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Imagining justice for Syria : water always finds its way

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Summary

This thesis situates the war in Syria within the actual and imagined system of international criminal justice. It explores the legal impediments and diplomatic challenges that have led to the fatal trinity that is Syria: the massive commission of international crimes that are subject to detailed investigations and documentation but whose perpetrators have enjoyed virtually complete impunity. Given this tragic state of affairs, the project tracks a number of accountability solutions and openings being explored within multilateral gatherings and by civil society actors, including innovations of institutional design; the renewed utility of a range of domestic jurisdictional principles (including the revival of universal jurisdiction in Europe); the emergence of creative investigative and documentation techniques, technologies, and organizations; and the rejection of state consent as a precondition for the exercise of jurisdiction. Structured around a matrix of accountability presented in the thesis's introduction, the text explores options at the international and domestic levels to pursue justice—criminal and civil—against individual perpetrators as well as the sovereign state of Syria. Engaging both law and policy around international justice, the text offers a set of justice blueprints, within and without the International Criminal Court (ICC). It also considers the utility, propriety, and practicality of pursuing a transitional justice program without a genuine political transition. All told, the project attempts to capture results of the creative energy radiating from members of the international community intent on advancing the accountability norm in Syria even in the face of geopolitical blockages within the United Nations. In so doing, it presents the range of juridical measures that are available to the international community to respond to the crisis, if only the political will existed.

The thesis begins with a brief history of the conflict—first from the headlines (Chapter 1) and then from the perspective of the Security Council chamber (Chapter 2). These chapters trace the international community's response to the conflict with an emphasis on condemnations of human rights violations and abuses; attempts to impose ceasefires and expand humanitarian access; the use of force and the Responsibility to Protect; efforts toward a political transition; the preoccupation of the international community with counter-terrorism and countering violent extremism; neutralizing Syria's chemical weapons; futile efforts to impose U.N. sanctions; and—most relevant to this volume—promoting accountability, including a French-led effort to refer the situation in Syria to the ICC. The paralysis in the Council sets the scene for the chapters that follow, which recount efforts to promote accountability elsewhere within the U.N. system, within regional arrangements, and at the domestic level.

Chapter 3 begins the thesis's journey through the accountability matrix with the ICC with a discussion of "Prospects for Justice before the International Criminal Court." Although Russia and China vetoed the referral resolution, thus preventing the Court from exercising its plenary jurisdiction over events in Syria, there are still some options for invoking the Court's nationality and territorial jurisdiction. Given the proliferation of foreign fighters hailing from around the globe, including ICC member states, the Syrian conflict offers the potential to activate the Court's nationality jurisdiction. In addition, the spill-over effects of the war implicate the territories of ICC states parties, and states where the ICC is already active, in the region and beyond. Finally, there are theoretical arguments that the Security Council could refer "the situation involving ISIL" to the Court, which could encompass either the organization itself, untethered from any territorial space, or the transboundary statelet that once encompassed ISIL's self-proclaimed caliphate.

Although many advocates and diplomats assumed that the ICC was designed to adjudicate crimes committed in Syria, the chapter closes with some notes of caution as to why the ICC may not be the ideal forum, even assuming a Council referral were forthcoming.

Given the limited availability of the ICC when it comes to the crimes being committed in Syria, Chapter 4, “A Menu of Models: Options for an *Ad Hoc* Tribunal for Syria,” presents other legal theories and practical modalities for creating an international or hybrid tribunal. It pulls together novel arguments drawn from the Nuremberg precedent, previous multilateral justice institutions, proposals that envision U.N. member states pooling their domestic jurisdictional competencies, and the theoretical literature. The chapter argues that many of these models offer a better option for the situation in Syria than the ICC given the extent of the international crimes being committed and limitations within the ICC’s subject matter (especially with respect to war crimes committed in non-international armed conflicts) and personal jurisdiction.

Following this discussion of the options for invoking the ICC or creating a new international institution to address the crimes in Syria, the next chapter explores the potential posed by domestic courts. Chapter 5, “National Courts Step Up: Syrian Cases Proceeding in Domestic Courts,” demonstrates the way in which classic principles of domestic criminal jurisdiction—territoriality, effects, nationality (active and passive), protective, and universal jurisdiction—could all be, and are all being, activated to address the presence of perpetrators and victims who find themselves outside the Syrian battlespace. This chapter offers a taxonomy of the criminal cases proceeding to date in domestic courts around the world, some involving the state’s own nationals, some involving perpetrators found within the territorial state, and some proceeding in various ways while the defendant is still *in absentia*. While compiling a number of novel observations about this collection of cases, the chapter also acknowledges their inherent limitations, in general and when it comes to Syria in particular. Rounding out the matrix of accountability, chapter 6 queries explores the value of exploring non-penal accountability mechanisms—“Civil Suits: The Utility of State Responsibility and the Law of Tort”—to address the prevailing impunity in Syria. When it comes to state responsibility, this chapter explores untried options for invoking the International Court of Justice as well as a groundbreaking suit in a U.S. court against the sovereign state of Syria under the Foreign Sovereign Immunity Act.

The penultimate chapter moves from this matrix of accountability to the new evidentiary landscape for atrocity crimes litigation. Chapter 7, entitled “Innovations in International Criminal Law Documentation Methodologies and Institutions,” focuses on the new sources, techniques, technologies, and organizations that have given rise to an unprecedented cache of potential evidence of international crimes in Syria, making it the most documented crime base in human history. The Syrian conflict coincided with the explosion of social media and digital technologies that render ordinary people capable of capturing the commission of international crimes on their cell phones. This surfeit of potential evidence has created both opportunities and challenges to accountability. This chapter surveys the various multilateral, national, and civil society efforts underway with an eye towards capturing new technological developments, analytical outputs, and public-private partnerships. This chapter is premised on the observation that 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 endeavour.

The final substantive chapter, “Transitional Justice Without Transition: The International Community’s Efforts in Syria,” addresses the question of whether and how transitional justice can

be pursued pre-transition, while a conflict continues to rage. Chapter 8 begins with an historical discussion of the way in which the field of transitional justice has internationalized, in part due to its perceived utility in instantiating peace and human rights values following a period of violence or repression. The chapter then surveys the most recent research testing these claims, which has been made possible by the development of a number of new databases gleaned from states in transition. The chapter then describes the range of initiatives launched by the international community to lay the groundwork for a genuine transitional justice process within Syria, including training Syrian advocates, surveying Syrian communities to understand their knowledge of and preferences around transitional justice, promoting psychosocial rehabilitation and solidarity among victims, and preparing for truth-telling exercises and institutional reform measures. The conclusion of this chapter suggests ways in which the international community could still promote some form of transitional justice as part of the reconstruction process, even if Assad remains in power, which is seeming increasingly likely.

The thesis's conclusion offers a number of over-arching observations about the prospects of justice for Syria and highlights a few bright spots on an otherwise rather bleak landscape. These grounds for cautious optimism include the fact that we now have a robust and comprehensive international *jus puniendi* of international crimes, even if we lack sufficient institutions in which to apply it. Although the failures of the Security Council have eroded our faith in the post-World War II system of collective security, other multilateral, regional, and domestic institutions have—to a certain extent—stepped in to fill the breach. This multilateral paralysis has thus spurred creative thinking about new jurisdictional theories, generated multiple and varied institutional models, and re-enlivened the principle of universal jurisdiction after a period of decline. While these proposals have yet to bear fruit, it is now clear that they suffer from no legal impediments; all that is needed is the political will and resources to bring them to fruition. The enhanced sophistication of international crimes documentation ensures that future transitional justice efforts will have the evidence needed to hold those most responsible for abuses to account. All of these developments are the work of an epistemic community of justice entrepreneurs—representing multilateral institutions, sovereign nations, and the global civil society—who refuse to take “no” for an answer.