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## The Price of Prosecution: The Reality for Syrian Transitional Justice

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**THE PRICE OF PROSECUTION:  
THE REALITY FOR SYRIAN  
TRANSITIONAL JUSTICE**

*Faten Ghosn & Joanna Jandali\**

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## I. INTRODUCTION

As Syria enters its ninth year of civil war, the numbers only continue to rise. Deaths have reached 370,000 and counting.<sup>1</sup> More than 6.2 million individuals have been internally displaced. Over 5.6 million individuals have registered as refugees. Loss in cumulative GDP has topped 226 billion dollars.<sup>2</sup> But as the numbers remain staggeringly high, dominating international attention, there has been a shift in the power balance of the war—a shift back towards the previous status quo with the Assad regime holding a firm clasp on territorial power.<sup>3</sup> And with the announcement from President Trump to withdraw U.S. troops from Syria, the Assad regime watches one more player trickle off the battlefield as they close in on the last remaining rebel enclave in Idlib.<sup>4</sup> An end, thus, looms in sight with President Assad in power and the regime still standing. While the precise date of this end remains precarious, it is critical to begin examining the options available to Syria post armed conflict to transition the country away from violence, and any cycles of violence, into sustainable peace.

The most widely recognized, highly funded paradigm of transitional justice is retributive justice, taking on the form of

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<sup>1</sup> *Eight years after the war began, more than 370,000 individuals have been killed, including 112,000 civilians.*, FRANCE24 (Mar. 15, 2019), <https://www.france24.com/en/20190315-syria-death-toll-tops-370000-8-years-war-monitor>.

<sup>2</sup> *The World Bank In Syrian Arab Republic, Overview*, THE WORLD BANK (Oct. 11, 2018), [www.worldbank.org/en/country/syria/overview](http://www.worldbank.org/en/country/syria/overview).

<sup>3</sup> See Liz Sly, *Syria's War Could Be Entering Its Last and Most Dangerous Phase*, THE WASH. POST, (Aug. 10, 2018), [www.washingtonpost.com/world/syrias-war-could-be-entering-its-last-and-most-dangerous-phase/2018/08/09/e9e60442-8f60-11e8-ae59-01880eac5f1d\\_story.html?utm\\_term=.0bc52680dba0](http://www.washingtonpost.com/world/syrias-war-could-be-entering-its-last-and-most-dangerous-phase/2018/08/09/e9e60442-8f60-11e8-ae59-01880eac5f1d_story.html?utm_term=.0bc52680dba0).

<sup>4</sup> See Missy Ryan and Josh Dawsey, *U.S. Troops to Be Pulled out of Syria Quickly, White House Says*, THE WASH. POST (Dec. 19, 2018), [www.washingtonpost.com/world/national-security/trump-administration-plans-to-pull-us-troops-from-syria-immediately-defense-official-says/2018/12/19/4fcf188e-0397-11e9-b5df-5d3874f1ac36\\_story.html?utm\\_term=.e9c6a69b7c19](http://www.washingtonpost.com/world/national-security/trump-administration-plans-to-pull-us-troops-from-syria-immediately-defense-official-says/2018/12/19/4fcf188e-0397-11e9-b5df-5d3874f1ac36_story.html?utm_term=.e9c6a69b7c19).

international criminal tribunals (“ICTs”). Following World War II and the infamous Nuremberg Trials, contemporary schemes of justice have been molded into ICTs as vehicles to settle disputes and to try the most serious of human rights violations.<sup>5</sup> Impunity was the target; international jurisprudence was the tool. But as ICTs have increased in frequency consecutively with on-going human rights abuses, the discourse on the efficacy of such retributive mechanisms has grown.<sup>6</sup> Concerns center on whether the goals of justice have been achieved, whether international showcases of punishment effectively deter future abuses, and whether the high costs of such institutions are offset by the benefits gained. With Syria’s civil war approaching a new phase of its life, finding the answers to these concerns re-emerges as a goal more critical than ever to accomplish.

Through a brief examination of the history of ICTs, we attempt to address these concerns and apply them to Syria. First, we look at what types of issues an international tribunal would be handling by examining what types of crimes have been perpetrated in Syria. Next, we evaluate whether international criminal prosecution exists as an available option in Syria’s near future. Then we examine, if prosecution does present itself plausible, what the cost-benefit scale would look like for a Syrian tribunal based on past and present ICTs. Looking at a variety of factors from cost to legitimacy to political challenges, this holistic lens drives us to a conclusion that not only is international criminal prosecution an improbable option in Syria’s near future, but that even if it were plausible, the benefits reaped would serve neither local Syrian interests nor international goals. Last, we offer a different picture of Syria’s future, shaped by reconstruction, reparations, and reconciliation rather than retribution to pave the way for a balance of peace with accountability.

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<sup>5</sup> See *Ad Hoc Tribunals International*, INT’L COMMITTEE of the RED CROSS 1 (Feb. 9, 2017), [www.icrc.org/en/document/ad-hoc-tribunals](http://www.icrc.org/en/document/ad-hoc-tribunals).

<sup>6</sup> See generally Julian Ku and Jide Nzelibe, *Do international criminal tribunals deter or exacerbate humanitarian atrocities?*, 84 WASH. U.L. REV. 779 (2006); See also David Wippman, *The Costs of International Justice*, 100 INT’L L. 861 (2006);; See also Mirjan Damaska, *What is the point of international criminal justice?*, 83 CHI.-KENT L. REV. 329 (2008).

## II. THE CRIMES

Assessing the plausibility of a war crimes tribunal necessitates understanding the extent to which the court is to prosecute individual crimes. Given the scale, the extremity, and the arduous disposition of such a war, understanding the crimes committed by all parties to the war proves to be a daunting, if not quite near insurmountable task. The mere quantity of armed groups involved on the ground in Syria complicates such a task, with each major party to the war, the Baathist Party, rebel forces, Russia, Iran, Turkey, the Kurds, and ISIL being partitioned into smaller bands each responsible for asserting their own agendas.<sup>7</sup> Moreover, the war is still ongoing and first hand access to the country to investigate alleged crimes remains near impossible. This has left the global community without fundamental resources to fully comprehend to what extent crimes are taking place and, more importantly, by whom. While the issue of evidence procurement and reliability will be addressed later, it is critical to discern what types of crimes a potential court would be facing if such an avenue for transitional justice is to be pursued.

Two different mechanisms, both spawned by the United Nations, have been established as an effort to document and preserve evidence of international law violations and crimes within Syria. First in 2011, the Independent International Commission of Inquiry on the Syrian Arab Republic (“the Commission”) was established by the UN Human Rights Council “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 amount to such violations . . . and, where possible, to identify those responsible.”<sup>8</sup> In 2016, the UN General Assembly went even further by establishing the International, Impartial and Independent Mechanism (“IIIM”), with the specific mandate to “to collect, consolidate, preserve and analyze evidence of violations of international humanitarian law and

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<sup>7</sup> Alia Chunghtai, *Syria's War: Who Controls What?*, GCC News, ALJAZEERA, Al Jazeera, (Mar. 13, 2019, 15:09 GMT), [www.aljazeera.com/indepth/interactive/2015/05/syria-country-divided-150529144229467.html](http://www.aljazeera.com/indepth/interactive/2015/05/syria-country-divided-150529144229467.html).

<sup>8</sup> Report Rep. of the Human Rights Hum. Rts. Council on its 17th special session, ¶ 13, U.N. Doc. A/HRC/S-17/2 (2011).

human rights violations and abuses and to prepare files in order to facilitate and expedite . . . criminal proceedings.”<sup>9</sup> The main difference between the two mechanisms is that the Commission focuses on investigating and publishing records of crimes, while the IIIM focuses on collecting and preserving evidence of international law violations and individual criminal liability for use in future prosecutions. Furthermore, the IIIM is not required to publicly disclose the evidence collected nor publish reports on its findings, highlighting its particular attention to evidence preservation.<sup>10</sup> Given the restricted status of IIIM findings, reports by the Commission will be employed to paint a better picture for the class of crimes and evidence that a future tribunal would be evaluating.

#### A. Unlawful Killing

Article 3 of the Geneva Conventions prohibits the killing of persons taking no part in the hostilities outside of a judgement by a regularly constituted court and the due process of law.<sup>11</sup> Under the Rome Statute, murder of civilians is a crime against humanity under Article 7 (1)(a), willful killing is a war crime under Article 8(2)(a)(i), intentionally attacking civilians is a war crime under Article 8(2)(b)(i), and killing or wounding an *hors de combat* fighter is a war crime under Article 8(2)(b)(vi).<sup>12</sup> The right to life is further protected under a number of international treaties, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (“ICCPR”).<sup>13</sup>

Since the start of the war in 2011, there has been documented evidence corroborated by eyewitnesses that implicates government forces in the extrajudicial killings of civilians and *hors de combats* in

<sup>9</sup> General Assembly G. A. Res.71/248, ¶ 4. (Dec. 21, 2016).

<sup>10</sup> Theodor Meron, *Closing the Accountability Gap: Concrete Steps Toward Ending Impunity for Atrocity Crimes*, 112.3 AM. J. INT’L L. 433, 443 (2018).

<sup>11</sup> The Geneva Conventions common art. 3, Aug. 12, 1949, 63 U.S.T. 3114, 3217, 3316, 3516, 75 U.N.T.S. 31, 85, 135, 287 [*hereinafter* Geneva Conventions.].

<sup>12</sup> Rome Statute of the International Criminal Court common art. 7–8, July 17, 1998, U.N. Doc. A/Conf.183/9 (1998), 37 I.L.M. 999 [*hereinafter* Rome Statute].

<sup>13</sup> See G. A. Res. 217 (III) A, Universal Declaration of Human Rights. art. 3 (Dec. 10, 1948); International Covenant on Civil and Political Rights part III, art. 6, Dec. 16, 1966, 999 U.N.T.S. 171 [*hereinafter* ICCPR.].

violation of Article 3 of the Geneva Conventions.<sup>14</sup> Starting in 2011, eyewitnesses, including defectors, alleged government forces using indiscriminate attacks to systematically quell protestors.<sup>15</sup> In 2016, reports were made of detainees perishing while in government custody, often times following arbitrary detention.<sup>16</sup> Furthermore, a 2016 UN report asserts that the systematic deaths of prisoners in regime-controlled detention centers constitutes crimes against humanity.<sup>17</sup> A 2018 report documents pro-government militia members indiscriminately attacking civilians and a site for internally displaced people in northern Homs. The victims included both children and the elderly.<sup>18</sup>

Akin to the regime forces, reports have documented extra judicial killings by non-government forces including both foreign and domestic armed factions. A 2013 report documented, “a captured soldier or pro-government fighter who ‘confesses’ faces immediate execution. . . . On 20 May, a captured soldier was executed in Qalat Al-Madiq after confessing to killing a fighter for the Free Syrian Army (“FSA”).”<sup>19</sup> Furthermore, eyewitnesses have reported anti-government forces killing civilians and *hors de combat* fighters.<sup>20</sup> In one instance, anti-government fighters executed pro-government Sunnis in villages outside Dara’a city.<sup>21</sup> In 2017, armed non-government forces carried out numerous car explosions in Al-Rashidin, including one instance which alone killed ninety-six evacuees, of which sixty-eight were

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<sup>14</sup> See generally Independent International Commission Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, Reports 2011-2018. <https://www.ohchr.org/EN/HRBodies/HRC/IIICISyria/Pages/Documentation.aspx>.

<sup>15</sup> UN Human Rights U.N. Hum. Rts. Council, Report of the *independent international commission* Indep. International Comm’n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/S-17/2/Add.1, ¶ 41(2011) [*hereinafter*: The Commission.].

<sup>16</sup> The Commission, U.N. Doc. A/HRC/33/55., ¶ 11 (2016).

<sup>17</sup> UN Human U.N. Hum. Rts. Council, *Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic*, U.N. Doc. A/HRC/31/CRP.1; *hereinafter* ¶ 97 (Feb. 3, 2016) [*hereinafter* *Out of Sight, Out of Mind*].

<sup>18</sup> The Commission, U.N. Doc. A/HRC/39/65., ¶ 32–5 (2018).

<sup>19</sup> The Commission, U.N. Doc. A/HRC/24/46., ¶ 49 (2013).

<sup>20</sup> The Commission, U.N. Doc. A/HRC/22/59., ¶ 64 (2013).

<sup>21</sup> *Id.* ¶ 62.

children.<sup>22</sup> That same year, residents of Aqarib al-Safiyah fell victim to ISIL-lead snipers during the night. The Commission reported that “among the victims were a four-month-old baby and an eleven-year-old boy. In total, fifty-two civilians were killed, including seven women and twelve children.”<sup>23</sup> In 2013, Jabhat Al-Nusra, an Al Qaeda affiliate, was found to command several makeshift courts, whose procedures resulted in summary execution without due process.<sup>24</sup> One video shows Jabhat Al-Nusra fighters executing twelve pro-government soldiers with gunshots to their heads.<sup>25</sup>

## B. Arbitrary Arrests and Detention

Article 9 of the ICCPR forbids arbitrary arrest or detention: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”<sup>26</sup> Persons who are arrested are to be told of the reasons for their arrest pursuant to established law.<sup>27</sup> If a person is arrested on a criminal charge, they are to be brought before a judge or authorized official who is empowered by law to exercise judicial authority.<sup>28</sup> Furthermore, Article 55 (1)(c) of the Rome Statute prohibits arbitrary arrest or detention.<sup>29</sup>

In 2013, the Commission interviewed approximately fifty interviewees who reported arbitrary arrest by both government and anti-government forces.<sup>30</sup> Most of those arrested were male, some of these arrestees were even children.<sup>31</sup> Reports indicate that during government led raids in neighborhoods, those suspected of partaking in opposition or rebel activities were sent to one of the varying government-controlled detention centers. There, the prisoners were often tortured to procure information that would expose others

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<sup>22</sup> The Commission, U.N. Doc. A/HRC/36/55., ¶ 40 (2017).

<sup>23</sup> *Id.* ¶ 45.

<sup>24</sup> *See Out of Sight, Out of Mind, supra* note 17, ¶ 71.

<sup>25</sup> *Id.* ¶ 72.

<sup>26</sup> ICCPR, *supra* note 13, at art. 9.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Rome Statute, *supra* note 12, at art. 55.

<sup>30</sup> The Commission, U.N. Doc. A/HRC/22/59, *supra* note 20 at Annex VI, ¶ 1.

<sup>31</sup> *Id.* ¶ 2.



possibly involved in oppositional activities to create a list of future arrestees.<sup>32</sup> Those arrested were held indefinitely without access to legal counsel. Often, those detained were only released in exchange for ransom or bribes.<sup>33</sup> In one instance, a man from Dara'a was detained for six months before being released following a payment of 300,000 Lira (3,000 USD) to government officials.<sup>34</sup> A 2016 Commission report titled, "Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic," estimates that tens of thousands of people have been detained by the Syrian government, while thousands have disappeared after initial arrest by state forces or while moving through government held territory.<sup>35</sup> Most of the deaths taking place in detention centers were reported to be in detentions centers controlled by regime intelligence services, the *mukhabarat*.<sup>36</sup> Furthermore, the extent to which these enforced disappearances have been taking place by government forces has been characterized by the Commission as "a widespread and systemic attack against the civilian population."<sup>37</sup>

Similarly, early scenes of the civil war saw anti-government armed groups taking members of the regime's coalition hostage. Some were taken for ransom or exchange; others were taken for intelligence and recruitment purposes.<sup>38</sup> One witness explained, "After the army has come and gone, the FSA come back and do the same. They also arrest and detain people. . . . We don't know what happened to them. They'd take them away and we'd never see them again."<sup>39</sup> Anti-government groups often created their own makeshift detention centers, where detainees, including both civilians and government soldiers, were held, tortured, and killed, some by means of execution and others by means of lack of medication and extensive injury.<sup>40</sup> It is critical to note that the dynamic and inconsistent nature of these anti-

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<sup>32</sup> *Id.* ¶ 5.

<sup>33</sup> *Id.* ¶ 7.

<sup>34</sup> *Id.* ¶ 12.

<sup>35</sup> *Out of Sight, Out of Mind*, *supra* note 17, ¶ 4.

<sup>36</sup> *Id.* ¶ 36.

<sup>37</sup> *Id.* ¶ 19.

<sup>38</sup> The Commission, U.N. Doc. A/HRC/22/59, *supra* note 20, at Annex VI, ¶ 15–9.

<sup>39</sup> *Id.* ¶ 17.

<sup>40</sup> *Out of Sight, Out of Mind*, *supra* note 17, ¶ 67–9.

government armed forces, including dissolution, reformation, and evolution of new groups, has limited the Commission's ability to track the violations by these groups.<sup>41</sup>

### C. Torture and Ill-Treatment

Torture and cruel, inhuman or degrading treatment are prohibited under Article 7 of the ICCPR.<sup>42</sup> Additionally, the UN General Assembly ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1984, to which Syria is a signatory.<sup>43</sup> It should be noted, however, that under this convention only public officials or persons acting in official capacity are encompassed within the definition of torture; thus, torture by anti-government forces or non-state actors would be excluded from this scope of liability. Common Article 3(1)(a) of the Geneva Conventions forbids "violence to life and persons, in particular . . . cruel treatment and torture."<sup>44</sup> The Rome Statute categorizes torture or inhuman treatment as a crime against humanity under Article 7(1)(a) and a war crime under Article 8(2)(a)(ii).<sup>45</sup>

The Commission conducted interviews in 2012 with individuals who had either been tortured at a detention center or endured torture at an unofficial facility by government officials and officers.<sup>46</sup> Torture was consistently described among the interviewees who discussed "being severely beaten about the head and body with electric cables, whips, metal and wooden sticks and rifle butts, burned with cigarettes, kicked, or subjected to electric shocks applied to sensitive parts of the body, including the genitals."<sup>47</sup> Some other torture tactics included hanging detainees to walls or ceilings by their wrists, tying detainees to boards while they were either stretched or

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<sup>41</sup> *Id.* ¶ 66.

<sup>42</sup> ICCPR, *supra* note 13, ¶7.

<sup>43</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984  
1465 U.N.T.S. 85.

<sup>44</sup> Geneva Conventions, *supra* note 11, at art. 3.

<sup>45</sup> Rome Statute, *supra* note 12, at art. 7.

<sup>46</sup> The Commission, U.N. Doc. A/HRC/21/50., ¶ 74–7 (2012).

<sup>47</sup> *Id.* ¶ 77.

folded in half, and engaging in sexual violence.<sup>48</sup> Degrading treatment has included forcibly shaving the detainees, forcing detainees to imitate animals, forcibly undressing detainees who would remain nude for an extended periods of time, and threatening both assault and execution on the detainees themselves as well as their relatives.<sup>49</sup> Detainees reported lack of food, water, medication, and sanitary facilities at detention centers.<sup>50</sup> One detainee reported drinking his own urine after going a week without water.<sup>51</sup> Another report documents that a fourteen-year-old boy detained following demonstrations received electric shocks and beatings during an interrogation by Military Intelligence.<sup>52</sup>

Starting in 2012, the Commission documented reports of torture and ill-treatment, including infliction of severe pain, punishment and humiliation by armed groups against members of government forces.<sup>53</sup> Captured government fighters reported that they were beaten with electric wire and had their heads forcibly pushed in and out of water in a threat of drowning.<sup>54</sup> Video footages depicts Syrian security forces and regime supporters confessing under torture; the detainees displayed signs of physical abuse including bruising, bleeding, and broken bones.<sup>55</sup> Civilians suspected of government affiliation have been subjected to torture by anti-government armed groups; some have died because of the extent of their injuries.<sup>56</sup> In August of 2013, armed groups detained and tortured civilians for their religion; in July of 2013, Kurds were beaten and electrocuted by Islamist terrorist factions.<sup>57</sup> At checkpoints in Ar Raqqa and Al-Hasakah, armed groups (including Jabhat-al-Nusra, Ahrar Al-Sham, Shahic Walid Al-Sukhni Battalion) would routinely beat, humiliate, and expose civilians to harsh treatment, including severe physical and

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<sup>48</sup> *Id.* ¶ 78.

<sup>49</sup> *Id.* ¶ 79.

<sup>50</sup> *Id.* ¶ 81.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at Annex VIII, ¶ 12.

<sup>53</sup> *Id.* ¶ 32.

<sup>54</sup> *Id.* ¶ 30.

<sup>55</sup> *Id.* ¶ 31.

<sup>56</sup> *Out of Sight, Out of Mind*, *supra* note 17, ¶ 68.

<sup>57</sup> The Commission, U.N. Doc. A/HRC/25/65., ¶ 58 (2014).

mental suffering.<sup>58</sup> The Commission determined that the level of torture and inhuman treatment by nonstate armed groups constitutes widespread and systematic attack on the civilian population.<sup>59</sup>

#### D. Rape and Sexual Violence

Rape and sexual violence are defined as crimes against humanity under Article 7(1)(g) and war crimes under Article 8(2)(b)(xxii) of the Rome Statute.<sup>60</sup> The Geneva Conventions do not list rape and sexual violence as prohibited acts; however, under common Article 3, violence to life and person, cruel treatment, torture, and outrages upon personal dignity are all prohibited.<sup>61</sup> Additionally, Article 8(2)(e)(vi) of the Rome Statute lists rape, sexual slavery, and any other form of sexual violence as violations of common Article 3 to the Geneva Conventions.<sup>62</sup> Additional Protocol II to the Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts adds rape, enforced prostitution, and any indecent assault to the list of prohibited acts against civilians.<sup>63</sup> Furthermore, the realm of liability for rape and sexual violence has increasingly expanded through ad hoc tribunals, including the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”). The ICTY and ICTR have both proscribed acts of sexual violence among indictments for genocide, torture, inhumane acts, and crimes against humanity.<sup>64</sup>

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<sup>58</sup> *Id.* ¶ 58–9.

<sup>59</sup> *Id.* ¶ 60.

<sup>60</sup> Rome Statute, *supra* note 12, at arts. 7–8.

<sup>61</sup> Geneva Conventions, *supra* note 11, at art. 3.

<sup>62</sup> Rome Statute, *supra* note 12, at art. 8.

<sup>63</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(2), June 8, 1977., 1125 U.N.T.S. 3.

<sup>64</sup> *See, e.g., Crimes of Sexual Violence: Landmark Cases.*” United Nations: International, U. N.: INT’L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases;> Prosecutor v. Akayesu, ICTR-96-4-T; Judgment (June 1, 2001); Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze, ICTR-99-52-T, Judgement (Dec. 3, 2003).

Collecting evidence for rape and sexual violence has proven to be one of the hardest tasks in the pursuit of the truth. Cultural, social, and religious institutions surrounding sexuality within Syria have created roadblocks in procuring eyewitness and victim testimonies of the extent to which these crimes have taken place.<sup>65</sup> Nonetheless, evidence of rape and sexual violence does exist, though it may underestimate the frequency to which these crimes take place.

Reports demonstrate that government forces overwhelmingly used rape and sexual violence during house searches, at checkpoints, and in both official and unofficial detention centers.<sup>66</sup> Government forces and *Shabiha*, pro-government militias, used house raids to arrest males suspected of partaking in opposition activities; there, women were subjected to rapes and often gang-rapes by up to six perpetrators while their families, husbands, and children were forced to watch.<sup>67</sup> In 2012, reports indicate that women were also abducted, raped, and forced to walk naked in the streets of Homs.<sup>68</sup> Accounts further demonstrate that rape and sexual violence were used as part of torture and coercive tactics in detention centers as a means to procure information and force surrender.<sup>69</sup> Numerous accounts depict males receiving electric shocks and burning by cigarettes or lighters to their genitals, genital mutilation, and rape using objects including batons, wooden sticks, pipes, and bottles.<sup>70</sup> Children as young as nine years old also fell victim to rape and sexual violence.<sup>71</sup> The Commission determined that Government forces used rape and sexual violence as part of a widespread and systematic attack against civilians.<sup>72</sup>

The infrequent use of checkpoints by armed groups and the decreased movement of persons from Government territory into territory controlled by armed groups reduced the exposure of women

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<sup>65</sup> The Commission, U.N. Doc. A/HRC/21/50, *supra* note 454, ¶ 97.

<sup>66</sup> *Id.* ¶ 98.

<sup>67</sup> UN Human Rights U.N. Hum. Rts. Council, “*I lost my dignity*”: *Sexual and gender-based violence in the Syrian Arab Republic*, U.N. Doc. A/HRC/37/CRP.3, ¶ 14, 49–50 (Mar. 8, 2018) [*hereinafter Sexual and gender-based violence in Syria*].

<sup>68</sup> The Commission, U.N. Doc. A/HRC/21/50, *supra* note 45, ¶ 98.

<sup>69</sup> *Sexual and gender-based violence in Syria*, *supra* note 67, ¶ 43.

<sup>70</sup> *Id.* ¶ 44–50.

<sup>71</sup> *Id.* ¶ 14.

<sup>72</sup> *Id.* at Summary.

from pro-government areas to rape and sexual violence.<sup>73</sup> Contrary to the findings regarding government forces, the Commission determined that evidence does not exist, of the use of rape and sexual violence by armed groups as a part of a systematic and widespread practice to extract information, extract loyalty, and cause fear.<sup>74</sup> Rather, rape and sexual violence most often were used by non-government forces in instances of exploitation, sectarianism, and revenge.<sup>75</sup> For instance in 2013, a family, suspected of being Shi'a, was travelling to Damascus when they were stopped and subsequently raped by an unknown opposition group.<sup>76</sup> In another instance, a young Sunni girl befriended government soldiers to ease her passage through a checkpoint. The relationship between the girl and the soldiers was not sexual; but the girl's Facebook page depicted the Government of Syria flag.<sup>77</sup> The girl was consequently raped by FSA members for her alleged support of the government.<sup>78</sup> Armed groups also have used threats of rape and sexual violence to pressure families into allowing their young daughters to marry FSA fighters.<sup>79</sup>

The Commission found evidence of severe psychological, mental, and social impacts by the use of rape and sexual violence. Depression is prominent among the affected individuals while adequate mental health facilities remain sparse.<sup>80</sup> Furthermore, established views of sexuality and marriage have created an environment where interviewees described rape as worse than death.<sup>81</sup> Men and boys subjected to rape and sexual violence described overwhelming shame, impotency, and guilt.<sup>82</sup> Some women were impregnated by rape. With the illegality of seeking abortion under domestic law, women and girls face a range of dangerous situations: either seek illegal or outsourced procedures for abortion or have the

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<sup>73</sup> *Id.* ¶ 51.

<sup>74</sup> *Id.* ¶ 52.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* ¶ 53.

<sup>77</sup> *Id.* ¶ 54.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* ¶ 55.

<sup>80</sup> *Id.* ¶ 94.

<sup>81</sup> *Id.* ¶ 95.

<sup>82</sup> *Id.* ¶ 96.

child and face the societal and religious implications of having a child of rape.<sup>83</sup> Children who witnessed such sexual violence suffer psychological and physical consequences including nightmares, bed-wetting, shaking, inability to speak of the events, and trauma.<sup>84</sup>

### III. PROSECUTORIAL AVENUES

Three arenas exist to pursue criminal prosecution of the international law violations committed during the Syrian Civil War: (1) ad hoc tribunals, including international and hybrid tribunals, (2) the International Criminal Court (“ICC”), and (3) domestic courts. While each arena presents its own challenges, both of the international routes, *ad hoc* tribunals and the ICC, have been institutionally constructed in a manner that would make establishing jurisdiction over Syria nearly impossible. Ad hoc tribunals are at the mercy of the United Nations Security Council for authority to pursue prosecution. The ICC, absent state party membership or state consent, is likewise reliant on the Security Council for a grant of authority to exercise jurisdiction. But in contrast to the previous two avenues, domestic courts are exclusively independent of international authority and require no further efforts to establish jurisdiction over the crimes committed in Syria; rather, domestic courts present more internal issues concerning the legitimacy and integrity of such existing institutions to deliver justice. Considering each available prosecutorial channel will highlight the improbable reality of each one propositioning itself as feasible mechanism for justice.

#### A. Ad Hoc Tribunals

The International Criminal Tribunal for the former Yugoslavia (“ICTY”), established in 1993, rejuvenated the modern global inclination toward ad hoc tribunals as the archetype for trying individuals.<sup>85</sup> Global governance saw court after court established, all created with individualized mandates, from the civil war in Sierra

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<sup>83</sup> *Id.* ¶ 97–9.

<sup>84</sup> *Id.* ¶ 100.

<sup>85</sup> *The Tribunal – Establishment*, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, [www.icty.org/en/about/tribunal/establishment](http://www.icty.org/en/about/tribunal/establishment).

Leone to the genocide in Rwanda. As the frequency of these courts grew, two categories of criminal courts emerged: (1) international criminal courts, and (2) hybrid criminal courts.

International criminal courts, like the ICTY, export domestic violations of international humanitarian law and human rights law to a court comprised of international judges, attorneys, and law.<sup>86</sup> Hybrid tribunals, the more fledgling forum, fuse components of international prosecution with components of the local judiciary in an effort to bring prosecution closer to the population and victims of impact.<sup>87</sup> Irrespective of the variations in staff and law utilized by the two categories, the ad hoc and international nature of these courts imply a reliance on the United Nations as an organ to create and largely fund the appropriate vehicle to carry out these prosecutions. All past ad hoc tribunals, with the exception of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), which was established by a joint agreement between the UN and the Cambodian government, have been procured from a UN Security Council resolution, detailing the individualized mandates of these mechanisms.<sup>88</sup>

Chapter VII of the UN charter for the Security Council has evolved in its authority to create these prosecutorial mechanisms. Article 39 of Chapter VII espouses the Security Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression and . . . make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.”<sup>89</sup> Considering the broad nature of Article 39, interpretations have since effectuated international mechanisms like the ICTY and

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<sup>86</sup> *International and Hybrid Criminal Courts and Tribunals - United Nations and the Rule of Law*, UNITED NATIONS, [www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/](http://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/).

<sup>87</sup> See generally Sarah M.H. Nouwen, *Hybrid Courts-The Hybrid Category of a New Type of International Crimes Courts*, 2 *UTRECHT L. REV.* 190 (2006).

<sup>88</sup> See Table 1 for UN Security Council Resolutions for tribunals examined.

<sup>89</sup> The Charter of the United Nations, Chapter VII § 39 [*hereinafter*: UN U.N. Charter].



hybrid mechanisms like the Special Tribunal for Lebanon (“STL”).<sup>90</sup> But a critical component of the Security Council’s authority to determine how and if such measures should be taken is the institutional design of the Security Council, specifically the five permanent members on the council.

Chapter V of the UN Charter dictates that China, France, Russia, the United States, and the United Kingdom individually bear the right to veto any resolution passing through the Security Council.<sup>91</sup> A reflection of post-World War II global order, any of the five permanent members can effectively halt efforts by the council to address threats and breaches of peace. Thus, all UN Security Council resolutions are exclusively dependent on concurring approval by these five countries. Five countries, out of a global world order consisting of 195 countries, control the existence and fate of international criminal courts. Herein lies the first challenge ahead in pursuing individual accountability for war crimes within Syria, specifically crimes by the incumbent Assad regime.

Russia, wielding one of the five vetoes on the council, has persisted as a staunch proponent of the Assad regime for the entirety of the war, ensuring the Kremlin maintains the whole of its geostrategic interests.<sup>92</sup> Syria presents itself as an attractive contender geographically, economically, and politically for Russia to root its stake in the Middle East, an analogous counterpart to the U.S. foothold in Saudi Arabia.<sup>93</sup> The downfall of the Alawite Assad regime would reorient regional dynamics, ushering in the already looming Sunni-dominated order with Saudi Arabia and the United States at the head of the table.<sup>94</sup> With a Russian port in Tartus, the Kremlin holds a critical passageway to the Mediterranean for economic and military

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<sup>90</sup> See S.C. Res. 827, International Criminal Tribunal for the Former Yugoslavia (ICTY) (May 25, 1993); see also S.C. Res. 1757, Establishment of a Special Tribunal for Lebanon (May 30, 2007).

<sup>91</sup> UN Charter, Chapter V § 27.

<sup>92</sup> Roy Allison, *Russia and Syria: explaining alignment with a regime in crisis*, 89 INTERNATIONAL AFFAIRS 795, 796 (2013).

<sup>93</sup> *Id.* at 808-09.

<sup>94</sup> Hanna Notte, *Russia in Chechnya and Syria: Pursuit of strategic goals*, 23 MIDDLE EAST POLICY 59, 61. (2016).

use.<sup>95</sup> Combine all these interests together and the result is consistent opposition to any UN led intervention in Syria and absolute rejection of any attempt to proceed with action under Chapter VII of the UN charter.<sup>96</sup>

Consequently, if the Assad regime is to stay in power and Russia is to continue shielding the regime from the rest of the global community, there will not be a UN resolution any time soon authorizing the prosecution of any humanitarian law and human rights violations that the regime may be guilty of. The closest thing we may see to a viable attempt at retributive justice would be trying the crimes committed by the regime's armed opponents, which the UN has documented evidence for.<sup>97</sup> While holding these armed groups accountable for violating international law is salient, the overwhelming amount of international calls for justice are directed towards the crimes of the Assad regime. Any prosecutions that exclude the high-ranking officials within the regime would only rejuvenate the argument for victor's justice and potentially exacerbate sectarian tensions.

## B. The International Criminal Court

The alternative international prosecutorial path would be proceeding through the International Criminal Court ("ICC"), established in 1998 as the first permanent international court. With the intent to try individuals rather than states, the Court prosecutes four main crimes: genocide, war crimes, crimes against humanity, and crimes of aggression.<sup>98</sup> Thus, pursuing individual criminal liability for

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<sup>95</sup> Allison, *supra* note 92, at 807.

<sup>96</sup> See S.C. Draft Res. 321 [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2018/321](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2018/321); UN Draft Resolution S/(Apr. 10, 2018); S.C. Draft Res. 970 (Nov. 17, 2017/); S.C. Draft Res. 315 (Apr. 12, 2017); S.C. Draft Res. 1026; S.C. Draft Res. 348 (May 22, 2014). [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2017/970](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2017/970)[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2017/315](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2017/315)[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2016/1026](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2016/1026)[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2014/348](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/348).

<sup>97</sup> See *Sieges as a weapon of war: Encircle, starve, surrender, evacuate*, UN INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC REPORT (May 2018).

<sup>98</sup> Rome Statute, *supra* note 12, at Part II.

high-ranking officials within the regime would seem to be the next logical option for Syrian transitional justice, given that the crimes of the regime fall appropriately within the scope of the Court. However, akin to the obstacles encountered when pursuing prosecution through ad hoc tribunal, establishing appropriate ICC jurisdiction over the Assad regime presents itself improbable and implausible.

The ICC has three means by which it can exercise jurisdiction over a particular crime. First, Article 13(a) of the Rome Statute allows the ICC to exercise jurisdiction through State Party referral.<sup>99</sup> A state that has signed and ratified the Rome Statute can refer alleged crimes to the ICC prosecutor if they occurred on the territory of the State Party or another State Party, or if the alleged crimes were committed by a national from a State Party.<sup>100</sup> Syria, though it signed the Rome Statute, has yet to ratify it, and therefore, is not a member state to the ICC. Consequently, to proceed down this path, the Syrian government would need to ratify the Rome Statute. Given the domestic circumstances for the incumbent regime and the turmoil embroiled by the civil war, ratification of the Rome Statute would be a far from pragmatic option.

Second, Article 13(b) of the Rome Statute empowers the UN Security Council to refer states to the ICC under Chapter VII of the UN Charter, irrespective of whether the referred state is a Rome Statute signatory.<sup>101</sup> As previously discussed when examining the viability of a UN Security Council resolution to establish an Ad Hoc tribunal, a web of geostrategic interests are so strongly weaved between the Assad regime and Russia that any chances of a referral will be halted at their inception. That is not to say an attempt hasn't been made—it has. In May of 2014, the Security Council voted on a resolution to refer Syria to the ICC for investigation.<sup>102</sup> Russia acted in accordance with its geopolitical interests and vetoed the resolution.

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<sup>99</sup> *Id.* at art. 13(a).

<sup>100</sup> *Id.* at art. 14.

<sup>101</sup> *Id.* at art. 13(b).

<sup>102</sup> Somini Sengupta, *China and Russia Block Referral of Syria to Court*, New York N. Y. Times (May 20, 2014), [www.nytimes.com/2014/05/23/world/middleeast/syria-vote-in-security-council.html](http://www.nytimes.com/2014/05/23/world/middleeast/syria-vote-in-security-council.html).

Moreover, China also exercised its veto power, in line with its stringent opposition to any western imperialist practices that may usher in regime change.<sup>103</sup> Thus, two of five different players on the Security Council maintain political coalitional restraints that, in turn, restrain the Security Council from proceeding with any accountability measures that could perturb the Assad regime and the current state of the nation.

The third jurisdictional trigger available to the ICC is a *proprio motu* investigation under Article 15 of the Rome Statute.<sup>104</sup> The ICC prosecutor may choose to investigate alleged crimes that either occurred on the territory, or by a national, of a State Party; or on the territory, or by a national, of a non-State Party that has consented to ICC jurisdiction. Again, akin to the challenges discussed previously, consent to any ICC jurisdiction lies outside the incumbent regime's interests. The Assad regime is already facing a fragile legitimization of their state power domestically. Any consent to foreign prosecution, even if it were to only target a specific few high-ranking officials, would not only shake their already teetering grasp on power, but would cast open a wider vacuum for competing factions to take hold.

While these three avenues have historically been the only options available to establish jurisdiction, the ICC recently unlocked a fourth channel through which jurisdiction could be established. In September of 2018, the ICC published a decision that would allow prosecutors to pursue charges against officials of Myanmar, a state that is not party to the ICC, has not been referred to the ICC by the UN Security Council, nor has consented to ICC jurisdiction. The charges were instead pursued by means of jurisdiction over neighboring Bangladesh, which is a state party to the ICC.<sup>105</sup> To be specific, the prosecutors submitted a request to pursue charges of deportation and forcible transfer of the Rohingya population from Myanmar to

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<sup>103</sup> See generally Markos Kounalakis, *China's position on international intervention: A media and journalism critical discourse analysis of its case for "Sovereignty" versus "Responsibility to Protect" principles in Syria*, 1.3 GLOBAL MEDIA AND CHINA 149 (2016).

<sup>104</sup> *Proprio motu* is Latin for "on one's own initiative." See Rome Statute, *supra* note 12, at art. 15.

<sup>105</sup> Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," ICC-RoC46(3)-01/18, Decision (Sept.6, 2018) [*hereinafter* ICC Decision, Myanmar].

Bangladesh under Article 7(1)(d) of the Rome Statute.<sup>106</sup> The Court affirmed in its ruling that, while the Assembly of States of the United Nations brought into existence the ICC, the judicial entity exists independently and has continued in its existence with both cooperation by State parties and non-State parties to prosecute the most serious international crimes.<sup>107</sup> Furthermore, it justified that the exercise of jurisdiction is valid in that Article 12(2)(a) of the Rome Statute dictates that the Court has jurisdiction if the conduct in question occurred on the territory of a state party.<sup>108</sup> Herein the Court decided that these preconditions set out by Article 12 are minimum standards which are fulfilled if at least one element of the crime satisfies it.<sup>109</sup> The conduct in question, being deportation and forcible transfer of populations, in part took place on the territory of Bangladesh, a state party, where the Rohingya populations settled as a result of the deportations by Myanmar.<sup>110</sup> As such, at least one element of the crime meets the Article 12 criteria; thus, the entirety of the crime was ruled as falling within ICC jurisdiction. The Court concluded, “the Chamber is of the view that acts of deportation initiated in a State not Party to the Statute (through expulsion or other coercive acts) and completed in a State Party to the Statute (by virtue of victims crossing the border to a State) fall within the parameters of article 12(2)(a) of the Statute.”<sup>111</sup>

This 2018 decision has consequently created a precedent that is now being used by attorneys to pursue charges against the Assad regime. Lawyers have requested the ICC to investigate alleged crimes by the Assad regime, using the September 2018 precedent.<sup>112</sup> In this case, refugees have fled to Jordan, a state party to the ICC, following torture, abuse, violence, and widespread and systematic violations.<sup>113</sup>

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<sup>106</sup> *Id.* ¶ 52.

<sup>107</sup> *Id.* ¶ 48.

<sup>108</sup> *Id.* ¶ 64.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* ¶ 71.

<sup>111</sup> *Id.* ¶ 73.

<sup>112</sup> *Lawyers Hope Refugees' Case against Damascus Will Be Breakthrough*, THOMSON REUTERS (Mar. 7, 2019, 7:30 AM), [www.reuters.com/article/us-mideast-crisis-refugees-icct/lawyers-hope-refugees-case-against-damascus-will-be-breakthrough-idUSKCN1QO1HD](http://www.reuters.com/article/us-mideast-crisis-refugees-icct/lawyers-hope-refugees-case-against-damascus-will-be-breakthrough-idUSKCN1QO1HD).

<sup>113</sup> *Id.*

Applying the same ruling from 2018 to this situation, prosecutors could seek charges of individual criminal liability for crimes against humanity, specifically deportation and other broader crimes that meet Article 12(2)(a) for jurisdiction. At this point in time, the Court has not published an opinion either rejecting or accepting jurisdiction but based off of the precedent set in the fall of 2018, it would not seem too far off for the ICC to have willfully created a fourth avenue by which it could assert its own jurisdiction.

This path, however, is not absent its own drawbacks. Even if the ICC were to accept jurisdiction, there exists a serious concern of both cooperation and enforceability. Take, for example, the ICC case against Sudanese President Omar Al Bashir. With an indictment and arrest warrants dating back to 2009, the president of Sudan has yet to be detained and the ICC has yet to proceed with a trial.<sup>114</sup> Moreover, while Sudan is not a State party to the ICC, Al Bashir has made numerous visits to states that are party to the Rome Statute and who were ordered to hand over Al Bashir.<sup>115</sup> Despite these outstanding warrants, state parties to the ICC, including Jordan, have refused to cooperate. Herein lies largely the flaw of the ICC: its exclusive reliance on state cooperation to function.<sup>116</sup> The Rome Statute lacks any repercussions for state parties that fail to fulfill their obligations as a member; in fact, Article 87(7) of the Rome Statute specifically defers authority to the United Nations in situations of non-compliance by state parties.<sup>117</sup> Even with a referral to the United Nations, repercussions remain unlikely. The UN charter allows suspension of a state following a recommendation by the Security Council, and subsequently, a state can be expelled if the state continues to violate its obligations upon a two thirds vote by the General Assembly and

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<sup>114</sup> "Al Bashir Case." *Rome Statute of the International Criminal Court*, [www.icc-cpi.int/darfur/albashir](http://www.icc-cpi.int/darfur/albashir).

<sup>115</sup> Tom White, *States Failing to Seize Sudan's Dictator despite Genocide Charge*, THE GUARDIAN (Oct. 2018, 2:00 AM EDT), [www.theguardian.com/global-development/2018/oct/21/omar-bashir-travels-world-despite-war-crime-arrest-warrant](http://www.theguardian.com/global-development/2018/oct/21/omar-bashir-travels-world-despite-war-crime-arrest-warrant).

<sup>116</sup> Gwen P. Barnes, *The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir*, 34 FORDHAM INT'L L.J.L.J. 1585, 1595. (2010).

<sup>117</sup> Rome Statute, *supra* note 12, at para 87(7).

absent any veto by the Security Council.<sup>118</sup> As was the situation in the Al Bashir case, the ICC referred Jordan to the United Nations for failure to detain and surrender Al Bashir, but as of today, no formal actions have been taken to sanction or punish Jordan for failure to comply.<sup>119</sup> Applying this fallibility to the case at hand, there remains a high chance that even with an indictment of senior officials of the Assad regime, prosecution would be halted at its early stages, particularly because the path of indictment being tried is through Jordan, a state that has already demonstrated a willingness to ignore its obligations to the ICC. Without collective state cooperation to detain and surrender those implicated in charges, ICC prosecution, even with appropriate jurisdiction, remains distant.

### C. Domestic Courts

Even if the international community fails in its endeavors to pursue retributive justice, enthusiasm persists for justice to cascade, albeit, through the domestic court system. But this alternative maintains its own shortcomings, once again beating down hopes for Syrian justice and accountability through prosecution. While domestic courts would bring the process of accountability and retribution closer to the victims, a domesticized process without exhaustive reform would only polarize the country even further, leaving it susceptible to fall back into cyclical violence. The main concern with domestic prosecution would be the prevalence of judicial corruption. Given Syria, prior to the war, was not active in its exercise of due process of law and constitutionalism, it would be fair to assume that the state of the judiciary following the war would either be the same if not worse.<sup>120</sup> Add looming victor's justice to the already rampant corruption and the result is a pseudo-court system with the Assad regime using the courts to target any and all members of the opposition.

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<sup>118</sup> UN Charter, *supra* note 89, at art. 5-6.

<sup>119</sup> *Al Bashir Case: ICC Appeals Chamber Invites Observations from International Organisations, States Parties and Professors of International Law on Legal Matters Raised by Jordan*, ICC (Mar. 29, 2018), [www.icc-cpi.int/Pages/item.aspx?name=pr1375](http://www.icc-cpi.int/Pages/item.aspx?name=pr1375).

<sup>120</sup> See generally Abdulkader Al-Sheikh and Abdullah Hamadah, *Corruption in Syria Causes, Effects, and Anti-Corruption Strategies*, SYRIAN ECON. F. (2014).

It is also critical not to forget the size of the task that the domestic courts would have to undertake. Diving into nine plus years of war and a continually growing number of varying factions, both native and foreign, the courts would require a hefty source of funding to embark on such a project, from staff to investigative teams to even infrastructure like buildings and offices. Furthermore, because the prosecutions would be operating in a domestic setting, outside of international donors, the funding would most likely be sourced by the local population, namely the same victims requiring rehabilitation and justice. Ergo, Syrians would be diverting money away from local infrastructural and institutional reconstruction toward prosecution that focuses on the same individuals who caused the destruction in the first place.

Nevertheless, even if the judiciary did conduct transformative internal reforms and even if there were sufficient resources available to fund the court's escapades, there still remains the lingering sectarianism pulling at the country's fabrics.<sup>121</sup> An amalgam of varying religious, ethnic, and ideological circles, Syria's modern political history has been shaped by a minority sect ruling over a disparate majority through systematic authoritarianism. To ignore this prevalent sectarianism when proceeding with domestic prosecution would only add insult to injury. Prosecution may produce an ephemeral tone of "justice" but may also lack any of the substantive societal implications such as local reconciliation and reconstruction. Domestic prosecution, without the efforts of an impartial international player, could exacerbate already fragile relationships. The pursuit of justice would in its entirety be halted if the country were to be plunged back into cyclical sectarian violence.

#### IV. EVALUATING INTERNATIONAL CRIMINAL COURTS

Despite the above-mentioned challenges, global discourse predominately favors international prosecution as the solution to the

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<sup>121</sup> See generally Frederic C. Hof and Alex Simon, *Sectarian violence in Syria's civil war: Causes, consequences, and recommendations for mitigation*, CENTER FOR THE PREVENTION OF GENOCIDE, UNITED STATES HOLOCAUST MUSEUM (2013).



Syrian crisis.<sup>122</sup> While optimism for justice is critical and owed to the Syrian people, it is equally as critical to spend time and resources efficiently, creating realistic frameworks for transitional justice that work for all the people of Syria. At the end of the day romanticized notions of punishment and accountability do little for the victims who are left without resources, without jobs, without infrastructure, and without human rights. Thus, even if an international criminal tribunal were able to come to fruition, it is imperative to understand the associated strings attached to such a mechanism—strings that could make prosecution an unattractive, injurious instrument as a vehicle for sham justice. Understanding the implications of a future tribunal means understanding the efficacy of past international tribunals.

Measuring efficacy is not a simple task. Part of the problem lies in the fact that defining “success” for these international criminal courts remains contentious. One view of success could be whether the court has prosecuted as many international law violators as possible. Another view of success could be whether there has been an installation and maintenance of peace and democracy. With varying definitions for success comes varying views on the efficacy of these tribunals. There surely is no one correct way to evaluate efficacy. Thus, here we attempt to holistically evaluate past international criminal courts by looking at a number of considerations that might impact success: monetary cost, time, procurement of evidence, and legitimacy of the process. We conclude this evaluation by examining the influence of these past courts on the level of freedoms enjoyed within each targeted country.

First, we start with cost. Trials are expensive and long. This is true whether you examine domestic or international trials. Investigations are lengthy, overhead costs for court in session are high, and sometimes the outcome is not always what the victim wants or needs. But take the already complex nature of domestic trials, throw in

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<sup>122</sup> See *Those Responsible for War Crimes in Syria Will Be Held Accountable for What They Have Done,' Says UN Rights Chief*, UN NEWS (Mar. 2, 2018), [news.un.org/en/story/2018/03/1003981](https://news.un.org/en/story/2018/03/1003981); See also *Syria: Criminal Justice for Serious Crimes under International Law*, HUMAN RIGHTS WATCH, (Dec. 17, 2013, 12:00 AM EST), [www.hrw.org/news/2013/12/17/syria-criminal-justice-serious-crimes-under-international-law#IV-Conclusion](https://www.hrw.org/news/2013/12/17/syria-criminal-justice-serious-crimes-under-international-law#IV-Conclusion).

different players from across the world, add in inaccessible evidence, and mix in a brand-new legal code for the proceedings; the result is an exponentially more convoluted, costly trial with a low conviction rate. This begs the question: at what point does the cost outweigh the value of these proceedings?

When examining the history of the price of prosecution, the different types of international courts have to be taken into consideration to provide a holistic depiction of the range of costs that can be expected, from a small tribunal designed to address one specific event to a large tribunal designed to address years of armed conflict and violence. And while a holistic picture of the cost of tribunals can highlight key differences between the courts and the administration of the courts, it can also highlight key consistencies between them. The most obvious being the staggeringly high estimated total cost and the staggeringly low conviction rate.

#### <Table 1>

For instance, take the Special Tribunal for Lebanon (“STL”), a tribunal that’s been active for the past ten years following the terrorist attack on February 14, 2005, that killed former Lebanese Prime Minister Rafik Hariri and twenty-two others while injuring over 200 individuals.<sup>123</sup> The tribunal’s mandate is to address this precise attack, with conditional extended jurisdiction to address other terrorist crimes around this time period in Lebanon if the Court finds that these attacks were all interrelated.<sup>124</sup> With a decade under its belt and half a billions dollars spent, all the STL has to show is nine indictments, four of which were indictments on charges of contempt for unauthorized release of confidential information related to ongoing STL cases.<sup>125</sup> Thus, only five indictments were on charges related to the February 14<sup>th</sup> attack.<sup>126</sup> Furthermore, one of the five accused died before the trial concluded, while the remaining four accused are fugitives with

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<sup>123</sup> See SPECIAL TRIBUNAL FOR LEBANON, [www.stl-tsl.org/en/](http://www.stl-tsl.org/en/).

<sup>124</sup> S.C. Res 1757, Annex, art. 1. (May 30, 2007).

<sup>125</sup> See *Special Tribunal for Lebanon*, *supra* note 123, *The Cases*. For estimated total cost of the tribunal, see Table 1.

<sup>126</sup> *Id.*

outstanding warrants for their arrest.<sup>127</sup> Half a billion dollars spent for no arrests, no convictions, and no clear indication of who was responsible for the attack. Additionally, the budget was funded 51% by voluntary contributions from member states in the UN and the remaining 49% by the people of Lebanon through taxes.<sup>128</sup> This was already a high burden for a country that was on shaky economic grounds; but then, within the first two years of the establishment of the court, Lebanon began hosting its first wave of Syrian refugees, reaching more than 1.5 million refugees in 2014.<sup>129</sup> By 2015, the unemployment rate in Lebanon had reached 20% and public debt had widened to 150% of the GDP.<sup>130</sup> This version of justice has been defined by the victims themselves funding a court that is costly and inaccessible to the people. Rather than use that money to recoup the victims and their families following the attack, the country under international auspices proceeded down a path that has only devoured time and resources all the while allowing the alleged perpetrators to escape without a trace. The people of Lebanon bore the high cost of the tribunal without receiving any yield from the proceedings thus far. If this is the cost of justice, it is too high for justice not delivered, especially when Lebanon opted out of prosecuting individuals responsible for heinous violence that led to over 144,000 individuals being killed during the fifteen-year civil war (1975-1990).<sup>131</sup>

On the other end of the spectrum, there are trials like the ICTY, designed to address years of violence and abuses, rather than a particular individual event. The ICTY, active for a little over two decades, was contrived to end a culture of impunity and to “help pave the way for reconciliation.”<sup>132</sup> That “reconciliation” was funded by more than two billion dollars. The ICTY undeniably did indict more

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<sup>127</sup> *Id.*

<sup>128</sup> S.C. Res 1757, art. 5 (May 30, 2007).

<sup>129</sup> *ILO Response to Syrian Refugee Crisis in Lebanon*, ILO, <http://www.ilo.org/beirut/areasofwork/syrian-refugee-crisis/lebanon/lang--en/index.htm>.

<sup>130</sup> *The World Bank in Lebanon*, THE WORLD BANK (Apr. 1, 2019), <http://www.worldbank.org/en/country/lebanon/overview>.

<sup>131</sup> Faten Ghosn and Amal Khoury, *Lebanon after the Civil War: Peace or the Illusion of Peace?*, 65 *THE MIDDLE EAST JOURNAL* 381, 382 (2011).

<sup>132</sup> *About the ICTY International*, INT’L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, [www.icty.org/en/about](http://www.icty.org/en/about).

than 150 individuals, more than half of which were convicted.<sup>133</sup> But convictions alone are not sufficient to reconcile societies fractured by sectarianism. One survey found that the ICTY did little to transform relationships among the varying ethnic and religious communities in Bosnia and Herzegovina, with most people reporting an unwillingness to forget and reconcile the crimes committed by other groups.<sup>134</sup> Not only did the ICTY fail in rehabilitating these relationships, it actually aggravated them by reaffirming group identity. Finding the accused guilty solidifies narratives that criminalize the other side.<sup>135</sup> Accordingly, the more the ICTY was “successful” in its convictions, the stronger the enemy images would grow within each community. Those deteriorated inter-ethnic community networks were also further braced by the Dayton accords, which established a consociational government along ethnic lines.<sup>136</sup>

A catch-22 thus evolves out of retributive justice. On the one hand, if the proceedings result in no convictions, an air of impunity survives with the high cost lingering as a reminder of the wasted resources. On the other hand, if the proceedings result in plentiful convictions, a silent consequence arises further fracturing of relations between the varying local groups that prompted the abuses in the first place. This leaves the country vulnerable to fall back into cycles of violence. With a history of international tribunals costing at least fourteen million dollars per indicted person, it is worth investigating why tribunals of these types cost so much and whether these funds would be better used elsewhere in the pursuit of transitional justice.<sup>137</sup>

International tribunals incur similar expenses as domestic trials, with the exception being the cost of travel and the international nature of the tribunals complicating the costs incurred. For instance, domestic trials incur costs such as judge salaries, attorney salaries,

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<sup>133</sup> *Infographic: ICTY Facts & Figures*, INT’L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, [www.icty.org/node/9590](http://www.icty.org/node/9590).

<sup>134</sup> Roland Kostić, *Transitional justice and reconciliation in Bosnia-Herzegovina: Whose memories, whose justice*, 54 *SOCIOLOGIJA* 649, 653- 59 (2012).

<sup>135</sup> *Id.* at 658.

<sup>136</sup> Dayton Accords, Annex 4, art. IV.

<sup>137</sup> See Table 1 for estimated tribunal cost per indicted person.

courtroom staff salaries, facility costs, and security cost.<sup>138</sup> As the nature of the case grows more complicated, so do the associated costs. And the reasoning is evident: the more complicated a case, the longer the trial will be, thus the higher the costs.<sup>139</sup> The same reasoning applies to international tribunals and their cases. The cases are riddled with such a high degree of complexity that the associated costs are significantly higher than we would see for an ordinary domestic trial. The complexity is spurred by a number of different factors.

First, the accused are often charged with a higher number of offenses than domestic indictments, extending the length of the trials.<sup>140</sup> Because of the degree of these crimes, the tribunals will hear more and longer witness testimonies.<sup>141</sup> Attorneys will use more time and resources to address these witness testimonies and the judges will take longer filtering admissible evidence. Furthermore, these witnesses often need to be flown into the country housing the tribunal.

This relates to the second factor that complicates and increases the overall cost of tribunals: investigations. The investigative stage of international proceedings often takes longer because the evidence is harder to reach, a longer time period passes between the crime and the initiation of investigation, and international travel of varying investigators is required to retrieve such evidence. Additionally, the reliance on state cooperation leaves the court in a precarious position; in contrast to a domestic court where systems are already in place to do much of the pretrial legwork including arrests and evidence retrieval, international courts must staff their own groups to go into the relevant states to detain the accused, perform forensic investigations, and find witnesses to testify.<sup>142</sup>

Third, the court is left using more resources and time to create codified procedural and substantive law to guide the trial.<sup>143</sup> In a

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<sup>138</sup> David Wippman, *The Costs of International Justice*, 100 *American Journal of International Law* AM. J. INT'L L. 861, 864-68. (2006).

<sup>139</sup> *Id.* at 873.

<sup>140</sup> *Id.* at 876.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

domestic trial, the law is already laid out; practically no time is spent creating the law before the proceedings. In contrast, international tribunals lack codified precedent to go off of, thus novel issues arise related to the scope of the tribunal's reach, admissibility questions, and to the elements in contention. Additionally, the cost of detention and sentences of the accused and guilty persons adds to the total bill, particularly if the accused are sentenced to lifetime in prison. International tribunals under the auspices of the UN prohibit the death penalty, thus the highest sentence possible is a lifetime imprisonment paid for either by the state itself or by other states that have yielded to house these convicted individuals.<sup>144</sup> Put all these factors together and international prosecution becomes exponentially more intricate than any domestic proceeding.

Another consideration in evaluating international criminal courts is the procurement of evidence. Due process of law survives in international adjudication; therefore, prosecutors bear the burden of proof, *onus probandi*, such that without substantive evidence, no accused may be found guilty.<sup>145</sup> Implicitly, prosecutors are tasked with developing new investigative strategies to retrieve necessary but inaccessible evidence for the trials at hand. The origin of this authority lies in the peculiar disposition of the evidence required to determine the culpability of the accused on trial. Part a need for evidence that is often inaccessible with that the absence of a singular codified set of rules detailing how prosecutors may obtain evidence, and the procurement of evidence grows to be one of the biggest obstacles encountered by international criminal courts.

In contrast to national court systems, international criminal courts operate outside of state institutions that function hand in hand with the judiciary. Instead, international criminal courts establish their own mechanisms to replace those of the national institutions that a court would normally rely on for fact finding and evidence gathering. The authority to establish such mechanisms lies in Chapter VII of the UN Charter, with the exception of the ICC where it lies in the *de jure*

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<sup>144</sup> Dirk van Zyl Smit, *International Imprisonment*, 54 *International INT'L Comparative Law Quarterly & COMP. L. Q.*, 357, 366 (2005).

<sup>145</sup> James B. Thayer, *The Burden of Proof*, 4 *HARV. L. REV.* 45, 46 (1890):.

obligations created by the Rome Statute.<sup>146</sup> The prosecutors are endowed with the responsibility to use this authority to retrieve evidence necessary to substantiate any claims made; but given that state consent is not always present, the prosecutors are obligated to maneuver their way through geopolitical hurdles to acquire whatever unknown evidence may exist. Take the ICTY for instance. The UN required all states to cooperate with the ICTY's investigations; but, absent an enforcement mechanism and formal operations to instigate such investigations, the ICTY was left without a capacity to oblige states to comply with what was asked.<sup>147</sup> Consequently, the Chief Prosecutors were charged with leading the investigation phase of the tribunals by expanding their military and political networks to increase their resources, expand their powers, and gain access to places and people they would otherwise be excluded from.<sup>148</sup> As demonstrated, a dangerous interdependence emerges between the prosecutors and state officials. State officials get to decide what and whom prosecutors have access to, leaving room for victor's justice to play a role in the procurement of evidence for indictments and trials.

This leaves room to question the reliability and the justiciability of the evidence gathered by the prosecutors. While the prosecutors maintain the higher burden of proof, the defense still retains the right to rebut any prosecutorial claims by making assertions of their own. Yet without safeguard institutions in place to protect the balanced collection of evidence, the defense is only able to sift through evidence produced by the prosecution.<sup>149</sup> In the case of the ICTR, defense counsel was not only blocked by the Rwandan government from interviewing potential witnesses, but they were also threatened and arrested for proceeding with investigations of their own.<sup>150</sup> Despite an

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<sup>146</sup> Cogan, Jacob Katz. Cogan, *The problem of obtaining evidence for international criminal courts*, 22 HUM. RTS. Q. 404, 405 (2000).

<sup>147</sup> Ron Levi et al., *International Courts in Atypical Political Environments: The Interplay of Prosecutorial Strategy, Evidence, and Court Authority in International Criminal Law*, 79 *Law and Contemporary Problems*. 289, 303 (2016).

<sup>148</sup> *Id.*

<sup>149</sup> JONATHAN HAFETZ, PUNISHING ATROCITIES THROUGH A FAIR TRIAL: INTERNATIONAL CRIMINAL LAW FROM NUREMBERG TO THE AGE OF GLOBAL TERRORISM 51 (2018).

<sup>150</sup> *Id.*

appearance of due process, there exists an inequity in resources between the prosecution and the defense within international criminal courts, affording the prosecution more power under the law.<sup>151</sup>

Procedural legitimacy of this process becomes even more dubious when the staffing of these courts is investigated. Because of previously mentioned resource and financial constraints, the staffing of these ad hoc courts can often include unqualified, ill-informed personnel. During the formation of the ICTY, such a heavy focus was placed on the Rules of Evidence and Procedure that the primarily international staff and management were largely neglected.<sup>152</sup> As a result, integral players in the prosecutorial process, including attorneys, investigators, and judges, were left ignorant of relevant circumstances and viewpoints. This fostered insensitivity to the targeted ethnic populations, delegitimizing the process in the eyes of many of the victims. On the other end of the scale, staff sourced from local populations proved concerning for the ECCC as evidence arose that individuals were bribing Cambodian government officials for positions within the tribunal.<sup>153</sup> There is legitimate skepticism in whether the process is designed to be fair. Not only are these courts reliant on the approval and funding by the permanent five members of the Security Council, but also, their inherent design is to go after a specified group of individuals. Thus, there exists little incentive to provide the defendants with adequate resources to prove their innocence. This was quite clear in the case of the SCSL, as the defense team received a very modest budget, making it one of the lowest ever allocated for legal aid for accused individuals.<sup>154</sup> In addition, given the funding mechanism (i.e. donation based) of the majority of the tribunals, many defendants filed petitions against the SCSL claiming that donors compromise the independence of judges.<sup>155</sup> When the budget is limited or gets cut,

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<sup>151</sup> *Id.*

<sup>152</sup> Ivana Nizich, *International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal*, 7 ILSA J. INT'L & COMP. L. 353, 355 (2000).

<sup>153</sup> Kate Yesberg, *Assessing justice through victim participation at the Khmer Rouge Tribunal*, 40 VICTORIA U. WELLINGTON L. REV. 555, 556 (2009).

<sup>154</sup> Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, *Michigan Journal of?*, 32 MICH. J. INT'L LAW L. 395, 440 (2007).

<sup>155</sup> *Id.*, at 428.



those that pay the price are the defendants and victims.<sup>156</sup> As long as an appearance of fairness survives, there is no higher authority that can combat inequality within the process. This draws doubt on the type of rule of law created by these systems.

Moving beyond the due process deficit in the procurement of evidence by the prosecution and defense, we also find logistical challenges in just evaluating evidence once it has been retrieved. First, the mere volume of evidence that the parties and the arbitrator must decipher proves time consuming.<sup>157</sup> Witness testimony, both written affidavits and oral statements, has evolved to become a prominent player in these trials.<sup>158</sup> Thus, prosecutors and defense attorneys are required to sift through interviews and statements to evaluate the reliability and the admissibility of this evidence. Without a set of rules to guide admissibility, this process is similar to navigating through the dark.

Second, language complicates percolating through the evidence.<sup>159</sup> Given the international nature of the court, translations are required for every step of the process, with attorneys, judges, and witnesses varying in the use of primary languages.<sup>160</sup> But more than just translating documents and witness statements, all parties involved have to be hyper-aware of the impact of language on decisions and on the arbiter of fact.

Third, the free rein on admissible evidence entails longer trials, more evidence to consider, and stronger discretion by the judges to either give evidence different weights or to exclude the evidence all together.<sup>161</sup> Both the ICTY and the ICTR shared the same rule on evidence: “A Chamber may admit any relevant evidence which it deems to have probative value.”<sup>162</sup> Thus, practically no evidence is ever

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<sup>156</sup> *Id.* at 429.

<sup>157</sup> Rutledge, Kristina D. Rutledge, ‘*Spoiling Everything*’—*But for Whom? Rules of Evidence and International Criminal Proceedings*, 16 REGENT U. L. REV. 151, 151 (2003).

<sup>158</sup> *Id.* at 152.

<sup>159</sup> *Id.* at 163.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 168.

<sup>162</sup> *Id.* See also International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed

excluded during these proceedings, despite doubts of credibility and chances of prejudice. With the inclusion of all evidence, the prosecutors and the defense have to rely more on the judges to trust that they will give the evidence the weight it deserves, rather than rely on safeguards to preclude unnecessarily pernicious evidence.<sup>163</sup> This judicial empowerment can raise concerns, especially when cases of judicial impropriety arise, such as the case of the ECCC.<sup>164</sup>

If such a costly mechanism is to be used, there needs to be, at the minimum, an assurance that the apparatus produces intended consequences—that retributive justice will achieve the goals it was designed to accomplish. If such an endeavor is to be undertaken, the product that the international community is buying into should certainly meet expectations. Both UN resolutions that established the international tribunals for Yugoslavia (UNSCR 827) and Rwanda (UNSCR 955) maintained that the tribunals would contribute to the process of reconciliation and “the restoration and maintenance of peace.”<sup>165</sup> Within the international community, there exists an underlying belief that trials will: (1) improve human rights protections and diminish repression,<sup>166</sup> (2) have a deterrent effect,<sup>167</sup> (3) contribute to the development of liberal democracy,<sup>168</sup> and (4) guide the reform of the national criminal justice system as well as promote the rule of law.<sup>169</sup>

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in the Territory of the Former Yugoslavia., Rules of Procedure and Evidence r. 89(3) (July 8, 2015).

<sup>163</sup> *Id.* at 171.

<sup>164</sup> Shannon Maree Torrens, Allegations of Political Interference, Bias and Corruption at the ECCC, in *The Extraordinary Chambers in the Courts of Cambodia*. 45-75 (Simon M. Meisenberg and Ignaz Stegmiller eds., 2016.).

<sup>165</sup> See S.C. Res. 827 (May 25, 1993); S.C. Res. 955 (Nov. 8, 1994).

<sup>166</sup> See generally Kathryn Sikkink and Carrie Booth Walling, *The impact of human rights trials in Latin America*, 44.4 J. PEACE RES. 427 (2007).

<sup>167</sup> See generally Hunjoon Kim and Kathryn Sikkink, *Explaining the deterrence effect of human rights prosecutions for transitional countries*, 54 INT’L STUD. Q. 939 (2010).

<sup>168</sup> See generally MARK OSIEL, ‘MASS ATROCITY,’ COLLECTIVE MEMORY, AND THE LAW (1997).

<sup>169</sup> See generally Etelle R. Higonnet, *Restructuring hybrid courts: local empowerment and national criminal justice reform*, 23 ARIZ. J. INT’L & COMP. L.347, (2005).

However, while advocates of tribunals argue that retributive justice is the most pertinent, and for some the only, response to addressing human rights and humanitarian law violations, several scholars have cautioned against such an approach, even questioning the relationship between trials and post-conflict peacebuilding. For instance, Lie, Binningsbo and Gates find that trials have a weak and inconsistent effect on the durability of peace.<sup>170</sup> On the other hand, Meernick, Nichols and King<sup>171</sup> as well as Olsen, Payne and Reiter<sup>172</sup> conclude that countries that experience only trials are no more or less likely to experience recurrence of violence or witness improvements in human rights practices and democracy than countries that do not have any prosecutions.

### <Table 2>

Given the mixed empirical findings in the literature on the relationship between countries that have prosecutions and those that have not, we turn to take a look at how the tribunals mentioned in Table 1 have affected each of the states that were involved. Investigating the efficacy of tribunals through paradigmatic goals of liberal democracy and individual values, it would be expected that an effective mechanism would demonstrate consistent success. Table 2, outlining freedom levels of countries post-tribunal, casts international prosecution in a bleaker light than the narrative that primarily dominates the field of transitional justice.<sup>173</sup> It is evident that even after twenty-six years following the establishment of the ICTY, the states that make up former Yugoslavia have varied from being free (Croatia, Serbia and Slovenia) to partly free (Bosnia & Herzegovina, Macedonia, and Montenegro). As for Rwanda, the country is still considered not free with severe threats on political and civil liberties, despite

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<sup>170</sup> See generally Scott Gates, Helga Malmin Binningsbo, and Tove Grete Lie, *Post-conflict justice and sustainable peace*, THE WORLD BANK (2007).

<sup>171</sup> See generally James D., Meernick, Angela Nichols, and Kimi L. King, *The impact of international tribunals and domestic trials on peace and human rights after civil war*, 11 INT'L STUD. PERSP. 309, (2010).

<sup>172</sup> See generally Tricia D. Olsen, Leigh A. Payne, & Andrew G. Reiter, *TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY* (2010).

<sup>173</sup> FREEDOMHOUSE. Freedom levels in 2018 are based on an evaluation of political rights and civil liberties.

guarantees in the constitution. Pair Cambodia's freedom level (not free) with its estimated total cost (\$300 million) and it becomes unclear if the investment in such an apparatus is producing any beneficial outcome, particularly for the victims of the armed conflict.

<Table 3>

Proponents of retributive justice further maintain that tribunals offer justice and accountability, but just as importantly they normalize the rule of law. However, if we take a look at the impact of the ICTY on each of the states that emerged from the dissolution of Yugoslavia we, again, find mixed results in terms of the level of the rule of the law in each of the countries (see Table 3).<sup>174</sup> Despite the same ad hoc institution pursuing aims of accountability and justice, the effects vary across the board. On one end, Slovenia has benefitted with a rule of law score at 14/16. On the other end, however, Bosnia and Herzegovina suffer weak rule of law (score of 7/16) with a fragmented judiciary, inconsistent guarantees of due process of law, and rampant discrimination both within and by state institutions.<sup>175</sup> One of the main reasons we see such a difference in the scores for the rule of law is due to the variation in the level of independence of the judiciary, guarantees of due process, corruption and patronage within the justice system as well as discrimination against ethnic and religious minorities across the different states that emerged. Despite an estimated total cost of \$2.3 billion, the emerging states of the former Yugoslavia experienced disparate impacts following prosecution, with some benefiting and some remaining predisposed to injustice. As such, funding such an institution might prove to be an unproductive endeavor considering the absence in consistency of success.

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<sup>174</sup> FREEDOMHOUSE. Rule of law is a subcategory of civil liberties within the freedom levels. A country is awarded 0 to 4 points on 4 different questions regarding rule of law, with a score of 0 representing the lowest degree of freedom and a score of 4 representing the highest degree of freedom.

<sup>175</sup> *Bosnia and Herzegovina Profile*, FREEDOMHOUSE, <https://freedomhouse.org/report/freedom-world/2019/bosnia-and-herzegovina>.

## V. ALTERNATIVES TO RETRIBUTIVE JUSTICE

One of the main issues that arises with retributive forms of transitional justice is that retribution ignores the nexus between state fragility, socio-economic inequity, and self-perpetuating cycles of violence. Imbalances in social capital paired with highly fallible institutions fosters an environment hospitable to communal violence. Irrespective of the number of perpetrators indicted and convicted, if a country transitioning out of war is unable to transform away from its previous condition, it is left vulnerable to the divisive issues that led to the armed conflict in the first place. Looking past retributive justice, we find restorative justice, aimed at reconstruction, reparations, and reconciliation, not just at an institutional level, but more importantly, at grassroots, interpersonal level.

## A. Reconstruction

Reconstruction can and should occur in three distinct dimensions: (1) political, (2) security, and (3) economic. Syria's current environment, even before the end of armed conflict, is ripe to receive new practices, policies, and pillars to create a new state foundation, both on a national level and on a local level. Particular to reconstruction would be the redistribution and balance of social capital among the varying ethno-religious and political sects throughout Syria, with a specific focus on transforming and rehabilitating the relationships of the different groups that comprise the Syrian population. While the reconstruction of the three dimensions is going to look quite different among them, it should remain that they are consistent in integrating power-sharing arrangements to breed security and stability.<sup>176</sup> Power sharing arrangements ensure that all groups are afforded protections and equity in their share of state power and social capital, preventing one group from overpowering another.<sup>177</sup>

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<sup>176</sup> Amal Khoury and Faten Ghosn, *Bridging Elite and Grassroots Initiatives: The Road to Sustainable Peace in Syria*, in POST-CONFLICT POWER-SHARING AGREEMENTS. 47 (Imad Salamey, Mohammed Abu-Nimer, and Elie Abouaoun eds., 2018). [Hereinafter Khoury and Ghosn]

<sup>177</sup> Caroline Hartzell and Matthew Hoddie, *Institutionalizing peace: Power sharing and post-civil war conflict management*, 47.2 AM. J. POL. SCI. 318, 319 (2003).

Political reconstruction, with power sharing arrangements in mind, needs to accommodate the diverse ethnic, religious, and political makeup of Syria. Especially considering the sectarian nature of the war, any political arrangement moving forward must be encompassing of the different cleavages in a manner that balances the shares of authority. Khoury and Ghosn suggest integrative consociationalism as the political power sharing arrangement for Syria.<sup>178</sup> This system fuses traditional consociationalism, guaranteeing proportional representation for the varying cleavages, with an integrative system, that moves towards a more centralized national identity.<sup>179</sup> Here, the hybrid system would envelop and protect the ethno-cultural cleavages under one umbrella of unified national identity.

This begs the question: should the country proceed with a campaign of lustration, universal amnesty, or meet somewhere in the middle? Considering all sides of the war are guilty of war crimes, a purge of officials loyal to the former regime would be contrary to national reconstruction efforts by signifying that supporters of the former regime are disparately being punished more than the other sides of the war. Additionally, an exhaustive purge of government officials could create a personnel dilemma by disqualifying a large portion of technocrats that might be essential to administrative and specialized roles within the government.<sup>180</sup> On the other hand, universal amnesty could preclude bureaucratic reform by diminishing the integrity of power sharing and accountability within the new regime. The equilibrium to this dilemma would be fusing a comprehensive vetting system while excising the individuals that present the greatest detriment to reform. It is critical though that those individuals that are removed from civil service are provided with economic security, by means of pensions and severance packages, to ensure they do not fall vulnerable to unemployment and the same economic grievances that drove the country to conflict in the first place.<sup>181</sup>

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<sup>178</sup> Khoury and Ghosn, *supra* note 176, at 49.

<sup>179</sup> *Id.* at 48–49.

<sup>180</sup> Eric A. Posner and Adrian Vermeule, *Transitional justice as ordinary justice*, *Harvard Law Review*, 117 HARV. L. REV. 761, 779 (2004).

<sup>181</sup> Khoury and Ghosn, *supra* note 176, at 50.

Establishing a legitimate monopoly over the use of force is necessary in safeguarding against the machine of civil violence. Normative security sector reform (“SSR”) addresses institutional security deficits through a state-centric lens.<sup>182</sup> Primarily, SSR leads with the demobilization, disarmament, and reintegration of factional forces.<sup>183</sup> This provides that the new security apparatus co-opts militant groups who took to arms during the war. If the new military is unable to co-opt certain groups, the new security apparatus must ensure it can curb the influence of such armed groups as to weaken any *spoiler* effect they may have on the new fledgling institution and civil peace. While this unquestionably addresses certain sectarian issues, there additionally needs to be an underlying redevelopment of trust between state institutions and civil society.<sup>184</sup> This can be spearheaded by efforts to reorganize security sector mechanisms around a normative legal framework that stresses transparency, accountability, and the protection of liberties, particularly for any minorities. Furthermore, similar to political reconstruction, a system of vetting should be utilized to ensure administrative technocrats within the security apparatus can remain, while those that pose the largest detriments to the integrity of the institution are removed, creating room for more participation by the historically marginalized populations.

The length of the conflict in Syria, eight years of economic infrastructural destruction, combined with the economic grievances that existed prior to the conflict has bred conditions that make economic reconstruction a necessity, rather than a suggestion. Any reconstruction that does not transform the economic status quo would be reconstruction that is ignorant of the economic component to civil violence. Power sharing arrangements within the economic domain would address structural inequities that engender inter-group resentment and violence. Additionally, only when a country is financially stable can it begin to realistically examine retributive justice mechanisms to combat impunity and build a culture of accountability.

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<sup>182</sup> Alan Bryden, *Towards a Security Governance Agenda in Post-Conflict Peacebuilding*, 24 SICHERHEIT UND FRIEDEN (S+ F)/SECURITY and PEACE 22, 23 (2006).

<sup>183</sup> *Id.*

<sup>184</sup> Khoury and Ghosn, *supra* note 176, at 51.

For instance, Olsen, Payne, and Reiter found that high- and middle-income countries were more likely to utilize trials for justice, while low income countries were more likely to use amnesty for justice.<sup>185</sup> Thus, to even begin a realistic discussion of punishment and deterrence, economic reconstruction has to be prioritized. Khoury and Ghosn suggest an *adoption scheme*, as was used in Lebanon, to help fund bottom-up efforts at economic revitalization.<sup>186</sup> In this way, non-governmental organizations (“NGOs”), international governmental organizations (“IGOs”), other states can directly fund and compensate grassroots projects aimed at the rebuilding of infrastructure and homes, social and psychological rehabilitation of civil society, and creating a balance of access to economic welfare for all cleavages, ensuring no one group monopolizes these resources.<sup>187</sup> This scheme ensures enough financial flexibility to allow a manifold of programs to be established that tailor to the needs of particular regions, while simultaneously providing room for the government to undertake internal reconstruction measures without the weight of an unilateral national economic transformation.

## B. Reparations

Reparations can work as a compliment rather than a stand-alone mechanism to economic reconstruction and the broader aims of transitional justice. Reparations, as a vehicle for restorative justice, explicitly address the damages and injuries to victims and families of victims. The need for such an apparatus has even been addressed by the UN, which has created a framework for post-armed conflict states to work with to address victim needs following mass violations of international human rights law and international humanitarian law.<sup>188</sup> Reparations pairs with reconstruction in that victim recognition is emphasized simultaneously with state reform, ensuring that trust and social parity is enshrined in the transitional process. It is critical, however, that reparations are not approached with a traditional lens

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<sup>185</sup> Tricia D., Olsen, Leigh A. Payne, and Andrew G. Reiter, *At What Cost? The Political Economy of Transitional Justice*, 6 *TAIWAN Journal of DEMOCRACY* 165, 179 (2010).

<sup>186</sup> Khoury and Ghosn, *supra* note 176, at 52.

<sup>187</sup> *Id.*

<sup>188</sup> G.A. Res. 60/147 (Mar. 21, 2006).



that is molded around domestic forms of damages for civil injuries. Such mechanisms rely solely on state instituted reparation programs comprising only of material compensation to restore victims back to their original state prior to the injury. This vehicle is unrealistic for Syria considering both the sheer number of victims to be repaired and the financial incapacity and relative weakness of the state. Thus, programs for reparations, akin to the economic reconstruction discussed above, should expand beyond state administered programs to include third parties such as other states and NGOs, as well as diversify its capital of reparations to include both material and symbolic redress across a spectrum targeting individuals and communities.<sup>189</sup>

As was recommended for economic reconstruction, an *adoption scheme* can provide the financial means to pursue programs of redress by expanding the pool of sources from which compensation and projects can be drawn. For instance, following the 2006 war in Lebanon, Qatar took lead in bypassing the Lebanese government to directly compensate victims in some of the most damaged parts of the country, including Aynata, Beint Jbeil, and Khiam.<sup>190</sup> Victims would submit claims to the local Qatari office, which upon review, would issue checks directly back to the victims.<sup>191</sup> Such forms of compensation can address housing damages, loss of income, and treatment for physical and mental health. Beyond such individualized material compensation, the *adoption scheme* can be also used to establish community programs, including educational grants and health services.<sup>192</sup> Reparations can thus induce the early stages of socio-economic justice while concurrently working with reconstruction projects to provide the needed state infrastructure to not only maintain

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<sup>189</sup> See generally Ernesto Verdeja, *A normative theory of reparations in transitional democracies*, 37 METAPHILOSOPHY 449 (2006).

<sup>190</sup> Faten Ghosn and Amal Khoury, *The case of the 2006 War in Lebanon: reparations? Reconstruction? Or both?*, 17. INT'L J. HUM. RTS. 1, 10–11 (2013).

<sup>191</sup> *Id.*

<sup>192</sup> Naomi Roht-Arriaza, Naomi. Pablo De Greiff, Ed., *The American Journal Handbook of Comparative Law Reparations*, 56 AM. J. COMP. L. 233, 237 (2008) (book review).

such progress but to also bridge grassroots efforts with broader, national efforts.

### C. Reconciliation

A consistent theme throughout non-retributive justice is the transformation of relationships throughout society. Without targeting the crux of the social breakdown that allowed such violence and dehumanization to occur, groups are going to maintain their narrative that perpetuates an “us” vs. “them” dimension. Scholars warn of the impact of enemy images- the perpetual cycle that moves from hostile images to violence back to a self-reinforcing hostile image of the “other” by providing evidence of the “other’s” ill intentions.<sup>193</sup> To halt such cycles, the relationships and the images have to be reimaged. Integral to reimagining relationships for the future is understanding the relationships of the past.

A truth and reconciliation commission should be established, to provide an exhaustive history of all the abuses and human rights violations committed by all actors in the war for all communities throughout Syria. In contrast to trials where individual criminal liability is emphasized, truth commissions aim to create a single narrative that encompasses all of the crimes committed by all party sides to the armed conflict. This compiled narrative thus creates a new collective identity.<sup>194</sup> With such a comprehensive documented history, areas within state institutions that require the most reform can be uncovered, necessary reparations to certain victimized communities can be outlined, and projects can be undertaken to begin social and psychological healing at the most grassroots level possible. Furthermore, similar to the Independent International Commission of Inquiry on the Syrian Arab Republic and the International Impartial

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<sup>193</sup> Janice Gross Stein, *Psychological explanations of international conflict*, HANDBOOK OF INTERNATIONAL RELATIONS, (Walter Carsnaes, Thomas Risse, & Beth A Simmons eds., 2002) at 294.

<sup>194</sup> Anne K. Krüger, *From Truth to Reconciliation: The Global Diffusion of Truth Commissions*, RECONCILIATION, CIVIL SOCIETY, AND THE POLITICS OF MEMORY: TRANSNATIONAL INITIATIVES IN THE 20TH AND 21ST CENTURY, 343 (Birgit Schwelling ed., 2012).

and Independent Mechanism, the documentation of such abuses can be stored for later prosecutorial use.

Local control over reconciliation, which has already emerged even in the midst of continuing armed conflict, is pivotal in allowing for a peacebuilding process that is individualized and sensitive to the particular regions and communities it is affecting. Moreover, it allows for a grassroots level of accountability and transparency within the rebuilding process, safeguarding that the products of such endeavors are sustainable. For instance, in Al -Waar, a town in the Homs governorate that witnessed a large amount of sectarian violence, the local council took part in a series of negotiations over the course of a year with both the Regime, rebels, and Russian forces.<sup>195</sup> Despite many obstacles to negotiations, the council was able to ensure a halt to hostilities, access to humanitarian assistance, prisoner exchanges, and general disarmament.<sup>196</sup> Because of the work by the local council, residents reported improved living conditions, including increased access to basic goods, increased freedom of movement, and an increased feeling of safety.<sup>197</sup> In addition to local governance, initiatives for reconciliation have been spearheaded by community leaders, women's groups, youth initiatives, religious leaders, and various other civil society organizations.<sup>198</sup> In some cases, these groups have approached reconciliation through a teaching lens, convening workshops and open forums to discuss conflict resolution, violence prevention, battling sectarian rhetoric, and coexistence.<sup>199</sup>

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<sup>195</sup> Samer Araabi and Leila Hilal, *Reconciliation, reward, and revenge: Analyzing syrian deescalation dynamics through local ceasefire negotiations*, 16–19 (2016).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 19.

<sup>198</sup> Metwaly Abo Naser, Sara Hellmüller, Leila Hila, Ryme Katkhouda, and Yosra Nagui, *Inside Syria: What Local Actors Are Doing For Peace*. 21, SWISSPEACE (Jan. 2016), [https://www.swisspeace.ch/fileadmin/user\\_upload/pdf/Mediation/Inside\\_Syria\\_en.pdf](https://www.swisspeace.ch/fileadmin/user_upload/pdf/Mediation/Inside_Syria_en.pdf).

<sup>199</sup> *Id.*

## VI. CONCLUSION

When assessing Syria's future in terms of transitional justice, it can be easy to get caught in a maelstrom of romanticized, neoliberal views on justice: punishing the guilty, while avenging the victims. Syria has certainly proven to be one of the worst atrocities in contemporary history, with media and mass communication bringing the destruction of the war to our living rooms half a world away. At no point should it be doubted that those that have committed the worst of crimes need to be held accountable; they need to pay the price for crimes they have committed and the lives they have taken. But by the same token, the people of Syria, those whom were devastated by the war, those whose livelihoods have been swept away, those that remain to find their county broken, deserve to have realistic and effective mechanisms in place to transition their country away from armed conflict into a new period of restoration. In the case of Sierra Leone, the running joke was that every single detainee at the Special Council had gained weight during incarceration due to the quality of food, while detainees at regular courts were packed in prison cells like meat freezers<sup>200</sup> and amputee victims were begging on the streets for food.<sup>201</sup> Similarly, victims in the Ugandan conflict noted how Dominic Ongwen, who was on trial for seventy counts of war crimes and crimes against humanity, had better living conditions and entitlements than his victims back in Uganda who had not received any form of support to heal or recover.<sup>202</sup>

Furthermore, the global climate surrounding these international criminal courts, that ostensibly aim to deliver justice, is overwrought, not only in claims of impotence, but also in doubts of legitimacy. Take, for example, the United States' refusal to allow ICC

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<sup>200</sup> Sulakshana Gupta, *The Not So Special Court for Sierra Leone*, NEW INTERNATIONALIST (Nov. 2, 2009), <https://newint.org/columns/essays/2009/11/01/special-court-sierra-leone>.

<sup>201</sup> *Did Sierra Leone Get War Crimes Justice?*, BBC NEWS (Nov. 6, 2009, 9:54AM GMT), <http://news.bbc.co.uk/2/hi/africa/8345618.stm>.

<sup>202</sup> Sarah Kihika Kasande, *The Trial of Dominic Ongwen: A Delicate Balance Between the Rights of the Accused and the Interests of Victims*, ICTJ (Oct. 25, 2018), <https://www.ictj.org/news/trial-dominic-ongwen-delicate-balance-between-rights-accused-and-interests-victims>.

prosecutor, Fatou Bensouda, into the country to investigate potential war crimes violations by the U.S. in Afghanistan.<sup>203</sup> As one of the five permanent members of the Security Council, the U.S.' defiance to comply with the ICC is behavior that engenders further disregard of these allegedly "permanent" international institutions. If one of world's global powers is inclined to ignore strides at retributive justice, there leaves little incentive for smaller, transitioning countries to act any differently.

Institutions are at play that hinder the establishment of such international prosecution, particularly if the Assad regime is to stay in power and Russia is to continue shielding the regime. Both ad hoc tribunals and the ICC would require approval from the Security Council, which is currently unattainable with Russia's occupancy of one of the five permanent seats. Similarly, domestic courts demonstrate an inability to deliver justice with their current dependency on the Assad regime. Unless the judiciary was to undergo an exhaustive purge and reformation, domestic courts would only continue in the path of systematic injustice.

Even if Syria was able to find a path to international prosecution, the cost and challenges of pursuing such a mechanism do not appear to equal the value received by the victims. The complexity of such lengthy trials implies notoriously high costs, especially when the cost is evaluated against the number of people indicted by these tribunals. From the ECCC costing 300 million dollars to the ICC costing a billion dollars, international prosecution proves to be a financial feat with a deep need for a steady stream of resources. Given that President Trump has been cutting back on American funding of the UN and other international institutions, it will be quite difficult for any new tribunal to get the requisite financial support to be effective.<sup>204</sup>

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<sup>203</sup> U.S. Revokes ICC Prosecutor's Entry Visa over Afghanistan . . . , *Reuters Investigation*, THOMSON REUTERS (Apr. 5, 2019, 3:52 PM), [www.reuters.com/article/us-usa-icc-prosecutor/u-s-revokes-icc-prosecutors-entry-visa-over-afghanistan-investigation-idUSKCN1RG2NP](http://www.reuters.com/article/us-usa-icc-prosecutor/u-s-revokes-icc-prosecutors-entry-visa-over-afghanistan-investigation-idUSKCN1RG2NP).

<sup>204</sup> Robbie Gramer and Colum Lynch, *Trump Stealthily Seeks to Choke Off Funding to U.N. Programs*, FOREIGN POL'Y (Oct. 2, 2018, 5:21 PM).

Additionally, international prosecution also faces challenges in its pursuit of evidence, the bread and butter of all prosecutions. From political obstacles to the mere logistics of sorting through the volumes of evidence, trials struggle to find appropriate means of proving allegations, especially without the guidance of a codified rule book to screen admissible and non- admissible evidence. Furthermore, the procurement of evidence proves especially challenging given the serious nature of the crimes and the destruction caused by armed conflict.

Thus, instead of allocating resources and hope to an institution that has failed to deliver justice and successful deterrence, alternate means of transitional justice should be explored. The same amount of money that has been spent on tribunals could be diverted to reconstruction efforts (political, economic, and military) and reparations that focus on rebuilding from a grassroots level. This could take the shape of new schools, memorializing the lives lost, rebuilding fractured industries, investing in new and burgeoning local markets, or even rebuilding broken roads and buildings. Resources could also be redirected towards reconciliation initiatives that aim to rebuild and transform relationships throughout social groups.

There are a number of alternatives for transitional justice other than retributive justice. For the people of Syria, post armed conflict mechanisms need to be explored in a manner that works to benefit them, rather than alienate them. Justice should be investing in the future of Syrians, instead of investing in showcases of inaccessible, pseudo-justice.

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<https://foreignpolicy.com/2018/10/02/trump-stealthily-seeks-to-choke-off-funding-to-un-programs/>

Table 1: International Criminal Courts

Court	International Criminal Tribunal of the former Yugoslavia ("ICTY")	International Criminal Tribunal of the former Rwanda ("ICTR")	Extraordinary Chambers in the Courts of Cambodia ("ECCC")	Special Court for Sierra Leone ("SCSL")	Special Tribunal for Lebanon ("STL")	International Criminal Court ("ICC")
<b>Location</b>	The Hague, Netherlands	Arusha, Tanzania	Phnom Penh, Cambodia	Freetown, Sierra Leone	The Hague, Netherlands	The Hague, Netherlands
<b>Years Active</b>	1993-2017	1994-2015	2006-Present	2002-2013	2009-Present	2002-Present
<b>Type of Court</b>	International	International	Hybrid	Hybrid	Hybrid	International
<b>Established by</b>	UN Resolution 827	UN Resolution 955	Joint agreement between UN and domestic government	UN Resolution 1315; Domestic Law	UN Resolution 1757; Domestic Law	Rome Statute
<b>Estimated Total Cost (USD)</b>	\$2.3 Billion	\$2 Billion	\$300 Million	\$300 Million	\$500 Million	\$1 Billion
<b>Number of Persons Indicted</b>	161	93	9	13	9*	45
<b>Number of Persons Convicted</b>	90	62	3	9	2**	5

Rate of Convictions/ Indictments)	.56	.66	.33	.69	.22	.11
Estimated Cost Per Indicted Person (Estimated Total Cost/ Number of Indicted Persons)	\$14.2 Million	\$21.5 Million	\$33.3 Million	\$23.0 Million	\$55.5 Million	\$22.2 Million
<p>*Two individuals and two media companies were indicted on charges of contempt and obstruction of justice for releasing confidential information related to ongoing STL cases. They were not accused of participating in the 14 February 2005 attack.</p> <p>**One individual and one media company were found guilty of contempt and obstruction of justice. As of December 2018, no person has yet been convicted for involvement in the 14 February 2005 attack that killed prime minister Rafik Hariri and 22 others.</p>						



**Table 2: Freedom Level in 2018**

	<b>Freedom Level</b>
<b>ICTY</b>	
<i>Bosnia &amp; Herzegovina</i>	Partly Free
<i>Croatia</i>	Free
<i>Macedonia</i>	Partly Free
<i>Montenegro</i>	Partly Free
<i>Serbia</i>	Free
<i>Slovenia</i>	Free
<b>ICTR</b>	
<i>Rwanda</i>	Not Free
<b>ECCC</b>	
<i>Cambodia</i>	Not Free
<b>SCSL</b>	
<i>Sierra Leone</i>	Partly Free
<b>STL</b>	
<i>Lebanon</i>	Partly Free

**Table 3: Rule of Law in Former Yugoslavian States**

	<b>Rule of Law</b>
<i>Bosnia &amp; Herzegovina</i>	7/16
<i>Croatia</i>	11/16
<i>Macedonia</i>	8/16
<i>Montenegro</i>	10/16
<i>Serbia</i>	9/16