entities. In an early initiative, George Clooney and John Prendergast—working through the Not on Our Watch and Enough Project nonprofits and with DigitalGlobe, a major satellite imaging company—launched the Satellite Sentinel Project in 2010 order to track troop build-ups, looting and razed villages, blockaded humanitarian aid, and other atrocities in Sudan, South Sudan, and elsewhere in Central Africa for detection, deterrence, and documentation purposes.²¹¹ The project was eventually shuttered, however, when its deterrence impact could not be ensured and it became clear that the international community was not going to respond to such revelations.²¹²

Other human rights organizations are attempting to salvage the utility of satellite imagery for human rights purposes in Syria and elsewhere, although this potentiality has not been fully tapped.²¹³ For example, Amnesty International has forged a partnership with the Geospatial Technologies and Human Rights Project of the American Association for the Advancement of Science (AAAS) and the Standby Volunteer Task Force Satellite Team (SBTF), an online volunteer community established in 2010 at the International Conference of Crisis Mapping to

²⁰⁶ Hamilton, *supra* note 2, at 55; *id.* at 45 (“There is a valid legal argument to make that the app itself *is* the witness”) (quoting Wendy Betts, Program Director, eyeWitness to Atrocities).

²⁰⁷ Witness: See it, Film It, Change It, <https://witness.org/our-work/>.

²⁰⁸ INSTITUTE FOR INTERNATIONAL CRIMINAL INVESTIGATIONS, <https://iici.global/>.

²⁰⁹ Monica Grady, *Private Companies are Launching a New Space Race—Here's What to Expect*, THE CONVERSATION, Oct. 3, 2017.

²¹⁰ James Walker, *Remote Sensing and Mass Graves Detection 101*, MEDIUM (Feb. 27, 2017); Ben Yunmo Wang, Nathaniel A. Raymond, Gabrielle Gould and Isaac Baker, *Problems from Hell, Solution in the Heavens?: Identifying Obstacles and Opportunities for Employing Geospatial Technologies to Document and Mitigate Mass Atrocities*, 2(4) STABILITY: INT'L J. SECURITY & DEV'T 1 (2013) (exploring “operational feasibility, data reliability, and legal admissibility” of satellite imagery in international criminal law).

²¹¹ SATELLITE SENTINEL PROJECT, <http://www.satsentinel.org/documenting-the-crisis>. See Yunmo, *supra* note 209, at 3; Ian Daly, *Can You Spot the Human-Rights Abuses Here?*, WIRED, Mar. 19, 2013 (featuring the initiative).

²¹² Interview, John Prendergast, Stanford University, Mar. 1, 2017. See also MAROUF HASIAN, JR., FORENSIC RHETORICS AND SATELLITE SURVEILLANCE: THE VISUALIZATION OF WAR 110 (2016) (discussing critiques and defenses of the Satellite Sentinel Project).

²¹³ HUMAN RIGHTS WATCH, BURMA: NEW WAVE OF DESTRUCTION IN ROHINGYA VILLAGES (Nov. 21, 2016) (discussing surveillance imagery of Rakhine State showing 820 destroyed structures in ethnic Rohingya villages); HUMAN RIGHTS WATCH, SYRIA: NEW SATELLITE IMAGES SHOW HOMS SHELLING (Mar. 2, 2012) (discussing evidence of the bombardment of the Baba Amr neighborhood of Homs).

provide dedicated live mapping support to organizations in the humanitarian and human rights space, including in Syria.²¹⁴ Using high-resolution imagery from DigitalGlobe, this team has employed crowd-tasking to document the presence of regime forces and armored vehicles in civilian areas and identify the commission of potential war crimes, such as the destruction of civilian objects²¹⁵ in Aleppo and elsewhere through before-and-after damage assessment images.²¹⁶ The project depends largely on volunteers who are recruited through the Tomnod micro-tasking platform, which invites volunteers to solve real-world problems using satellite imagery, and trained in live crisis mapping. This reliance upon volunteers raises reliability concerns, although their work is vetted by an imagery expert before being published.²¹⁷ According to a recent report from OpenGlobalRights, what determines the admissibility of satellite imagery in human rights litigation is the ability of a human witness to testify credibly about what the images depict.²¹⁸

Hindering such efforts is the “resolution gap” that continues to exist between the what is available for civilian purposes versus for government intelligence agencies. The U.S. National Oceanic and Atmospheric Administration (NOAA) handles the licensing of commercial remote sensing. On national security grounds, there are limitations on the production of high-resolution imagery (the limit was lowered to .25m in 2014) as well as other types of imagery (hyperspectral and infra-red). In addition, there are “shutter controls”, whereby the U.S. government reserves the right to exclusively purchase images over certain geographic areas, such as active combat zones.²¹⁹

Beyond the tech realm, human rights investigations have become increasingly interdisciplinary, borrowing from tools and techniques developed in other contexts. Forensic Architecture (FA), a multidisciplinary collective of investigators based at the University of London, has employed architectural rendering software to create groundbreaking computer models of potential crime scenes. These can shed light on the circumstances of particular armed attacks on civilians and civilian objects and, where necessary or possible, identify the perpetrators. For example, FA has recreated the sites of chemical attacks and created a three-dimensional rendition of Saydnaya prison where detainees have credibly alleged they were tortured.²²⁰ In addition, FA examined the destruction of the Sayidina Omar Ibn Al-Khattab Mosque in Al-Jinah, Syria, which was hit by U.S. airstrikes on March 16, 2017. The United States originally denied having caused multiple civilian casualties and insisted that the venue was a community hall where regional

²¹⁴ STANDBY TASK FORCE, <http://www.standbytaskforce.org/>. *Combining Crowdsourced Satellite Imagery Analysis with Crisis Reporting: An Update on Syria* (Sept. 21, 2011), <http://www.standbytaskforce.org/2011/09/21/combining-crowdsourced-satellite-imagery-analysis-with-crisis-reporting-an-update-on-syria/>.

²¹⁵ *Satellite Imagery Analysis for Urban Conflict Documentation: Aleppo, Syria*, AAAS, June 27, 2017.

²¹⁶ *Combining Crowdsourced Satellite Imagery Analysis with Crisis Reporting: An Update on Syria*, iREVOLUTIONS, Sept. 19, 2011. See also AMNESTY INTERNATIONAL, DECODE DARFUR, <https://decoders.amnesty.org/projects/decode-darfur#about> (discussing project in which 28,000 volunteers analyzed 326,000 square kilometers of satellite imagery to identify attacks on remote villages).

²¹⁷ Neal Ungerleider, *The Syrian War Crowdsourcing Experiment*, FAST COMPANY, Sept. 21, 2011.

²¹⁸ Theresa Harris et al., *Geospatial Evidence in International Human Rights Litigation: Technical and Legal Considerations* (2018) (report prepared under the auspices of the AAAS Scientific Responsibility, Human Rights and Law Program), <https://www.aaas.org/resources/geospatial-evidence-international-human-rights-litigation-technical-and-legal>.

²¹⁹ See James A. Vedda, *Updating National Policy on Commercial Remote Sensing* (2017).

²²⁰ Michael Kimmelman, *Forensics Helps Widen Architecture’s Mission*, N.Y. TIMES, Apr. 6, 2018.

members of Al Qaida were meeting on the night in question.²²¹ Based on a reconstruction of the building prior to the attack and other data, FA concluded that the building was clearly a mosque being used for religious purposes and that 38 civilians were killed.²²² Following these civil society investigations, the United States admitted that the strike had hit part of a “mosque complex” and that “a more deliberative pre-strike analysis should have identified that the target was part of a religious compound,”²²³ but continued to argue that appropriate precautions were undertaken.²²⁴ The Syrian COI disagreed and determined that although munitions designed to inflict minimal casualties were employed, the United States still “failed to take all feasible precautions to avoid or minimize incidental loss of civilian life, injury to civilians and damage to civilian objects, in violation of international humanitarian law.”²²⁵ This conclusion has its detractors, with one set of commentators arguing that the COI applied the wrong legal standard—and had inadequate information—to credibly evaluate the effects of the attack.²²⁶ They cite the Rendulic rule in this regard, which dictates that the legality of wartime attacks should not be judged by their results but by what the commander reasonably knew at the time the attack was launched.²²⁷

Crowdsourcing, as occurred with the Caesar photos, offers another way to aggregate data of relevance to accountability. Adalmaz is crowdsourcing photographs of fighters to identify anonymous perpetrators and generate leads for law enforcement.²²⁸ The Humanitarian Tracker has been crowdsourcing and live mapping the Syrian conflict since April 2011.²²⁹ In an effort to consolidate eye witness accounts and leverage the work of citizen reporters, it accepts anonymous reports—via email, Twitter, phone, the website, and other encrypted means—which are tagged and catalogued by type of attack. These contributions are then cross-referenced with media reports and other validation sources where possible using data mining tools.²³⁰ Only a small percentage of submissions are published, given limited resources for de-duplication and verification. The site is built upon the crowdmap technology first developed by Ushahidi to track post-election violence in Kenya.²³¹ The Humanitarian Tracker has remained focused on the conduct of regime forces, rather than other participants in the conflict. Crowdsourcing offers an option for real-time (or close to real-time) information gathering in constrained collection environments.²³² Data visualization

²²¹ *Al-Jinah Mosque*, Forensic Architecture, <http://www.forensic-architecture.org/case/al-jinah-mosque/>.

²²² FA worked in conjunction with Bellɿngcat and Human Rights Watch in this investigation. See Bellɿngcat, *The Al-Jinah Mosque Complex Bombing—New Information and Timeline* (Apr. 18, 2017); HUMAN RIGHTS WATCH, *ATTACK ON THE OMAR IBN AL-KHATTAB MOSQUE: US AUTHORITIES’ FAILURE TO TAKE ADEQUATE PRECAUTIONS* (Apr. 18, 2017).

²²³ *Transcript of Pentagon’s Al Jinah Investigation Media Briefing*, AIRWARS (June 27, 2017).

²²⁴ Barbara Starr, *Pentagon Investigation: US Hit Mosque Complex in Syria*, CNN, May 5, 2017.

²²⁵ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. No. A/HRC/36/55, ¶¶ 52-61 (Aug. 8, 2017).

²²⁶ Shane Reeves & Ward Narramore, *The UNHRC Commission of Inquiry on Syria Misapplies the Law of Armed Conflict*, LAWFARE (Sept. 15, 2017). *But see* Adil Ahmad Haque, *A Careless Attack on the UN’s Commission of Inquiry on Syria*, JUST SECURITY (Sept. 21, 2017) (defending the COI’s conclusions).

²²⁷ See generally Brian J. Bill, *The Rendulic ‘Rule’: Military Necessity, Commander’s Knowledge, and Methods of Warfare*, 12 Y.B. INT’L HUMANITARIAN L. 119 (2009).

²²⁸ Adalmaz, <https://justicefortheoppressed.org/#gallery-1>.

²²⁹ See Syria Tracker—Crowdmap, <https://syriatracker.crowdmap.com/>. Humanitarian Tracker empowers citizens to support humanitarian causes by using technological innovations. See Lorenzo Franceschi-Bicchierai, *How Data Scientists are Uncovering War Crimes in Syria*, MASHABLE (Aug. 8, 2014).

²³⁰ *Id.*

²³¹ Taha Kass-Hunt, et al., *Syria Tracker: Crowdsourcing Crisis Information*, LINKED IN (Jan. 5, 2012).

²³² See generally The Engine Room, Benetech & Amnesty International, *How to Navigate Digital Data for Human Rights Research*, BENETECH (June 2016).

tools allow information to be disaggregated along desired characteristics (such as the age and sex of victims or cause of death) and conveyed to multiple audiences, including the general public and policy-makers, in compelling and accessible ways.²³³

To be sure, there are limitations to crowdsourcing. Coverage bias is a particular concern: large events generally receive extensive coverage whereas incidents with few victims may be neglected or even invisible. If the violence takes different forms depending on the identity of the perpetrator or victim—for example, a terrorist attack may involve multiple victims whereas a campaign of ethnic cleansing may target households one at a time—the data that is collected and visualized will be inaccurate and may mislead users about the patterns of violence. The biggest concern is often missing data, which can dramatically distort perceptions of the conflict and, in turn, lead to poor policymaking or biased responses.

Digital data is both potent and fragile. The ubiquity of digital evidence of crimes committed in Syria has given rise to some controversy when private platforms, such as Facebook and Twitter, remove videos that show the commission of atrocities on the theory that such posts run counter to their terms of use or community standards.²³⁴ At times, these take-downs are based upon a machine-learning video recognition algorithm rather than human decision-making and without reference to the information's potential evidentiary value.²³⁵ Even ISIL propaganda footage and pledge videos, which absolutely should be removed from public social media platforms, have value from an accountability perspective, as these sources often contain criminal admissions; clues to the organization's structure, *modus operandi*, and chain of command; and images of logos and other insignia. In the Syrian context, these take-down policies have negatively affected the work of the Syrian Archive, Bell_gncat, and other documentation groups.²³⁶

To be sure, digital data never fully disappears and can often be reconstituted. However, it becomes inaccessible to members of the public when an intermediary blocks its public availability or fails to appropriately archive it. If it is possible to extract the metadata from a video or photograph before it disappears, a user can go back to the original source (assuming they still have it) or petition the platform to return or retain it on the grounds that it is human rights evidence. Social media platforms are still struggling to find the right balance between compliance with national policies that demand the immediate removal of material that may contribute to radicalization and the imperative not to eliminate potential evidence of the commission of international crimes. Getting such decisions reversed or regaining access to removed content is time-consuming and difficult to navigate, especially from a war zone.²³⁷ There is no question that this process needs to be expedited and implemented in a way that does not undermine the potential evidentiary value of even the most odious digital material.

Conclusion

This chapter is premised on the observation that Syria has become the most documented conflict in human history. In past conflicts, amassing evidence was often the major challenge to preparing cases. When it comes to Syria, the problem is in many respects the reverse: there is too

²³³ Katharina Rall, etc. al., *Data Visualization for Human Rights Advocacy*, 8(2) J. HUM. RIGHTS PRACTICE 171 (2016).

²³⁴ Malachy Browne, *YouTube Removes Videos Showing Atrocities in Syria*, N.Y. TIMES, Aug. 22, 2017.

²³⁵ Rosen, *supra* note 3; Avi Asher-Schapiro, *YouTube and Facebook are Removing Evidence of Atrocities, Jeopardizing Cases against War Criminals*, THE INTERCEPT (Nov. 2, 2017).

²³⁶ *Salvaging Online Videos as Proof of War Crimes in Syria*, THE OBSERVERS (Feb. 2, 2018).

²³⁷ Ingrid Burrington, *Could Facebook be Tried for Human-Rights Abuses?*, THE ATLANTIC, Dec. 20, 2017.

much documentation, which can overwhelm advocates who must sift through everything for material capable of inculcating a particular perpetrator and for the “best evidence” of any particular recorded incident. Even with all these documentation efforts underway, we still only have what two statisticians call “snapshots of violence,” given the difficulty of gaining access to a complete record of the conflict and all its consequences.²³⁸ Nonetheless, the trends and regime patterns are clear. When the Syrian conflict ends—which it must at some point—the documentation exists to undergird a comprehensive set of transitional justice processes if there is political will to undertake such an endeavor. In the meantime, this information is being used in a number of domestic legal proceedings being held around the world. Many documentation groups, however, have been at this for eight years and are losing faith in the possibility of more comprehensive justice.²³⁹

²³⁸ Price & Ball, *supra* note 194, at 10.

²³⁹ Cristina Roca, *Long Read: How the Syrian War Changed How War Crimes Are Documented*, NEWS DEEPLY, June 1, 2017.