

**ONGOING CRIMES AND THE UNLIKELIHOOD OF PUNISHMENT -
SYRIA AS A CASE STUDY**

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ABSTRACT

Taking the war in Syria as a case study, this dissertation proposes an account of criminal accountability that merits the language that is expressed by calls for criminal accountability, even where physical punishment is not possible. Syria is, of course, a society that is in the midst of ongoing conflict – one where almost every party on the battlefield is committing atrocity crimes against civilians. In response, and – importantly – while the conflict continues, the international community, the United Nations, and the Syrian diaspora have made calls for holding war criminals accountable. But, what are values of these calls if there is a lack of institutional criminal accountability to punish perpetrators. The Syrian government, who is reportedly involved in atrocity crimes against its citizens, controls domestic criminal institutions in Syria. Syria is not a signatory to the Rome Statute of the International Criminal Court, and there seems to be no international will to refer crimes committed during the conflict in Syria to it.

This dissertation poses the question: given the significant unlikelihood of institutional criminal punishment, are there justifications for calls for criminal accountability in the midst of the ongoing Syrian war?

The philosophy of criminal law provides several justifications as to why criminal justice institutions, in stable societies hold perpetrators to account and punish them. I suggest that calls for criminal accountability are important because they express willingness to punish. Calls are not punishment, but they aim to deliver the same values that punishment delivers. Therefore, the values that calls for criminal accountability express stem from the values of the criminal justice system itself, including those values stemming from fact-finding and trials. This dissertation advocates for calls that aim to create the possibility of punishment. The language that has been expressed by these calls for criminal accountability has value to societies in general, and to victims in particular. The values of calls might not be as important as the values of punishment but calls express willingness to hold criminals accountable.

The Syrian case triggers some critical questions for international criminal law and policy. It challenges some established norms and doctrines, showing their inability to find solutions to cases where civilians are suffering heinous crimes, and where neither the law nor the international community has been able to act. This dissertation proposes that, even when there is no possibility of holding perpetrators accountable during ongoing conflicts, there is still value in the messages that such calls for criminal accountability express. It as well argues that using the language of *criminal* accountability is much stronger than using the language of *human rights*. Criminal law generates punitive responses as opposed to undefined responses that calls for human right violations generate. In the absence of a criminal justice system that has the ability, willingness, and authority to call perpetrators to account, it is our humanity that justifies such calls.

KEY WORDS: Criminal accountability; Syrian conflict justifications; criminal law; human rights law; atrocity crimes

DEDICATION

To the Syrian people, I dedicate this dissertation

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Gratitude makes sense of our past, brings peace for today, and creates a vision for tomorrow

Melody Beattie

I would like to express my appreciation to few people who, without their full support, motivation, and guidance, I would not have had the strength to complete this challenging work, and face the challenges that are still to come.

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Figure 1: numbers of civilians that each party killed in a graph.

LIST OF ABBREVIATIONS

CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
COI	Independent International Commission of Inquiry on the Syrian Arab Republic
CWC	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction
FSA	Free Syrian Army
HTS	Hay'at Tahrir al-Sham
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHFFC	International Humanitarian Fact-Finding Commission

IHL	International Humanitarian Law
IIIM	International, Impartial and Independent Mechanism
ISIS	Islamic State of Iraq and Syria (Dae'sh/ISIL)
NGOs	Non-governmental organizations
MSF	Médecins Sans Frontières
OHCHR	Office of the United Nations High Commissioner for Human Rights
R2P	Responsibility to Protect
SAA	Syrian Arab Army
SCSL	Special Court for Sierra Leone
SDF	Syrian Democratic Forces
SEL	State Emergency Law
SNHR	Syrian Network for Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Council

UNSC United Nations Security Council

YPG People's Protection Units

CHAPTER ONE: INTRODUCTION AND A POSSIBLE ALTERNATIVE

Part One: Introduction

Part Two: A Possible Alternative

PART ONE: INTRODUCTION

I. METHODOLOGICAL APPROACH

A. What Is Criminal Accountability?

For the purpose of this research, the term “criminal accountability” refers to *individual punishment* as a response to the egregious atrocity crimes that are listed in the Rome Statute of the International Criminal Court (ICC).¹ Individual criminal accountability is here distinguished from state, corporate, and institutional responsibility – these latter concepts are not the subject of this dissertation.

Criminal accountability is one of the ways that societies use their criminal justice systems to hold perpetrators criminally accountable. The criminal justice system includes the following sequential steps: (1) fact-finding (i.e., investigation, collection of evidence, documentation, deposition of witnesses, and preparation of cases); (2) trial and possible conviction; (3) if defendants are found guilty during trial, they are punished. Punishment is a final step in the criminal justice system, but it is often the case that, when people call for criminal accountability, they are seeking a particular response, i.e., punishment. So, although the previous two steps are crucial to the criminal justice system, the criminal process is not complete unless perpetrators are punished. Moreover, although there are many ways to hold criminals accountable – such as civil responsibility, reparation, and truth commissions – the

¹ *Rome Statute of the International Criminal Court, 17 July 1998, UN Doc A/CONF 183/9. (entered into force 1 July 2002). Articles 5, 6, 7 & 8. [ICC].*

term “criminal accountability” refers to criminal punishment. Throughout this dissertation, I will use the terms “criminal accountability” and “criminal justice” synonymously.

B. What Are Calls for Criminal Accountability?

Calls for criminal accountability during the ongoing Syrian war have been loud and insistent. In one way or another, these calls have expressed censure of the international community’s silence regarding the war in Syria. They have come from Syrian citizens, foreign governments, intergovernmental organizations, non-governmental organizations (NGOs), international lawyers, scholars, politicians, human rights activists, and many others. Calls include all practices and discourses that aim to hold criminals accountable, starting with simple declarations by the United Nations (UN), politicians, diplomats, heads of states, and policymakers, including the process of documentation and investigation and trials in absentia. But they have not led to *punishment*, as we understand the concept in the criminal justice system, and they are unlikely to lead to punishment.

C. Contribution and Personal Motivation – Why Calls in Syria?

It is often the case that societies seek to deal with the aftermath of a conflict either upon termination of the war, or when the particular society is on the cusp of transition from conflict to stability. Transitional justice philosophy provides justifications as to why societies hold criminals accountable after a conflict. The philosophy of criminal law as well provides justifications as to why stable societies endeavour to punish criminals during times of stability. This dissertation, however, deals with a case of *ongoing* war crimes, where there is an absence

of criminal justice institutions that are able and willing to punish perpetrators. It questions the justifications for calls for criminal accountability before the end of conflicts.

The case of Syria provides an interesting example that is worth examining. In February 2011, Syrians began what they thought then to be a revolution against an authoritarian regime, but the situation rapidly transformed into a bloody conflict, not only between the citizens and the government, but also involving many other states' armies, non-states' armies, and terrorist groups. The conflict continues, even at the time of writing in September 2020, and the international community has failed to bring the conflict to an end. The Syrian civil conflict has been singled out as the world's largest crisis since World War II, with over six million displaced persons who have been forced to flee a war-torn country and more than half a million civilians who have been killed. People have lost their homes, security, and dignity, yet the international community has not contained the Syrian tragedy, nor has international law been able to provide legal solutions to complicated situations that the war has exposed. In this dissertation, I discuss one of these situations: the unlikelihood of punishment when atrocity crimes are ongoing.

This dissertation aims to develop a new way of thinking in the philosophy of criminal law and international criminal law. There is a considerable amount of scholarship, studies, and statistics that address the Syrian case and the challenges it has created for international law. However, there has been little discussion of the justification of calls for criminal accountability in the midst of an ongoing war, particularly when punishment is unlikely to take place. Therefore, this dissertation assesses and analyzes the challenge that the Syrian case has

demonstrated, i.e., that of trying to provide justifications for calls for criminal accountability in the midst of a civil war.

The overarching aim of this dissertation is to open the debate to a new way of thinking that can contribute to the philosophy of criminal law in cases of instability. I am seeking to open the door for the establishment of an account in the philosophy of criminal law that merits that language of “criminal accountability,” but one that is divorced from punishment. I propose a concept that values the language of criminal accountability in cases where physical punishment is not possible. I argue that the Syrian case poses critical questions for international law and policy. It challenges some established norms and doctrines, showing their inability to find solutions to cases where civilians are subjected to heinous crimes, and where neither the law nor the international community have been able to resolve the situation. I have already spoken and written about some of these gaps in international law. In my master’s thesis at Osgoode Hall Law School, I explained that the doctrine of responsibility to protect (R2P) has failed to respond to cases where mass atrocity crimes against civilians are escalating on a daily basis. I questioned whether, after the current and continuing failure of the R2P in Syria, R2P is still a viable doctrine. I have also argued that the Syrian case has shown that, contrary to its mission, humanitarian intervention materialized only because of the political interests of individual states, rather than to fulfill its intended goals, i.e., to save humanity from the scourge of war.² The Syrian case has, as well, challenged the theory of transitional justice. I have said

2 Ghuna Bdiwi, “The R2P Yesterday, Today, and Tomorrow: Analyzing Canada’s Response to the Syrian Conflict: Accountability for Responsibility” (2019) 1 *The Canadian Journal on the Responsibility to Protect*, Munk School of Global Affairs and Public Policy, University of Toronto.

elsewhere that Syria was able to “push the traditional paradigms of transitional justice further to cover situations in which transitions have not even begun to take place. The Syrian case has generated a new approach to how the concept of transitional justice can be applicable to face today’s political challenges.”³ The war in Syria has also challenged both human rights law and refugee law, which is why it represents a new phenomenon that will re-shape our understanding of the gaps in international law.⁴

Finally, this dissertation is special for me, not only as a lawyer, a researcher, and a doctoral student, but also as a Syrian citizen who has been displaced outside of my homeland and who has had the opportunity, at Osgoode Hall Law School, to provide firsthand insight into the heinous conflict. I hope that this research will help scholars, lawyers, and policymakers to find ways of avoiding future similar tragedies. How should we develop international criminal law to fill the gaps that have been unveiled by the Syrian tragedy? What lessons can we pass on to future generations?

Since beginning work on this dissertation with Professor François Tanguay-Renaud, I have become very attached to this project, not only as academic research, but also as a legal

3 Ghuna Bdiwi, “Attempting Justice Within Conflict: How Has Syria Influenced the Contemporary Conceptions of Transitional Justice?” (November 2019) Tahrir Institute For Middle Eastern Policy, online: <<https://timep.org/commentary/analysis/attempting-justice-within-conflict-how-has-syria-influenced-the-contemporary-conceptions-of-transitional-justice/?fbclid=IwAR0z0I7CeYg6Wzdi7Ut4DfbRYN9W1veB6NQKtnaJQgAlimOJPLYFGtmy84o>>.

4 See Michael P. Scharf, Milena Sterio & Paul R. Williams, *The Syrian Conflict’s Impact on International Law* (NY: Cambridge University Press, 2020). [Michael P. Scharf, Milena Sterio & Paul R. Williams]. Reese Erlich & Noam Chomsky, *Inside Syria: The Backstory of Their Civil War and What the World Can Expect* (NY: Prometheus Book, 2016). [Reese Erlich & Noam Chomsky].

activist. I have travelled to join many Syrian lawyers' initiatives for criminal justice. I have met with officials in Europe, the US, and Canada, and I have raised awareness about the importance of justice during conflict in universities' research centres and among the general public. In 2019, I was nominated by the UN Special Envoy to Syria to serve on the Constitutional Committee that is tasked with drafting the Syrian constitution. At the opening session, I was invited to speak to the Committee about my vision for the Syrian constitution; my message was that, without criminal justice, peace cannot come to the Syrian people. With this dissertation, I hope that my academic, practical, and personal experiences will enable me to produce a genuine addition to existing scholarship in criminal law philosophy, as well as make a contribution to the Syrian people, who have suffered dreadful war crimes during the last 10 years.

D. Acknowledgement and Limitations of the Research

One can rightly ask: who is the party (the criminal) that the "calling to account" is meant to target? Although I acknowledge that concentrating on one party would narrow the dissertation and thus work to its advantage, concentrating on one party was not possible for two reasons. The first reason is a personal one; for my personal security, it would be unsafe to concentrate on one party. But, moreover, I am quite convinced that there are no innocent parties on the battlefield; it would be immoral to take a stand against one party when all parties are involved in war crimes. I am using Syria as a case study to demonstrate that there are situations when the language of the calls is intrinsically valuable, regardless of whom the perpetrator is.

The second reason is a pragmatic one. The major states parties to the conflict, which I address later in this chapter, including the Syrian government, are not signatories to the Rome

Statute. This provides for a jurisdictional issue for the international justice system, which I will address. And, given that the Syrian government itself stands accused of war crimes, it's obviously extremely unlikely that the state's own domestic criminal justice system will hold criminals accountable. As for the non-state actors – i.e., rebel groups – the Syrian government is unlikely to refer them to the ICC, and would instead try them domestically, that is, in Syrian criminal justice institutions. However, if that happens, defendants will deny the legitimacy of the courts, arguing that they are neither impartial nor objective. In other words, rebels will not accept the legitimacy of trial by al-Assad's government.

The only party to the conflict that can be held accountable is the Islamic State of Iraq and Syria (ISIS) (also known as Dae'sh or ISIL) and other terrorist groups, like al-Nusra Front that is affiliated with al-Qaeda. ISIS and other terrorist groups can be tried domestically and internationally, but the process of holding them to account is very difficult. There are rumours that the United States might ask the Kurdish militias to try ISIS fighters. Many questions could be asked about the legitimacy of such trials, and whole dissertations written about it. Do the Kurds form a state? Are they impartial? Kurdish militias were the armed group that defeated ISIS on the ground, with the assistance of the US. Nonetheless, concentrating on ISIS as the subject of calls for criminal accountability is possible; however, it is not the focus of this dissertation. Instead, my focus is to highlight a case where criminal accountability is not possible; hence, calling ISIS to account is not my focus. That said, in the future, I do intend to write about ISIS trials. I therefore ask readers to accept the structure of this the dissertation; I acknowledge that it is limited in scope.

E. Research Design – Timeline and Methodology

Using doctrinal and analytical approaches, this dissertation will take the ongoing war in Syria as a case study to investigate the values that a society gains by calling for criminal accountability in the absence of criminal justice institutions. The chosen timeframe for the data collection is limited to the period between February 2011, the date the Syrian uprising started, and September 2020, the time when I felt confident that the information I had about the case study was sufficient to assess the questions under investigation. This dissertation conducts an in-depth analysis on both primary and secondary sources. It often uses the criminal law, international human rights law, international humanitarian law (IHL), international criminal law, and Syrian domestic law as primary sources. The research also considers relevant instruments, such as reports and studies by credible governmental and NGOs.

The main question that this dissertation aims to address is: given the significant unlikelihood of institutional criminal punishment, are there justifications for calls for criminal accountability in the midst of the ongoing Syrian war? The question will be unpacked through a series of sub-questions that will be posed in each chapter.

The dissertation is organized into three chapters, and each of the first two chapters is divided into two parts, where the third chapter provides the conclusion. This chapter, Chapter One, is titled “Introduction and a Possible Alternative.” Part One introduces in its first section the methodological approach of the dissertation. It defines the meaning of “criminal accountability” and what is meant by calls for criminal accountability. It explains how this dissertation will contribute to the existing literature in the field, in addition to my own personal

motivation for the project. Finally, the section explains the research design, as well as the limitations of the project. The second section of Part One deals with the Syrian case study. It provides background information about the conflict: how it started, and the circumstances of its transformation from a revolution to a civil war. It also explains the geographical and demographic dimensions of the country, which are very much related to elements of the conflict.

To call for criminal accountability is to point out those suspected of crimes, but the complicated nature of the Syrian conflict makes it difficult to identify all parties to it. Therefore, the second section of Part One separates the parties to the conflict into three categories: the government, non-state armed groups, and states parties. I provide reports to show that all parties on the battlefield are involved in atrocity crimes. The section provides some figures compiled by international organizations that show the number of civilians killed by each party from February 2011 to September 2020; the aim is to give some sense of the intensity and involvement of each party. Moreover, since 2011, reports have provided evidence of conduct that constitutes war crimes and crimes against humanity against civilians.⁵ I address some of the crimes that have been reported by the Independent International Commission of Inquiry on the Syrian Arab Republic (COI). The UN Human Rights Council (UNHRC) established the COI on 22 August 2011, with a mandate to investigate all alleged atrocity crimes in Syria from the beginning of the conflict. Finally, the section introduces the consequences of the Syrian

5 *UNHRC, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (5 February 2015) 27th Sess, UN Doc A/HRC/28/69, online:* <<http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A.HRC.28.69E.doc>>. [COI, 2015].

conflict on civilians, such as the loss of life, the dire humanitarian conditions, the health impacts, and the negative impacts on Syria's heritage – all consequences that have led to the Syrian crisis being deemed to be the worst humanitarian refugee crisis since World War II.

Although all of the previously mentioned crimes are categorized and defined under Articles 7 and 8 of the Rome Statute, the Rome Statute is applicable only to states parties, and Syria is not a party to it. The ICC has neither the authority to investigate allegations of crime, nor the authority to punish criminals if they were to be found guilty.

The following section classifies the conflict for each of the warring parties and analyzes the international law that applies to each of them. It further identifies the treaties and customary laws that are applicable to the Syrian case. Of course, treaties apply only to the states that have ratified them. Syria is a signatory to and has ratified the four Geneva Conventions of 1949. It signed and ratified the Additional Protocol (I) to Geneva Conventions 1977, which applies to international armed conflicts, but it did not sign the Additional Protocol (II) to Geneva Conventions 1977 that applies to non-international armed conflicts. However, in non-international armed conflicts, Article 3 of the four Geneva Conventions remains applicable. Moreover, international human rights law obliges Syria to implement universally agreed human rights standards.

As a response to vicious atrocity crimes in Syria, calls to hold criminals to account have been loud and insistent, even as the conflict continues. Calls for criminal accountability during the ongoing war have come from almost all actors – Syrian citizens, foreign governments, intergovernmental organizations, NGOs, international lawyers, scholars, politicians, human

rights activists, and many others. However, the problem is that there is no criminal justice institution to hold criminals to account; therefore, the following section explains the question of this dissertation and why I argue that there is an unlikelihood of institutional criminal punishment for perpetrators of crimes in Syria.

Normally, it is the case that societies tend to call criminals to account in times of stability, or at a point following the termination of conflict. Only at that point, when the political and legal situations permit, will suspects be brought to justice and punished. Only then will it be possible to hold them accountable. In the case of the Syrian conflict, however, calls are happening while the conflict is ongoing, even before any kind of political settlement is achieved. Although justice during conflicts would be difficult to achieve, with a strong enough political will, it may be possible. However, in the case of the conflict in Syria, the international community has not yet demonstrated the requisite political will. Moreover, a credible criminal accountability system that could handle the justice process and hold those responsible to account does not exist in Syria; and, of course, the existence of such a system is a necessary component. Legally speaking, there are two ways to prosecute defendants – via the Syrian domestic criminal justice institutions, or via international criminal justice institutions. Unfortunately, neither option is available in the Syrian case. In this section, I explain the constraints on the Syrian domestic criminal justice system, which would otherwise be the ideal institution to hold perpetrators accountable. Syrian domestic criminal justice institutions lack the major characteristics that are necessary under the rule of law, i.e., those that distinguish any credible legal system; namely, it lacks impartiality, independence, and neutrality. At best, it

would be appropriate to claim that Syrian domestic criminal justice institutions are unable and unwilling to perform the task of criminal justice.

Simultaneously, the international criminal justice system has no role to play over crimes in Syria because it lacks the jurisdiction that is legally required. The ICC would have an important role to play in holding perpetrators of crimes in Syria accountable; however, the ICC is unlikely to play any role in Syria, at least not currently, because it doesn't have jurisdiction over those crimes. There are two options for overcoming this jurisdictional problem, but neither is viable in Syria. The first option – for the Syrian government to self-refer these crimes to the ICC – is extremely unlikely, given that the al-Assad government is heavily complicit in them. In addition, the Syrian government has continuously claimed that its national criminal justice institutions are in the process of investigating serious crimes, arguing that, since the national proceedings are taking place, the ICC has no role to play. Furthermore, the political and regional situation of the Syrian conflict at the time of writing (fall of 2020) shows the advancement of the al-Assad government's armed forces over its opposition, and victors don't usually refer their own crimes to international courts. Therefore, it is extremely unlikely that the al-Assad government would refer cases to the ICC.

The second option is under the power of Chapter VII of the *Charter of the United Nations*.⁶ The United Nations Security Council (UNSC) can refer alleged atrocity crimes that are within the jurisdiction of the Court's prosecutor. However, due to the political divisions

6 *Charter of the United Nations*, 26 June 1945, (1973) 892 U.N.T.S.1. [*Charter*].

between members of the UNSC, Russia and/or China have repeatedly vetoed all resolutions that sought to refer the situation in Syria to justice.

In response to calls for criminal accountability, some institutions in Europe has taken measures to try to bring about justice, particularly by establishing trials based on the principle of universal jurisdiction. The principle is defined as “a criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.”⁷ Two reasons explain why it is necessary to apply the principle of universal jurisdiction. First, it deals with crimes that infringe peremptory norms of international law (*jus cogens*). A peremptory norm of general international law is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”⁸ Second, these crimes affect international security.⁹ The principle of universal jurisdiction is relatively new to international criminal justice, but has been used to convict war criminals, starting with the Nazis in post-World War II trials, and later in the 1961 International Military Tribunal at Nuremberg, used to convict

7 Stephen Macedo et al., *The Princeton Principles on Universal Jurisdiction. Program in Law and Public Affairs* (New Jersey: Princeton University, 2001) at 28 [Macedo, 2001]. Also see Stephen Macedo, ed., *Universal jurisdiction: national courts and the prosecution of serious crimes under international law* (Philadelphia: University of Pennsylvania Press, 2006) at 21. [Macedo, 2006].

8 *United Nations Convention on the Law of Treaties*, 23 May 1969. Online: <<https://www.jus.uio.no/lm/un.law.of.treaties.convention.1969/53.html>>.

9 A. Hays Butler, “The doctrine of universal jurisdiction: a review of the literature.” (2000) 11:3 *Criminal Law Forum* at 356. [Butler, 2000].

Adolf Eichmann, and later still in the 1999 trial of former Chilean dictator Augusto Pinochet.¹⁰ Some European states hope to apply the principle to criminalize perpetrators of war crimes in Syria, and thereby bring justice to victims and prevent impunity. Despite past successes, there are limits to the extent that the principle can be used; the main obstacle is that most Syrian regime personnel who have been accused of committing war crimes are in Syria, and they are unlikely to travel outside of the country.

Returning to this dissertation's main question, and considering the absence of a reliable and credible criminal justice system in Syria, are there any justifications to call for criminal accountability in the midst of war? In Chapter Three, I will suggest there are important values that have been expressed by calls for criminal accountability. But here in Part Two of Chapter One, I will suggest a possible alternative – one that I will ultimately reject – to calls for criminal accountability: using human rights law.

Given that criminal accountability –more precisely, punishment – is unlikely to happen, why should we continue to call for it when there is another viable alternative, i.e., human rights law? Rather than using the language of criminal law, why not look to the language of human rights and call for the application of human rights law? While legal avenues are currently unavailable for holding criminals accountable, there might be an opportunity to instead apply human rights law. The idea is that there is room to use the relevant human rights treaties and conventions to condemn perpetrators for their wrongdoings. Syria has ratified many human

10 See Kenneth C. Randall, "Universal Jurisdiction under International Law" (1988) 66 *Tex. L. Rev.* 800-801. [Randall, 1988].

rights conventions and treaties, and by referencing them, it might be possible to hold violators of human rights law accountable for breaching the intentions and provisions of human rights law. Therefore, in Part Two, I offer a normative evaluation of an alternative to calls for criminal accountability in the midst of Syria's civil war. I ask two sub-questions. First, is human rights law applicable in armed conflict situations? Generally speaking, it is assumed that IHL is the applicable law in times of war, and human rights law is applicable during times of peace. But does this mean that human rights law has no role to play in armed conflicts or war situations? There is controversy among scholarly opinions; therefore, I briefly examine the relationship between human rights law and IHL, and argue that it is indeed acceptable to call for the application of human rights law in the midst of ongoing war situations. However, given that I do not rely overly on this argument, I do not undertake an in-depth discussion on how each type of law, and under which circumstances, should be applied.

The second sub-question is: what remedies or justifications might human rights law offer? To answer this question, I conduct an analysis on human rights law and international criminal law. I suggest that, in general, human rights law does not provide the same responses as does criminal law. François Tanguay-Renaud says, "there is nothing in the idea of human rights that specifically calls for, or is intrinsically connected to, a punitive response. If sound, as I think it is, this further objection entails that the category of human rights is not only under-inclusive, but also over-inclusive, in terms of the wrongs it singles out."¹¹ Of course, there are

11 François Tanguay-Renaud, "State Crimes," in Michelle Dempsey and François Tanguay-Renaud (eds), *From Morality to Law and Back Again: Liber Amicorum for John Gardner* (Oxford: Oxford University Press, forthcoming). [Tanguay-Renaud].

many possible responses to human rights violations. Such responses might include, among other things, the use of declarations from different international committees – say, for example, a condemnation from the United Nations General Assembly (UNGA) or the UNSC. Such condemnations express a language of resentment, and they may encourage further remedies, such as allowing for compensational measures. And, while there may be other remedies, they will not be punishment, at least not punishment in the same sense that criminal law offers. Similarly, criminal law is not associated with the ideas of declaration and compensation. When people call for the imposition of criminal sanctions, generally, they are thinking of punishment. Similarly, if there is no option for punishment, then we tend to think of different types of law, say, civil law. If we instead concentrate on compensation, then we tend to think of different kinds of law as a remedy to our calls, but not of the criminal law. There are certain values and justifications in criminal law that are not the same as in human rights law. When people call for criminal accountability, they are calling for neither compensation nor for declaration; they are calling for punishment, and human rights law does not provide the same remedies as does criminal law. The difference between calls for findings of human rights violations and findings of criminal accountability is punishment. Criminal law brings more to the table; hence, in our case, human rights law does not fill the void.

However, the question remains: given the unlikelihood of institutional criminal accountability in Syria, what is the point of calling to account? Should we go with human rights law and accept whatever limited remedies it may be able to provide, or should we pursue criminal accountability, regardless of the unlikelihood of success on that front? As I will address further in Chapter Two, the language of calls for criminal accountability has a specific

expressive value that the language of calls for human rights violations lacks. Calls for criminal accountability express a message that says, ‘if we could, we would hold criminals accountable, and we would punish them,’ and that is valuable in and of itself. When perpetrators are called to account, they are not called only to censure them for their wrongdoings; rather, the purpose of such calls is both censure and punishment. There is intrinsic value in using the language of criminal law versus human rights law. Human rights law simply does not function in the same way as does the criminal law.

Chapter Two will explain why the criminal law is, and has traditionally been perceived to be, important. The chapter is divided to two parts. Part One starts by highlighting a critical issue that is directly related to the argument in the chapter. It asks whether the justifications of criminal accountability in domestic criminal law are felicitous to international criminal justice. In other words, can theories that justify punishment in domestic criminal law also justify punishment in international criminal law? Many scholars take it for granted that whatever justifies criminal accountability on the domestic level also applies to the international level.¹² International criminal justice, as William A. Schabas describes it, is often considered to be “little more than an afterthought.”¹³ We tend not to think about it as a distinct system that stands by itself, but rather as a supplemental system that corresponds to society’s willingness to criminalize perpetrators only when the domestic system is unable to do so. Others disagree,

12 Immi Tallgren, “The sensibility and sense of international criminal law” (2002) 13.3 *European Journal of International Law* at 565. [Tallgren, 2002].

13 William Schabas, “From Leipzig (1923) to Arusha (1996)” in M Cherif Bassiouni (ed), *International Criminal Law, Vol 3 (The Hague: Kluwer Law International, 1999)* at 171. [Schabas, 1999].

however, claiming that the nature of international crimes is fundamentally different than domestic crimes. In the following section, I rely on literature in both domestic and international criminal law to demonstrate why criminal law is important, and the value of speaking in terms of it. I outline the justifications of the system itself when all of its components – fact-finding, trials, and punishment – are functional. I first seek to establish the nexus between punishment and criminal accountability. Punishment is perceived of as the characteristic that differentiates criminal law from other types of law. Citizens tend to focus on punishment as an end goal and as a distinctive feature of the criminal justice system; it is the end goal of their calls for criminal accountability. In using the language of the criminal law, we highlight a precise response to the calls – that is, punishment. While there are many theories that justify punishment, I will limit my discussion to three of the major ones: consequentialism, retributivism, and expressivism. The first two theories are traditionally understood as providing justifications for inflicting punishment. Each provides its own unique understanding as to why societies punish perpetrators. While consequentialists think of punishment as a deterrence to future crimes (among other justifications that the theory provides), retributivists think of punishment as the just response to perpetrators, who must be punished for the wrongs they have committed. The third theory, expressivism, however, is considered to be the main justification for international criminal punishment.

While it is perhaps true that people tend to focus on punishment as the end goal of the criminal justice system and a distinctive feature of it, the criminal justice system is not only about punishment. The criminal justice system has other important components that must be pursued before imposing punishment. These components are trials and fact-finding, and they

embody values over and above punishment. In trials, wrongdoers are called to account – to explain themselves – to the polity. Sometimes, trials are more meaningful to society than punishment itself. Trials give wrongdoers an opportunity to explain themselves; because they have done something that society thinks is wrong, society wants an explanation as to why they did that particular wrong. Trials are more than a process that seeks the truth. Trials are a communicative process between defendants, victims, witnesses, and society.¹⁴ Therefore, trials have a valuable rationale beyond punishment. Fact-finding is the process of investigating and documenting what has happened during a certain event. We want to have records of what we think are crimes, and fact-finding potentially helps in the prosecution process. Once the truth is known, society has knowledge of what happened. Fact-finding provides a historical archive, and educates future generations so as to lessen inhumane and immoral wrongs from occurring in the future.

In the second part of Chapter Two, Part Two, I consider the problem of authority: specifically, *who has the authority to call to account?* The absence of criminal justice institutions is one of the major obstacles facing societies in ongoing war situations, and by the Syrian case in particular. Criminal justice institutions are one of the crucial characteristics of a stable society. Where such stability does not exist, and crimes are ongoing, the issue of which institution can take on that role will surely be triggered. Immanuel Kant prioritizes justice even if a society decides to abolish itself. He says, “Even if a Civil Society resolved to dissolve itself

14 RA Duff, Lindsay Farmer, Sandra Marshall, and Victor Tadros, *The Trial on Trial: Towards a Normative Theory of the Criminal Trial*, vol 3 (Portland: Bloomsbury Publishing, 2007). [Duff et al, 2007].

with the consent of all its members – as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world – the last Murderer lying in the prison ought to be executed before the resolution was carried out.”¹⁵ In international criminal justice, the question of who may call wrongdoers to account, and the legitimacy of international criminal institutions, is always under the spotlight. States must invite or accept the authority of international tribunals in order for those tribunals to take over the criminal justice role. Or, the request for international court intervention might be possible through a resolution from the UNSC, which intrinsically stems from a political decision. The state usually monitors a special justice apparatus, and the state has standing to call alleged wrongdoers to account. However, Syria has no apparatus by which to hold criminals accountable in the ongoing war. Therefore, in this part, I review theories that deal with the assumption of what might happen if there is no criminal justice system in place. Is there still the means to call for criminal accountability? And does it matter who makes these calls? Should criminal accountability necessarily be a function of the state, or can other entities initiate it? In situations where there are ongoing war crimes against civilians, does it really matter who makes the call for criminal accountability? One argument says that criminal accountability must be carried out by a legitimate authority that has the standing to impose punishment – usually the state, since it is considered deliberative and impartial and is able to do so in a cost-effective way. Another argument, however, assesses the principle of legality. David Luban argues that the legitimacy of international tribunals stems from their ability to practice fair procedures and

15 *Immanuel Kant, The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right, by Immanuel Kant, trans. W. Hastie (Edinburgh: Clark, 1887) at 198. [Kant, 1887].*

impose fair punishments. In other words, it is the quality of the implemented justice that defines the tribunal's legitimacy. The legitimacy of criminal justice institutions comes from their fairness, not from the political authority that establishes them; justice should exist regardless of any political interests. Moreover, he points out that "the centre of gravity in international tribunals lies in the trial, not the punishment, punishment following conviction remains an essential part of any criminal process that aims to project a no-impunity norm."¹⁶ International trials aim to send a message that mass atrocities are taking place and that we must respond to them. In Luban's opinion, in cases where the state is absent, unable, or unwilling to take on the role, then the natural justice approach may justify alternative institutions taking it on. If the state is unable to call wrongdoers to account, then whoever can do it, must do it, because it fulfills the requirement of justice.

Antony Duff has suggested that international tribunals act "in the name of humanity."¹⁷ Our collective humanity is what gives those who call suspects to account for their crimes their standing; when domestic criminal justice institutions fail, international criminal justice institutions must act in their stead.

Chapter Three is the assessment. It uses the arguments from the previous two chapters to answer the question of the dissertation: given the significant unlikelihood of institutional

16 David Luban, "Fairness To Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal law" in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (NY: Oxford University Press, 2010) at 579. [Luban, 2010].

17 Antony Duff, "Authority and Responsibility In International Criminal law" in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (NY: Oxford University Press, 2010) at 598. [Duff, *Authority and Responsibility*, 2010].

criminal punishment, are there justifications for calls for criminal accountability in the midst of the ongoing Syrian war? In Chapter Three, I suggest that calls for criminal accountability are important because they express a *willingness* to punish. Although calls do not do the same job that punishment does, they aim to address values that otherwise justify punishment in stable societies. Calls do not punish, but they aim to deliver the values that punishment delivers. Therefore, the values that calls for criminal accountability express mirror the values of the criminal justice system itself. I argue that these calls allow the possibility of punishment. The language in calls for criminal accountability expresses a willingness to hold criminals accountable.

I divide the chapter into three sections. The first section provides what I argue are the justifications for calls for criminal accountability in the midst of the ongoing Syrian war. It lists the reasons why messages expressed by calls are valuable. The second section suggests the kind of messages that calls send, and identifies who has standing to call criminals to account in the absence of criminal institutions prosecuting crimes in Syria. Using the proper message is essential, and I argue for using the language of criminal law, as opposed to the language of human rights law. By calling the violation a “crime” and the violator a “criminal,” we change the message from one that condemns human rights violations, to another that expresses the willingness to punish perpetrators. Calls send messages to criminals, victims, local societies, and to the international community that, if we could, we would punish perpetrators for their criminal behaviour, and, moreover, that the time will come when perpetrators of atrocity crimes in Syria will be held accountable. Crimes hurt us and they violate the values that we all share as human beings. Whoever violates these values, violates our humanity. Therefore, I argue that

our shared humanity is what provides the standing for our calls for criminal accountability. In the absence of a criminal justice system that has standing to hold criminals accountable, calls for accountability might provide legitimacy to some institution to pursue justice in Syria. Changes in the discourse also put pressure on the international community – pressure to take immediate action to stop the ongoing crimes in Syria. Calls for criminal accountability might provide legitimacy to some criminal institutional practices, thereby avoiding the authority problem of holding war criminals accountable. Criminals in the Syrian case are answerable to humanity and, in the absence of a legitimate Syrian institution, they are answerable to any institution that can take on the criminalization role. Using the language of criminal law might satisfy those who are calling for criminal accountability.

In the third section of this part, I highlight what has been achieved as a result of calls for criminal accountability in Syria; I argue that, in the absence of institutional criminal accountability, calls for criminal accountability have put pressure on individual states and on the international community to take positive steps toward achieving justice. Unfortunately, however, these efforts have not led to punishment in the same sense as what would be achievable in stable societies, and punishment might not happen for the crimes that have happened in Syria. In this section, I outline the three levels where efforts toward justice in Syria have been made: (1) there has been a preliminary investigation by the ICC; (2) – although it is not a criminal court, the efforts of the International Court of Justice (ICJ) have increased the possibility of criminal prosecution for war perpetrators; and (3) there are national criminal proceedings going on in some states in Europe. Notably, when I started my doctoral research, none of these efforts were being made; during the course of writing this dissertation, I have

been able to observe how calls for accountability have encouraged the international community to respond. Today, in 2020, three important justice-like efforts have become a reality, proving that calls for criminal accountability are indeed valuable. I believe that calls are able to deliver some form of alternative justice.

II. SYRIA – THE CASE STUDY

Since 2011, the beginning of the Syrian uprising, scholars have directed their attention to the challenges that the Syrian conflict presents for both established legal norms and international policy. Some scholars have analyzed the root causes of the conflict, while others have assessed its consequences, as well as its impact on international law. In the following, I will discuss recent scholarship that concentrates on how scholars understand the conflict, and how the Syrian file has impacted international law.

Reese Erlich and Noam Chomsky explain the conflict from a historical and geopolitical perspective, directing our attention to the colonization era in the Middle East. They argue that the British and French colonies and other international powers have long been interested in the Middle East. They also point to the Iranian domination of the region, explaining that Iran has an ideological interest in expanding the Shai'a Crescent in the Middle East. Moreover, they claim that, contrary to US propaganda that extols the virtues of the principles of international human rights, security, and democracy, the US (and Western powers in general) cares primarily about its own interests. While Erlich and Chomsky are opposed to humanitarian intervention in Syria, they nonetheless admit that Syria is in a dreadful humanitarian crisis. However, they argue that the crises going on in Eastern Congo, Rwanda, Uganda, and Kosovo are much worse.

Their claim is that, due to lack of media attention, those crises have not led to demands for humanitarian intervention.¹⁸ They assert that the Syrian conflict will have impact not only on Syria but also on the whole region.

Amichai Cohen takes a less conservative approach, arguing that the Syrian conflict has shone a light on the gaps in international law, and the need for change: “The current conflict in Syria reflects everything that is problematic about the current state of affairs in international relations (and to some extent also in international law?) ... International law needs to be rethought. ... Of course, altering international law would probably not change a whole lot on the ground, but it is a first step in the correct direction.”¹⁹ In 2020, in response to the gaps in international law that the Syrian case has highlighted, scholars are now suggesting tools and principles in several areas of international law – tools and principles that address some of international law’s controversial norms, and that look to replace them with new norms. Relying on their observation that the Syrian conflict has impacted international law, Michael P. Scharf, Milena Sterio, and Paul R. Williams argue that the Syrian case is something of a “Grotian moment” – a paradigm shift in international law, a time when new rules will come into being. They discuss “the principles and process of customary international law formation and the phenomenon of accelerated formation of customary international law known as Grotian moments.”²⁰ They note that the use of chemical weapons against innocent civilians has changed

18 Reese Erlich & Noam Chomsky, *supra* note 4.

19 Amichai Cohen, “Syria: International Use of Force and Humanitarian Intervention” in Hilly Moodrick-Even Khen, Nir T. Boms & Sareta Ashraph, eds, *The Syrian War: Between Justice and Political Reality* (NY: Cambridge University Press, 2020) at 87.

20 Michael P. Scharf, Milena Sterio & Paul R. Williams, *supra* note 4 at 2.

the way we understand humanitarian intervention. Contrary to Erlich and Chomsky, they suggest that limits to well-established doctrines in international law, such as the principle of humanitarian intervention, began as early as the 1999 NATO strikes on Serbia to prevent the killing of Kosovar Albanians, but only became fruitful in 2018 at the distinctive moment when chemical weapons were used against civilians in Syria. Participating countries claimed its legality and “embraced a common justification – humanitarian intervention – rather than cite only factual considerations that render use of force morally defensible.”²¹ Moreover, the authors argue that US intervention in Syria against ISIS are “lawful acts collective of self-defences”²² that are changing the traditional understanding of the legality of using self-defence against non-state actors in the territory of a third state without its consent. As well, the authors view Syria as being in a time of change as it pertains to “the negotiation of the Global Compact of Refugees and the Global Compact on Safe, Orderly and Regular Migration,” adopted in 2018.²³ Moreover, the authors direct our attention to how the Syrian conflict has caused the transformation of the traditional accountability paradigm, as a response to the need and as a way of putting pressure on the international community to hold perpetrators of atrocity crimes accountable. The authors’ thesis is that, “As a result, after falling out of favor ..., countries around the world are expanding the use of the global enforcer approach to universal jurisdiction to prosecute Syrian officials and rebels for war crimes and crimes against humanity.”²⁴ They

21 *Ibid* at 87.

22 *Ibid* at 29.

23 *Ibid* at 110.

24 *Ibid* at 91.

suggest that the need to hold perpetrators of war crimes in Syria responsible for their crimes has rekindled use of the principle of universal jurisdiction after lack of use.²⁵

In this dissertation, I contribute to the ongoing conversation by showing how calls for criminal accountability were the cause of that transformation in the accountability paradigm. Nonetheless, I present a challenge to the effectiveness of the principle of universal jurisdiction: even though states in Europe are taking steps toward criminalizing perpetrators of Syrian war crimes, that does not mean that those states will be able to establish a full criminal justice system equivalent to the Syrian domestic criminal justice system or even equivalent to the ICC. That is, even if courts in Europe issue arrest warrants, they cannot prosecute perpetrators unless they are present in the territory of the state; that is, such cases can only go so far. It is tremendously unlikely that perpetrators who know that they are involved in war crimes will travel to Europe. I will expand on this in two chapters, particularly in Chapter Three. Meanwhile, in this section, I will provide a sketch of the ongoing scholarly discussion by relying on primary sources. In this section, I will also create a picture of the Syrian conflict by describing its origins, the warring parties on the battlefield, the kinds of heinous atrocity crimes that are being committed against civilians, the conflict's legal classification, and the legal framework that applies to it. I will then describe the different calls for criminal accountability, and the question that is the focus of this dissertation, which shows that, despite there being no credible domestic criminal justice system that can hold perpetrators criminal accountable, there is nonetheless value in such calls.

²⁵ *Ibid* at 4.

A. Understanding the Syrian Situation

In 2020, the Syrian crisis is approaching its tenth year of vicious and ugly conflict. Many Syrians mark February 2011 as the starting point, although the root cause goes back in history to the time of President Hafez al-Assad (hereafter referred to as “President Hafez”), the father of President Bashar al-Assad (hereafter referred to as “al-Assad”). President Hafez came to power in a *coupe d'état*, appointing himself as the leader of Syria.²⁶ He remained in power until he died in 2000 when his son inherited power via a constitutional amendment.²⁷ Since understanding the root cause is important for any legal analysis, this section will start with a brief overview of the Syrian situation; it will explain the geographical and demographical dimensions, to the extent needed for the purpose of this dissertation. It will explain how the Syrian crisis escalated from a revolution to an armed conflict, and it will then identify the major warring parties on the battlefield, and explain the consequences of their conduct on civilians. I classify the conflict as a non-international armed conflict and accordingly identify the laws applicable to it. As a result of the ongoing war, many individuals and organizations have called for holding criminals accountable; hence, I give examples of these calls.

Syria is located in a very sensitive location in the Middle East: it borders on Lebanon, Iraq, Jordan, and Turkey. It is in a continuous war situation with Israel and, politically, has Russia as its main ally. The country has been ruled by a sole political party, that is, the Ba'ath

26 See Patrick Seale, *Asad: The Struggle for the Middle East*. (LA, Berkeley, University of California Press, 1989).

27 Human Rights Watch, *A Wasted Decade: Human Rights in Syria during Bashar al-Assad's First Ten Years in Power* (16 July 2010) at 2, online: <<http://www.hrw.org/node/91580/section/2>>.

party, since the time of President Hafez. A multi-party system has only come into being since the uprising.

Syria is one of the world's oldest civilizations, which is reflected in the diversity of its people. Ethnically, the majority of Syrians are Arabs (90.3%), while Kurds, Armenians, and other minorities constitute the rest of the general population (9.7%).²⁸ Historically, Kurds have been repressed since the time of President Hafez. Despite the fact that Syria is their homeland, before 2011, approximately three million Kurds were prohibited from acquiring Syrian citizenship. The uprising provided them with the opportunity to establish a Kurdish state in northern Syria.

The religion of the majority of Syrians is Islam (87%), of which 74% are Sunni, and 13% belong to other sects of Islam, including Shia, Druze, Alawi, and Ismaili. Syria is also home to a sizeable Christian population (9%) and to Jews (4%).²⁹ al-Assad belongs to the minority Alawi sect, a fact used to ignite sectarianism among Syrians. He has claimed to be the guardian of minorities, but politicizing religious identities has contributed to fragmentation in the society and has subsequently fuelled a civil war.³⁰

28 *General Intelligence Agency: Library: The World Factbook, Syria, online:*
<<https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html>>.

29 *World Population Review, Syria Population 2020, online:*
<<http://worldpopulationreview.com/countries/syria-population/>>.

30 *Joseph Holliday, "The Assad Regime: From Counterinsurgency to Civil war" (March 2013) Institute for the Study of War – Middle East Security Report 8 at 18, online at:*
<<http://www.understandingwar.org/sites/default/files/TheAssadRegime-web.pdf>>.

In 1971, President Hafez came to power and he maintained a tight grip on state institutions, repressed the rights of citizens, and abolished opposition parties.³¹ To do that, he used the power of the State Emergency Law (SEL), which was established in 1962, before his presidency, during the war with Israel and has remained active and open-ended.³² The SEL enabled the government to nullify the power of the constitution and to undertake all exceptional measures with no limits.³³ A special court was established to try citizens who opposed the government, but the court's legitimacy was highly questionable, as it neither followed any legal process nor respected the due process of law.³⁴ A security apparatus system reporting directly to President Hafez was established. The system continues to this day and is composed of several security branches that have absolute power over citizens' rights and freedoms, with no legal limits. Its officers operate with impunity, and its detention centres are hidden and far from the supervision of the Ministry of Justice.³⁵ This, in part, explains how President Hafez was able to maintain power until his son took over.

31 *Human Rights Watch, Syria's Tadmor Prison: Dissent Still Hostage to a Legacy of Terror, Vol. 8, No. 2 (E) (April 1996). Human Rights Watch Publications, online:* <<http://www.hrw.org/reports/1996/Syria2.htm>>.

32 *Emergency Law, Legislative Act no. 15 dated 22 December 1962, online:* <<http://www.shrc.org/en/?p=19812>>.

33 *For example, the Law for Protecting the Revolution, issued through Legislative Decree No. (6) dated 17 January 1965. It restricts any opposition against the government. See The Syrian Human Rights Committee, Special Report – Repressive Laws in Syria (21 July 2003), online:* <<https://www.shrc.org/en/?p=19753>>.

34 *See Human Rights Watch, Far from Justice, Syria's Supreme State Security Court, (24 February 2009). Human Rights Watch Publications, online:* <<https://www.hrw.org/report/2009/02/24/far-justice/syrias-supreme-state-security-court>>.

35 *Human Rights Watch, Torture Archipelago – Arbitrary Arrests, Torture and Enforced Disappearances in Syria's Underground Prisons since March 2011 (July 2012) at 9. Online:* <<https://www.hrw.org/report/2012/07/03/torture-archipelago/arbitrary-arrests-torture-and-enforced-disappearances-syrias>>. Also, *Amnesty International, Syria Amnesty International submission to the UN Universal Periodic Review 12th session of the UPR Working Group, October 2011 (14 March 2011) at 1, online:* <<http://www.upr->

Although citizens were not pleased with the way al-Assad came to power, they were generally optimistic that the young president might bring real change to the country. Indeed, early on, he allowed for some political pluralism and democratization. Social and political groups start publicizing their activities, hoping that decades of political repression had ended. But, the government quickly realized that such changes would jeopardize its grip on power, and so security forces arrested opposition leaders and cracked down on civil society groups, thereby ending any hope of change under the al-Assad government.³⁶

In February 2011, the flame of the uprising was sparked by a critical incident. A few children in a city in southern Syria, Dara'a, were caught painting anti-government graffiti on street walls. Apparently, they were inspired by the wave of democratization that started in Tunisia and spread to other countries in the region – a wave that is often referred to as the “Arab Spring.” The children were subsequently detained and tortured to death by the Syrian government’s security forces. This incident marks the beginning of a long period of unrest, following more than 40 years of political repression under the authoritarian regime of the al-Assad family. Not surprisingly, al-Assad thought that his government would be immune from the Arab Spring. In an interview in *The Wall Street Journal*, prior to the Syrian uprising but after the uprising in other Arab Spring countries, he was asked if he thought that Syrians would

info.org/sites/default/files/document/syrian_arab_republic/session_12_-_october_2011/ai-amnestyinternational-eng.pdf>.

36 *Human Rights Watch, No Room to Breathe: State Repression of Human Rights Activism in Syria*, vol. 19, no. 6 (E) (16 October 2007) at 10. Human Rights Watch Publications, online: <<https://www.hrw.org/report/2007/10/16/no-room-breathe/state-repression-human-rights-activism-syria>>.

revolt against him, to which he responded that he did not think they would.³⁷ When the people did revolt, his reaction was one of brutality.

Ordinary citizens took to the streets, chanting fundamental human rights principles, such as “freedom, equality, and democracy.” Soon after, the uprising spread all over the country. At the beginning, citizens wanted reforms, such as eliminating government corruption, improving living conditions, respecting human rights, implementing the rule of law, reforming state institutions, the separation of power, political pluralism, and democratic elections. In response, the government initially took some measures, and proposed some reforms in order to try to quell the revolution.³⁸ al-Assad rescinded the SEL, amended the constitution, and allowed for political pluralism, but these reforms were inadequate.³⁹ The reforms were criticized by the opposition, as they gave additional power and autocracy to his government rather than to the people. While the new constitution of 2012 recognized political pluralism, in practice, political parties were nonetheless required to align with al-Assad’s ideology if they were to be allowed to continue to exist in Syria. The SEL was nullified, but the state replaced it with the Terrorist Act, so those opposing the government could be convicted as terrorists. Security branches were

37 “Interview with Syrian President Bashar al-Assad,” *The Wall Street Journal* (31 January 2011) *The Wall Street Journal*, online:

<<https://www.wsj.com/articles/SB10001424052748703833204576114712441122894>>.

38 *Human Rights Watch, No Room to Breathe: State Repression of Human Rights Activism in Syria, Vol. 19, No. 6 (E), (16 October 2007) at 9. Human Rights Watch Publications, online:* <<https://www.hrw.org/report/2007/10/16/no-room-breathe/state-repression-human-rights-activism-syria>>. See also, UNHRC, *Report of the Fact-Finding Mission on Syria pursuant to Human Rights Council, resolution S-16/1 (August 2011) at 18, online:* <<http://www.refworld.org/docid/4e4e2ba72.html>>.

39 See “Syria to hold referendum on new constitution,” *BBC News* (12 February 2011), online: <<http://www.bbc.com/news/world-middle-east-17040392>>. Also, “Syria protests: Assad to lift state of emergency,” *BBC News* (20 April 2011). Online: <<http://www.bbc.com/news/world-middle-east-13134322>>.

(and still are) in power, with increasing control over citizens' rights. Worse still, while these reforms were taking place, al-Assad continued to exercise violence against his people, killing and detaining them.

In order to conceal his attacks against protesters, al-Assad claimed that there were foreign conspiracies against the country, and he used the Syrian Arab Army (SAA) and state institutions to support his position.⁴⁰ Local populations affected by the violent repression tried to resist the brutality, using peaceful protests, but as the level of violence increased, many people began carrying weapons.⁴¹ In July 2012, military officers and government officials began to defect from the SAA to form what was at the time called the Free Syrian Army (FSA).⁴² The greater the level of violence the government used against civilians, the more the number of defectors increased. Many armed groups began to establish themselves and join the battle, but they were not a coherent group. The FSA was not one entity, but, in fact, a number of different fighting groups. Within a few months, the revolution became an armed conflict.

Amid an increasingly violent and chaotic landscape, jihadist and radical extremist groups, strongly committed to global military operations, began to infiltrate Syria and mobilize

40 "Assad blames conspirators for Syrian protests," *The Guardian* (30 March 2011) online: <<https://www.theguardian.com/world/2011/mar/30/syrian-protests-assad-blames-conspirators>>.

41 UNHRC, *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic*, 18th Sess, UN Doc A/HRC/18/53, (15 September 2011) at 7, online: <http://www.ohchr.org/Documents/countries/SY/Syria_Report_2011-08-17.pdf>.

42 Elizabeth O'Bagy, *The free Syrian Army – Middle East Security Report 9* (Washington, DC: Institute for the Study of War, 2013), online: <<http://www.understandingwar.org/sites/default/files/The-Free-Syrian-Army-24MAR.pdf>>.

the already unstable country. Soon after, in 2013, ISIS, the worst terrorist group of our time, began to grow in influence.⁴³ Later on, different states intervened in the battlefield, using different excuses, but none with the goal of helping Syrians in their struggle for freedom, but instead for their own strategic and political interests.

B. Parties to the Conflict

The complicated nature of the Syrian war makes it difficult to identify all parties to it. In a state of war, it is hard to have definite and fully accurate information and numbers; however, in this section, I rely on reports by internationally recognized organizations that aim to provide some idea of who is on the battlefield and the intensity of each party's involvement.

In general, there are no innocent parties on the battlefield; reports have shown that all parties are involved in atrocity crimes. Table 1 below provides figures from the Syrian Network for Human Rights (SNHR), a pro-opposition organization, that show the number of civilians killed by each party during the civil war, from February 2011 to September 2020. The numbers might not be completely accurate, because there is no official governmental body to compile the statistics. According to the SNHR, 226,247 civilians were killed between March 2011 and March 2020.⁴⁴ Figure 1 below portrays the numbers as a graph.

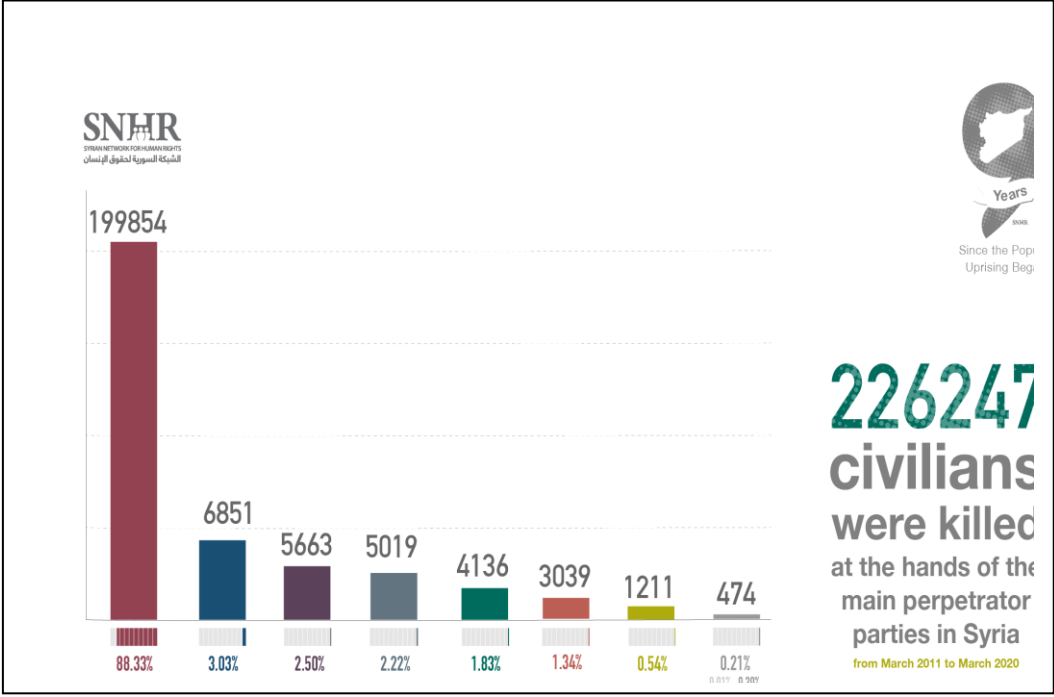
43 *Claude Moniquet, "The Involvement of Salafism/Wahhabism in the Support and Supply of Arms to Rebel Groups Around the World" (2013) Directorate – General for External Policies of the Union Directorate B at 16-17.*

44 *Syrian Network for Human Rights, "Civilian Death Toll" (March 2020). Online: <<http://sn4hr.org/blog/2018/09/24/civilian-death-toll/>>.*

Table 1: The number of civilians that each party killed.

Parties	Number of killed civilians
Syrian government forces	199,854
Russian forces	6,851
ISIS	5,019
Other unnamed parties	5,663
Other rebel forces	4,136
International Coalition Forces	3,039
Syrian Democratic Forces	1,211
Hayat Tahrir al-Sham	470
Turkish forces	4
TOTAL	226,247

Figure 1: the numbers of civilians that each party killed in a graph.



Source: Syrian Network for Human Rights, 2020

Who are the main parties on the battlefield? The following gives a general idea of the main actors.

1. The Government

The al-Assad regime is the party that presents itself as the authority in Syria and it controls the SAA and uses it to counter civilians, rebel groups, Kurdish armed groups, and state parties.

2. Non-State Armed Groups

Opposition Rebel Forces

Comprised of numerous diverse groups, many opposition rebel forces claim to fight under the umbrella of the FSA. The intensity of violence makes it difficult to identify who is fighting against al-Assad and who is fighting for completely different reasons. Many of these groups are involved in conduct that is in violation of international law.⁴⁵

Kurdish Militias

Kurdish militias operate in the northern region of Syria. Their prominent military group is known as the People's Protection Units (YPG). They fight whoever stands against their autonomy, including the Syrian government, ISIS, and various rebel groups. The YPG also controls the Syrian Democratic Forces (SDF), a militia supported by the US, and the

45 UNHRC, *Report of the independent international commission of inquiry on the Syrian Arab Republic, 24th Sess, UN Doc A/HRC/24/46 (16 September 2013) at 1, online:* <http://www.globalr2p.org/media/files/a_hrc_24_46_encoisept2013.pdf>. [COI, 2013].

international coalition against ISIS. Reports claim that Kurdish militias have been involved in atrocity crimes and that they have been known to provide arms to children.⁴⁶

Islamic State of Iraq and Syria

In April 2013, ISIS began its operations in Syria, proclaiming the establishment of an Islamic caliphate that would extend from Aleppo in Syria to Diyala in Iraq.⁴⁷ ISIS is considered to be an offshoot of the al-Qaeda terrorist group.⁴⁸ ISIS has targeted civilians and attacked the Syrian government, Syrian rebel forces, and Kurdish militias. In 2015, the US weaponized the Kurds and some Syrian rebel groups to defeat ISIS, and in 2019, announced that it has seized all ISIS territories. The group continues to operate as sleeping cells in the country.⁴⁹

Salafist and Jihadist Groups

The main organization used to be al-Nusra Front (Jabhat al-Nusra), but, in 2017, it merged with a number of other Salafī groups to form one group, Hay'at Tahrir al-Sham (HTS) (although the leaders are commanders from the former al-Nusra Front). They mostly operate in Idlib,

46 COI, 2015, *supra* note 5 at para 40.

47 “Country Information and Guidance Syria: The Syrian Civil War,” *The Independent Advisory Group on Country Information – Country of Origin Information*, (August 2016), online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/566270/CIG_Syria_security_and_humanitarian.pdf>.

48 UNHRC, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic: Rule of Terror: Living under ISIS in Syria*, 27th Sess, UN Doc HRC/CRP/ISIS (14 December 2014) at para 7, online: <http://webcache.googleusercontent.com/search?q=cache:RDauUxgmAasJ:www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/HRC_CRP_ISIS_14Nov2014.doc+&cd=2&hl=en&ct=clnk&gl=ca>.

49 “The Islamic State” *Mapping Militant Organizations*, Stanford University, online: <<http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/1?highlight=Islamic+State>>.

southern Syria. According to analysis from Chatham House, “HTS’ approach has evolved from believing in the principle of global jihad and drawing on the Salafist jihadist ideology of Al-Qaeda to a paradigm framed by Syria’s borders as a particular theatre of combat with a reliance on local cadres, albeit with an Islamist jihadist character that motivates its members and stimulates continued fighting.”⁵⁰ HTS has committed, and continues to commit, crimes against civilians in areas under its control.

Lebanese Hezbollah

Hezbollah is a non-Syrian, pro-government militia that has been supporting al-Assad well before 2011. It is directly backed by Iran. In 2013, when al-Assad started losing control over Syria, Hezbollah officially announced its intention to support and fight alongside the Syrian government.⁵¹

3. State Parties

Iran

Iran has a historical alignment with Syria. When the war started, it “conducted an extensive, expensive, and integrated effort to keep President Bashar al-Assad in power as long as possible while setting conditions to retain its ability to use Syrian territory and assets to pursue its

50 Sultan Al Kanj “HTS Tries to ‘Syrianize’” *Chatham House* (August 2019), online: <<https://syria.chathamhouse.org/research/hts-tries-to-syrianize-1>>.

51 Will Fulton, Joseph Holliday & Sam Weyer, “Iranian Strategy in Syria – A Joint Report by AEI’s Critical Threats Project & Institute for the Study of War” (May 2013) *Institute for the Study of War*, at 21-23, online: <<http://www.understandingwar.org/sites/default/files/IranianStrategyinSyria-1MAY.pdf>>.

regional interests should Assad fall.”⁵² Iran provided advice and assistance to al-Assad’s forces to maintain power and to fight rebel group forces. It established the National Defense Forces – a coalition of Iranian-backed local militias that operate in Syria.

Russia

In September 2015, and based on al-Assad’s request, the Russian military forces officially started their military operations in Syria.⁵³ On several occasions, Russian President Vladimir Putin has announced that Russia supports Syria “to stabilize the legitimate power in Syria, and to create conditions for the search for political compromise.”⁵⁴ Reports indicate that Russian forces have committed serious crimes against civilians in Syria.⁵⁵

Turkey

In January 2018, Turkish armed forces physically entered the Syrian battlefield.⁵⁶ Turkish authorities claimed to target both ISIS and Kurdish militias (YPG and SDF) inside Syria. In 2019, in north-eastern Syria, Turkish armed forces launched “Operation Peace Spring.” According to the Turkish government, the operation seeks to depose the SDF because of its

52 *Ibid* at 6.

53 “Russia’s military action in Syria – timeline,” *The Guardian* (14 March 2016), online: <<https://www.theguardian.com/world/2016/mar/14/russias-military-action-in-syria-timeline>>.

54 “Putin’s Syrian strategy: Not following playbook of American exceptionalism,” *Russia Today* (19 March 2016), online: <<https://www.rt.com/op-ed/336259-putins-syrian-strategy-american/>>.

55 “*The Monthly Statistical Report on Victims, September 2016: Violations Documentation Center in Syria – VDC*,” (September 2016), online: <<http://vdc-sy.net/wp-content/uploads/2016/10/September-report-Eng.pdf>>.

56 Joseph V. Micallef, “The Crowded Syrian Battlefield: Is a Turkish Invasion Next?” *HuffPost – The World Post* (19 January 2018), online: <https://www.huffingtonpost.com/joseph-v-micallef/the-crowded-syrian-battle_b_9045794.html>.

tight connection with the Kurdistan Workers' Party, which is categorized as a terrorist group by Turkey. Reports indicate that Turkish forces carried out several violations of human rights against civilians, such as summary killings, looting, and confiscation of property.⁵⁷

International Coalition Forces Led by the US

On 10 September 2014, US President Barack Obama announced the establishment of the international coalition forces to “degrade and ultimately destroy the terrorist group known as ISIL.”⁵⁸ Sixty states joined the coalition.⁵⁹ Participating states with ground troops in Syria include the US, Australia, Belgium, Germany, France, Jordan, Netherlands, the United Kingdom, and the United Arab Emirates.⁶⁰ It is often reported that the coalition targets innocent civilians.⁶¹ In March 2019, the US claimed that it had defeated ISIS and won the battle.⁶²

As a result of the ongoing multiple battles between warring parties, mass atrocity crimes are ongoing against innocent civilians. Unfortunately, as I mentioned earlier, there are no

57 *Human Rights Watch, World Report 2020 “Events of 2019” (January 2019), online:* <<https://www.hrw.org/world-report/2019/country-chapters/syria>>.

58 “Statement by the President on ISIL” *The White House, Office of the Press Secretary*, (10 September 2014), online: <<https://obamawhitehouse.archives.gov/the-press-office/2014/09/10/statement-president-isil-1>>.

59 “Joint Statement Issued by Partners at the Counter-ISIL Coalition Ministerial Meeting” *Office of the Spokesperson, Washington, DC, U.S. Department of State, Diplomacy in Action* (3 December 2014), online: <<https://2009-2017.state.gov/r/pa/prs/ps/2014/12/234627.htm>>.

60 *Non-international Armed Conflict in Syria, Geneva Academy*, online: <<http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse5accord>>. [RULAC].

61 “US airstrikes allegedly kill at least 73 civilians in northern Syria,” *The Guardian* (20 July 2016), online: <<https://www.theguardian.com/world/2016/jul/20/us-airstrike-allegedly-kills-56-civilians-in-northern-syria>>.

62 “ISIL defeated in final Syria victory: SDF,” *AlJazeera News* (23 March 2019), online: <<https://www.aljazeera.com/news/2019/03/isil-defeated-syria-sdf-announces-final-victory-190323061233685.html>>.

entirely accurate statistics on the number of casualties in Syria. In January 2014, the UN declared its inability to confirm the death toll, because of the lack of access to affected communities inside Syria.⁶³ However, the Syrian Observatory for Human Rights, a monitoring group based in the UK, suggested that by the end of 2019 the death toll had exceeded 586,100 people, a number that includes both civilians and fighters.⁶⁴

The United Nations High Commissioner for Refugees (UNHCR) announced that, in 2017, more than 11.7 million civilians inside Syria are in dire need of humanitarian assistance.⁶⁵ By the end of 2017, the number of internally displaced people was 6.2 million, including 2.5 million children; this is considered to be the largest number of displaced people worldwide.⁶⁶ In 2018, the number of refugees was estimated at 5.6 million, mostly located in neighbouring countries and living under very difficult humanitarian conditions. Only 45% of UNHCR's appeal for the regional refugee response is funded.⁶⁷ In 2015, more than 440,000 refugees risked their lives trying to reach Europe by sea.

The war has destroyed the Syrian cultural heritage. According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), “[w]orld heritage sites have been

63 John Heilprin, “UN says it can no longer keep track of Syria death toll,” *CTV News* (7 January 2014), online: <<http://www.ctvnews.ca/world/un-says-it-can-no-longer-keep-track-of-syria-death-toll-1.1626828>>.

64 “Syrian Revolution NINE years on: 586,100 persons killed and millions of Syrians displaced and injured,” *Syrian Observatory for Human Rights* (15 March 2020), online: <<http://www.syriaohr.com/en/?p=157193>>.

65 UNHCR, *Syria in Focus, Humanitarian Needs Overview*, online: <<https://hno-syria.org/#severity-of-needs>>.

66 UNHCR, “Internally Displaced People,” *Syria*, online: <<https://www.unhcr.org/sy/internally-displaced-people>>.

67 UNHCR, “Syria Emergency,” online: <<https://www.unhcr.org/syria-emergency.html>>.

turned into battlefields and archaeological sites, looted.”⁶⁸ Finally, because of the war, many innocent civilians, particularly children, are vulnerable to unknown diseases and deteriorating health conditions.⁶⁹

C. Atrocity Crimes

Since 2011, reports have provided evidence of conduct that constitutes war crimes and crimes against humanity against civilians.⁷⁰ I list some of these crimes, but the list is by no means exhaustive. In identifying the crimes, I use reports from multiple credible organizations, but I mostly rely on the reports and documents of the COI, whose reports are comprehensive about all parties on the battlefield. The COI was established on 22 August 2011, by the UNHRC, with a mandate to investigate all alleged atrocity crimes in Syria since the beginning of the conflict in 2011.

1. Killing and Widespread Attacks against Civilians

Since the beginning of the conflict, killing and unlawful widespread and indiscriminate attacks on civilians, their homes, medical facilities, schools, and religious places have been systematic. For example, for only a short period in 2018, from 18 February to 21 March, the attacks of the Syrian-Russian military alliance resulted in the killing of 1,600 civilians and the destruction of

68 UNHRC, *Statement by Mr. Paulo Sérgio Pinheiro Chair of the Independent International Commission of Inquiry on the Syrian Arab Republic (17 March 2015)*, online: <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15843&LangID=>>

69 Annie Sparrow, “Syria’s Polio Epidemic: The Suppressed Truth,” *New York Reviews of Books* (20 February 2014), online: <<http://www.nybooks.com/articles/2014/02/20/syrias-polio-epidemic-suppressed-truth/?insrc=hpma>>.

70 COI, 2015. *Supra* note 5.

25 medical facilities, 11 schools, and countless residences of civilians.⁷¹ In 2019, within only five months, between January and June, at least 416 civilians have been killed in US-led coalition airstrikes, and approximately 630 major sites have been damaged in the coalition's widespread destruction of buildings. Also in 2019, between September and October, the coalition's widespread and indiscriminate attacks in eastern Aleppo resulted in the killing of 446 civilians,⁷² as well as the killing of 84 civilians, including 30 children in the city of Raqqa. As previously mentioned, in 2019, Turkey launched a military operation in north-eastern Syria, and according to Amnesty International, the operation resulted in the killing of 70 civilians and the displacement of over 300,000 civilians.⁷³

2. Sexual Violence

In its report, "I lost my dignity," the COI demonstrates that sexual and gender-based violence against women, girls, men, and boys has been a continual concern since the beginning of the conflict. All of the parties to the conflict use sexual violence as a method of gradually establishing fear, humiliation, and "in the case of terrorist groups, as part of their enforced social order." While these practices affect all citizens, regardless of their gender, women and girls have been the main victims, regardless of their geographical locations. "Government forces and associated militias have perpetrated rape and sexual abuse of women and girls and

71 *World Report, 2020. Supra note 48.*

72 *Human Rights Watch, World Report 2018, "Events of 2017" (January 2018). Online:* <<https://www.hrw.org/world-report/2018/country-chapters/syria>>.

73 "Syria: Damning evidence of war crimes and other violations by Turkish forces and their allies" *Amnesty International* (18 October 2019). Online: <<https://www.amnesty.org/en/latest/news/2019/10/syria-damning-evidence-of-war-crimes-and-other-violations-by-turkish-forces-and-their-allies/>>.

occasionally men during ground operations, house raids to arrest protesters and perceived opposition supporters, and at checkpoints.”⁷⁴ In detention centres, women and girls have suffered aggressive and demeaning searches and have been raped, sometimes suffering multiple perpetrator rape. Men detainees have been subjected to genital mutilation and rape with objects. The practices of some Salafi armed groups, such as HTS, have brought psychological and physical harm to women, girls, men, and boys by enforcing certain religious dress codes and behaviour. Women, girls, and sexual minorities, detained by ISIS, have been charged with crimes, such as adultery and homosexuality, and have been stoned to death and punished with lashings. Muslim Sunni women have been forced to marry ISIS fighters, who control them, and limit their freedom and their engagement in public life. According to the COI, sexual crimes in Syria might constitute war crimes and crimes against humanity, which include murder, executions, torture, cruel or inhuman treatment, outrages upon personal dignity against women, and denial of the right to life and the right to be free from discrimination. The reported crimes form part of a systematic attack directed against a civilian population.

3. Enforced Disappearance, Torture, Inhuman Treatment, Imprisonment, and Death in Detention Centres

In 2013, Caesar – a pseudonym of a Syrian military officer – was tasked with taking photos of corpses of detainees at the Syrian regime detention centres. Caesar smuggled out of Syria about 55,000 photos of 11,000 dead detainees. The photos document the torture and inhumane

⁷⁴ UNHRC, “*I lost my dignity*’: Sexual and gender-based violence in the Syrian Arab Republic,” 37th Sess, UN Doc A/HRC/37/CRP.3 (8 March 2018), online: <<https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-37-CRP-3.pdf>>.

treatment detainees suffered before death. A committee that included three former prosecutors of international tribunals investigated the authenticity of the photos. In their 2014 report, the committee indicated that there is evidence of “systematic torture and killing of detained persons by the agents of the Syrian government [and that] such evidence would support findings of crimes against humanity against the current Syrian regime.”⁷⁵ As a result, 60 states of the international community have called the UNSC to refer criminals to the ICC; six years later, in 2020, this still has not happened. Moreover, in February 2016, the UNHRC issued a report that investigated the human rights situation in Syrian government detention centres during the period of 10 March 2011 to 30 November 2015. The report relies on various documents and 621 interviews with former detainees and witnesses. The report confirms evidence of serious injury causing great suffering to detainees, inhumane treatment, torture, and killings committed by the government.⁷⁶

In its report “Detention in the Syrian Arab Republic: A Way Forward,” the COI ascertained that several non-governmental groups also secured makeshift places of detention where arrested government officers and fighters have been tortured, ill-treated, and, in some cases, summarily executed. These groups not only targeted government soldiers, but they also held civilians “for a variety of reasons including as punishment for suspected loyalty, to extract

75 “A report into the credibility of certain evidence with regard to torture and execution of persons incarcerated by the current Syrian regime,” prepared for Carter-Ruck and Co. Solicitors of London, (20 January 2014), at 21, online: <https://www.carter-ruck.com/images/uploads/documents/Syria_Report-January_2014.pdf>.

76 “About 4500 persons executed by ISIS during 27 months since declaring its alleged caliphate,” (29 September 2016) The Syrian Observatory for Human Rights, online: <<http://www.syriahr.com/en/?p=51519>>.

ransom, or as bargaining chips to initiate prisoner swaps with Government forces and affiliated militias.”⁷⁷ According to the COI, these acts constitute the war crimes of murder, torture, and other forms of ill treatment, and amount to violations of the rules of due process. Similarly, HTS – the Salafi group – has arbitrarily arrested several civilians in areas under its control. In January 2019, reports surfaced that 11 civilians were seemingly tortured.⁷⁸

4. Use of Unlawful Weapons, including Chemical Weapons

According to the report of the Médecins Sans Frontières (MSF), in August 2013, 3,500 civilians experienced neurotoxic symptoms in the Ghouta area, a suburb of Damascus, the capital of Syria, and as a result 355 of them died.⁷⁹ The United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic was established to investigate the allegations. In its report, the Mission confirmed that “chemical weapons have been used in the ongoing conflict between the parties in the Syrian Arab Republic, also against civilians, including children, on a relatively large scale.”⁸⁰ Although, the report did not directly accuse the al-Assad regime for these attacks, since 2013, many reports have confirmed the continued

77 UNHRC, “*Detention In The Syrian Arab Republic: A Way Forward*” *Independent International Commission Of Inquiry On The Syrian Arab Republic* (8 March 2018). Online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/AWayForward_DetentionInSyria.pdf>.

78 *World Report, 2020*. *Supra* note 57.

79 “*Syria: Thousands suffering neurotoxic symptoms treated in hospitals supported by MSF*” Médecins Sans Frontières, (24 August 2013), online: <<http://www.msf.org/article/syria-thousands-suffering-neurotoxic-symptoms-treated-hospitals-supported-msf>>.

80 UNGA-UNSC, *Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the alleged use of chemical weapons in the Ghouta area of Damascus on 21 August 2013*, 67th Sess, UN Doc A/67/997-S/2013/553 (September 2013), online: <http://www.un.org/ga/search/view_doc.asp?symbol=S/2013/553>.

use of chemical weapons by al-Assad's forces against civilians.⁸¹ Note that the regime is a signatory to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC).⁸² Moreover, the regime agreed to destroy the chemical weapons it owned.⁸³

5. Siege and Denial of Humanitarian Access

In February 2016, an estimated one million civilians were under siege, mainly blocked by al-Assad's forces. al-Assad practised a well-known strategy, i.e., putting civilians under siege, starving them until they are ready to surrender, forcing them to leave their geographical areas, and then seizing their land.⁸⁴ Such acts constitute war crimes. The UNSC demands that all parties to the battlefield "enable the rapid, safe and unhindered evacuation of all civilians who wished to leave ... [and] that all parties respect the principle of medical neutrality and facilitate free passage to all areas for medical personnel, equipment and transport."⁸⁵

81 "Syrian regime and Isis carried out chemical attacks, say UN investigators," *The Guardian* (25 August 2016), online: <<https://www.theguardian.com/world/2016/aug/25/assad-regime-isis-chemical-attacks-syria-un-investigators>>. Also see online: <<https://www.hrw.org/world-report/2019/country-chapters/syria>>.

82 *The Chemical Weapons Convention or CWC, OPCW*, online: <<https://www.opcw.org/chemical-weapons-convention>>.

83 Thomas Grove, "Syria Will Sign Chemical Weapons Convention, Declare Arsenal, Foreign Ministry Says," *Reuters* (10 September 2013), online: *The World Post* <http://www.huffingtonpost.com/2013/09/10/syria-chemical-weapons-convention_n_3901417.html>.

84 *Siege Watch*, "First Quarterly Report on Besieged Areas in Syria," (February 2016) *The Syria Institute*, online: <<https://siegewatch.org/wp-content/uploads/2015/10/PAX-RAPPORT-SIEGE-WATCH-FINAL-SINGLE-PAGES-DEF.pdf>>.

85 UNSC, "Security Council Unanimously Adopts Resolution 2139 (2014) to Ease Aid Delivery to Syrians, Provide Relief from 'Chilling Darkness'" 7116th Meeting, SC/11292 (22 February 2014), online: <<https://www.un.org/press/en/2014/sc11292.doc.htm>>.

6. Displacement of Civilians

According to the 2019 COI report, the war in Syria has displaced approximately 13 million civilians, internally and externally. “Uprooted from their homes and forced to leave everything behind, many continue to endure serious violations of their basic human rights. Attacks against medical and educational facilities, in addition to constraints on humanitarian access and the destruction of food supplies, have further compounded the plight of those fleeing and exacerbated their vulnerabilities.”⁸⁶ While displaced people include, without discrimination, people of all backgrounds and genders, women and children make up the majority those so affected.

These are only a few examples that show the kind of vicious crimes that have been committed – and are ongoing – against civilians. These crimes are not those of just one party; according to the previously cited reports, all parties on the battlefield are involved in war crimes and crimes against humanity. All parties have played a part in the suffering of the Syrian people. All of the previously mentioned crimes are categorized and defined under Articles 7 and 8 of the Rome Statute. Article 7 acknowledges the following as constituting crimes against humanity:

Any of the following acts when committed as part of a widespread
or systematic attack directed against any civilian population, with

86 UNHRC, “*Report of the Independent International Commission of Inquiry on the Syrian Arab Republic Syrian Arab Republic*,” 42nd Sess, UN Doc A/HRC/42/51 (15 August 2019), online: <<https://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/Documentation.aspx>>.

knowledge of the attack:

Murder;

Extermination;

Enslavement;

Deportation or forcible transfer of population;

Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

Torture;

Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

Persecution against any identifiable group or collective on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

Enforced disappearance of persons;

The crime of apartheid;

Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Article 8 (2) defines war crimes as:

Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

Wilful killing;

Torture or inhuman treatment, including biological experiments;

Wilfully causing great suffering, or serious injury to body or health;

Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

Unlawful deportation or transfer or unlawful confinement;

Taking of hostages.⁸⁷

Although some might argue that the ICC should have universal jurisdiction over atrocity crimes, the Rome Statute is applicable only to state parties, and Syria is not a party to it. The Statute, however, remains the main reference for defining international crimes. I will explain later in this chapter the conditions under which the ICC would have jurisdiction over crimes, but for present purposes, the ICC has neither the authority to investigate allegations of crimes, nor the authority to try defendants or to punish them if they were to be found guilty.

The following section will classify the conflict in Syria, say whether it meets the definition of an international or a non-international armed conflict, and then list the applicable laws.

D. Applicable International Law

Since 2012, the Syrian government has continued to proclaim that the country is in a “state of war.”⁸⁸ The Rule of Law in Armed Conflicts project, at the Geneva Academy of International Humanitarian Law and Human Rights, suggests that there are, in fact, multiple ongoing armed conflicts going on in Syria. So, what is an armed conflict, on what basis should a conflict be categorized as such, and what set of international laws apply to each category?

87 *ICC, supra note 1.*

88 “Syria is in state of war, says Bashar al-Assad” *BBC News*, (27 June 2012), online: <<https://www.bbc.com/news/world-middle-east-18598533>>.

The term “armed conflict” assumes “the existence of hostilities between armed forces organized to a greater or lesser extent; there must be the opposition of armed forces and a certain intensity of the fighting.”⁸⁹ The Chamber of Appeals at the International Criminal Tribunal for the Former Yugoslavia (ICTY) has advised that an armed conflict exists in cases where “there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”⁹⁰ Categorizing a conflict as an international or non-international armed conflict is not subject to the judgement of the parties to the conflict; rather, it is established based on verified criteria set out for that purpose.

In relation to classifying non-international armed conflicts, international tribunals – such as the ICTY, the Special Court for Sierra Leone (SCSL),⁹¹ and the ICC⁹² – have identified two indicative factors to assess whether a certain disturbance or hostility meets the threshold. These factors are: (1) that the intensity of the violence has increased, and (2) that at least one organized, non-governmental armed group is involved in the conflict. To assess the intensity of the violence, the ICTY has suggested certain elements that are set out below, but they are by no means exhaustive:

89 ICRC, *Working Paper*, 29 June 1999, online:

<<http://www.iccnw.org/documents/ICRCWorkPaperArticle8Para2e.pdf>>.

90 ICTY, *The Prosecutor v Dusko Tadić, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72*, (2 October 1995) at 70, online: <<http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>>.

91 See *Special Court for Sierra Leone, The Prosecutor v Sesay, Kallon and Gbao, Judgment, SSL-04-15-T* (2 March 2009) at 95.

92 See ICC, *supra note 1, The Prosecutor v Thomas Lubanga Dyilo, Pre-Trial Chamber, Decision of Confirmation of Charges, ICC-01/04-01/06*, (29 January 2007) at 233.

[T]he seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed. With respect to the organisation of the parties to the conflict Chambers of the Tribunal have taken into account factors including the existence of headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms.⁹³

As previously noted, there are multiple non-governmental armed groups fighting in the Syrian combat zone. I have also emphasized the intensity of the ongoing violence by, and between, the parties to the conflict. Applying the previously identified two indicative factors, the Syrian conflict clearly qualifies as a non-international armed conflict. The COI has confirmed that categorization, saying that the conflict in Syria has “met the threshold for a non-international armed conflict.”⁹⁴ Hence, the Syrian government and its allies are involved in a non-

93 *ICTY, The Prosecutor v Fatmir Limaj and others, Trial Chamber, Judgment, IT-03-66-T (30 November 2005) at 90, online: <<http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf>>.*

94 *UNHRC, Human rights situation the required the council's attention: Report of the independent international commission of inquiry on the Syrian Arab Republic, 21st Sess, A/HRC/21/50, (16 August 2012) at 6, online: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50_en.pdf>. [COI, 2012].*

international armed conflict against the wide array of rebel forces. The same categorization applies to the fighting between the different armed forces.⁹⁵

An international armed conflict takes place when one or more states wage war against another. Unlike non-international armed conflicts, to be recognized as an international armed conflict, the violence needs not reach a certain threshold, nor is a formal declaration of war required. Article 2(1) of the I-IV Geneva Conventions affirms that “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them” are international armed conflicts.⁹⁶ In Syria, there are multiple international conflicts. The fight of the US-led international coalition forces against ISIS, without the permission of the Syrian government, is an international armed conflict. The use of force by Turkish armed forces against ISIS and against the Kurdish militias, without the permission of the Syrian government, is also an international armed conflict.⁹⁷

International law is a combination of treaty law (international conventions) and customary law. Each law imposes certain rules and obligations on the warring parties. Some treaties apply to all armed conflict categories, whether international or non-international, and others are exclusive to only one category. Of course, in order to be obliged to comply with a treaty’s provisions, states must have first ratified them, i.e., they must be a party to them. Parties

95 *RULAC. Supra note 60.*

96 *Geneva Conventions I-IV, Art. 2(1) ICRC, online: <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>>.*

97 *RULAC, International armed conflicts in Syria, Geneva Academy, online: <<http://www.rulac.org/browse/conflicts/international-armed-conflict-in-syria>>.*

that are involved in international armed conflicts are bound by a number of treaties, including the four Geneva Conventions of 1949, and the Additional Protocol (I) to Geneva Conventions of 1977, in addition to others.

Parties involved in non-international armed conflicts are bound by the four Geneva Conventions of 1949 and the Additional Protocol (II) to Geneva Conventions of 1977. However, regardless of whether a state has ratified any of these treaties, all parties to non-international armed conflicts are bound by the common Article 3 to the four Geneva Conventions, which reads:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed “hors de combat” by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-

mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.⁹⁸

98 *GC I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Conflicts Not Of An International Character, Article 3. ICRC, online: <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=BAA341>*

Syria is a party to a number of treaties that apply to non-international armed conflicts,⁹⁹ including the following:

- ⇒ The four Geneva Conventions, since 1953,
- ⇒ Additional Protocol (I), since 1983; however, it did not ratify Additional Protocol (II),
- ⇒ Convention Optional Protocol on the Involvement of Children in Armed Conflict, since 2003,
- ⇒ CAT, since 2004,¹⁰⁰
- ⇒ Convention on the Prevention and Punishment of the Crimes of Genocide, since 1955,¹⁰¹
- ⇒ CWC, since 2013,¹⁰²
- ⇒ Geneva Protocol on Asphyxiating or Poisonous Gases, and of Bacteriological Methods, since 1968,
- ⇒ Hague Convention for the Protection of Cultural Property, since 1958,
- ⇒ Hague Protocol for the Protection of Cultural Property, since 1958,
- ⇒ Convention on Mercenaries, since 2008.

028EBFF1E8C12563CD00519E66>.

99 ICRC, *Treaties, States Parties and Commentaries, Syrian Arab Republic*, online: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SY>.

100 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with Article 27 (1)*, online: <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>>. [CAT].

101 *United Nations Treaty Collection*, online: <https://web.archive.org/web/20121020233944/http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en>.

102 *The Chemical Weapons Convention or CWC, OPCW*, online: <<https://www.opcw.org/chemical-weapons-convention>>.

Even though Syria has not ratified all of the treaties listed above, customary IHL is applicable.¹⁰³ IHL includes rules that have been generated from states' repetitive practice and they are recognized as law. According to the International Committee of the Red Cross (ICRC), the importance of IHL in today's conflicts comes from its ability to fill "gaps left by treaty law in both international and non-international conflicts."¹⁰⁴ Finally, the international human rights law requires states to give due regard to the minimum respect of human rights standards, to protect civilians from the violation of human rights, and to investigate alleged violations. Syria signed the 1948 Universal Declaration of Human Rights – the key instrument of international human rights law – and therefore is bound by it; Syria has a legal obligation to protect its citizens from any conduct that is prohibited by the Declaration.

E. Calls for Criminal Accountability

As a response to vicious atrocity crimes in Syria, calls for criminal accountability have been loud and insistent, even as the conflict continues. As explained, the word "calls" in this dissertation is used to direct our attention to the discourses that encourage criminal accountability. Calls for criminal accountability during the ongoing war have been heard from almost all actors – Syrian citizens, governments, intergovernmental organizations, NGOs, international lawyers, scholars, politicians, human rights activists, and many others.

103 *Customary Law, The International Review of the Red Cross, Volume 87 Number 857 (March 2005)*, online: <https://www.icrc.org/en/doc/assets/files/other/icrc_002_0860.pdf>.

104 *International Committee of the Red Cross, "Customary international humanitarian law" (29 October 2010)*, online: <<https://www.icrc.org/en/document/customary-international-humanitarian-law-0>>.

Syrian individuals, professionals, and civil society organizations have been the main sources of information, reporting on ongoing and mass crimes in Syria. They have had the courage to unveil the reality of the ugly conflict, exposing violations of human rights and mass atrocity crimes, and calling for criminal accountability. Civil society organizations have documented ongoing crimes, collected evidence, and kept records about suspected perpetrators. Some of these organizations include Syrians for Truth and Justice,¹⁰⁵ Syria Justice and Accountability Centre,¹⁰⁶ SNHR,¹⁰⁷ The Day After Project (United States Institute of Peace),¹⁰⁸ and the Violations Documentation Center.¹⁰⁹

By unveiling the truth, these organizations and others have given the UN knowledge about the situation in Syria. As a result, initiatives to hold perpetrators to account have taken place. In 2011, the UNHRC, in its Resolution S-17/1 dated 22 August 2011, established the COI, whose mandate is to investigate alleged human rights violations and to report them to the UNHRC so that it can take action against wrongdoers.¹¹⁰ The COI investigates the “facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, ... identif[ies] those responsible with a view of ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held

105 *The Syrians for Truth and Justice*, online: <<https://stj-sy.com/en>>.

106 *Syria Justice and Accountability Centre*, online: <<https://syriaaccountability.org/>>.

107 *Syrian Network for Human Rights*, online: <<http://sn4hr.org/>>.

108 *The Day After*, online: <<http://tda-sy.org/en/>>.

109 *Violations and Documentation Center*, online: <<http://vdc-sy.net/en/>>.

110 *UNHRC, The Independent International Commission of Inquiry on the Syrian Arab Republic, About the Commission of Inquiry*, online: <<http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/AboutCoI.aspx>>.

accountable.”¹¹¹ The COI has several times called for international criminal accountability. In its 21st report for 2012, it called on the international community to “ensure that those responsible are held to account, in accordance with due process, and that victims are afforded access to justice and reparation.”¹¹²

The UN has also established several other commissions to investigate alleged crimes in Syria. In 2015, the UNSC adopted Resolution Nr. 2235 dated 7 August 2015 to establish a joint mission between the Organisation for the Prohibition of Chemical Weapons and the UN Joint Investigative Mechanism, with the aim of identifying to the “greatest extent feasible individuals, entities, groups, or governments who were perpetrators, organizers, sponsors or otherwise involved in the use of chemicals as weapons, including chlorine or any other toxic chemical.”¹¹³

The UNGA, in its Resolution A/71/L.48 dated 19 December 2016, also established the International, Impartial and Independent Mechanism (IIIM) to:

Assist in the Investigation and Prosecution of Those Responsible
for the Most Serious Crimes under International Law Committed
in the Syrian Arab Republic since March 2011 under the auspices
of the United Nations to closely cooperate with the Independent

111 *COI, 2012. Supra note 94 at 15.*

112 *Ibid at para 153 (a).*

113 *UNSC, resolution 2235 (2015), adopted by the Security Council at its 7501st meeting, on 7 August 2015, UN Doc S/RES/2235, (7 August 2015) para 1& 5, online: <<https://www.un.org/press/en/2015/sc12001.doc.htm>>.*

International Commission of Inquiry on the Syrian Arab Republic to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.¹¹⁴

The work of the IIIM overlaps with the mandate of the COI. While the latter focuses on fact-finding in relation to violations of human rights, the IIIM is mandated to collect data, investigate it, and prepare for future trials – although, the IIIM has not yet identified what it means by the “national, regional or international courts or tribunals.”¹¹⁵ Nevertheless, a glimpse at the development of accountability issues for crimes in Syria from 2011 to today clearly demonstrates that there are serious efforts generated by calls for criminal justice that are taking place at the international level.

The significant amount of evidence continues to suggest the involvement of almost all parties on the battlefield in atrocity crimes against civilians. Officials have called for

114 UNGA, *International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, 71st Sess, UN Doc A/71/L.48 (19 December 2016), para 4. online:

<http://www.un.org/ga/search/view_doc.asp?symbol=A/71/L.48>.

115 Independent International Commission of Inquiry on the Syrian Arab Republic, Mandate, online: <<http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/CoIMandate.aspx>>.

accountability. For example, UN Secretary-General António Guterres asserted that criminal accountability is a responsibility of the international community, and that “the threat to seek or apply international legal sanctions has in recent years become a major new weapon in the international preventive armory. ... [It] will concentrate the minds of potential perpetrators of crimes against humanity on the risks they run of international retribution.”¹¹⁶ Guterres has urged the UNSC to refer perpetrators of Syrian war crimes to the ICC.¹¹⁷ International advisers have called for accountability. Adama Dieng, the UN Secretary-General’s Special Adviser for the Prevention of Genocide, called the UNSC to refer the situation in Syria to the ICC, saying, “the international community should step up its commitment to end impunity for the perpetrators of the most serious crimes in Syria and thus contribute to preventing new atrocities from being committed.”¹¹⁸ Navi Pillay, the UN Human Rights Chief, has suggested that the COI has found considerable evidence of grave human rights violations that may establish the responsibility of government personnel at the highest level.¹¹⁹

International NGOs have devoted a considerable number of initiatives to address issues of criminal accountability in Syria. These NGOs have frequently called upon the international

116 COI, 2012, *supra* note 94 at 24.

117 Edith M. Lederer, *UN chief asks security council to refer Syria to International Criminal Court*, CTV News (26 January 2018), online: <<https://www.ctvnews.ca/world/un-chief-asks-security-council-to-refer-syria-to-international-criminal-court-1.3778007>>.

118 “Statement by Adama Dieng, Special Adviser on the Prevention of Genocide, on the situation of civilians in the Syrian Arab Republic,” *United Nations Press Release*, (9 May 2016), online: <<http://www.un.org/ar/preventgenocide/adviser/pdf/2016-05-09%20OSAPG%20statement%20on%20the%20situation%20in%20Syria>>.

119 “Bashar al-Assad implicated in Syria war crimes, says UN,” *The Guardian* (2 December 2013), online: <<https://www.theguardian.com/world/2013/dec/02/syrian-officials-involved-war-crimes-bashar-al-assad-un-investigators>>.

community to refer the Syrian situation to the ICC. Several reports have been published by organizations such as Human Rights Watch, Amnesty International, MSF, International Crisis Group, No Peace Without Justice, and others. David Crane, former chief prosecutor of the SCSL, and now head of the Syria Accountability Project, has prepared a list of names of alleged perpetrators of war crimes in Syria. The list is said to include the names of officials in the Syrian government, along with those from the Islamic rebel groups al-Nusra Front and ISIS.¹²⁰ William Wiley, a Canadian war crimes investigator who has worked on a number of sophisticated international tribunals, in 2012, founded the Commission for International Justice and Accountability, an independent investigative organization for crimes in Syria.¹²¹ Wiley and his team have collected more than 600,000 official government documents, which they have managed to smuggle out of Syria. He says that they now have enough evidence to prosecute senior figures from parties to the conflict.¹²² That evidence is now hidden in a high-security location in Europe in the hopes that it will one day be presented to a special court that will deal with war crimes in Syria.

120 *Assad tops list of Syria war crimes suspects handed to ICC: Former prosecutor, Reuters (10 June 2014), online: <<http://www.reuters.com/article/us-syria-crisis-warcrimes-idUSKBN0EL25020140610>>.*

121 *CIJA has no official website and they work secretly; for further information, see Ben Taub, "The Assad Files: Capturing the top-secret documents that tie the Syrian regime to mass torture and killings," The New Yorker, (18 April 2016), online: <<http://www.newyorker.com/magazine/2016/04/18/bashar-al-assads-war-crimes-exposed>>.*

122 *"Smuggled Syrian documents enough to indict Bashar al-Assad, say investigators: Prosecution cases have been prepared against president and senior members of his regime for possible war crimes tribunal," The Guardian (12 May 2015), online: <<https://www.theguardian.com/world/2015/may/12/smuggled-syrian-documents-indict-assad-investigators>>.*

Prominent scholars in the international criminal law arena have called for criminal accountability in Syria. Michael P. Scharf, M. Cherif Bassiouni, and William A. Schabas, along with a prestigious committee of high-profile chief prosecutors, have prepared “The Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes,”¹²³ in order to help in the accountability process, as soon as the political situation permits.

Individual states have called for criminal accountability, endeavouring to make some efforts toward criminal justice. In September 2015, based on the evidence smuggled out of Syria by Caesar, France took the initiative, conducting “the world’s first criminal inquiry into torture.”¹²⁴ In 2016, Germany took referred war perpetrators to its national courts, relying on the principle of universal jurisdiction (I will explore these efforts further, later in this chapter).¹²⁵ In December 2019, the US passed the Caesar Syria Civilian Protection Act, which aims “[t]o halt the wholesale slaughter of the Syrian people, encourage a negotiated political settlement, and hold Syrian human rights abusers accountable for their crimes.”¹²⁶ The legislation is named after the Syrian officer “Caesar,” who smuggled out 55,000 photos of prisoners’ corpses – prisoners who were tortured and killed in Syrian government detention

123 “The Chautauqua Blue Print for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes” (27 August 2013) Public International Law & Policy Group, online: <<https://securitypolicylaw.syr.edu/wp-content/uploads/2013/09/Chautauqua-Blueprint1.pdf>>.

124 “France Opens Criminal Investigation of Torture in Syria Under Assad” *New York Times* (30 September 2015), online: <http://www.nytimes.com/2015/10/01/world/europe/france-investigates-syria-torture-bashar-assad.html?_r=1>.

125 “German denies committing war crimes in Syria at ground breaking trial” *The Telegraph* (3 May 2016), online: <<http://www.telegraph.co.uk/news/2016/05/03/german-denies-committing-war-crimes-in-syria-at-groundbreaking-t/>>.

126 *Caesar Syria Civilian Protection Act of 2019*, 20 December 2019, *The Senate Of The United States*, online: <<https://www.state.gov/caesar-syria-civilian-protection-act/>>. [*Caesar Syria Civilian Protection Act of 2019*].

centres. The Act includes 47 names of people who are responsible for or complicit in certain human rights violations in Syria. The Act also aims to establish robust mechanisms that will support the US government's economic sanctions against the Syrian government, prevent access to international financial transactions, strengthen the peace negotiations process, and name and shame criminals.¹²⁷

I have noted in this section a small amount of the extensive discourse and the various initiatives that seek to hold those responsible for various crimes accountable. While one might expect a response to these calls, that is unlikely to happen, at least not currently. But, if holding criminals to account is not a viable option, why bother calling for accountability? This is, of course, the main question with which this dissertation grapples, and I turn to it in the following section.

III. EXPLANATION OF THE QUESTION

Up to this point, I have provided an overview of the Syrian situation and its surrounding circumstances. I have named some of the parties to the conflict and the consequences of their actions on civilians, actions that include atrocity crimes. I have assessed the legal framework that applies to armed conflicts. I have also noted the calls for criminal accountability by different actors.

127 “Engel & Royce Syria Sanctions Bill Passes House, Legislation Cracks Down on Assad Supporters & Pushes Negotiations,” *Foreign Affairs Committee*, online: <<https://gop-foreignaffairs.house.gov/press-release/engel-royce-syria-sanctions-bill-passes-house/>>.

Societies tend to call criminals to account in times of stability or after the termination of conflict. Only at that point, when the political and legal situation permits, are suspects brought to justice. Only then is it imaginable to hold them accountable. In the case of Syria, however, calls are happening while the conflict continues, before any kind of political settlement has been achieved. Although justice during conflicts has not been the norm, it is not impossible, given a strong enough political will and the legal capability to pursue it. Unfortunately, Syria is a case of a state in conflict where there is a lack of political will by the international community to refer suspects to justice, as well as a lack of a credible domestic criminal accountability system that could handle the justice process. Both the Syrian domestic criminal justice institutions and the international criminal justice institutions have their own obstacles, which I will explain shortly. Given the lack of political will, and the lack of a credible criminal justice institution in Syria, I argue that there is a significant unlikelihood of criminal accountability during the ongoing war. So, why should we call for criminal accountability? What would the justifications for such calls be in the midst of the ongoing war?

In this section, I will explain why I think there is a significant unlikelihood of institutional criminal punishment during the ongoing conflict, and why I claim that war perpetrators cannot be institutionally punished during the ongoing war. I will discuss the constraints of the Syrian domestic criminal justice system, which would otherwise be the ideal institution to hold perpetrators accountable. Internationally, there is also a lack of legal avenues. The ICC would have an important role to play in holding perpetrators accountable of crimes in Syria, but the ICC is unlikely to play any role, at least not currently. For these crimes to be addressed in front of the ICC, it must have jurisdiction over them, which it does not. Syria did not ratify the Rome

Statute, and it is extremely unlikely that the Syrian government will refer itself to the ICC, given that many government officials are suspected of serious crimes. To close the impunity gap, some European states have taken steps toward criminal accountability, relying on the doctrine of universal jurisdiction and initiating national trials. The doctrine allows states to have jurisdiction over crimes, even if their courts lack the traditional connection with the crimes, the suspects, or the victims. As I will explain, however, universal jurisdiction has its own limitations. I should note that this dissertation will not concentrate on the possibility of establishing a hybrid tribunal for Syria, and particularly for ISIS, because this terrorist group is not the concentration of this dissertation. The following sub-sections will then address this dissertation's claim of "the significant unlikelihood of institutional criminal punishment" during the war in Syria.

A. Syria's Domestic Criminal Justice System

Holding perpetrators to account at domestic criminal justice institutions is the ideal scenario that any society would prefer. Where domestic courts are trustworthy, they generally are able to have greater impact than are international institutions, are better able to access evidence, and are less expensive.¹²⁸ Moreover, international institutions are sometimes perceived as intervening on a state's sovereignty. People tend to have more faith in domestic institutions

¹²⁸ See Annika Jones, "Seeking International Criminal Justice in Syria" (2013) 89 *International Law Studies* at 805. [Jones, 2013].

than international institutions, over which they have no control. Also, international courts cannot take the serious actions of arresting and punishing criminals of serious crimes.¹²⁹

A case cannot be referred to international criminal justice institutions unless the possibility of criminal accountability at the domestic level has been exhausted. The Rome Statute advances the principle of complementarity, which means that the ICC should be the court of last resort and cannot look at cases unless domestic courts are unwilling or unable to handle the task. Article 17 on issues of admissibility reads:

the Court [ICC] shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.¹³⁰

It is, in fact, one of the ICC's missions to promote justice at the domestic level. The principle of complementarity is important insofar as it plays a role in the advancement of national sovereignty, and it encourages states to comply with their international obligations. Moreover, Article 17 lists some conditions that determine the unwillingness of domestic states to hold criminals accountable. These are:

- (a) The proceedings were or are being undertaken or the national

129 Paul Seils, "Handbook on Complementarity, An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes" at 9, online: *The International Center of Transitional Justice* <<https://www.ictj.org/complementarity-icc/>>.

130 ICC, *supra* note 1 at Article (17).

decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes ...;

(b) There has been an unjustified delay in the proceedings ...;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.¹³¹

As stated, Syrian domestic criminal justice institutions would be the ideal place to address war crimes that have been committed on its own territory. They have access to the evidence, the ability to depose witnesses, and it would be less costly than if addressed by international institutions. In its 2012 report, the COI stated that the Syrian government, based on the principles of state responsibility in international law, “bears the duty to ensure that individual perpetrators are punished and that victims receive reparation.”¹³² It further indicated that this duty stems from Syria’s treaty obligations and customary international law.¹³³ The problem is that it is beyond unlikely that Syria’s criminal justice institutions would be credible and impartial while they remain under the control of the al-Assad government – a fact that was reflected in the 2013 COI report, which noted that accountability at the domestic level is currently unlikely to happen, and explaining that there is “not only a lack of willingness to

131 *Ibid.*

132 *COI, 2012, supra note 94 at 50.*

133 *Ibid at 51.*

institute proceedings, a country torn by ... years of bloody and destructive conflict is also unlikely to be capable of such an effort.”¹³⁴ The COI thus indicated the unwillingness and inability of the Syrian domestic system to try criminals, at least not while the war continues.

There are many reasons to believe that the Syrian justice system is incapable of handling these crimes. First and foremost, the Syrian government is, according to reports provided earlier, suspected of atrocity crimes, and probably to a greater extent than any other party to the conflict. The COI has indicted that there are sufficient grounds to believe that government armed forces have committed atrocity crimes, and “[t]here are also reasonable grounds to believe that anti-Government armed groups committed war crimes and abuses of international human rights law and international humanitarian law.”¹³⁵ There is no separation of power in Syria, and all governmental institutions are controlled by the al-Assad regime, including the judicial system. Criminal justice institutions cannot be presumed independent or impartial. So, practically speaking, the al-Assad regime is extremely unlikely to punish the country’s institutions – its own military sergeants – or even its allies.¹³⁶

134 UNHRC, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, 22nd Sess, UN Doc A/HRC/22/59 (5 February 2013), at 124, online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/A.HRC.22.59_en.pdf>. [COI, February 2013].

135 COI, 2012, *supra* note 94 at 23.

136 *The Constitution of the Syrian Arab Republic*, adopted on 13 March 1973. Article (131) provides that “The judicial authority is independent. The President of the Republic guarantees this independence with the assistance of the Higher Council of the Judiciary,” online: <<http://www.icla.up.ac.za/images/un/use-of-force/asia-pacific/SyrianArabRepublic/Constitution%20Syrian%20Arab%20Republic%201973.pdf>>. [Syrian Constitution, 1973].

Second, there are many reasons to believe that the al-Assad government does not respect the rule of law, and that there is no real separation of power between the executive and the judiciary branches of government. Despite the fact that the Syrian constitution(s) confirm the separation of powers – executive, legislative, and judicial – judges do not enjoy autonomy.¹³⁷ Of course, there are many highly qualified and credible judges, but the government enjoys full authority over the Higher Council of the judiciary, and has the capacity to appoint and dismiss any judge who does not obey its orders.¹³⁸ The government even controls bar associations and other professional institutions.¹³⁹ In fact, al-Assad has the power to appoint and dismiss officials in both civilian and military institutions.¹⁴⁰

In its 2015 report, the COI concluded that “[a]fter monitoring national proceedings for more than three years, the Commission has determined that Syrian national courts are not, at this time, an effective mechanism through which to pursue justice.”¹⁴¹ And the situation has not improved since that time; in fact, arguably, the system is even more dominated by vicious conflict and violent repression at the hands of the government.

137 *Ibid*, Article (133) provides that “(1) Judges are independent. They are subject to no authority except that of the law. (2) The honor, conscience, and impartiality of judges are guarantees of public rights and freedoms.”

138 *Ibid*, Article (132) provides that “The President of the Republic presides over the Higher Council of the Judiciary. The law defines the method of its formulation, its powers, as well as its internal operating procedures.”

139 See Syrian Expert House, *Syria Transition Roadmap* (Washington: Syrian Center for Political and Strategic Studies, 2013) 119-155.

140 Syrian Constitution, 1973, *supra* note 136, Article (109) provides: “The President of the Republic appoints civilian and military officials and terminates their services in accordance with the law.”

141 COI, February 2015, *supra* note 134.

It is unfortunate that the Syrian domestic criminal system is unable to bring perpetrators of war to justice. There is no doubt that the national courts are more efficient and often more credible in the eyes of citizens than are international courts. But if the Syrian criminal justice system were to try to hold suspects to account, its impartiality would be under suspicion, and it would surely be accused of bias, not only by the international community, but also by the Syrian society. Therefore, it is significantly unlikely that domestic criminal justice institutions will criminalize perpetrators during the ongoing Syrian war. So, that option has been all but eliminated, and I have already mentioned that Article 17 of the Rome Statute indicates certain conditions that determine the unwillingness of a domestic state to hold criminals accountable. These conditions have been met in relation to the Syrian criminal justice system. That allows the ICC to react to the ongoing crimes, but as we will see in what follows, even the international criminal justice system has no jurisdiction over the Syria file.

B. International Criminal Court

The Rome Statute was adopted on 17 July 1998 and came into force on 1 July 2000 to establish a permanent and autonomous court located in the Netherlands. The ICC is tasked with investigating and prosecuting individuals who are responsible for certain serious crimes: war crimes, crimes against humanity, genocide, and crimes of aggression.¹⁴² The establishment of the ICC brought with it several changes to international criminal law and practice. First, the individual criminal accountability model emerged to close the impunity gap on state officials. According to Kathryn Sikkink, “the emergence of the individual criminal accountability model

¹⁴² ICC, *supra* note 1 at Article 5.

for basic human rights violations means that the huge disjuncture between the treatment of crime in the domestic and the international realms has started to narrow.”¹⁴³

Second, justice has transformed from “victory justice” to an international justice paradigm. The ICC is perceived as representing a “dramatic shift in the global accountability regime.”¹⁴⁴

Third, attention has started to be paid to criminal accountability during ongoing conflicts. As mentioned, traditionally, courts were established after the termination of conflicts, but that has changed with the contemporary war model, as war has become intra-state rather than inter-state.¹⁴⁵ Par Engstrom argues, “there has been a discernible shift from the pursuit of accountability strategies after the cessation of armed hostilities on the one hand, and in the aftermath of political transitions on the other, to attempts to achieve accountability for atrocities even before a political settlement of armed conflict has been reached.”¹⁴⁶ The difficulties of creating domestic courts during ongoing wars have created the need for international courts. Luis Moreno Ocampo, former prosecutor of the ICC, explains that the court is “engage[d] in judicial proceedings in relation to conflicts even before they have ended. Working in these circumstances can mean conducting investigations in situations where physical access is

143 Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (NY and London: WW Norton & Company, 2011) at 7-24. [Sikkink, 2011].

144 Par Engstrom, “Transitional Justice and Ongoing Conflict,” in Chandra Lekha Sriram et al., eds., *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants* (New York: Routledge, 2013) at 43. [Engstrom, 2013].

145 Andrew G. Reiter, Tricia D. Olsen & Leigh A. Payne, “Transitional Justice and Civil War: Exploring New Pathways, Challenging Old Guideposts” (2012) *1:1 Transitional Justice Rev* 137 at 139. [Reiter, et al].

146 Engstrom, 2013, *supra* note 144 at 42.

sometimes impossible or where there is a total collapse of functioning institutions.”¹⁴⁷ Nevertheless, many have argued that the pursuit of justice during ongoing conflict might delay the return to stability. For example, Jack Goldsmith and Stephen Krasner claim that the ICC “initiate[s] prosecutions that aggravate bloody political conflicts and prolong political instability in the affected regions.”¹⁴⁸

The ICC is challenged by political will. Some scholars view the ICC as “a mainstream approach of diplomats, without taking the political delicacy of such an intervention seriously enough.”¹⁴⁹ Others criticize it for its political nature, considering it as “a renewed commitment to international idealism.”¹⁵⁰ The ICC has been seen as justice imposed by outsiders, in the sense that it is viewed as an alternative to military intervention, which gives foreign occupiers legitimacy to violate the sovereignty of states. However, probably the more challenging criticism of the ICC is that it lacks the power to enforce arrest warrants insofar as it does not have the same power of policing, as do domestic courts. These shortcomings were obvious in the case of Sudan’s President Omar al-Bashir, who was accused of war crimes. The ICC failed to seize him, although at the time, he was travelling freely among the territories of state parties to the ICC.¹⁵¹

147 Luis Moreno Ocampo, “Transitional Justice in Ongoing Conflicts” (2007) 1:1 *Int J Transit Justice* 8 at 8.

148 Jack Goldsmith & Stephen D. Krasner, “The Limits of Idealism” (2003) 132:1 *Daedalus* 47 at 55. [Goldsmith & Krasner].

149 Patrick S. Wegner, *The International Criminal Court in Ongoing Intrastate Conflicts: Navigating the Peace-Justice Divide* (Cambridge: Cambridge University Press, 2015) at 332. [Wegner].

150 Goldsmith & Krasner, *supra* note 148 at 48.

151 “States ‘failing to seize Sudan’s dictator despite genocide charge’,” *The Guardian* (21 October 2018), online: <<https://www.theguardian.com/global-development/2018/oct/21/omar-bashir>

In the case of Syrian perpetrators, the ICC would have been a possible venue in which to hold criminals accountable, given that the domestic state is both unable and unwilling to try those responsible for mass atrocity crimes. However, the ICC's jurisdiction is limited to those states that have ratified the Rome Statute, which Syria did not do. Hence, the ICC has no jurisdiction over crimes in Syria. There are two options for overcoming this jurisdictional problem: self-referral or UNSC referral. However, neither are viable options in Syria.

1. Self-Referral

For the ICC to have jurisdiction over crimes in Syria, the government would have to self-refer or accept the jurisdiction of the Court, neither of which is likely. Article 12(3) of the Rome Statute states that:

If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay.¹⁵²

Self-referral is an exceptional route that states can take if they wish the ICC to put its hands on their cases. According to Daniel D. Ntanda Nsereko, this exception “makes the ICC accessible to States that, for one reason or another, may not be able to become party to the

travels-world-despite-war-crime-arrest-warrant>.
152 ICC, *supra* note 1 at Article (12) 3.

Statute.”¹⁵³ Many countries have used the power of Article 12(3) to self-refer their cases to the ICC. For example, Côte d’Ivoire in May 2011 self-referred its situation to the ICC to investigate the alleged crimes against humanity committed after presidential elections.¹⁵⁴ Nonetheless, it is unlikely that the Syrian government would self-refer its crimes to the ICC. The al-Assad government has continuously proclaimed the capability of its domestic criminal justice institutions to investigate the atrocity crimes in its conflicts. The government has, moreover, claimed complementarity, arguing that, since national proceedings can take place, the ICC has no role to play. Bashar Jaafari, Syria’s permanent representative at the UN, asserts that:

The international legal system is based on fundamental pillars, of which the most important is the fact that States have primary and exclusive responsibility for establishing accountability and justice in their territories. ... [T]he Syrian Government has taken a series of steps designed to hold accountable the people involved in these events and to take appropriate legal action against them. Our national investigation committee continues to work alongside the Syrian judiciary, which since the crisis began has investigated 30,000 cases, issued rulings on those involved and settled the conditions of others, confirming the Syrian Government’s desire

153 Daniel D. Ntanda Nsereko, “*The International Criminal Court: Jurisdictional and Related Issues*” (1999) 10:1 *Criminal Law Forum* at 106.

154 Côte d’Ivoire accepted the ICC’s jurisdiction in April 2003, and then ratified the Rome Statute on 15 February 2013. See *International Criminal Court, Côte d’Ivoire, Situation in the Republic of Côte d’Ivoire, ICC-02/11*.

and ability to have justice and negating the possibilities of pretext aimed at involving any international judicial body that might contradict our national judiciary's power.¹⁵⁵

The Syrian government asserts its ability to pursue criminal justice. Moreover, the political and regional situation of the conflict at the time of writing (fall of 2020) shows the advancement of the al-Assad government's armed forces over its opposition, and victors are unlikely to refer their own crimes to foreign courts – that would be illogical. Therefore, self-referral is not an option in this case.

2. United Nations Security Council

The second option to overcome the ICC's jurisdictional problem over crimes in Syria is through a referral by the UNSC. The Rome Statute offers the UNSC an exceptional jurisdictional task. Under the power of Chapter VII, the UNSC can refer alleged atrocity crimes that are within the jurisdiction of the ICC's prosecutor. Under Article 13(b) of the Rome Statute, the ICC can exercise its jurisdiction if a "situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations."¹⁵⁶ Moreover, Article 16 of the Statute gives the UNSC the right to postpone the investigation or prosecution for 12 months.¹⁵⁷

155 UNSC, 7180th Meeting, UN DOC S/PV. 7180 Provisional (22 May 2014) at 16/18online: <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7180.pdf>.

156 ICC, *supra* note 1 Article (13) b.

157 *Ibid*, Article (16) & (13) b.

The most recent case of UNSC referral to the ICC occurred in February 2011 – an investigation of alleged atrocity crimes in Libya.¹⁵⁸ Although the Syrian situation occurred simultaneously to that in Libya, the UNSC did not take the decision to refer the situation in Syria to the ICC. al-Assad’s allies, mainly Russia, have – since 2012 – vetoed 13 draft resolutions aimed at finding a solution to the Syrian situation,¹⁵⁹ including draft Resolution S/2014/348 dated May 22, 2014, in which 60 states called for criminals to be held accountable. Thirteen members of the UNSC voted in favour of the draft resolution, while two permanent

158 UNSC, *Adopted by the Security Council at its 6491st meeting, on 26 February 2011, UN Doc S/RES/1970 (26 February 2011)*, online: <https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2011_02/20110927_110226-UNSCR-1970.pdf>.

159 Michelle Nichols, “Russia casts 13th veto of U.N. Security Council action during Syrian war” *United Nations – Reuters* (19 September 2019), online: <<https://www.reuters.com/article/us-syria-security-un/russia-casts-13th-veto-of-un-security-council-action-during-syrian-war-idUSKBN1W42CJ>>. See, for example, UNSC, *France [et al]: draft resolution*, UN Doc S/2011/612, (4 October 2011), online: <<http://www.securitycouncilreport.org/atf/cf/%7B65BF99B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Syria%20S2011%20612.pdf>> (vetoed by China, Russia). UNSC, *Bahrain [et al]: draft resolution*, UN Doc S/2012/77, (4 February 2012), online: <<http://www.securitycouncilreport.org/atf/cf/%7B65BF99B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Syria%20S2012%2077.pdf>> (vetoed by China, Russia). UNSC, *France [et al]: draft resolution*, UN Doc S/2012/538, (19 July 2012), online: <<http://www.securitycouncilreport.org/atf/cf/%7B65BF99B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Syria%20S2012%20538.pdf>> (vetoed by China, Russia). UNSC, *Andorra [et al]: draft resolution*, UN Doc S/2016/846, (8 October 2016), online: <https://www.un.org/en/ga/search/view_doc.asp?symbol=S/2016/846> (vetoed by Russia). UNSC, *Egypt [et al]: draft resolution*, UN Doc S/2016/1026, (5 December 2016), online: <https://www.un.org/en/ga/search/view_doc.asp?symbol=S/2016/1026> (vetoed by China, Russia). UNSC, *Albania [et al]: draft resolution*, UN Doc S/2017/172, (28 February 2017), online: <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2017/172> (vetoed by China, Russia). UNSC, *France [et al]: draft resolution*, UN Doc S/2017/315, (12 April 2017), online: <http://www.securitycouncilreport.org/atf/cf/%7B65BF99B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2017_315.pdf> (vetoed by Russia). UNSC, *France [et al]: draft resolution*, UN Doc S/2017/962, (16 November 2017), online: <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2017/962> (vetoed by Russia).

members – Russia and China – vetoed it.¹⁶⁰ Accordingly, the draft resolution was not adopted, leaving the perpetrators of crimes against humanity unpunished.

Some scholars have criticized the limited jurisdiction of the ICC to bring justice to victims in cases where atrocity crimes are happening on a daily basis, suggesting that the ICC should have universal jurisdiction to hold perpetrators to account, regardless of the perpetrators' nationality or the issue of territorial jurisdiction. Nsereko describes it as “a particularly severe handicap for the Court. It will not be able to try dictators whose countries, for obvious reasons, may not accede to the Statute. These dictators will be able to roam the globe assured that the arm of international justice will not be long enough to reach them.”¹⁶¹ Although the ICC does not enjoy universal jurisdiction, a few states in Europe, such as Germany and France, have attempted to use the principle of universal jurisdiction to investigate crimes and issue arrest warrants against suspects of atrocity crimes in Syria. It remains unclear whether Europe can take these initiatives further. So far, the principle of universal jurisdiction has its own obstacles, which I will address in the following section.

C. Universal Jurisdiction

Thus far, I have explained that, while the war continues, neither the domestic nor the international criminal justice system will likely be able to hold perpetrators of war crimes in

160 *UNSC, Albania [et al]: draft resolution, UN Doc S/2014/348, (22 May 2014), online: <https://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/348> (vetoed by China, Russia).*

161 *Daniel D. Ntanda Nsereko, “The International Criminal Court: Jurisdictional and Related Issues” (1999) 10:1 Criminal Law Forum at 120.*

Syria accountable. As a result, victims have submitted their claims against perpetrators to European courts, relying on the doctrine of universal jurisdiction, as the best available alternative.

Universal jurisdiction is a “criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.”¹⁶² International law sets out five scenarios where states might exercise priority of jurisdiction. These are: (1) when there is a nexus to its territory (territoriality principle); (2) when the suspect is one of its citizens (nationality principle); (3) when the victim is one of its nationals (passive personality principle); (4) when the conduct itself threatens the state’s security (protective principle); and (5) universal jurisdiction, allowing the state to investigate, prosecute, and punish offenders of serious crimes in its domestic courts without being limited to a territorial, nationality, personal, or protective nexus to the crime, the suspect, or the victim.¹⁶³

Universal jurisdiction is a human rights doctrine that operates under treaty law and customary international law.¹⁶⁴ The courts developed the doctrine to tackle the piracy problem that faced international trade, and it was defended based on the reasoning that pirates are “*the enemy of all people*.”¹⁶⁵ Universal jurisdiction was advanced in post-World War II trials; the

162 Macedo, 2001, *supra* note 7 at 28. Also see, Macedo, 2006, *supra* note 7 at 21.

163 Randall, 1988, *supra* note 10 at 785.

164 M. Cherif Bassiouni, “The history of universal jurisdiction and its place in international law,” in Macedo, 2006, *supra* note 7 at 62.

165 Randall, 1988, *supra* note 10 at 786-801.

International Military Tribunal applied it in its judgements at the time, and, in 1961, it was used in the case against Adolf Eichmann.¹⁶⁶ And a more recent example is that of the case of former Chilean dictator Augusto Pinochet in 1999. Today, the principle is still defended according to the reasoning that atrocity crimes are the enemy of humanity – they breach our values as human beings. Crimes that are subject to universal jurisdiction include piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture.

There are two bases for the explanation that universal jurisdiction is necessary in some cases of atrocity crimes: first, it deals with crimes that infringe *jus cogens* peremptory norms of international law, which are the norms that have been recognized by the international community. These are norms from which “no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”¹⁶⁷ Second, these crimes affect international peace and security.¹⁶⁸ In the words of Kenneth C. Randall, universal jurisdiction deals with “those offenses [that] endanger values to which the global community is committed, the legal force of any nation’s challenge to the prosecution of universal crimes also is weakened.”¹⁶⁹ In a case before the Court of Appeal in the US, the Court decided that “neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the law

166 Hannah Arendt, *Eichmann in Jerusalem* (UK: Penguin, 2006).

167 *United Nations Convention on the Law of Treaties, Signed at Vienna 23 May 1969, Entry into Force: 27 January 1980, online:*
<<https://www.jus.uio.no/lm/un.law.of.treaties.convention.1969/53.html>>.

168 Butler, 2000, *supra* note 9 at 356.

169 Randall, 1988, *supra* note 10 at 785.

of nations or against humanity and that the prosecuting nation is acting for all nations.”¹⁷⁰ Universal jurisdiction is said to bring justice to victims, end impunity gaps, and eliminate opportunities for perpetrators to escape justice.¹⁷¹

It is contested among scholars whether the presence of the perpetrator (or the suspect) is an essential condition for a state to exercise universal jurisdiction. Theories tend to distinguish between two terms, which are: universal jurisdiction in absentia and conditional universal jurisdiction. The latter, as it seems for its name, is conditional on the physical presence of the perpetrator on the territory of the country that is to practice jurisdiction (*judex loci deprehensionis*).¹⁷² But, according to some scholars, “even that requirement is not absolute and might be questionable.”¹⁷³ The second term, universal jurisdiction in absentia, implies that states can exercise universal jurisdiction without the presence of the prosecutor. Some scholars argue that this type is a different type of universal jurisdiction that distinguishes itself from conditional universal jurisdiction, which necessitates the presence of the prosecutor to start criminal process.¹⁷⁴ Other scholars understand universal jurisdiction to imply the possibility and the capability of the state to investigate and arrest perpetrators without conditions.¹⁷⁵ The

170 “*Demjanjuk v. Petrovsky*, 776 F.2d 571” 582-83 (6th Cir. 1985). online: <<https://openjurist.org/776/f2d/571/demjanjuk-v-petrovsky>>.

171 Xavier Philippe, “The principles of universal jurisdiction and complementarity: how do the two principles intermesh?” (2006) 862 *International Review of the Red Cross* at 378.

172 Luc Reydam, “Prosecuting Crimes Under International Law on the Basis of Universal Jurisdiction: The Experience of Belgium,” in: Horst Fischer et al. eds., *International and National Prosecution of Crimes Under International Law: Current Developments* (Berline: Berliner Wissenschafts-Verlag, 2001) at 812.

173 See, Mohamed El Zeidy, “Universal Jurisdiction In Absentia: Is It A Legally Valid Option for Repressing Heinous Crimes?” (2003) *Oxford U Comparative L Forum* 4, online: <ouclf.law.ox.ac.uk>.

174 Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005) at 261- 262.

175 Brigitte Stern, “International Decision, Universal Jurisdiction over Crimes Against Humanity Under French Law,” (1999) 93 *AM. J. INT’L L.* 525.

latest view is reliant upon the UN resolution, which includes the G.A. Res., U.N. GADR 2840 (XXVI), adopted in 1971, and stipulates that: “refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law.”¹⁷⁶ Some countries, such as Germany, Belgium and Spain had a type of jurisdiction that could be exercised without any connection between the country and the perpetrator; this type is titled by many scholars as universal jurisdiction in absentia.¹⁷⁷ In practice, virtually all countries today, including those three mentioned above, only allow universal jurisdiction under the condition that the perpetrator is present in its territory.

In the Syrian case, Europe was the right place for victims to seek to have their perpetrators tried. The application of universal jurisdiction in a few European states allows the domestic courts to initiate investigations in cases of mass crimes, even if defendants are not present. The prosecutor still requires them to be present in order to hold trials and to punish them, but what distinguishes the application of universal jurisdiction in Europe from its application in other countries, say, Canada, is that prosecutors in Europe tend to accept claims, regardless of the prerequisite that the suspect be present in the territory of the state trying the suspected perpetrator. They accept the claim if they find credible evidence, they then undertake further

176 UNGA, *Question of the punishment of war criminals and of persons who have committed crimes against humanity*, (18 December 1971), A/RES/2840, online:<
<https://www.refworld.org/docid/3b00f04b28.html>>.

177 M. Cherif Bassiouni, *Crimes against humanity: historical evolution and contemporary application* (Cambridge: Cambridge University Press, 2011).

investigation, they depose witnesses, and they can issue arrest warrants. This is what happened in regard to crimes in Syria: European courts conducted investigations and sometimes issued arrest warrants against suspects of war crimes.¹⁷⁸ There are currently a number of criminal cases under investigation in seven European states – Italy, Belgium, Spain, German, Sweden, and Austria – and I will discuss them further in Chapter Three, but these efforts certainly prove the nobility of the justice systems in these states and their adherence to justice. In Chapter Three, I demonstrate that these cases only came to be as a result of calls for criminal accountability. However, these criminal cases in Europe are not equivalent to a full criminal justice system; they are not parallel to a domestic criminal justice system or even to the ICC. In reality, even if courts in Europe issued arrest warrants, and they did, they cannot prosecute perpetrators unless they are present in the territory of the state; in other words, the cases can only go far. It is tremendously unlikely that perpetrators who know that they are involved in war crimes will travel to Europe; so, unless these states arrest perpetrators, such as what happened in the Israeli case against Eichmann, Syrian war criminals are unlikely to be arrested. It is also doubtful that the Syrian government will extradite accused persons to other jurisdictions. Moreover, there is no collaborative law-enforcement procedure or any other kind of legal arrangements between the Syrian and European jurisdictions. In other words, criminal

178 “Q&A on the Dabbagh Case: French judges’ issue 3 international arrest warrants against top Syrian officials,” *fidh World Movement for Human Rights* (5 November 2018), online: <<https://www.fidh.org/en/issues/litigation/q-a-on-the-dabbagh-case-french-judges-issue-3-international-arrest>>. Also see *Trials International, Make way for Justice #4, Momentum towards accountability Universal Jurisdiction, Annual Review 2018 #U*, online: <<https://trialinternational.org/wp-content/uploads/2018/03/UJAR-Make-way-for-Justice-2018.pdf>>.

accountability is unlikely, which proves my claim: it is significantly unlikely that there will be institutional criminal accountability for war crimes in Syria during the ongoing conflict.

To conclude, in this section, I have explained the significant unlikelihood of institutional criminal punishment for crimes in Syria, and why I argue that there are no institutions to hold suspects of these crimes to account during the ongoing conflict. Using international reports, I explained the constraints on using the Syrian domestic criminal justice system, which would otherwise have been the ideal institution to hold perpetrators accountable; unfortunately, it is unlikely to be able or willing to handle the criminal justice task, because the system currently lacks the fundamental principles of any healthy and credible judicial institution – that is, it lacks impartiality, independence, and neutrality. Internationally, the ICC would have had an important role to play in holding perpetrators of crimes in Syria accountable, however, the ICC has no jurisdiction to deal with ongoing crimes in Syria, and apparently the UNSC does not have the political will to refer Syrian war crimes to the ICC. Finally, I explained that some European states have established national trials relying on the principle of universal jurisdiction; however, their efforts might not exceed issuing arrest warrants for suspects who are unlikely to be present at trials. So, I have built the case that there is an absence of domestic and international criminal justice institutions to hold criminals of war crimes accountable during the ongoing war. If this is the case, then the question is again: what are the justifications for calls for criminal accountability if there are no criminal justice institutions that can hold perpetrators to account? Before answering this question in Chapter Three, in the next part, I will address a different question: if criminal accountability is not currently a viable option, why not use the language of international human rights?

PART TWO: A POSSIBLE ALTERNATIVE

I. INTRODUCTION

Given the significant unlikelihood of institutional criminal punishment, is there an alternative for holding wrongdoers accountable? Is there another set of laws that can help, aside from the criminal law? Given the current lack of criminal law institutions that have the authority to hold war perpetrators accountable, is there another possible legal avenue that can be used? Is human rights law able to provide a response to calls for criminal accountability? In this Part, I will consider – and ultimately reject – a possible alternative to criminal law, i.e., human rights law. Given that legal avenues for holding criminals accountable are currently unavailable in Syria, instead, let's consider using human rights law. The relevant human rights treaties and customary international law provide the capacity to condemn perpetrators for their wrongdoings. So, instead of calling for criminal accountability and leaning toward taking the criminal law path, why not call human rights law into play? As explained, Syria has ratified a number of human rights treaties, and by making reference to them, we might be able to hold violators of human rights law accountable for breaching the rules and provisions of human rights law.

I will argue that human rights law provides a range of responses to those who violate internationally agreed human rights norms, but those responses are not punitive responses. Although calls for accountability for human rights violations and calls for criminal accountability both generate legal responses, calls for criminal accountability are much narrower. The problem with human rights responses is that they are not punishment per se.

Punishment as we understand it (and as I will explain in Chapter Two) is solely a feature of criminal law; in fact, it is the feature that distinguishes criminal law from other kind of laws.

Since 2011, Syrian civilians have been subjected to heinous crimes, and the international community has provided an array of responses, but not punishment. Generally, victims look for punishment as the right response to their suffering. Imagine a mother who has lost her children, husband, and her own dignity; quite naturally, she would ask that her wrongdoers be punished. Calls for accountability for human rights violations generate undefined responses, while calls for criminal accountability generate more specific responses, i.e., punishment for wrongdoers. Responses to calls for accountability for human rights violations are calls that *wait* for some kind of legal response – an undefined legal response that will not be punitive.

To establish this argument, I ask two sub-questions. First, is human rights law applicable in armed conflict situations? Generally speaking, it is assumed that IHL is applicable in times of war, and human rights law is applicable in times of peace; but does human rights law have no role to play during armed conflicts or war situations? Scholarly opinions are quite divided, as Judge Christopher Greenwood demonstrates:

To one group, human rights law is simply unsuited to the waging of warfare in any age but, particularly, the one that we have today. To them human rights law is designed for the quite different environment of a normal state in the condition of peace and are therefore hopelessly unsuited to regulating conditions on or near a battlefield. To another group, human rights are the jewel in the crown of

modern international law and the laws of war are being invoked by governments.¹⁷⁹

Hence, I will briefly explain the interconnected and complicated relationship between human rights law and IHL by explaining the circumstances behind the creation of each, the aim of each, and the reasons that states decide to apply them. Consequently, I will find that it is quite acceptable to call for the application of human rights law in the midst of ongoing war situations. I will not pursue an in-depth discussion on how, and under what circumstances, each law should operate; that is not a major argument of this dissertation. The aim is to simply provide some sense as to whether human rights law can or cannot operate during armed conflicts.

The second sub-question is: what are the remedies that human rights law offers to calls for accountability for human rights violations? In other words, if we resort to human rights law, what are the possible responses to such calls? To answer this question, I assess the remedies that international communities have offered Syria and other similar situations, like Libya, which include the following: condemnation (by the international community); declarations (from international bodies, such as the UNGA and the UNSC); imposition of political, diplomatic, economic, and legal measures; encouragement of humanitarian intervention, often as a last resort. But these remedies are not the same as punishment; they do not provide a punitive response. I then explain that calls for accountability for human rights violations are

179 Christopher Greenwood, “Human Rights and Humanitarian Law – Conflict or Convergence” (2010) 43 *Case W. Res. J. Int’l L.* at 495.

calls that then wait for some kind of legal response – an undefined legal response that will not result in punishing violators. Calls for criminal accountability, however, are calls that do indeed wait for a punitive response – they are narrower and more precise. Therefore, I will consider the value of the language of calls for accountability for human rights violations versus the value of the language of calls for criminal accountability. This argument is critical because of the crisscrossing and the complicated relationship between international human rights law and international criminal law, which makes it difficult to distinguish the responses that each law provides. I suggest that human rights law, in general, relies on moral and ethical principles. Human rights law provides certain remedies in response to calls for accountability for human rights violations, but it is unable to hold perpetrators of war crimes criminally accountable – that would require calls that require a criminal response.

Calls for accountability for human rights violations express a language of resentment, and they encourage compensational measures, but they are not punishment, at least not in the sense offered by the criminal law. Similarly, criminal law is not really associated with the idea of compensation. When people call for criminal accountability, they are typically envisioning punishment, and more specifically, incarceration.¹⁸⁰ So, the question is whether the focus is on punishment or compensation, as the two types of law and the corresponding calls deliver different remedies: punishment for criminal law, and compensation for human rights law. I suggest that, when people call for criminal accountability, they are calling for neither

180 Barrie Sanders, “Justifying International Criminal Punishment: A Critical Perspective,” in M. Bergsmo and E.J. Buis (eds), *Philosophical Foundations of International Criminal Law: Foundational Concepts (TOAEP 2019)* at 167-240. [Sanders, 2018].

compensation nor declaration, but rather for punishment. The debate is then between the responses that each of the two types of laws provide. Calls for criminal accountability are more specific and precise, as they provide for punishment as the response, while calls for accountability for human rights violations are a broader category that delivers unspecified responses. I argue that, insofar as calls for criminal accountability bring the possibility of punishment, they are superior to calls for accountability for human rights violations.

A. International Human Rights Law in Armed Conflicts

It is often claimed that international human rights law is the law of peace and IHL is the law of war. While I do not doubt this, does it imply that human rights law cannot apply in situations of armed conflict? I see no reason that that should be the case. Rather, there is a very interconnected and complicated relationship between the two types of law. In fact, scholars have argued that there is an overlapping relationship between them and that both types of law can apply in a cumulative fashion. Some would even argue that human rights law applies during times of war in a similar manner as it does in times of peace.¹⁸¹

I will begin by looking at the nature of each of the types of law. International human rights law and IHL are both branches of public international law. Both are customary international laws that are governed by international treaties. However, each type of law has its own objectives that are incorporated into articles, legal principles, and obligations that trigger differently, depending on the time and circumstances. The key instruments of IHL are the four

181 Hans-Joachim Heintze, “On the relationship between human rights law protection and international humanitarian law” (2004) 856 *Int’l Rev Red Cross* at 797.

Geneva Conventions of 1949, and the two Additional Protocols of 1977, while the key documents of human rights law are the 1945 Declaration of Human Rights and its two Covenants of 1966: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), in addition to a number of other treaties that follow the rights established in the ICESCR.¹⁸²

Much of the interaction between the branches of law can be understood by looking at the history and circumstances of their creation. The tendency to protect human rights during armed conflict is not a new phenomenon; rather, there are a number of historical treaties that were designed for this purpose.¹⁸³ One of the oldest is the 1864 Geneva Convention, which was initiated to ensure that human rights would be safeguarded in a manner whereby rights are inviolably attached to human dignity, even during hostility.¹⁸⁴ The Geneva Convention of 27 July 1929 followed, which safeguarded the treatment of prisoners of war, in which, according to René Provost, the word “rights” was first used.¹⁸⁵ The grave atrocity crimes committed

182 *Such as: the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, the Convention on the Elimination of All Forms of Discrimination against Women of 1979, the Convention on the Rights of the Child of 1989, the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984. Other relevant instruments are the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction of 1997, the Convention on the Safety of United Nations and Associated Personnel of 1994, the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 and its Protocol of 1999, and the Convention on Conventional Weapons of 1980 and its four Additional Protocols.*

183 *See Howard S. Levie, Documents on prisoners of war, International Law Studies, volume 60 (Newport, R.I., Naval War College Press, 1979) at 5.*

184 *Jean Pictet ed., Commentary, The Geneva conventions, For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva: International Committee of the Red Cross, 1952).*

185 René Provost, *International Human Rights and Humanitarian Law* (Cambridge, New York: Cambridge University Press, 2002) at 27. [Provost, 2002].

during World War II brought about a change in international law; consequently, a number of treaties came to life to guarantee certain principles, and human rights was a major principle. In 1948, the international community established the *Charter of the United Nations*, which affirmed in its preamble the “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”¹⁸⁶ Moreover, the *Charter* “establish[es] conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”¹⁸⁷ The focus on human rights during war was again mentioned in the 1949 four Geneva Conventions, particularly in their two Additional Protocols of 1977. The reference in Additional Protocol I regulates the conduct of hostilities and protection of civilian populations during international armed conflicts, and Additional Protocol II regulates the conduct of hostilities and protection of civilian populations during non-international armed conflicts, namely in cases of inter-state armed conflict, national liberation armed conflict, and non-international armed conflict. The Geneva Conventions and the 1948 Universal Declaration of Human Rights were established around the same time, in the aftermath of World War II. While they have a shared intention, i.e., to safeguard humanity, they do so in different ways.

The codification of the Geneva Conventions was deemed necessary to protect innocent civilians from war, but the intention was not to embark upon a law to regulate the conduct of war; that was not the intention of the founders. That was, in a way, in contrast to their noble

186 *Charter, supra note 6.*

187 *Ibid.*

mission at the time after a long period of war.¹⁸⁸ Provost analyzes both laws and points out the areas of commonality and differences between them, finding a mutual relationship between the two branches. Although he clarifies that each law performs differently, he finds a “cross-pollination and better integration of human rights and humanitarian law.”¹⁸⁹ The ICRC also notes the overlapping relationship between them, explaining that the laws of war and the law of peace, respectively, are, nowadays, often simultaneously applicable, as opposed to having clear, distinct boundaries. Since the two laws are often seen as a pair, they can also be applied simultaneously.¹⁹⁰

Scholars have emphasized applying human rights law in war situations, arguing that humanitarian law contains far too many opportunities for states to justify military necessity. Human rights, in that sense, help to prevent fighters from committing outlawed conduct. Regional human rights conventions also apply human rights in the time of war. According to Article 27 of the American Convention on Human Rights, rights cannot be derogated or suspended in time of war. Such rights include the right to life, the right to be free from torture, and the right to be free from servitude.

In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from

188 Andrew Clapham, “The Complex Relationship Between the Geneva Conventions and International Human rights Law” in Andrew Clapham, et al., eds. *The 1949 Geneva conventions: a commentary*. (NY: Oxford University Press, 2015) at 705. [Clapham, 2015].

189 Provost, 2002, *supra* note 185 at 249-250.

190 Dietrich Schindler, “The International Committee of the Red Cross and human rights” (1979) 208 *Int’l Rev Red Cross*, online: <<https://www.icrc.org/en/doc/resources/documents/article/other/57jm9z.htm>>.

its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.¹⁹¹

Sometimes, there are political reasons behind the division between the two laws. Andrew Clapham explains that the founders of the two laws aimed to separate the work of the ICRC and, more broadly, humanitarian law from intergovernmental organizations and the politics that are perceived to influence the work of the UN. Clapham further explains that the bodies – whether regional or international – that have jurisdiction over each of the laws are different. Often, case law is limited to a particular body, and it is rare to find case law that leads to interaction between both laws.¹⁹²

Much of the controversy in the application of both branches is a result of states' practices. Some states reject the application of some human rights treaties or prefer certain interpretations of them; for example, the US denies the extraterritorial application of the ICCPR in the time of war. Article 2(1) of the ICCPR confirms that rights enlisted and recognized apply to any individual present within its territory.¹⁹³ Therefore, if the US is involved in a war outside its

191 *American Convention on Human Rights, Costa Rica, 22 November 1969, Article (27).*

192 *Clapham, 2015, supra note 188 at 702-706.*

193 *International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 19 December 1966 Optional Protocol to the above-mentioned Covenant. Adopted by the General Assembly of the United Nations on 19 December 1966. Online: <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>>.*

territory or with non-US citizens, the provisions of the ICCPR would not be enforced. That is a clear example of how the applicability of human rights conventions might rely on the state itself; however, it is worth noting that both the UN Human Rights Committee and the ICJ reject the US' approach, and instead have confirmed the applicability of the ICCPR during armed conflict.¹⁹⁴ In its Advisory Opinion on 8 July 1996, the ICJ advised that:

the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.¹⁹⁵

The ICJ, however, did not distinguish between nationals of the state and individuals of other nationalities; all humans enjoy the minimum standards of human rights, even in times of

194 UNHRC, ICCPR, *The nature of the general legal obligation imposed on States Parties to the Covenant*, general comment Nr. 31 [80], 26 May 2004, UN DOC CCPR/C/21/Rev.1/Add.13. p 4. Online: <<https://www.refworld.org/docid/478b26ae2.html>>. It declares that "also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation."

195 International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders, Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion. 8 July 1996, para 25. Online: <<https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>>. The opinion was also used in the case of the wall in Palestine: <<https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>>.

hostilities. In fact, the ICJ, in its various decisions, emphasised on the application of IHL and IHRL in a consecutive manner. In the 2014 report on the human rights situation in Palestine pursuant to the Israeli Wall case, the independent commission of inquiry stated that parties to conflict are obligated by the provisions and principles of international humanitarian and international human rights treaty and customary law. The report contemplates that, “in situations of armed conflict or occupation, international humanitarian law and international human rights law apply concurrently, and shares the position of United Nations human rights treaty bodies and the International Court of Justice.”¹⁹⁶ The commission advised that both Israel and the Palestinian Authority should take adequate measures in the direction of their full realization of human rights agreements and treaties they have acceded, despite being in a conflict situation.¹⁹⁷ The report emphasizes that parties to the conflict situation might only attack soldiers and their objects, but not civilians and their objects. Furthermore, the warring parties should consider the principles of proportionality and precautions in their attacks and thus, avoid and lessen loss of civilian lives and impairment to their properties.

Another example of the overlap between general international human rights and the *lex specialis* of international humanitarian law are the judgments by the ICJ on the Congo v Uganda case of 2015, where the commission urged the international community to hold accountable those responsible for human rights and international humanitarian law violations.

196 UNHRC, *Human rights situation in Palestine and other occupied Arab territories, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, 29 Sess, UN Doc A/HRC/29/52 (24 June 2015) at paras 12-13, online:*

<<https://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.asp>>.

197 *Ibid* at para 24.

Violation of human rights norms has been understood as to be reason for criminal prosecution. The reports indicated that: “human rights and humanitarian law violations that were committed ... can be considered as crimes according to Congolese and international criminal law, in particular murder and deliberate physical attacks, whereby each constitute a crime punishable by imprisonment.”¹⁹⁸

In its 2018 report to the UNSC on the protection of civilians during the armed conflict in Syria, the UN Secretary-General noted that respect of both international instruments – IHL and international human rights law – is essential to protect civilians in armed conflict. The Secretary-General has further urged the UNSC to ensure that violations of these instruments be addressed.¹⁹⁹

Again, it is not my intention to conduct an in-depth analysis of how each type of law applies and under what circumstances; instead, my point is to clarify that some rights cannot be violated, even during times of war. Examples of such rights include the rights to life, dignity, and freedom – rights that are important to all human beings. It is, hence, unacceptable to kill, torture, detain, or enslave civilians without reasonable justification, even in times of conflict.

198 UNHRC, OMNUSCO, *Report Of The United Nations Joint Human Rights Office On International Humanitarian Law Violations Committed By Allied Democratic Forces (Adf) Combatants In The Territory Of Beni, North Kivu Province, Between 1 October And 31 December 2014*, (May 2015).
Online: <https://www.ohchr.org/Documents/Countries/CD/ReportMonusco_OHCHR_May2015_EN.pdf>.

199 UNSC, *Protection of civilians in armed conflict, Report of the Secretary-General*, UN DOC S/2018/462, (14 May 2018) at p 8, online: <<https://reliefweb.int/sites/reliefweb.int/files/resources/NI812444.pdf>>.

To that end, I argue that it is acceptable to call for the applicability of human rights law during ongoing conflict.

B. Remedies of Human Rights Law

The question is: what remedies can human rights law offer as responses to calls for accountability for human rights violations, and are they enforceable? Typically, such remedies involve condemnation (by the international community) and declarations (from international bodies, such as the UNGA and the UNSC). Other remedies might be preventive and compensational in nature, for example, when the international community encouraged the imposition of political, diplomatic, economic, and legal measures in response to the Syrian file. Calls might also prompt other remedies; in Libya, for example, the escalation of human rights violations led to humanitarian intervention. Notably, however, none of these remedies include punishment per se.

The crisscrossing and the complicated relationship between international human rights law and international criminal law make it difficult to distinguish the responses that each type of law provides. Human rights law provides a range of responses to calls for accountability for human rights violations, but notably they are not punitive responses. For punitive responses, the criminal law must be used. Human rights law is a broader category than criminal law, but only the criminal law can provide punishment as a response. While calls for criminal accountability and calls for accountability for human rights violations both generate legal responses, calls for criminal accountability are much narrower.

Human rights rely on moral and ethical principles. While the language of human rights allows for naming and shaming, and it expresses condemnation, censure, blame, and resentment, and it provides the remedies previously discussed, it does not specifically and necessarily offer punitive responses, at least not punishment in the same way that criminal law does. Similarly, criminal law is not generally associated with the idea of compensation. That said, people looking for justice typically envision punishment for wrongdoers. I argue that human rights law does not provide the same important remedies as criminal law does, and when people call others to account, they are calling for punishment.

The modern understanding of human rights can be traced back to two founding philosophies: natural law theory and political theory. Advocates of natural law theory assert that human rights are those natural and moral rights that all humankind enjoys.²⁰⁰ Political theory claims that human rights trigger a response, i.e., they point toward roles that must be filled by the state as a “necessary condition of the decency of a society’s political institution and its legal order.”²⁰¹ Political theory does not refute the importance of human rights, but it goes further to insist that the state protect its citizens by establishing necessary minimum standards.²⁰²

200 *John Locke, Second Treatise of Government, Peter Laslett (ed) 3rd edn (Cambridge: Cambridge University Press 1988). John Locke, An Essay Concerning Human Understanding, Roger Woolhouse (ed) (London: Penguin Classics 1997). Andrew Clapham, Human rights: a very short introduction (OUP Oxford, 2015) at 9-10.*

201 *John Rawls, The Law of People (Cambridge, Ma: Harvard University Press, 1999) at 80. [Rawls].*

202 *See Charles R. Beitz, The Idea of Human Rights (Oxford: Oxford University Press, 2009).*

The problem with human rights law is that it lacks the mechanism that is needed for its enforcement, and its implementation is heavily reliant upon a state being a signatory to it. Violations of human rights involve *treaties violations* and *atrocities crimes*.²⁰³ Treaties violations are breaches of the provisions of certain international human rights agreements. It is the responsibility of individual states to incorporate its international obligations into its domestic laws, and to take adequate steps to comply with them and prevent their violations. However, enforcement of human rights law is heavily reliant on individual states, with the international community having little control beyond the ability to offer condemnation. Some human rights treaties are dependent on whether a given state is a signatory, which means that some wrongdoing is prohibited for member states, but not for non-member states, for example, the rights provided for certain vulnerable people – women, Indigenous peoples, persons of different religions, and children. Furthermore, some treaties give signatory states the option to apply provisions gradually; for example, Article 2 of the ICESCR accepts the principle of progressive recognition of its provisions.²⁰⁴ Although states still remain under a moral (and perhaps legal) obligation to apply it when possible, if a state chooses not to apply it, then enforcement is problematic. Of course, the international community would condemn such a choice, and it may take positive measures to encourage the state to comply with its obligations, or it might take negative measures to sanction the state, but that may well be the extent of its response.

203 *Stanford Encyclopedia of Philosophy, Human Rights, online:*
<<https://plato.stanford.edu/entries/rights-human/>>.

204 *International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly of the United Nations on 16 December 1966, online:*
<https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf>.

Human rights violations might involve atrocity crimes, which include war crimes, crimes against humanity, genocide, and crimes of aggression. These kinds of human rights violations are criminally punishable, either by domestic courts or international courts and tribunals.²⁰⁵ It is here that we see the intersection between human rights law and criminal law. Atrocity crimes are wrongdoings that, because of their seriousness, require a response that is punitive in nature, i.e., punishment. That response became available upon the creation of international criminal law. In 1991, the International Law Commission adopted the Draft Code of Crimes Against the Peace and Security of Mankind – the title was later changed to Crimes Against Humanity – which listed the conduct that is considered to be crimes against humanity; that conduct included the “systematic or mass violations of human rights.”²⁰⁶ Scholars suggest that, with the inclusion of mass violations of human rights, international criminal law became more relevant. Andrew Clapham argues that international criminal law is largely an expansion of human rights law, and is celebrated as a major progression in the efforts to hold human rights violators accountable. The roots of international criminal law can be traced back to the Nuremburg trials, which dealt with the grave violations of human rights during World War II. However, international criminal law only morphed into its current shape with the inception of the Rome Statute, which regulates provisions to criminalize grave human rights violations – i.e., international crimes as listed in the Statute. Hence, human rights law, as we know it in the

205 Andrew Clapham, “Human rights and international criminal law,” in William A. Schabas, ed, *The Cambridge Companion to International Criminal Law* (Cambridge: Cambridge University Press, 2016) at 11. [Clapham, 2016].

206 UNGA, *International Law Commission, Summaries of the Work of the International Law Commission, Draft code of crimes against the peace and security of mankind (Part II) – including the draft Statute for an international criminal court. UNGA resolution 36/106 (10 December 1981)*, online: <http://legal.un.org/ilc/summaries/7_4.shtml>.

Universal Declaration of Human Rights and many other conventions (though not all), does not suggest penal responses, but international criminal law does.

Human rights law can come into conflict with criminal law – whether domestic or international – and it might sometimes stand *against* punishing perpetrators. Human rights law is “a double-edged sword”²⁰⁷ – one that protects victims whose rights have been violated, as well as the rights of suspects. This debate raged heavily in relation to the Nuremburg trials, where the legitimacy of some judgements was questioned.²⁰⁸ For example, German war criminals rejected their sentences, arguing that they were obligated to follow the orders of their Nazi commanders, and that disobedience would have cost them their lives and their families’ lives. The International Military Tribunal eventually denied that defence, arguing that the officers must have known that their conduct was contrary to law.

The Nuremburg trials are an exceptional example and one that is unlikely to happen again; during the trials, almost all prosecution of international crimes were perceived as being the fundamental enforcement of the criminalization of violations pertaining to human rights. With the advancement of human rights discourse, this notion changed.²⁰⁹ Take, for example, the International Criminal Tribunal for Rwanda (ICTR). The Court was obligated to comply with its legal obligations to protect the rights of the accused. Accordingly, the Court dismissed

207 Clapham, 2016, *supra* note 205 at 14-15.

208 See United Nations Economic and Social Council, *Information Concerning Human Rights Arising from Trials of War Criminals*, United Nations War Crimes Commission, UN Doc. E/CN.4/W.19 (15 May 1948) at 11, online: <<http://www.unwcc.org/wp-content/uploads/2017/02/UNWCCUN-HRs-Report.pdf>>.

209 See Cristian DeFrancia, “Due Process in International Criminal Courts: Why Procedure Matters” (November 2001) 87: 7 *Va L Rev* at 1381.

the charges with prejudice where it found that proceeding with the charges would negatively affect the integrity of the judicial process.²¹⁰ Nowadays, during the ICC era, protecting the rights of the accused has become imperative to the due process of law and is interwoven into trial procedures. This is a clear example of how human rights law can undermine prosecution and threaten established human rights protections.²¹¹ Hence, sometimes human rights law can be a burden on the criminal punishment process. It might advantage criminals, despite there being available evidence against them of grave human rights violations. So, while human rights law and criminal law can be in harmony, each is tasked differently, and they can sometimes come into conflict with one another.

Returning to the question of what remedies human rights law can offer as responses to calls for accountability for human rights violations and their enforceability, as mentioned, they include preventive and compensational measures. These remedies might include sanction; normally economic and political sanctions, in addition, such calls might increase the possibility of humanitarian intervention as a last resort to protect civilians and avert human rights violations. But these measures are either unenforceable or their legality might be questioned.

The purpose of economic sanctions is to put pressure on other states to halt human rights violations through withdrawal of customary trade and financial relations for foreign- and security-policy purposes. According to the report of the responsibility to protect, submitted in

210 *Barayagwiza v. Prosecutor*, ICTR – 97-19-AR72, 1 38 Appeals Chamber (31 March 2000) at para 75, online: http://www.worldcourts.com/icttr/eng/decisions/1999.11.03_Barayagwiza_v_Prosecutor.pdf.

211 *Clapham*, 2016, *supra* note 205 at 13-14.

2000 by the International Commission on Intervention and State Sovereignty, the application or threat of economic sanctions “is a significant one and should never be undertaken lightly. Such actions may result in the application of very high levels of political and economic ... pressure, and to that extent will require a relatively high level of political commitment on the part of the external actors.”²¹² Sanctions could involve political sanctions, diplomatic isolation, suspension of organizational membership, travel and asset restrictions on targeted persons, the threats of trade and financial sanctions, the withdrawal of investment, the withdrawal of International Monetary Fund or World Bank support, and the curtailment of aid and other assistance.

In 2011, the beginning of the Syrian conflict, many governments imposed sanctions, whether political representation or economic cooperation, to put pressure on the Syrian government hoping to halt human rights violations against civilians. It, per instance, enforced travel bans and froze assets of personnel of the Syrian government.²¹³ It also suspended Syria as a permanent chair of the Arab League.²¹⁴ The EU banned crude oil imports from Syria, and it blocked trade in gold and precious metals and diamonds with Syrian public bodies and the

212 *International Commission on Intervention and State Sovereignty, The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (Ottawa, ON: International Development Research Centre, 2001) at VII, online: <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>>.*

213 “Q&A: Syria sanctions”, *BBC News* (23 March 2012), online: <<http://www.bbc.com/news/world-middle-east-15753975>>.

214 Neil MacFarquhar, “Arab League Votes to Suspend Syria Over Crackdown”, *The New York Times* (12 November 2011), online: <<http://www.nytimes.com/2011/11/13/world/middleeast/arab-league-votes-to-suspend-syria-over-its-crackdown-on-protesters.html?pagewanted=all>>.

Syrian Central Bank. Furthermore, Arab governments halted investment in projects in Syria.²¹⁵ Canada, as one example, under the *Special Economic Measures Act*, since 2011 took special economic measures to prohibit their diplomatic representation, trade and business from operating in the Syrian market,²¹⁶ but of course, these measures did not generate any adequate responses to victims of human rights violations; al-Assad government continues its violations to date.

Violations of human rights are often internationally castigated, which prompts the international community to take corrective steps to deal with wrongdoing if it finds that the national state is not fulfilling its obligations. As Judge Greenwood explains:

[I]nternational law is not confined to treaty texts. It includes customary international law. That law is not static but develops through a process of State practice, of actions and the reaction to those actions. Since 1945, that process has seen a growing importance attached to the preservation of human rights. Where the threat to human rights has been of an extreme character, States have been prepared to assert a right of humanitarian intervention as a matter of last resort.²¹⁷

215 “Q&A: Syria sanctions”, *BBC News* (23 March 2012), online:
<<http://www.bbc.com/news/world-middle-east-15753975>>

216 Canada International Relations, *Canadian Sanctions Related to Syria*, (2011), online:
<https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/syria-syrie.aspx?lang=eng>.

217 Christopher Greenwood, “Humanitarian Intervention: The Case of Kosovo” in Jarna Petman & Martti Koskenniemi, eds, *Finnish Yearbook of International Law (The Hague, the Netherlands: Kluwer Law International, 2002)* at 162, online:

Although Greenwood considers humanitarian intervention to be legitimate, its legality is nonetheless an open question. Greenwood advises that international law is still developing, it stands on a number of foundational principles that are considered to be the pillars of international relations: sovereignty, equality, and independence. According to Article 7 of the *Charter of the United Nations*, states should refrain from intervening in one another's internal affairs,²¹⁸ and according to Article 2(4), states are prohibited from using force in their relations with one another.²¹⁹ Of course, these restrictions are not absolute; international law includes two exceptions. The first exception is found in Article 51 of the *Charter*, which allows states to use force in cases of "self-defence if an armed attack occurs against a Member of the United Nations."²²⁰ The second exception falls under Chapter VII, and it allows the Security Council to authorize intervention if the human rights violations intensify such that they threaten international peace and security. Humanitarian intervention as a response to calls for human rights violations might not be the best response, because it violates the principle of state sovereignty; also, state practices shows that states are hesitant to intervene.

<http://eprints.lse.ac.uk/21492/>.

218 *Charter, supra note 5, Article 7: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter."* Also see Alain de Benoist, "What is Sovereignty?" (1999) 116 *Telos* 99 at 100, online <<http://journal.telospress.com/content/1999/116/99.abstract>>. (Defined state sovereignty as "non-interference by external powers in the internal affairs of another state.")

219 *Charter, supra note 5, Article 2(4) asserts that: "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations."*

220 *Ibid, Article 51.*

Scholars argue that human rights law limits state sovereignty. John Rawls says, “[h]uman rights are a class of rights that play a special role in a reasonable Law of Peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to a regime’s internal autonomy.”²²¹ Joseph Raz does not reject Rawls’ statement but suggests that action should be in response to violations. He explains that, while we can take recourse in human rights in a variety of contexts and purposes, human rights practice often follows the trend of using a human right as a sufficient ground to take action against violators in the international realm.²²² Therefore, the action – to trespass on a state’s sovereignty – is permissible and that action is what distinguishes the importance of human rights as fundamental rights that trigger a response.²²³ Raz says that human rights are not rights that we all have in virtue of our humanity, but rather, they are universal rights that all humans share. He says that human rights are a political concept that paves the way for political measures; they are inherently moral rights that require legal-political protection.²²⁴ When we use the discourse of human rights, we are calling for intervention, and we are giving legitimacy to such actions. Human rights that are not backed by legal enforcement are not rights. In Raz’s view, if human rights do not generate action, then they have no power. He explains that moral rights cannot be considered human rights if legal processes lack the ability to fairly and effectively protect them. In my view, Raz’s statement is an exaggeration; human rights are moral rights and they are effectively protected by the value

221 Rawls, *supra* note 201 at 79.

222 Joseph Raz, “Human Rights without Foundations,” in Samantha Besson and John Tasioulas (eds.) *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) at 328.

223 *Ibid* at 329.

224 Joseph Raz, “Human rights in the emerging world order.” (2010) 1 *Transnational Legal Theory Journal* at 31- 44.

they carry, not by the legal process that enforces them; otherwise, they would not be human rights – that’s how we understand human rights. The legal process that protects human rights comes from the power of the criminal law, not from human rights law. Human rights are ethical teachings that inform us about what is right and what is wrong for a given society, but – unlike criminal law – they do not provide for punishment. The remedies that can result from calls for accountability for human rights violations are precarious; they rely on the points of view of scholars and practitioners, while the remedies that can result from calls for criminal accountability are more significant.

It has been argued that, in looking at the new trend of states’ practices, it is correct to say that intervention in state sovereignty is to be understood as an exception that states should be careful to take. In fact, statistics show that the international community refrains from using punitive language; instead, it leans more toward the use of preventive language. Gabriella Blum argues that, for the sake of peace over justice, UNSC-imposed sanctions against rogue countries are not considered to be a form of punishment, but rather, the sanctions are seen as preventive or regulatory actions.²²⁵ Indeed, if we look back at many of the UNSC resolutions on the Syrian file, we find that preventive language is what has been used; whenever punitive language has been used, the permanent members of the UNSC have vetoed the resolution; see, for example, the previously mentioned draft resolution to refer crimes in Syria to the ICC.

225 Gabriella Blum, “*The Crime and Punishment of States*,” (2013) 38:1 *Yale J Int’l L* at 58.

Many scholars speak about the duty to obey the law as a *prima facie* duty.²²⁶ Let us examine how Christopher Heath Wellman perceives human rights in the context of humanitarian intervention: he says that we have the onus to “obey only the *just* laws.”²²⁷ Laws impose negative (and limited positive) duties on us; they require us to refrain from acting in ways we otherwise might. If we apply that to human rights, and if human rights are obligatory, then states should have no choice as to whether to intervene. If human rights are neither mandatory nor forbidden, and we have the freedom to choose, then “those acts that are required by justice are a subset of just (i.e., permissible) acts. Given this, insisting that there is no obligation to obey an unjust law is perfectly compatible with there being content-independent reasons to obey the law.”²²⁸ But, in comparison, criminal law does not give us the same flexibility. Instead, criminal law outlines which conducts are wrong and therefore require condemnation, and it provides conditions for perpetrators to be punished and called to account.²²⁹ Thus, calls for criminal accountability are more compelling than are calls for accountability for human rights violations. According to Clapham, the most practical reason to advocate for calls for criminal accountability is that the expression “crimes against humanity” facilitates a more meaningful response, especially from journalists and policymakers. The magnitude of the term and what it represents inspires action, rather than indifference or

226 Matthew H. Kramer, “Moral and Legal Obligation,” in Martin P. Golding and William A. Edmundson, eds., *Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Blackwell, 2005) at 179.

227 Christopher Heath Wellman, “Taking Human Rights Seriously” (2012) 20:1 *Journal of Political Philosophy* at 128.

228 *Ibid.*

229 RA Duff, “Good and Evil and the Criminal Law” in Christopher Cordner, ed, *Philosophy, Ethics and a Common Humanity: Essays in Honour of Raimond Gaita* (Taylor & Francis – Routledge, 2011) at 3.

inaction.²³⁰ When we use the language of the criminal law, we expect an account that responds to the wrong, as opposed to the harm; but, as Tanguay-Renaud says, “there is nothing in the idea of human rights that specifically calls for, or is intrinsically connected to, a punitive response. If sound, as I think it is, this further objection entails that the category of human rights is not only under-inclusive, but also over-inclusive, in terms of the wrongs it singles out.”²³¹ Tanguay-Renaud explains that the difference between calls for criminal accountability and calls for accountability for human rights violations is punishment. Human rights might conjure parallels with the realm of criminalization. Given the illegality of human rights violations, the most significant missing variable that separates them from crimes is the notion of punishment. The message that criminal law gives is stronger because it holds a firm agreement among us (ordinary citizens, scholars, practitioners, and others), that some conducts are illegal and deserve punishment. When we use the language of criminal law, we highlight the fact that we will punish perpetrators at some point – if not now, then when circumstances allow. Tanguay-Renaud suggests that an important reason for this critical demarcation is that defining a wrongdoing as a crime is often understood to include a specific set of responses, including condemnation and punishment for the perpetrator, whereas human rights are moral norms and principles that embody values that describe standards of human behaviour – standards that we all share by virtue of our morals and by virtue of our membership in a polity. International human rights are important to every human being because they ground the standards that we all share. The main problem involved in using the language of human rights

230 *Clapham, 2016, supra note 205 at 17.*

231 *Tanguay-Renaud, supra note at 11.*

is that human rights norms are moral claims. Human rights law does not, so far, provide penalties for violators in the same way that criminal law does. “[V]iolations of human rights are also generally thought to warrant collective marking and condemnation of their wrongfulness, as well as related, yet under-specified, interferences with the perpetrator’s affairs.”²³² The language of human rights does not tell us what should be done if someone violates human rights, while criminal law does. Tanguay-Renaud suggests that the missing component is a central focus on punishment, a key response that is warranted when a criminal act is committed. Tanguay-Renaud’s analysis does indeed speak to the situation in Syria. Many people have called for the international community to respond to grave human rights violations. The international community has responded by taking some measures – such as condemnation, denunciation, sanctions, and boycotts – but the war continues nonetheless, and the crisis is not lessening. In fact, it is increasing by the day, although it is taking a slightly a different form. In March 2020, another wave of refugees fled Syria, riding death boats to other continents. Condemnation, denunciation, sanctions, and boycotts have not done much during the last nine years of the conflict. The message has not gone beyond that, and it has not helped. I argue that the situation may have been different if criminal measures were taken, instead of those of human rights. Calls for criminal accountability are calls waiting for a response, and that response is punishment.

232 *Ibid at 14.*

II. CONCLUSION

The first part of this chapter drew an overall picture of the ongoing Syrian conflict, explained its root causes, identified the parties on the battlefield, exposed the crimes that have been committed and continue to be committed, and assessed the consequences of those crimes on civilians, the refugee crisis, heritage, and health. Further, it categorized the conflict for the different parties and introduced the legal framework applicable to the conflict. The chapter established that, due to the current political and legal situation, holding perpetrators criminally accountable is unlikely to happen, because there are jurisdictional limits on domestic and international criminal institutions that would, otherwise, exercise criminal justice over crimes in Syria. I also explained that, although criminal accountability is unlikely to happen, Syrian citizens, governments, NGOs, scholars, politicians, human rights activists, and others are calling for it loudly.

The second part of this chapter offered a normative evaluation of what might be an alternative to calls for criminal accountability in the midst of the civil war in Syria. It challenged the assumption that, if criminal accountability is not currently an option for holding criminals accountable, instead we might apply the human rights treaties to which Syria is party, and whose provisions imply certain measures that would respond to those who violate human rights. I evaluated this possible alternative to criminal accountability. I explained that calls for accountability for human rights violations have a declarative potential; they stress that there are grave violations of human rights taking place and that the international community must take appropriate and necessary measures to halt them. The measures that can be taken in that

regard might include denunciation, condemnation, declaration, and even humanitarian intervention, but they do not include punishment. While human rights law provides a broader array of responses, criminal law provides punishment, which arguably is the appropriate response.

However, this does not answer the question of this dissertation. The question remains: due to the unlikelihood of institutional criminal punishment, what is the point of calling wrongdoers to account? Should we stick with human rights law, and accept whatever remedies it can provide? I argue that we should not, that the language of calls for criminal accountability has a specific expressive value; namely, calls for criminal accountability express a message that says that, if we could, we would hold criminals accountable and we would punish them. I will argue that there is intrinsic value in calls for criminal accountability.

The answer to this dissertation's question will become clear in Chapter Three. But, before that, there are a number of critical arguments to which I turn next. These arguments are related to the ongoing debates among scholars about why societies punish, whether punishment is necessary, and what justifies the practice. Criminal accountability is not punishment per se, although punishment is, typically, the end goal of it. There are, however, other components to the criminal law system: fact-finding and trials, which also have key values. I will also discuss the authority problem, which asks: in the absence of willing and able domestic criminal justice institutions that can call wrongdoers to account, who else has the authority or the standing to do that? In a situation of war, when people are suffering from ongoing heinous crimes, is the question of authority very important? Does the issue of jurisdiction in atrocity crimes matter as

much as it does in the domestic criminal justice system that exists in stable societies? I will argue that it is our shared humanity that provides the standing to call to account.

CHAPTER TWO: JUSTIFICATIONS OF CRIMINAL ACCOUNTABILITY AND THE PROBLEM OF AUTHORITY

Part One: justifications of criminal accountability

Part Two: the problem of authority

PART ONE: JUSTIFICATIONS OF CRIMINAL ACCOUNTABILITY

I. Introduction

In the previous chapter, I explained the central question of this dissertation: given the significant unlikelihood of institutional criminal punishment, are there justifications for calls for criminal accountability in the midst of the ongoing Syrian war? In order to demonstrate the value of such calls, in this chapter, I will explain why criminal law is important. I have already claimed that human rights law does not function the same way as does criminal law, and here I will explain why criminal law is important and why, traditionally, criminal law has been perceived as important.

Before delving into the justification for criminal accountability, I will deal with a critical issue that is directly related to the argument in this chapter, that is: whether the justifications for criminal accountability in the domestic criminal law are similar to those that justify international criminal law. That is: to what degree are justifications of criminal accountability in domestic criminal law felicitous to international criminal justice?

I then begin with a discussion of the third component of the criminal justice system, i.e., punishment, where I first establish the nexus between it and criminal accountability. Punishment is feature that differentiates criminal law from other types of law. Citizens tend to focus on punishment as an end goal and as the defining feature of the criminal justice system; it is the aim of and the answer to their calls for criminal accountability; when people call for

criminal accountability, they expect a criminal justice system to hold perpetrators accountable and punish them.

While there are many theories that justify punishment, I will limit my discussion to three of the major theories: consequentialism, retributivism, and expressivism. The first two theories are traditionally understood as providing justifications for inflicting punishment. Each of them provides its own unique understanding as to why societies punish perpetrators. So, while consequentialists think of punishment as deterrence to future crimes (among other justifications that the theory provides), retributivists think of punishment as the just response to perpetrators, who must be punished for the wrongs they have committed. The third theory, expressivism, however, is considered to be the main justification for international criminal punishment.

While punishment is a key element and the defining feature of criminal law, there are two other integral components that must be dealt with before anyone can be said to be legitimately punished. These components are fact-finding and trials. The general public tends not to focus on these components in relation to calls for criminal accountability because calls tend to focus on punishment, but they are part of any legitimate criminal justice system. As I will explain, the initiatives that have been taking place in absentia are limited to fact-finding and trials; they do not include the third component: punishment. And, as I have argued, while the war continues, there is no criminal justice institution in Syria that is both willing and able to perform the task of ensuring criminal accountability; in other words, there can be no impartial and fair trials at this time in Syria. In this chapter, I will explain the importance of these two parts of the criminal justice system and the justifications that they embody.

In Part Two of this chapter, I will consider the problem of authority; namely, who has the authority to call others to account? Criminal justice institutions are one of the characteristics of stable societies, but where such stability does not exist and crimes are ongoing, the issue of which institution can take on the role of criminal accountability will be triggered. However, the question is: in situations of ongoing atrocity crimes, does it really matter who makes the call for criminal accountability? I will suggest that, if the state is unable to call wrongdoers to account, then whoever can do it, must do it, because justice requires it. After I have considered these issues in this chapter, I will turn, in the next chapter, to the components of the criminal justice system – fact-finding, trials, and punishment – to evaluate the justifications for calls for criminal accountability in the midst of the ongoing Syrian war.

II. Criminal Accountability on Domestic versus International Levels

While the justifications for punishment at the level of international criminal law are similar to those at the domestic level, not all justifications that apply domestically, apply internationally. For example, individual (sometimes referred to as “specific”) deterrence and rehabilitation serve as justifications for domestic punishment; however, they do not apply internationally.

The philosophy of international criminal law is borne from domestic criminal law. Many scholars take it for granted that whatever justifies criminal accountability at the domestic level also applies at the international level.²³³ But, as William A. Schabas says, international criminal law is often “little more than an afterthought.”²³⁴ We tend not to think about it as a distinct

233 Tallgren, 2002, *supra* note 12 at 565.

234 Schabas, 1999, *supra* note 13 at 171.

system that stands by itself, but rather as a supplemental system that corresponds to society's willingness to criminalize perpetrators only when the domestic system is unable or unwilling to do so. The ICC's principle of complementarity – which aims to promote national proceedings, and insists that international proceedings will not intervene unless in the event of unwillingness or inability by the domestic justice system – well reflects that understanding.²³⁵ However, there are certain justifications for domestic criminal law that cannot be understood in the same way for international criminal law. According to Robert D. Sloane, the ferocity of atrocity crimes makes any philosophical analysis “invite ‘intuitive-moralistic answers,’ making debate about the rationales for punishing serious human rights atrocities seem pejoratively academic.”²³⁶ So, one could argue that we should understand punishment at the international level within the general philosophical framework of domestic criminal law, but we should keep in mind the particularities and the circumstances under which international criminal law operates. That said, it is important to acknowledge the major differences between the two systems, i.e., the society to which each law speaks, the circumstances under which each operates, the nature of the crimes, the intentions of perpetrators, and the goals that each law seeks to achieve.

Domestic criminal justice systems typically operate in monolithic societies, where citizens have shared moral values, history, political systems, and laws that guide and govern

235 *Fatou Bensouda, “Reflections from the International Criminal Court Prosecutor” (2012) 45:1 Case W Res J Int'l L at 507.*

236 *Robert D. Sloane, “The expressive capacity of international punishment: The limits of the national law analogy and the potential of international criminal law” (2007) 43 Stan. J. Int'l L. at 39. [Sloane, 2007].*

them. Citizens may come from different ethnicities, religions, and origins, but arguably they have explicitly or tacitly agreed – by joining or remaining in the given society – to a social contract that defines their rights and obligations. So, arguably, whoever breaches the contract deserves the proper response. Women’s rights in Saudi Arabia, for example, are not similar to those in Canada, and although not all women in Saudi Arabia are happy about their society’s laws, they comply with them, having been raised to respect them. The international criminal justice system, in contrast, speaks to a metaphorical, heterogeneous society; those subject to it do not necessarily share a similar social contract, but rather have various understandings of certain values that might not suit other societies around the world. For example, what concerns me as a Syrian is not exactly the same as what concerns me as a Canadian. What is largely agreed upon, however, is our humanity; it is the common thing that unites us. No reasonable person, for example, disagrees that genocide is a heinous crime and that we must respond to it. Whereas societies might disagree on whether polygamy is a crime, reasonable people will not disagree about the criminality of genocide. International criminal law, then, plays the role of mediator between multiple societies. Sloane says that international criminal law “emerges as a system of proxy justice for the disenfranchised local community victimized by the widespread human rights atrocities. ... At other times, we emphasize the interests and values of the figurative international community, either as a community of states or in terms of the more elusive, somewhat mystical, notion of a community of mankind, a *civitas maxima*.”²³⁷

237 *Ibid* at 48. *Civitas maxima*, is “Greatest society. A coalition or confederation of diverse social, ethnic, or cultural groups bound together by common legal, moral, and/or cultural ties.” See Aaron Xavier Fellmeth and Horwitz Maurice, *Guide to Latin in International Law* (Oxford University Press, 2009).

International criminal law seeks to reconcile the interests and goals of both the international and domestic societies. It is a system that is put in place for the benefit of deprived local communities that have been subjected to rampant human rights atrocities.

Another notable difference between the international and domestic justice systems is the types of the perpetrators with which each system must contend. In the domestic system, it is generally easier to identify those responsible for crimes. The international system recognizes that the collective nature of atrocity crimes is a major factor with respect to mitigating responsibility. It cannot punish every perpetrator; the difficulties of identifying and bringing perpetrators to justice are major challenges. Collective responsibility is “thought to diffuse moral responsibility, mitigating each perpetrator’s guilt in some proportion to that of the collective.”²³⁸ International criminal law cannot function exactly as does the domestic system.

Punishment at the international level, while it serves public goals, is “a mere means to an end.”²³⁹ It should not be understood as achieving the same goals as does domestic law. In other words, at the international level, there will be no punishment that corresponds to the kind of wrong that war can cause. Cesare Bonesana di Beccaria, in his essay on crimes and punishments, provides the right nuance:

If the passions, or necessity of war, have taught men to shed the blood of their fellow creatures, the laws which are intended to moderate the ferocity of mankind, should not increase it by

238 *Ibid* at 39.

239 *Ibid* at 82.

examples of barbarity Is it not absurd, that the laws, which detect and punish homicide, should, in order to prevent murder, publicly commit murder themselves? What are the true and most useful laws? Those compacts and conditions which all would propose and observe, in those moments when private interest is silent, or combined with that of the public.²⁴⁰

The nature of international crimes is different from that in the domestic sphere. Punishment at the domestic level deals with a different set of circumstances than those that operate at the international level. For example, war crimes are associated with exceptional circumstances, i.e., war, and they are unlikely to be repeated.²⁴¹ Moreover, the nature of the crimes with which each legal system deals is different. It would be extremely unusual for the domestic legal system to have to deal with war crimes. It offers different kinds of penalties that depend on the gravity of the crimes, while, so far, the penal response to international crimes has been incarceration.²⁴²

Therefore, because the international criminal justice system operates and functions in a

240 *Cesare Bonesana di Beccaria, An Essay on Crimes and Punishments (Albany: W.C. Little & Co., 1872) at 105.*

241 *Kirsten J. Fisher, Moral accountability and international criminal law: holding agents of atrocity accountable to the world (NY: Routledge, 2012) at 49. [Fisher, 2012].*

242 *UNGA, Formulation of The Principles Of International Law Recognized In The Charter Of The Nuremburg Tribunal And In The Judgment Of The Tribunal, International Law Commission, First Sess, A/CN.4/W.12 dated: 31/May/1949. Online: <<https://www.legal-tools.org/doc/0d1ffe/pdf/>>. According to the Formulation Of The Principles Of International Law Recognized In The Charter Of The Nuremburg Tribunal And In The Judgment Of The Tribunal, which state in Principle (I) that: “[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.”*

different manner than does the domestic criminal law system, the values that justify it should be tailored to it. Although traditional values, such as deterrence and retribution are also justifications for international criminal accountability, one should understand them in the context of international crimes. International criminal accountability aims as well to achieve several other values, including: preventing impunity, especially for high-ranking officials; addressing the rule of law and promoting justice; maintaining archives for historical purposes; compensating the wrongs of the past; maintaining international security; and encouraging peace.

Finally, the international criminal justice system is, to a large extent, reliant upon politics. It is often the case that the ICC and international criminal tribunals do not have the legal jurisdiction to deal with international criminal cases without referral by the UNSC, which requires political will. And, of course, the Syrian file is an example where that political will has thus far been missing.

III. Punishment – The Nexus between Criminal Accountability and Punishment

It is often thought that the rationale behind calling wrongdoers to account for criminal acts is ultimately the desire to punish them. People assume that the criminal justice system is designed to penalize wrongdoers and to remedy specific wrongs. And, while the criminal justice system is not solely about punishment, it is the end goal of the system, and it often represents the desire of victims, so, in one way or another, it represents justice.

Some of the reasons for calling wrongdoers to account include communicating with them, listening to them, hearing their defence, and allowing a form of communication with their victims and witnesses. Communication generally happens through the process of a trial. Trials give wrongdoers an opportunity to confront the general polity as well, to explain themselves, and to say why they have contravened society's values. Antony Duff explains that trials are more than a process that seeks the truth. Trials are a communicative process between (alleged) criminals, victims, witnesses, and society.²⁴³ Trials and investigations may, in fact, mean more to society than does punishment, and they might have values over and beyond punishment. While I do not deny the important of trials, I assert that, when people call for criminal accountability, their focus is on punishment, as the end goal of the criminal justice system and as a distinctive feature of it. The criminal justice system is concerned with the implementation of justice, and for most people, justice requires punishment.

Imagine an old Syrian woman who loses her children. Her son is arrested, tortured, and killed, her daughter is raped, and her grandchild is kidnaped for trafficking purposes. This woman would feel resentment and would call for punishment. She might want to know the truth and she may want to listen to perpetrator's defence, but her ultimate goal would that the defendant be punished; for her, punishment represents justice, and it's the right response to her suffering. Sloane suggests that punishment is indeed a pronounced feature of criminal law, and it is through punishment that the system pursues and articulates both its practical and moral objectives.²⁴⁴ But, what is punishment?

243 Duff et al., 2007, *supra* note 14.

244 Sloane, 2007, *supra* note 236 at 39.

Punishment has been defined as the “intentional incapacitation or infliction of pain by an authoritative institution on one who has been deemed liable to such treatment.”²⁴⁵ It is when a body, which claims authority, imposes something on an offender for a committed crime, and that something is intended to be both “burdensome and reprobative.”²⁴⁶ HLA Hart enumerates the following criteria to distinguish punishment: (i) Pain must be a component in the act of punishment. (ii) It must be related to an offence that breaks legal rules. (iii) “It must be of an actual or supposed offender for his offence.” (iv) It must be carried out by individuals who are not the offender, with an intention to cause suffering. (v) “It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.”²⁴⁷ If punishment does not involve these criteria, then it is simply pain without purpose.²⁴⁸

Punishment requires justifications in order to promote the purpose of imposing it. According to Duff, punishment is “morally problematic” and, unless it is justified, it is “morally wrong.”²⁴⁹ Criminal law philosophers often focus on the reasons that permit state punishment. Two major theories in the philosophy of law are retributivism and consequentialism (utilitarianism), and each, in their own way, advances punishment as a response to wrongdoing.

245 Larry May and Shannon Fyfe, *International Criminal Tribunals: A Normative Defense* (Cambridge: Cambridge University Press, 2017) at 50. [May & Fyfe, 2017].

246 RA Duff, “Legal Punishment” in *Stanford Encyclopedia of Philosophy* (2 January 2001). [Duff, 2001].

247 HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed (NY: Oxford University Press, 2008) at 4-5.

248 *Coker v. Georgia*, 433 U.S. 584 (1977) U.S. Supreme Court, at P. 591-592. It says: “punishment, and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.”

249 Duff, R.A. & David Garland, “Introduction: Thinking about Punishment,” in R.A. Duff and David Garland (eds.), *A Reader on Punishment*, (NY: Oxford University Press, Oxford, 1994) at 2. [Duff & Garland, 1994].

Consequentialism, advanced by John Stuart Mill and Jeremy Bentham, argues that punishment entails a mischievous and evil quality, and that it should only be used if it ensures the exclusion of a greater evil.²⁵⁰ Consequentialism takes a forward-looking approach, which means it considers that the aim of punishment is, in part, to prevent *future* crimes. Punishment must provide a “net social gain.”²⁵¹ In that, consequentialism brings together moral and political values – “the arriving at a definition of ‘the good’ and with establishing a foundation for the role of government and the basis of political obligation in the modern state.”²⁵² For consequentialists, punishment must do *good* for society overall, and must prevent *evil*.

Retributivism, on the other hand, punishes offenders for the harm they have inflicted. It takes a backward-looking approach that focuses on offenders’ past actions, which means that punishment is inflicted in return for the wrong done. Retributivism justifies punishment inflicted upon offenders simply because they deserve it – it is the principle of just deserts.²⁵³ Retributivists hold that the severity of punishment should be equal to the gravity of the offence, and they argue that it ensures justice and fairness better than do other theories, “because of predictions of future offending, predictions which may possibly be wrong and which are generally unverifiable.”²⁵⁴ Retributivism, assuring the reduction in “the scope of judicial

250 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislations*, 1789 (Oxford: Clarendon Press, 1907), online: <<http://www.econlib.org/library/Bentham/bnthPML13.html>>.

251 Michael S Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford: Oxford University Press, 2010) at 92. [Moore, *Placing Blame*].

252 Barbara Hudson, *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (Buckingham, England: Open University Press, 1996) at 18. [Hudson].

253 Moore, *Placing Blame*, *supra* note 251 at 92.

254 Hudson, *supra* note 252 at 18.

discretion, [is] used to punish people for their personal or social characteristics rather than for their crime, [which is appealing] to those who were concerned about race, gender or class bias in criminal justice.”²⁵⁵ While retributivists believe that punishment nullifies the wrong,²⁵⁶ their opponents deny that claim.

The justifications that each of these two sophisticated schools of thought provide can be better achieved by merging them to reach a different understanding of why punishment is to be inflicted. In the “Prolegomenon to the Principles of Punishment,” Hart attempts to reconcile consequentialism and retributivism:

On the one hand, the old Benthamite confidence in fear of the penalties threatened by the law as a powerful deterrent, has waned with the growing realisation that the part played by calculation of any sort in anti-social behaviour has been exaggerated. On the other hand a cloud of doubt has settled over the keystone of “Retributive” theory. Its advocates can no longer speak with the old confidence that statements of the form “This man who has broken the law could have kept it” had a univocal or agreed meaning; or where scepticism does not attach to the meaning of this form of statement, it has shaken the confidence that we are generally able to distinguish the cases where a statement of this

255 *Ibid* at 46.

256 *CL Ten, Crime, Guilt, and Punishment* (NY: Oxford University Press, 1987) at 38. [CL Ten].

form is true from those where it is not.²⁵⁷

Hart – noticing the distinct objectives of each theory of punishment – asserts that there is no single objective. Each justification’s objectives are pertinent at different times, explaining how, why, and who the state ought to punish.²⁵⁸

Criminal law philosophy informs us of the different justifications for punishment. The following addresses only three major philosophies that justify punishment: consequentialism, retributivism, and expressivism. These are the philosophies relevant to domestic and international criminal justice. As I suggested earlier, I selected these three in particular for three reasons: these theories have made a major contribution to scholarly debates, they are the most cited justifications for international punishment, and they are relevant to both the domestic and international criminal justice systems.²⁵⁹

A. CONSEQUENTIALISM

As stated, consequentialists understand punishment based on the good it produces and the evil that it wards off, hence the act of punishment should be contingent on doing good.²⁶⁰ Consequentialists argue that punishment is in itself an evil, and so we must impose it in a way that promotes good, rather than simply adding to the evil of the wrongdoing.²⁶¹ Punishment is

257 HLA Hart, “Prolegomenon to the Principles of Punishment” in *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd edition (NY: Oxford University Press, 1968) at 1. [Hart].

258 *Ibid* at 3.

259 May & Fyfe, 2017, *supra* note 245 at 53.

260 Duff, 2001, *supra* note 246 at 3.

261 Plato, *Protagoras*, Benjamin Jowett, trans. (Serenity Publishers, 2009). Plato said: “No one punishes the evil-doer under the notion, or for the reason, that he has done wrong – only the

the instrument that promotes doing good, i.e., deterring future crimes.²⁶² Punishment should *deter* on two levels: individual and general. Individual deterrence aims to prevent a specific offender from re-offending in the future, while general deterrence aims to dissuade a possible offender in society from committing a wrong in the first place.

Consequentialists also recognize other justifications for punishment, such as *rehabilitation* and *reformation*. According to these values, punishment is meant to cause criminals to reform their behaviour, change their values, and prevent them from repeating their offences; these changes are thought to come about because wrongdoers come to understand that their behaviour was wrong. Rehabilitation is understood as a way to facilitate the reintegration of criminals back into society. One of the major differences between rehabilitation and reformation processes, on the one hand, and deterrence, on the other, can be assessed by the outcome; that is, if wrongdoers abstain from committing criminal acts due to fear of punishment, then punishment has served as a deterrent, but otherwise not.²⁶³

Do these consequentialist justifications apply to international criminal justice? It is hard to make sense of rehabilitation and reformation as justifications for international criminal punishment. People tend not to care about reintegrating war criminals back into society; that is not the concern of a war-torn society. Rather, these two values pertain to domestic society,

unreasonable fury of a beast acts in that way. But he who desires to inflict rational punishment does not retaliate for a past wrong, for that which is done cannot be undone, but he has regard to the future, and is desirous that the man who is punished, and he who sees him punished, may be deterred from doing wrong again."

262 Duff, 2001, *supra* note 246 at 6.

263 CL Ten, *supra* note 256 at 8.

which is concerned with reforming criminals and reintegrating them back into society.²⁶⁴ However, whether international criminal justice has the power to deter is a controversial question. Punishment at the international level does not have the same preventive utility as it does at the domestic level. At best, the deterrence effect of international criminal law is uncertain. It is important to note that the preamble of the Rome Statute reflects states' willingness to dissuade future crimes. "The States Parties to this Statute, ... Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished ... Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."²⁶⁵ While the intention of the founding members when they established the ICC was clearly to deter future crimes, there is limited cause for optimism. Scholars are divided in their opinions, and supporters believe that the mere presence and the existence of a criminal justice institution plays a role in deterring would-be offenders. Larry May and Shannon Fyfe argue that, "the existence of [a] judicial system with the support of [the] international community and the legal authority to punish as an institution [is] capable of deterring future crimes."²⁶⁶ For them, the wording, "to put an end to impunity" is the deterring aspect of the ICC. But, they themselves acknowledge the counter-argument that, while the Rome Statute refers to ending impunity, it does not specifically mention the deterrent effect of international punishment.

264 *May & Fyfe, 2017, supra note 245 at 50. Also see Fisher, 2012, supra note 241 at 53. According to Fisher, "there is not the same anti-social element that punishment, viewed as reformatory, seeks to cure."*

265 *ICC, supra note 1.*

266 *May & Fyfe, 2017, supra note 245 at 53.*

Since its inception, the ICC's practices have not fostered the sense that it is capable of deterring wrongdoers. Looking at the recent case of Sudan's former president, Omar al-Bashar, one comes away with the impression that there is little opportunity for criminals to be punished. al-Bashir remained in power for almost 10 years following accusations, after which the ICC finally issued an arrest warrant against him.²⁶⁷ While it is true that in 2019 al-Bashir was arrested and put on trial in the domestic courts in Sudan, and later the authorities handed him over to international justice to face charges of alleged crimes,²⁶⁸ the prolonged period between the time of accusation and the issuance of an arrest warrant in 2009 and his arrest for trial in 2019 does not serve the Court's intention of deterring others. In fact, it may have the opposite effect on leaders who are involved in heinous acts against their own citizens. After all, al-Bashir served as president during the 10-year period of the arrest warrant. He was able to travel freely to other states, many of which are signatories to the Rome Statute, and who had legal obligations to arrest him but did not due to their own political interests. It might not be the case that the ICC is unable to deter, but rather that the Court is politicized. As Immi Tallgren points out, given the special circumstances surrounding international criminal justice, it is hard to say that punishment has a deterrent effect.²⁶⁹

267 "Omar al-Bashir Fast Facts, CNN Editorial Research, (11 February 2020)

<<https://www.cnn.com/2012/12/10/world/africa/omar-al-bashir--fast-facts/index.html>>.

268 Nima Elbagir, Tamara Qiblawi and Mostafa Salem, "Sudan will have deposed president Omar al-Bashir appear before the ICC to face war crimes charges," CNN (11 February 2020).

Online: <<https://www.cnn.com/2020/02/11/africa/sudan-omar-bashir-icc-intl/index.html>>.

269 Tallgren, 2002, *supra* note 12 at 571-572. She said: "It seems that in the current project of international criminal justice, the special circumstances of the criminality in question and thereby also the additional difficulties in affecting the behaviour of the potential criminals addressed are largely ignored or, rather, intentionally passed over in silence. Consequently, the project seems to have adopted a discourse following the rhetorical pattern established by a

Apart from the political circumstances surrounding the institution of the ICC, there are obstacles in measuring the deterrent impact of the international criminal justice system. The “collective nature of most international crime [... makes] it hard to assess the specific deterrent effect on ... [an] individual upon his/her release from prison.”²⁷⁰ Recent empirical studies suggest that deterrence varies among different groups. Hyeran Jo and Beth A. Simmons argue that calls for international criminal accountability promote the possibility of punishment. They found that punishment might deter some people from carrying out violations, particularly when the ICC flags its willingness to prosecute perpetrators. Jo and Simmons measured the ability of the ICC to deter, and they found that, when actors were susceptible to social pressure, they were more likely to be deterred. When actors are concerned for their legitimacy from the perspective of the domestic public and/or international community, the fear of an ICC prosecution will, more likely than not, deter them from committing crimes. According to Jo and Simmons, the ICC can hinder state actors, and it can also deter non-state actors who solicit for authenticity.²⁷¹ Michael Patrick Broach measured the long-term deterrence effect of the ICC’s prosecution of non-state armed groups, and found that (i) ICC preliminary actions that take place prior to the issuance of indictments have insignificant effects on atrocities,²⁷² while (ii) pending indictments have a propensity to exasperate atrocities, and (iii) indictments that

lame analogy of the national system that does not fully serve the utilitarian purposes it expressively declares, namely, the prevention of such criminality.”

270 *May & Fyfe, 2017, supra note 245 at 50.*

271 *Hyeran Jo & Beth A. Simmons, “Can the International Criminal Court Deter Atrocity?” (2015) Social Science Research Network at 7, online: SSRN: <<https://ssrn.com/abstract=2552820> or <http://dx.doi.org/10.2139/ssrn.2552820>>.*

272 *Michael Patrick Broache, Evaluating the Effects of International Criminal Court Prosecutions on Atrocities During Ongoing Armed Conflict (PhD Thesis, Columbia University, 2015) at 57.*

have been executed play a part in the prevention of atrocities.²⁷³ Mark Kersten studied the effect of the ICC on actors who are not targeted by the Court’s prosecution. He suggests that, “contrary to the criticism that the ICC leaves its targets with little to no incentive to negotiate a peaceful resolution to war, it is the non-targets of ICC interventions that often refuse to negotiate a peace agreement and who, in turn, commit to military solutions to the wars in which they are engaged.”²⁷⁴ In his study, he addressed the cases of Uganda and Libya, where he found that the ICC may have had a negative impact on non-targeted groups that will probably continue to be violent in the wars they fight. These studies suggest that the ICC’s deterrent effect appears to be “negligible,”²⁷⁵ and I would argue that, at best, it does not meet expectations. I believe that international criminal justice is capable of deterring crime, but only if politics allows it to work properly, a point I will develop more fully in Chapter Three. There, I argue that calls for the criminal accountability of high-ranking officials who are still in power do have a general deterrent effect. But, they are only calls for criminal accountability – they are not actual punishment.

Consequentialists suggest that punishment has a forward-looking impact on individuals, but I argue that individual deterrence is not attainable through international criminal justice. After all, it is quite unlikely that criminals would re-involve themselves in genocide or crimes against humanity after the termination of a war. Andrew Oldenquist explains that “[t]he pursuit of Adolph Eichmann, Josef Mengele, and other Nazis in their dotage, tending their rose gardens

273 *Ibid* at 315.

274 Mark Kersten, “Targeting Justice: Targets, Non-Targets and the Prospects for Peace with Justice” (2017) 23:3 *Canadian Foreign Policy J* at 247.

275 Fisher, 2012, *supra* note 241 at 52.

in South America, makes no utilitarian sense whatever. They will not do their crimes again, nor would their punishment deter others.”²⁷⁶ While I agree with Oldenquist’s claim that such individuals are unlikely to repeat their crimes, I believe that punishment does have a general deterrent effect, although perhaps quite a limited one. Scholars’ views on the deterrent impact of international criminal punishment are highly consistent: if it ever deters, it seems to have a more general and less specific or individual deterrent impact.²⁷⁷ Therefore, the deterrent impact of international criminal justice is, for reasons argued above, feeble and ambiguous, and cannot stand alone as a justification for punishment.

B. RETRIBUTIVISM

Retributivists, in contrast to consequentialists, take a backward-looking view to justify punishment. They believe that offenders deserve to be punished because of their wrongdoing. There is a vindicatory connection between past crime and current punishment. That connection is expressed by the concept of desert; “crimes make punishment appropriate.”²⁷⁸ Wrongdoers deserve to suffer pain because they are responsible for morally wrong acts and so they are deserving of blame. The responsibility stems from the clear intentional behaviour of committing crime.²⁷⁹

276 Andrew Oldenquist, “An Explanation of Retribution” (1988) 85:9 *Journal of Philosophy* at 464.

277 Mark A Drumbl, *Atrocity, Punishment, and International Law* (NY: Cambridge University Press, 2007) at 169. [Drumbl, 2007].

278 Duff, 2001, *supra* note 246 at 21.

279 Moore, *Placing Blame*, *supra* note 251 at 79-83.

Punishment for retributivists must be morally “good” and proportional. While proportionality means that those who are wicked deserve to suffer pain that is proportional to their wickedness,²⁸⁰ retributivists understand the moral good to be that someone who merits punishment gets it. Hence, punishment of the blameworthy is “an intrinsic good, not the merely instrumental good that it may be to the utilitarian.”²⁸¹ And, because it is morally acceptable to punish criminals, societies have a moral obligation to punish those who contravene its laws.²⁸²

Retributivists establish the connection between punishment and morality, but there is some internal disagreement about what the justifications of punishment are.²⁸³ Michael S. Moore calls it “closet retributivism,” pointing to the fact that not all retributivists hold similar understandings of the values of punishment. In the following, I will use some of the retributivist theory’s accounts that justify punishment.

Some retributivists think of punishment as the *payback* principle, which historically has its roots in the *lex talionis* of biblical times, which calls for an eye for an eye, a tooth for a tooth, and a life for a life. This idea can be linked to another account that justifies punishment, which is the claim that offenders should be made to suffer, but that suffering is not revenge. Defenders of this argument say that suffering might be good because of the positive psychological impact it can have on victims of crime. Moore rejects such thinking, claiming

280 Joel Feinberg, “The Expressive Function of Punishment” (1965) 49: 3 *The Monist* 397 at 421. [Feinberg].

281 Moore, *Placing Blame*, *supra* note 251 at 87-88.

282 Duff, 2001, *supra* note 246 at 187.

283 CL Ten, *supra* note 256 at 38. Ten claims that: “there is no complete agreement about what sorts of theories are retributive except that all such theories try to establish an essential link between punishment and moral wrongdoing.”

that this is an inaccurate depiction of what retributivism stands for. Rather, a retributivist should advocate punishment of all criminals who merit it, regardless of whether victims desire it.²⁸⁴

Similar to the consequentialists' approach, some retributivists think that punishment has *reformatory value*. Briefly, when offenders repent their crimes, they recognize the importance of reforming their conduct in the future.²⁸⁵ Another account used to justify punishment is the idea of *fairness*. The claim is that offenders have wrongfully acquired a favourable position and punishment offsets that unfair advantage. Punishment restores *equality*; it restores the equilibrium that was disturbed by the offence. Kant says:

It is just the principle of equality, by which the pointer of the scale of justice is made to incline no more to the one side than the other. It may be rendered by saying that the underserved evil, which any one commits on another, is to be regarded as perpetrated on himself. Hence it may be said: "if you slander another, you slander yourself; if you steal from another, you steal from yourself; if you strike another, you strike yourself; if you kill another, you kill yourself." This is the right of retaliation.²⁸⁶

284 Moore, *Placing Blame*, *supra* note 251 at 83-103.

285 RA Duff, "Penance, Punishment and the Limits of Community" (2003) 5:3 *Punishment & Society* 295 at 300-301. [Duff, *Penance, Punishment and the Limits of Community*].

286 Immanuel Kant, "Justice and Punishment," translated by W Hastie, in Gertrude Ezorsky, ed, *Philosophical Perspectives on Punishment* (Albany: State University of New York Press, 1972) 102 at 104.

Herbert Morris advocates a similar approach. He is in favour of punishing those who take *unjust advantage of the laws*, which occurs when a “person who violates the rules has something others have – the benefits of the system – but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage. Matters are not even until this advantage is in some way erased.”²⁸⁷ If offenders believe themselves to have impunity, they will be less prone to respect and accept the burdens of self-restraint.

The question that follows is: to what degree do retributivist justifications obtain at the international level? Many believe that international criminal justice is deeply mirrored in retributivism improvisations. Mark A. Drumbl argues that the predominant objective for punishment of atrocity crimes – at both the international and national levels – is retribution.²⁸⁸ However, for many reasons, it is difficult to reconcile the retributivist theory as it pertains to international punishment. For example, how would the principles of proportionality and the just deserts of punishment work at the international level? In the domestic system, the length and severity of a sentence varies, depending on the severity of the crime, but it is not possible to apply that same proportionality to international crimes, which are extraordinary in nature. Incarceration has, so far, been the only response to atrocity crimes at the ICC level – a response that is far less severe than the atrocity crimes to which this punishment responds. The conditions of imprisonment do not compensate for the severity of international crimes. In fact, it would be difficult to imagine a punishment that could respond proportionally to the viciousness of international crimes. For a sentence to be truly proportionate, it would have to

287 Herbert Morris, “Persons and Punishment” (1968) 52:4 *The Monist* at 478.

288 Drumbl, 2007, *supra* note 277 at 150.

include acts of torture and annihilation. Proportional, in that sense, would indeed be terrifying; it would ultimately lead to punishers becoming as depraved as perpetrators.²⁸⁹

Another challenge is to be able to understand the principle of “just deserts” at the international level. As mentioned, unfortunately justice often intertwines with politics when it comes to international criminal justice. The question of who deserves punishment and who does not is not always a matter of law; rather, sometimes, it is a matter of political interests. Drumbl points out that too few individuals and/or entities receive their just deserts: many powerful states, organizations, and not-so-innocent bystanders are exempted from criminal responsibility.²⁹⁰ Certain limitations to international criminal justice (such as its limited financial and human resources) make it difficult to argue that the retributivism theory’s goals can be fully attained, and certainly not to the extent that they can domestically. The circumstances surrounding international criminal institutions, particularly the ICC, might change with time, but it is still a new institution that needs time to develop, especially in the way it deals with political interference in its decisions. Although there are some institutional limits related to the ICC, international criminal justice maintains many of the retributivist justifications, such as just deserts, payback, fairness, and equality.

C. EXPRESSIVISM

In the previous two theories, namely consequentialism and retributivism, I questioned whether and to what degrees do the justifications of these two theories pertain at the

289 *Drumbl, 2007, supra note 277 at 155.*

290 *Ibid at 153.*

international level. However, the expressivism theory is, in fact, understood as the main theory that justifies punishment on the international criminal justice level. The tendency among philosophers is to justify international punishment based on the value it expresses. Therefore, the following is not going to follow the methodology that has been conducted earlier in the past two theories. Instead, I will go through the roots of the theory itself and then its values as justified by scholars on both the criminal law philosophy and the international criminal law philosophy. So, how do expressivists justify punishment?

While there is a tendency to think of punishment as a physical hardship, expressivists argue that it is more than a mere physical burden. Punishment expresses a message: it sends an emotional or oral censure that punishes. Punishment has a symbolic value, and that is what differentiates it from other kinds of penalties, say, fines. Punishment intends to condemn wrongdoings through the messages that it expresses. Joel Feinberg writes:

[P]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those “in whose name” the punishment is inflicted. Punishment, in short, has a symbolic significance largely missing from other kinds of penalties.²⁹¹

Inflicting punishment involves two components: society’s denunciation, and the unpleasant outcomes of it. The unpleasant outcomes express society’s denunciation or condemnation, and

291 *Feinberg, supra note 280 at 400.*

this expression is the key element that distinguishes punishment from other hard treatment. Feinberg distinguishes hard treatment from its symbolic significance, arguing that there are two imaginary components of punishment, that is, its “hard treatment” and its symbolic significance. Authentic cases of punishment involve both characteristics. To claim that the physical burden is the component that expresses condemnation is basically to say that specific kinds of hard treatment are the standard symbols of societal reprobation. Hard treatment alone is not necessarily adequate for that symbolic condemnation. Feinberg asserts that: “(1) both the hard treatment aspect of punishment and its reprobative function must be part of the definition of legal punishment; and (2) each of these aspects raises its own kind of question about the justification of legal punishment as a general practice.”²⁹²

Expressivism is not so different from the more traditional theories of punishment.²⁹³ It argues that punishment is right because it helps to ensure that the public maintains a sufficient faith in the rule of law, rather than because it serves as a deterrent or because wrongdoers deserve it.²⁹⁴ For expressivists, in punishment, there is an effort to publicly affirm a story of wrongdoing through trials and sanctions in order to quash the reverence of violence.²⁹⁵ Through punishment, expressivists aim to alter criminals’ behaviour, spread specific values, and educate offenders.²⁹⁶

292 *Ibid* at 400-402.

293 *Duff & Garland, 1994, supra note 249 at 14.*

294 *Drumbl, 2007, supra note 277 at 173.*

295 *Ibid.*

296 *Kristen J. Fisher, “The expressive Value of judgment and punishment,” in Fisher, 2012, supra note 241 at 59.*

Theorists, such as Duff and David Garland, explain that wrongdoing merits censure, and that censure sends both a backward-looking view of condemnation of the wrong that has been committed as well as a forward-looking view. They explain that the expressivist theory provides a foundation for a more realistic ideation of retributivism that can express the justifying relationship between punishment and crime or, in other words, the wrongdoing and condemnation that the wrongdoing deserves.²⁹⁷ However, retributivism holds that punishment combines morality and pain, while expressivism holds that the purpose of punishment is to express society's disapproval. In Feinberg's words:

[C]ondemnation is expressed by hard treatment, and the degree of harshness of the latter expresses the degree of reprobation of the former; still this should not blind us to the fact that it is social disapproval and its appropriate expression that should fit the crime and not hard treatment (pain) as such. Pain should match guilt only insofar as its infliction is the symbolic vehicle of public condemnation.²⁹⁸

This view is contrary to that of retributivists, who understand the principle of proportionality in the context of punishment, which means that the extent of disapproval conveyed by the act of punishment should be proportional to the crime, to the extent that more serious crimes are more strongly disapproved of than crimes less serious in nature.²⁹⁹ Therefore, the gravity of the

297 *Duff & Garland, 1994, supra note 249 at 14.*

298 *Feinberg, supra note 280 at 423.*

299 *Ibid.*

offence is determined by the total hurt it causes. Expressivists, in general, do not embrace the principle of proportionality. Expressivists believe that punishment is a moral educator; it deters, it corrects the equilibrium between victims and criminals, it communicates with criminals and others, it seeks apology, and it strengthens the rule of law. Let us examine each of these values.

The value of the victim – recognition of the victim’s suffering and correcting the equilibrium. Jean Hampton does not believe in mere harsh treatment as a response to wrongdoing. Hampton develops her sophisticated ideas based on the understanding that both the crime and the punishment express messages. In committing their crimes, criminals are sending a message of degradation to victims. An action is wrong because it expresses something to the person who is harmed.³⁰⁰ Punishment, in return, expresses repentance for the crime. Punishment works to restore the equilibrium between victims and criminals that was upset by the wrongdoing. The physical component of punishment is not Hampton’s concern; for her, punishment does not necessarily mean that people must be treated harshly or incarcerated. Rather, punishment could be achieved through humiliation, and that is in itself a cause of suffering.³⁰¹ Expressivists care about the messages that both crime and punishment send, as Jeffrie G. Murphy explains:

One reason we so deeply resent moral injuries done to us is not

300 Jean Hampton, “An Expressive Theory of Retribution” in Wesley Cragg, ed, *Retributivism and Its Critics, Canadian Section of the International Society for Philosophy of Law and Social Philosophy (CS,IVR), Papers for the Special NORDIC Conference University of Toronto, 25-27 June 1990 (Germany: Franz Steiner Verlag Stuttgart, 1992) at 5. [Hampton, “An Expressive Theory of Retribution”].*

301 Jean Hampton, “The retributive idea,” in Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988) at 126.

simply that they hurt us in some tangible or sensible way; it is because such injuries are also messages – symbolic communications. They are ways a wrongdoer has of saying to us, “I count but you do not,” “I can use you for my purposes,” or “I am here up high and you are there down below.” Intentional wrongdoing insults us and attempts (sometimes successfully) to degrade us – and thus it involves a kind of injury that is not merely tangible and sensible. It is moral injury, and we care about such injuries.³⁰²

The idea of a person’s intrinsic worth (the Kantian approach) implies that we are beholden to respect one another, and in that sense, we are all equal.³⁰³ When offenders commit wrong, they are attempting to degrade or diminish their victims.³⁰⁴ Hampton argues that “diminishment is the normal result of an immoral action and that which constitutes the moral injury inflicted by a wrongdoing. Therefore, it is the damage or ‘loss of value’ that wrongdoing inflicts.”³⁰⁵ With this understanding, punishment restores the balance between victims and offenders; that is, it restores the equilibrium. Hampton views retributive punishment as the victim defeating the wrongdoer, which is symbolic of the “correct relative value of the

302 Jeffrie Murphy, “Forgiveness and Resentment” in Jeffrie Murphy & Jean Hampton, eds, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988) at 25. [Murphy & Hampton, 1988].

303 Jean Hampton, “Correction Harms versus Righting Wrongs: The Goal of Retribution” (6 August 1992) 39 *UCLA Law Review* at 1668.

304 *Ibid.*

305 *Ibid* at 1673.

wrongdoer and victim.”³⁰⁶ Punishment symbolizes the process whereby the subjugator changes roles with the victim, and is now the one who is subjugated and dominated. Punishment sends a message that the two parties – victim and wrongdoer – are now equal; the victim can do to the wrongdoer what the wrongdoer did to the victim. This form of reciprocity is humbling for the wrongdoer and usurps the position of power the wrongdoer once had over the victim. Both the crime and the punishment have an expressive symbolic value; as the crime diminishes the victim, punishment diminishes the wrongdoer, thereby restoring the previous balance between them.³⁰⁷ In that sense, punishment is understood to be the recognition of the victim’s suffering and a correction or restoration of the equilibrium that the crime damaged.

Seeking apology – communication. The expressivist value has a communicative aspect. Duff’s thesis is that the guilty commission generated by wrongdoing disregards society’s moral values and offends fellow citizens. It also undermines the wrongdoer’s normative connections to the victim.³⁰⁸ Punishment, according to this account, is:

[A] communicative process between the offender and the polity: it aims to communicate to the offender the censure that his crime deserves; to bring him to recognize and repent that crime as a wrong for which he must make moral reparation; to bring him to make that reparation by undertaking or undergoing a burdensome

306 *Jeffrie Murphy & Jean Hampton, Forgiveness and Mercy (Cambridge: Cambridge University Press, 1988) at 125-126.*

307 *Hampton, An Expressive Theory of Retribution, supra note 300 at 13.*

308 *Duff, Penance, Punishment and the Limits of Community, supra note 285 at 300.*

penalty which constitutes and communicates a forceful apology to those he has wronged; and thus to reconcile him with the community whose values he flouted.³⁰⁹

Duff argues that punishment is an activity of moral communication, which conveys to wrongdoers the need to own up to and feel remorse for their wrongdoings, to change their behaviour, and to compensate and to seek forgiveness from those they have victimized.³¹⁰ Punishment then serves several goals: (1) to send a message to offenders regarding the magnitude of censure that their crimes warrant, (2) to convince wrongdoers that the censure is justifiable, (3) to convince wrongdoers to reform their future behaviour so as to prevent such wrongdoings in the future, and (4) to reconcile wrongdoers with their victims by providing restitution to those who have been harmed. Duff explains that an important distinction in the communicative theory is the emphasis on *moral* reparation for moral wrongdoing, in addition to material reparation. Integral to such moral reparation is an expression of remorse: the punishment that wrongdoers receive can be seen, to some degree, as a necessary public apology that is symbolic in nature. That statement of remorse is to be made to both victims and to the entire polity, whose values the wrongdoer has spurned and who partake in the evil that is inflicted on victims.

Although the “hard treatment” aspect of punishment, for many expressivists, is less important than its censure aspect, Duff argues that both are essential components of the

309 *Ibid* at 300-301.

310 *RA Duff, “In Defence of One Type of Retributivism: A Reply to Bagaric and Amarasekara” (2000) 24: 2 Melb UL Rev at 411-413.*

communication between criminals and victims. The hard treatment aspect “should serve both to assist the process of repentance and reform, by focusing his attention on his crime and its implications, and as a way of making the apologetic reparation that he owes.”³¹¹ Of course, Duff’s view is not shared by all scholars; some criticize his account because they argue that it is unable to demonstrate why punitive hard treatment is an important aspect of his theory, which nonetheless regards wrongdoers as dependable, with most being released after completion of their sentences.

Punishment as moral educator. In her 1984 essay, Hampton introduced the moral education theory, criticizing the retributivist understanding of punishment as deserved evil that must be inflicted upon wrongdoers. For Hampton, punishment is, in fact, *good* for whomever experiences it. In Hampton’s view, punishment has an educative value: societies punish criminals to educate them, i.e., “to improve a wayward person.”³¹² By way of example, Hampton likens punishment to electrified fences: through the utilization of a painful barrier, people are taught that there are barriers or limits to their actions.³¹³ This is different from deterrence because the goal of punishment, in this account, is not to simply avert criminals from traversing that “barrier”; instead, the goal is to educate them about the rationale behind the barriers and what will happen if they attempt to cross them.³¹⁴ The moral education account

311 RA Duff, “Legal Punishment,” (summer 2013 edition) *The Stanford Encyclopedia of Philosophy*, ed, online: <<https://plato.stanford.edu/archives/sum2013/entries/legal-punishment>>.

312 Jean Hampton, “The Moral Education Theory of Punishment” (1984) 13:3 *Philosophy & Public Affairs* 208 at 237. [Hampton, *Moral Education*].

313 Hampton, *An Expressive Theory of Retribution* supra note 300 at 20.

314 *Ibid.*

is neither a rehabilitative nor reformative account; it simply argues that evil merits correction.³¹⁵ Hence, correction is conceptually necessary in order to affirm victims' equivalent value with respect to their wrongdoers. Hampton argues:

[P]unishment is not intended as a way of conditioning a human being to do what society wants her to do (in the way that an animal is conditioned by an electrified fence to stay within a pasture); rather, the theory maintains that punishment is intended as a way of teaching the wrongdoer that the action she did (or wants to do) is forbidden because it is morally wrong and should not be done for that reason. The theory also regards that lesson as public, and thus as directed to the rest of society. When the state makes its criminal law and its enforcement practices known, it conveys an educative message not only to the convicted criminal but also to anyone else in the society who might be tempted to do what she did.³¹⁶

Hampton later came to see some flaws in her original argument for the moral educative theory, recognizing that teachers cannot *force* their students to listen and understand. Thus, she acknowledged that there are many criminals for whom an educative message would not be well received, including sociopaths, ideological radicals, and amoral risk-takers.³¹⁷

315 Hampton, *Moral Education*, *supra* note 312 at 238.

316 *Ibid* at 212.

317 Hampton, "An Expressive Theory of Retribution," *supra* note 300 at 21.

However, the moral education theory has found support from many other theorists on both the domestic and international levels. Sloane argues that criminal law has a function to shape, strengthen, and instill values to foster the development of internal restraints that are habitual in nature.³¹⁸ Punishment expresses a message that can change not only the attitude of the offender, but also that of society in general. Payam Akhavan underscores that international justice contributes “through the moral propaganda of international criminal justice.”³¹⁹ With time, international justice will be able to work as an educator to change the attitude of society in general. Disapproval of genocidal crimes will assist in generating internal restraints against major human rights violations, and “[c]oncerns for justice, customarily at the periphery of decision making, will converge increasingly with mainstream pragmatism such that accountability for war crimes will become a matter of course.”³²⁰ According to this account, calls for punishment are important because they send strong messages of condemnation and stigmatization in an effort to change offenders’ behaviour.

General deterrence. I previously provided some empirical studies that demonstrate that in international law the deterrent effect of punishment is ambiguous, and that punishment might deter only certain groups in society. Drumbl, however, suggests that expressivists go further than retributivists with respect to the traditional deterrent justification.³²¹ For expressivism, deterrence is concerned with the hindering impact of the message that punishment expresses to

318 Sloane, *supra* note 236 at 75.

319 Payam Akhavan, “Justice in the Hague, Peace in the Former Yugoslavia – A Commentary on the United Nations War Crimes Tribunal” (1998) 20:4 *Hum Rts Q* 737 at 742.

320 *Ibid.*

321 Drumbl, 2007, *supra* note 277 at 173.

society, as opposed to deterrence of specific or potential perpetrators. Messages point to crimes, to legal rules that have been violated, to victims' disapproval, and they communicate with the wider society. The message says, "[i]f the judicial body were to convict and punish an innocent or punish too severely, doing so would represent community values that would be very different than those represented by convicting the guilty and punishing her in a manner that could be deemed balanced."³²² The message fits the degree of disapproval that is expressed by society about the kind of crimes committed. According to Feinberg, "the degree of disapproval expressed by the punishment should 'fit' the crime only in the unproblematic sense that the more serious crimes should receive stronger disapproval than the less serious ones, the seriousness of the crime being determined by the amount of harm it generally causes and the degree to which people are disposed to commit it"³²³ The deterrent effect eliminates the impunity gap and rejects the violent behaviours behind it. In the words of Drumbl:

Punishment can thereby impede the early indoctrination phases in which average citizens become assimilated into the machinery of mass violence. This objective of punishment differs from deterring individuals from killing after they have become habituated into killing by desire or desperation. Whereas it seems problematic to deter – through fear of distant and deferred punishment – violence once it is imminent or has already begun, it seems somewhat more plausible to inhibit the mainstreaming of hatemongering as politics

322 *Fisher, 2012, supra note 241 at 58-59.*

323 *Feinberg, supra note 280 at 423.*

owing to the consolidation, through law and punishment, of a social consensus regarding the moral unacceptability of such politics.³²⁴

Punishment as a deterrent tool expresses a message that is meant to fit the condemnation and the censure that the crime deserves.

Strengthening the rule of law. Garland suggests that penalty, punishment, and institutional practices send a moral message that is far beyond physical hardship. It strengthens the rule of law and speaks to audiences. Garland argues that punishment conveys meaning not only about crime and sentencing, but similarly about “power, authority, legitimacy, normality, morality, personhood, social relations, and a host of other tangential matters. Penal signs and symbols are one part of an authoritative, institutional discourse which seeks to organize our moral and political understanding and to educate our sentiments and sensibilities.” These moral messages offer a consistent set of commands as to in what manner we should understand good and evil, and the legitimate and illegitimate. Condemnations help to convince us what to denounce and how to categorize wrongdoing. And, they provide a language with which to do so.³²⁵ Messages of condemnation help us to identify social authority, maintain order and a sense of community, locate social dangers, and they provide direction about how to feel regarding such matters. They open the door to a way of thinking about crimes as a set of broader debates

324 *Drumbl, 2007, supra note 277 at 174.*

325 *David Garland, Punishment and modern society: A study in social theory. University of Chicago Press, 2012, at 252-253. [Garland, 2012].*

about the rule of law, politics, moral values, and social systems. They reinforce the power of law within society.

IV. **Trials**

Criminal justice is, of course, not entirely about punishment; while it is the end goal for those who have been found guilty, other components – namely, trials and fact-finding – come into play before there is any possibility of achieving that goal. Trials involve prosecution by an authority or public body whereby defendants are held to account. This is where the question of guilt is adjudicated, in the presence of all interested parties: offenders, victims, and society.

Although the concept of a trial is not far removed from the idea of punishment, it is independent from it. There is more to be said about why we want to call people to account over and above the possibility of them being punished, which has value in itself. Societies utilize both trials and punishment to communicate disapproval and to have a moral discourse about wrongdoers' conduct. In their "calling to account" theory, Duff, et al. question the meaning of the criminal trial. They argue that it is:

[A] process through which defendants are called to answer a charge of criminal wrongdoing and, if they are proved to have committed the offence charged, to answer for their conduct. If the defendant is found not only to have committed the offence, but to have no defence, he is condemned through a guilty verdict which

holds him to account for his wrongdoing.³²⁶

Duff et al. believe that trials are about *communication* between society, victims, and criminals. Thus, much knowledge is acquired through active participation in the trial process.³²⁷ A trial is about calling people to account so they can *explain themselves* to us, the polity. We think they have done something wrong that has hurt us and endangered our values, so we want wrongdoers to tell us why they did what they did, i.e., to justify their actions. In this sense, trials are opportunities for defendants to challenge how society defines criminal wrongs, “including the norms in the light of which those accusations are made.”³²⁸ It is wholly possible to imagine such challenges in cases of ongoing conflict when wrongs are sometimes committed to prevent greater wrongs. Trials are important because they give defendants the opportunity to consider their conduct and *accept the charges*. They allow defendants to participate in a dialogue regarding the fairness of the charges, and perhaps to have them accept society’s condemnation.³²⁹

Criminal trials are public, except in rare circumstances when there is an extraordinary need for privacy. Trials have a value that is not only instrumental to punishment, but is also about calling wrongdoers to explain their wrongdoing and to tell society what happened, that is, to help society to find the truth. People are generally interested in *knowing the truth*, and sometimes trials do serve that purpose, even when punishment is not at issue. Duff et al. suggest

326 Duff et al., 2007, *supra* note 14 at 3.

327 *Ibid* at 199.

328 *Ibid* at 3.

329 RA Duff, *Trials & Punishment* (NY: Cambridge University Press, 1986) at 233.

that, because victims need to be recognized, they need to know the truth.³³⁰ Consider the following scenarios: (1) If *A* dies without being tried, and possibly punished, people might understandably feel that *A* has escaped justice, especially if his wrongdoing was a grave one. (2) If *A* dies after being tried, but before being punished, it is less likely to be thought that *A* escaped justice, as at least he faced a criminal trial. In this manner, “even where there are significant effects to which we can point in explaining why the trial matters, their value depends on the value of the truth that the trial aims to establish.”³³¹ Therefore, there is a rational reason that trials matter, over and above the punishment that may ensue.

A trial, as Duff et al. suggest, should not be seen as merely a discreet procedure to seek the truth. There are reasons that trials and the trial procedure are important. Consider the following scenario: If *A* was wrongly convicted, *A* might want to clear his name and refurbish his reputation in the eyes of the public. *A* might not want the public to consider him to have done wrong. *A* may want others to consider his actions to have been lawful. So, *reputation and public condemnation* are also values to be found at trials.

Calling to account involves calling defendants to participate in trials and to answer for the wrongs for which they are responsible. Duff et al. note four objectives that participation can provide: (1) It is a way to seriously consider the wrongdoing and classify it as a wrongdoing.³³² It is a way to repair the damage or provide compensation for the damage. (2) It is a means through which wrongdoers are taken seriously, and at the same time, it ensures that

330 Duff et al., 2007, *supra* note 14 at 81.

331 *Ibid.*

332 RA Duff et al., 2007, *supra* note 14 at 137.

they are treated with respect.³³³ (3) It is a way to convince wrongdoers to accept the verdicts and their consequences.³³⁴ (4) It involves a shared language, whereby accusers can call to account and defendants are given the opportunity to answer. Imbedded in this shared language is an expression of the shared values and understandings through which wrongs can be discerned and characterized, as well as a means through which responsibility and liability can be argued and attributed.³³⁵ To call wrongdoers to answer is to call them to participate in a judgement procedure on the premise of an arrangement of values that society evidently shares with them. Without trials, we cannot demand explanations from wrongdoers for their actions. But, the polity must first define what constitutes a “wrong.”³³⁶

Truth-telling is not exclusively the responsibility of defendants. The trial procedure must enable wrongdoers to confront their accusers and other parties of the polity who may be involved in the trial process, for example, witnesses; “there would be a clear contradiction in calling on you to answer in person to us, but refusing to face you ourselves.”³³⁷ Thus, trials entail a mutual responsibility, whereby both accusers and defendants must each prove themselves right.³³⁸

A trial is a forum in which accusers, victims, witnesses, and society in general participate in the decision-making process. Accusers have specific tasks in calling wrongdoers to account:

333 *Ibid at 138.*

334 *Ibid.*

335 *Ibid at 139.*

336 *Ibid at 159.*

337 *Ibid at 81.*

338 *Ibid at 3.*

they participate in decisions of whether or not to charge wrongdoers, and they are responsible for questioning defendants. As noted, trials involve prosecution by an authority or public body; defendants answer to that authority, and not directly to victims, who may or may not be merciful. It is *society's* values that are at issue, not those of victims, given the unlikelihood that victims can be impartial. A fundamental basis of the criminal justice system is that trials are public. It is necessary that there be public concern, and that the concern regarding criminal conduct is not solely based on victims' preferences.³³⁹ At the same time, trials provide the opportunity to hold not just defendants, but also accusers accountable, insofar as accusations might turn out to be unfounded. The purpose of the trial is not merely to establish the truth regarding the accused's conduct; rather, the aim of establishing the truth is imbedded in a broader process of accountability that is applicable to all actors involved in the trial.³⁴⁰ Duff et al. argue that the calling to account theory "can provide a more plausible rationalisation in terms of the idea that the trial is a forum in which a citizen is formally called to answer to the polity for an alleged criminal wrong – to answer to the charge that she committed such a wrong, to answer for that wrong if it is proved against her."³⁴¹ That said, they do admit that their account is not always adequate.³⁴²

A third component of the criminal justice system, quite apart from punishment and trials, is fact-finding. Fact-finding is the way the criminal justice system determines whether a wrong

339 *Ibid* at 216.

340 *Ibid*.

341 *Ibid* at 81.

342 *Ibid*.

has been committed. It should be understood as including investigation and documentation, and I turn to this next.

V. Fact-Finding

Fact-finding is a major component of the criminal justice system, and it is as important as are trials and punishment – in fact, trials and punishment depend on fact-finding. Suspects cannot be called to trial or held to account without procuring evidence of their wrongdoing. Knowing the facts is important for many reasons, and those reasons go beyond trials and punishment.³⁴³ It is important to secure and keep records of facts so that future generations can refer to them. Fact-finding delivers a moral message: it deters, educates, and condemns. Moreover, there are additional important justifications for fact-finding that I will explore in this section.

The Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security defines fact-finding as: “any activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security.”³⁴⁴ The term “Fact-finding” is often used interchangeably with other terms, such as documentation, record-keeping, investigation,

343 L Zegveld “*The Importance of Fact-Finding Missions Under International Humanitarian Law*” in C Meloni & G Tognoni, eds, *Is There a Court for Gaza? (The Hague: TMC Asser Press, 2011)* at 162.

344 Sir Kenneth Keith, “Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security” (9 December 1991) UNGA, online: <https://legal.un.org/avl/ha/ga_46-59/ga_46-59.html>.

inquiry, and examination, although not everyone agrees that the meanings are identical.³⁴⁵ Fact-finding activities fall under the ambit of international human rights law and practices, but the field is under-theorized.³⁴⁶ Literature and scholarship are developing, but at this stage they are still descriptive and uncritical.³⁴⁷ For my purposes, when I use any of these terms, the meaning will be the same: “any activity designed to obtain detailed first-hand knowledge of the relevant facts of any dispute or situation.”³⁴⁸

Domestically, it is the police that are tasked with investigating crimes. As part of the state criminal justice system, the police have their own policies, standards, and procedures that they use to respond to domestic crimes. This is also true at the international level where every international criminal institution conducts its own investigations. However, investigations can also be conducted by human rights commissions, intergovernmental organizations – whether international or domestic – state-run commissions, and international NGOs. Ordinary individuals, for example, citizens who may have witnessed wrongful conduct, can also conduct fact-finding activities.

Fact-finding organizations can often be of assistance to both domestic and international investigators and if they do assist, they have to ensure that the results of their finding are of the same quality as the work carried out by those investigators. For facts to be accepted by courts,

345 Priscilla B Hayner “*Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*” (1994) 16 *Hum Rts Q* 597 at 607. [Hayner].

346 Philip Alston & Sarah Knuckey, *The Transformation of Human Rights Fact-Finding* (NY: Oxford University Press, 2016) at 4. [Alston & Knuckey, 2016].

347 *Ibid* at 15.

348 H Victor Condé, *A Handbook of International Human Rights Terminology*, 2nd ed, vol 8 (Lincoln and London: University of Nebraska Press, 2004) at 78-88. [Condé].

the investigations must be conducted under certain conditions and with approved methodology. Documentation collection and investigation must be conducted according to established and accepted criteria. Not just anyone can do it. The most internationally credible body is the International Humanitarian Fact-Finding Commission (IHFFC), which carries out investigations of possible violations of IHL. The IHFFC was established in 1991 and stems from principles of the Additional Protocol I to the Geneva Conventions, established in 1977. The IHFFC is tasked to:

- i) [E]nquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;
- ii) [F]acilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.³⁴⁹

The IHFFC has been fairly inactive since its inception; in fact, some call it “sleeping beauty.”³⁵⁰ For that reason, many states rely on ad hoc commissions for their investigations and documentation, such as the Commission of Inquiry on Lebanon, the International Commission of Inquiry in Guinea, and the International Commission of Inquiry on Côte d’Ivoire.³⁵¹ These

349 Para 2(C), Article 90 of the Additional Protocol I (1977) of the 1949 Geneva Conventions, online <https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf>.

350 Frits Kalshoven, “The International Humanitarian Fact-Finding Commission: A Sleeping Beauty?” (2002) *HV (Humanitäres Völkerrecht)* 4 at 213.

351 Some recent examples are Commission of Inquiry on Lebanon, 2006, online: <<http://reliefweb.int/node/417831>>. International Commission of Inquiry in Guinea, 2009, online: <<http://www.refworld.org/docid/4b4f49ea2.html>>. Independent International Fact-Finding Mission on the Conflict in Georgia, 2008, online:

commissions take several forms and go by various names, for example, fact-finding commissions, commissions of inquiry, and truth commissions. Some of these commissions – for example, the UNHRC, the Council of Europe’s Human Rights Commissioner, and the Inter-American Commission on Human Rights – have become quite routinized,³⁵² and may operate during both peace and conflict situations.

Although there is no unified international methodology or codification of the process of fact-finding, international organizations endeavour to develop certain standards to respond to cases of human rights violations. Their officers often conduct site visits to ascertain evidence of human rights violations, and to check the validity of such allegations. They endeavour to collect credible testimony by interviewing witnesses and their families, as well as the heads of local councils, government personnel, and anyone else who can provide information that helps to get to the truth.³⁵³ Investigators then endeavour to substantiate the information collected, write reports that establish responsibility for violations, and finally make recommendations.³⁵⁴

<<http://www.refworld.org/docid/4ac45cd22.html>>. *The International Commission of Inquiry on Côte d’Ivoire, 2010*, online: <<http://www.refworld.org/pdfid/5134912d2.pdf>>. *International Commission of Inquiry on Libya, 2011*, online: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.44_AUV.pdf>. *Independent International Commission of Inquiry on the Syrian Arab Republic, 2011*, online: <<http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx>>. *United Nations Fact Finding Mission on the 2014 Israel-Gaza conflict*, online: <<http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx>>. *United Nations Fact Finding Mission on the Gaza conflict (Goldstone report), 2009*, online: <<http://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session9/Pages/FactFindingMission.aspx>>. *The Commission of Experts for the former Yugoslavia, 1992*, online: <http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf>. *International Commission of Inquiry for Darfur, 2004*, online: <<http://www2.ohchr.org/english/darfur.htm>>.

352 Alston & Knuckey, 2016 *supra* note 346 at 5.

353 Condé, *supra* note 348 at 88.

354 Alston & Knuckey, 2016, *supra* note 346 at 5.

The primary purpose of fact-finding is to objectively ascertain the events that unfolded and to ensure that facts are substantiated.³⁵⁵ A determination of the facts will ultimately involve an evaluation of numerous sources of information, and it will serve the purpose of identifying and bringing to light the circumstances, causes, and repercussions of a particular incident.³⁵⁶ Fact-finding provides society with the opportunity to know what happened during a conflict, to authenticate actions that constitute violations of international human rights law, and to weigh the truth behind contradictory allegations by different parties in the conflict.

Fact-finding has an *educational role*.³⁵⁷ The documents we acquire help to educate the community. In the opinion of Steven R. Ratner, Jason S. Abrams, and James L. Bischoff, fact-finding commissions are likely to produce a more comprehensive and truthful picture of abuses that have taken place; this picture will be more complete than that produced by a trial, which merely focuses on the possible guilt of a smaller subset of defendants.³⁵⁸ The acquired knowledge helps the public to condemn such oppressive behaviour.

Fact-finding is also valuable for *historical purposes*. Documents provide an archive for future generations; we want them to know how vicious these crimes were in order to help prevent recurrences. “Leaving an honest account of the violence prevents history from being

355 Théo Boutruche, “Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice” (2011) 16:1 *J Confl & Sec L* at 109. [Boutruche].

356 *Ibid* at 106.

357 Steven R Ratner, Jason S Abrams & James L Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (NY: Oxford University Press, 2009) at 270. [Ratner].

358 *Ibid*.

lost or re-written, and allows a society to learn from its past in order to prevent a repetition of such violence in the future.”³⁵⁹ Telling the story of what has happened and sending the message that such abuses should not happen again is vital. However, some commenters, such as *Marko Milanović*, who looked at the case of the former Yugoslavia, argue that each side of the conflict will, in the end, stick to its own truth.³⁶⁰

The process of fact-finding implies the *right to knowledge*. According to Article 19 of the Universal Declaration of Human Rights, “everyone has the right ... to seek, receive and impart information,”³⁶¹ and the process of fact-finding is what allows people to obtain knowledge about what happened.³⁶² Documentation enhances public credibility about the reported crimes and therefore it *reinforces the rule of law*.³⁶³ It advances justice by asserting moral censure, as well as the possibility of setting the foundation for other sanctions that may follow, particularly in situations where documentation ascribes responsibility for abuses that have taken place.³⁶⁴ Documentation also promotes human rights and stresses the fact that breaching these rights should not go unnoted. Fact-finding also plays a *deterrence role*, as such missions help to prevent future crimes. False allegations that remain undisputed for a long period of time tend

359 *Hayner, supra note 345 at 607.*

360 Marko Milanović, “The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem” (2016) 110:2 AJIL 233 at 257.

361 *Universal Declaration of Human Rights, GA Res 217A(III), UNGAOR, 3rd Sess, Supp No. 13, UN Doc A/180 (1948), online:*
<http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf>.

362 “*Who Wants to Forget? Truth and Access to Information about past Human Rights Violations,*” *Article 19, The Global Campaign for Free Expression, online:*
<<https://www.article19.org/data/files/pdfs/publications/freedom-of-information-truth-commissions.pdf>>.

363 *Ratner, supra note 343 at 270.*

364 *Ibid at 271.*

to incite resentment between communities and hostile actors, which may in turn lead to acts of retaliation.³⁶⁵

The fact-finding process has a *therapeutic role*. By giving victims and their families the opportunity to tell what happened, and involving them in the investigation process, we not only give them the sense that we care and accordingly acknowledge what happened to them and the suffering they faced, but we also provide therapeutic support for them, even if actual punishment of perpetrators does not take place.³⁶⁶ As Martha Mino argues, “the attempts to destroy groups of people cannot succeed in destroying their memory.”³⁶⁷ Thus, giving a full account of victims’ suffering potentially prevents their involvement in future abuses. However, as Shiri Krebs warns, fact-finding reports should be neutral, because emotional and cognitive biases have the ability to sway people’s reactions to data regarding war crimes carried out by people from their own countries.³⁶⁸ Inflammatory documents may lessen the credibility of the allegations about crimes, and eventually will be less effective in any accountability process.

Fact-finding missions also play a useful part in civil society campaigns for change. Civil society groups keep records of human rights abuses to *pressure and to generate public support* against certain misbehaviour, as well as to call on the international community to react to

365 *Boutruche, supra note 367 at 109.*

366 *Martha Minow, “The Hope for Healing: WHAT CAN TRUTH COMMISSIONS DO?” in Robert I Rotberg & Dennis Thompson, eds, Truth v. Justice: The Morality of Truth Commissions (New Jersey: Princeton University Press, 2000) at 241.*

367 *Ibid at 236.*

368 *Shiri Krebs, “The Legalization of Truth in International Fact-Finding” (2017) 17 Chicago J Intl L at 90.*

particular situations. Fact-finding missions help to *name and shame*,³⁶⁹ which Suzanne Katzenstein describes as “the process of exposing, publicizing, and condemning human rights abuses.”³⁷⁰ Naming and shaming is one of the central strategies that human rights defenders use to promote respect for human rights, and to discredit perpetrators and call for their accountability. Matthew Krain argues that naming and shaming is intended to put pressure on perpetrators in order to lessen the severity of atrocities, and, in turn, the spotlight will be shifted away from them, their identity will be re-framed, pressures from international actors will be alleviated, and they will be able to preserve their international and national legitimacy.³⁷¹ Naming and shaming uses information sourced from verifiable reports regarding the abuses committed, and it frames perpetrators as parties who cannot be trusted, and who have violated international standards.³⁷² Naming and shaming campaigns deliver messages of *condemnation* to offenders and their supporters, and they damage offenders’ reputations. In addition, they pressure other states in the international community to take sides, change their strategies, and act upon the knowledge instead of being bystanders. Katzenstein asserts that naming and shaming accomplishes an additional task, i.e., a dynamic “rhetorical entrapment”³⁷³ that may encourage instrumental commitment to human rights standards.

369 Alston & Knuckey, 2016, *supra* note 346 at 9.

370 Suzanne Katzenstein, “Reverse-Rhetorical Entrapment: Naming and Shaming as a Two-Way Street” (2013) 46 *Vand J Transnat’l L* 1079 at 1079. [Katzenstein].

371 Matthew Krain, “J’accuse! Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politicides?” (2012) 56:3 *Int’l Stud Q* 574 at 574.

372 *Ibid* at 576.

373 Katzenstein, *supra* note 370 at 1079.

However, some scholars see no reason to believe that the process is effective; instead, they argue that the impact of naming and shaming is exaggerated and perhaps even counter-productive. Ironically, it may put repressive governments under the spotlight and push them to continue their atrocities; it could escalate the very abuses it attempts to stop, and indeed it might generate additional forms of abuse.³⁷⁴ Emilie M. Hafner-Burton supports this opinion, arguing that there is variance across types of violations, in terms of the capacities of governments to make human rights improvements. Additionally, “governments are strategically using some violations to offset other improvements they make in response to international pressure to stop violations.”³⁷⁵ Naming and shaming has had an insignificant impact on the improvement of human rights. For two reasons, Cullen S. Hendrix and Wendy H. Wong advise that, for naming and shaming messages to be effective in promoting human rights, they must be *direct* communications with offenders. First, “targeting violators bypasses Western policymakers, who have conflicting interests in violator states, and in doing so recognizing the legitimacy of target states even as specific practices and condemned.”³⁷⁶ Second, direct communication with violators creates common understandings of abuses, and it has ability to draw violators’ attention to the fact that their violations are no longer private and unobserved.³⁷⁷ Having a

374 Emilie M Hafner-Burton & James Ron, “Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes” (2009) 61: 2 *World Politics* at 392.

375 Emilie M Hafner-Burton, “Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem” (2008) 62:4 *International Organization* at 700.

376 Cullen S Hendrix & Wendy H Wong, “The Pen Is Truly Mighty: Direct Communication, Amnesty International’s Urgent Action Campaigns, and Human Rights Practices in Target States” (Paper presented at the International Studies Association Annual Meeting, New Orleans, 17-20 February 2010) at 1.

377 *Ibid.*

dialogue with offenders could have a positive impact insofar as it may lead to a change in their abusive attitudes.

In certain circumstances, fact-finding can *foster peace* or reconciliation. Fact-finding commissions provide recommendations pertaining to past abuses, which is usually the limit of their missions. But they do not punish; it is courts that hold suspects accountable.³⁷⁸ The parties to conflicts tend to make peace as a result of the work of fact-finding commissions; for example, this happened during the conflict in the former Yugoslavia, which at one point had a very limited chance of making peace. The UN peacekeeping forces established a human rights investigations unit, which made a critical contribution to peace efforts by putting pressure on the parties that moved the peace talks forward. The fact-finding process is essential so that key actors, such as the UN, can put pressure on the parties to comply with their obligations outlined in peace agreements. Fact-finding can be very effective in encouraging warring parties to enter into peace talks during conflict.³⁷⁹

To this point, I have explained that the criminal justice system is comprised of three components: punishment, trials, and fact-finding. I have discussed several theories that justify and understand the value of each of those components. Understanding these theories and justifications is crucial insofar as it will help, in Chapter Three, to assess the justifications for

378 Ratner, *supra* note 367 at 271.

379 Bertrand G Ramcharan, "The Human Rights Field Operation in Partnership for Peace" in Michael O'Flaherty, ed, *Human Rights Field Operation in Partnership for Peace – Law, Theory, and Practice* (Ashgate Publishing Company, 2007) at 117-119.

calls for criminal accountability in the midst of the Syrian conflict. However, before that discussion, I will in the next part discuss the problem of authority.

PART TWO: THE PROBLEM OF AUTHORITY

I. WHO HAS THE AUTHORITY TO CALL TO ACCOUNT?

In this part, I consider the issue of who has the authority to call to account? Criminal justice institutions are one of the crucial characteristics of a stable society. When crimes take place, criminal institutions initiate investigations, collect evidence, document facts, hear from witnesses, and prepare cases. Upon completion the previous steps, suspects are called to trials and, if they are found guilty, they are punished. However, when a state lacks stability, crimes are ongoing, and criminal justice institutions are absent, the question of who has authority is triggered. As I explained in Chapter One, criminal justice institutions that could hold perpetrators accountable for crimes in Syria are absent. Domestic criminal institutions typically make calls for criminal accountability. But, in Syria, who has the authority – or more precisely, the standing – to hold perpetrators to account? Moreover, is the question important, i.e., does it matter who does the calling to account during an ongoing war? In stable societies, such a question would itself be surprising. Why would one even think of it if the criminal just system were doing its job properly? But, in cases where crimes are ongoing, the authority question will certainly arise. Should the principle of legitimacy in instable societies be measured similarly to ordinary justice in stable societies? Is there room for exception? Not asking the authority question will make any analysis of calls for criminal justice vague. Therefore, I address the question in an effort to understand how and in what way scholars have dealt with it.

In his book, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, Kant comments on the idea of justice when he suggests

that “justice would cease to be justice if it were bartered away for any consideration whatever.”³⁸⁰ Kant’s approach to justice is such that it prioritizes it even if a society decides to abolish itself. He says: “Even if a Civil Society resolved to dissolve itself with the consent of all its members – as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world – the last Murderer lying in the prison ought to be executed before the resolution was carried out.”³⁸¹ For Kant, even if the society metaphorically dissolves itself, justice is required. Does a similar analysis apply to societies that are in the midst of ongoing conflict, societies that lack a criminal institution to call to account? Should citizens undertake the task if no authority exists?

Let’s start by considering why only the state – not private entities or citizens – is permitted to handle criminal justice. In commercial, civil, and family arbitrations, the parties are free to choose their own arbitrators – arbitrators who settle disputes based on the evidence and arguments presented by the parties, and apart from the state courts. But this is not the case in criminal courts. Retributivists and consequentialists alike agree that criminal justice must be pursued by the state; it is the duty of the state to maintain criminal justice institutions that would call supposed wrongdoers to account, to try them, and to punish them if they are found guilty. This traditional conception of the state’s mission comes from John Locke, who argues that the state is indeed the proper actor.

I easily grant that civil government is the proper remedy for the

380 Kant, 1887, *supra* note 15 at 196.

381 *Ibid* at 198.

inconveniences of the State of Nature, which must certainly be great where men may be judges in their own case, since it is easy to be imagined that he who was so unjust as to do his brother an injury will scarce be so just as to condemn himself for it.³⁸²

John Rawls too agrees that it is the state's duty to carry out criminal justice. "[A] person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen on the ground that he has violated a rule of law, the violation having been established by trial according to the due process of law, providing that the deprivation is carried out by the recognized legal authorities of the state."³⁸³ There are several preconditions for wrongs to be corrected before a criminal justice institution, including that such correction must be conducted in accordance with the due process of law and carried out by the state (the recognized legal authority). Criminal justice is therefore part of the state's activities and it is solely responsible for it for a number of reasons. First, there are instrumental justifications, i.e., the state is the right entity to criminalize wrongdoing because of its deliberative and impartial nature.³⁸⁴ The state is more capable than are other entities or actors to determine the just response to misconduct. The state strives to maintain proportionality between the severity of a crime and the severity of its punishment. Also, state justice is cost effective. Second, there is the normative

382 *John Locke, Two Treatises of the Government, Ten vols, vol V (London: Printed for Thomas Tegg; W Sharpe & Son; G Offor; G and J Robinson; J Evans and Co.: Also R Griffin and Co. Glasgow; and J Gunning, Dublin, 1823) para 13 at 110.*

383 *John Rawls & Samuel Freeman, "Two Concepts of Rules," in Collected Papers (Cambridge: Harvard University Press, 1999) at 26.*

384 *Alon Harel, "Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions" (2008) 14 Legal Theory at 115-117.*

justification: although the state might not necessarily be successful in operating its criminal justice institutions, “it is a noncontingent normative precondition for the just infliction of criminal punishment.”³⁸⁵ Third, there is a state-centred justification: the state is the best entity to determine the objectives that should be achieved in a particular society.³⁸⁶

All are rational reasons, but what if the legal authority is absent, i.e., unwilling or unable to handle this task? What if it is biased? Even scholars who insist that the state is the right entity to carry out the criminal justice function might find these questions challenging. Alon Harel suggests that the normative precondition usually associated with stable societies may not be the ideal justification in cases where the state is significantly unstable – say, in a state of change or transformation.³⁸⁷ Duff also suggests that the state has the moral standing to condemn criminals.³⁸⁸ However, in his political community account, he moves away from that idea to pose a question: “[W]ho has the standing to call her to answer for her alleged crime?”³⁸⁹ There must be a requirement, that is, a prerequisite that must be considered. He says, “to be answerable is also to be answerable *to* someone or something.”³⁹⁰ It might be family, friends, bosses, or co-workers who call a person who commits blameworthy behaviour to account, but strangers cannot require answers. For example, work-related matters are not the rightful business of those who are outside of the work sphere. So, whoever calls wrongdoers to account

385 *Ibid.*

386 *Ibid at 118.*

387 *Ibid at 117-118.*

388 *Duff et al., 2007, supra note 14 at 225.*

389 *RA Duff, Punishment, Communication, and Community (NY: Oxford University Press, USA, 2001) at 181. [Duff, Duff, Punishment, Communication, and Community, 2001].*

390 *Ibid at 185.*

must possess the standing to do so. Without such standing, it would not be possible to effectively try or judge defendants. Without standing, the state is unable to convict, acquit, or make decisions about whether defendants are deserving of the punishment.³⁹¹ Duff argues the point thusly: X was called to trial to answer the court in relation to specific charges. The court represents the community of which X is a member, so it is the community that is trying him. But, what if the community has no standing? If parents ask one of their children not to hit his sibling, but the parents themselves sometimes hit their children, the child who the parents seek to hold accountable might claim that the parents “lack ... moral standing.”³⁹² They are not in a place to impose judgement or to punish their child, but not because hitting is permissible, rather because they themselves lack respect for the values they are asking their child to endorse. An analogous case would apply in relation to a community, Duff suggests. The legitimacy of the court (that represents the community or the state) is questionable if it does not respect the law or if it “lacks the standing”³⁹³ to hold defendants accountable. Therefore, based on Duff’s account, the state must not only have standing, but must also have the legitimacy to hold defendants to account.

The other account comes from Victor Tadros, who argues that punishment is justified because of its general deterrent impact on society. The idea is that, because of their conduct, wrongdoers have a duty to protect victims from future intimidation by others – other possible wrongdoers. In Tadros’ opinion, victims have the right to hold wrongdoers accountable. His

391 *Ibid.*

392 *Ibid at 186.*

393 *Ibid at 187.*

question, then, is whether that means that the state should hold wrongdoers accountable in order to help victims. And what would happen if victims do not wish to punish wrongdoers? Can the state's duty to punish perpetrators turn on the preferences of victims? Of course, many would claim that the state is the entity that must decide whether to punish, regardless of the victim's wishes. Tadros suggests, "the victim may have a right that the offender is punished, and she may have a duty to authorize punishment of the offender."³⁹⁴ Still, does that impose a duty to punish on the state? "Yes," is Tadros' straightforward answer. The state's duty to punish is deduced from our rights and obligations as citizens of the state. We have a collective responsibility to face and eliminate serious threats against our society, and we are obliged to rescue each other from such threats. We grant that responsibility to the state so that it can maintain criminal justice institutions on our behalf in such a way that we meet our responsibility to protect each other. Tadros asserts that "[t]he duties of the state to punish are, in this way, simply grounded in the duties that each person has to protect: the duty to protect future potential victims of crime, but also the duty to protect offenders from being harmed more than necessary to avert these threats."³⁹⁵ If so, does the state exclusively have the duty to punish? What if the state chooses not to punish wrongdoers? Is it permissible for victims to punish their wrongdoers? Based on Tadros' claims, victims have the right to punish their wrongdoers, but should they carry that out themselves? Tadros argues that, unless the state is incapable of taking on that role, the state remains the sole institution that should punish.

394 Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2013) at 299.

395 *Ibid* at 301.

So, the question is whether other entities – aside from the state – should be authorized to undertake the task of criminal accountability and, if so, under what conditions. For Tadros, the answer relies upon how just the state is and if it is in the position to undertake that task, in comparison to other bodies. In normal circumstances, states are best placed to handle justice; individual punishment and non-state punishment is not as effective as state punishment. For reasons already mentioned, and others on which Tadros relies, the state is the entity with the available resources, with greater capacity to identify offenders, and the entity most suitable to handle justice. State justice supports and develops social cohesion, which is a critical part of a state's stability.³⁹⁶ However, if a state is unable or unwilling to punish, or if its punishment is ineffective or disproportionate, then, in Tadros' opinion, private punishment is permissible:

If individuals can protect themselves to an equal or greater extent by punishing the wrongdoer individually, without imposing any greater cost on the offender or others, she may be permitted to do that rather than authorizing the state to do so. Individual punishment will, in that case, be preferable to state punishment.³⁹⁷

Of course, operationalizing private punishment would be difficult, and, as stated, undesirable for states that are stable, i.e., those states that have functioning criminal justice institutions. Private punishment might take the form of an international institution that may have the

³⁹⁶ *Ibid* at 306.

³⁹⁷ *Ibid*.

capacity to deal with the enormity of the task. But, as Tadros alludes, private punishment would be acceptable only in extraordinary cases, i.e., “where states are either ineffective or unjust.”³⁹⁸

In international criminal justice, the questions of who may call wrongdoers to account and questions about the legitimacy of international criminal institutions are always under the spotlight. David Luban, assessing the principle of legality in international criminal law, argues that the legitimacy of international tribunals stems from their ability to practice fair procedures and punishments. In other words, it is the *quality* of justice that grounds the tribunal’s legitimacy,³⁹⁹ i.e., tribunals must embrace the principles of natural justice, which he eloquently lists as including:

the right to a speedy, public trial before an impartial tribunal that bases its decision solely on the evidence, under rules designed to reach accurate verdicts; the right to offer a defence; the right to be informed of the charges, in a language that the accused understands, through a written indictment that specifies the charges and the conduct charged; the right of the accused to confront the witnesses against him; the right of the accused to have compulsory process for obtaining witnesses in his favour; the right to counsel and the privilege against self-incrimination; and the ban on double jeopardy (*ne bis in idem*). Natural justice also includes

³⁹⁸ *Ibid.*

³⁹⁹ Luban, 2010, *supra* note 16 at 579.

the right to appeal; and it includes familiar duties of prosecutors: to pursue cases only when there is probable cause, to disclose exculpatory evidence to the accused, and more generally, to seek justice rather than victory. Finally, it includes humane conditions of confinement and reasonable punishments.⁴⁰⁰

The legitimacy of criminal justice institutions comes from their fairness, not from the political authority that establishes them; in other words, justice should exist regardless of any political interests. Luban explains that, in the absence of a world governance structure that is in a position to authorize international tribunals, such as the ICC, international tribunals must impose their authority through a strict adherence to natural justice.⁴⁰¹ If there are no specialized institutions to take on the role of imposing criminal accountability, international tribunals must take it on, even if they lack standing.

Luban considers the principle of legality as it pertains to international as distinct from domestic criminal law. He argues that the issue of legality is a feature of domestic criminal law, but not one that is central in international criminal law; “the centre of gravity in international tribunals lies in the trial, not the punishment, punishment following conviction remains an essential part of any criminal process that aims to project a no-impunity norm.”⁴⁰² International trials aim to send the message that mass atrocities are taking place and that we must respond to them – that is what provides international trials with their standing, their authority. Luban

400 *Ibid* at 580.

401 *Ibid* at 579.

402 *Ibid* at 576.

argues that concern for the “despotic abuse of the power to punish,” and for fair notice – two arguments that inspire the principle of legitimacy – are less persuasive in international criminal law than they are in domestic criminal law. Regarding the argument about government abuse, Luban explains, “when a state with no political axe to grind against the defendant and whose jurists aren’t under the thumb of politicians prosecutes great crimes under a UCJ [universal criminal jurisdiction] statute, the Principle of Legality loses its central place in the pantheon of legal values.”⁴⁰³ As for the fair notice rationale, Luban believes that the law exists to guide people’s actions, so it would be mere mockery to try supposed perpetrators based on retroactive law – law that did not exist at the time of the “wrongdoing” – or based on hazy legal principles tailored to disfavour wrongdoers.⁴⁰⁴ For Luban, in cases where the state is absent, unable, or unwilling to take on the criminal justice role, the principles of natural justice justify other institutions stepping in. So, if the state cannot call wrongdoers to account, then whoever can do it, must do it, because justice demands it.

Duff, however, criticizes Luban’s approach of grounding the legitimacy of international institutions in the principles of natural justice. Duff instead concentrates on the moral legitimacy and authority of international institutions. He asks who has the standing to call perpetrators to account. He says that suspects will legitimately ask, “who are you to call me to account?,” and moreover that it’s insufficient to reply that suspects have been called to account because of their conduct. Tribunals must have standing in order to make such calls; they must be able to show that they are acting on behalf of those to whom the accused is answerable. Duff

403 *Ibid* at 583-584.

404 *Ibid*.

suggests that international tribunals act “in the name of humanity.”⁴⁰⁵ Our “shared humanity”⁴⁰⁶ provides the standing that tribunals need in order to call suspects to account for their crimes. When domestic criminal justice institutions fail, international criminal justice institutions must act in their names.

II. CONCLUSION

In Chapter One, I described the question with which this dissertation deals, as well as the obstacles surrounding holding perpetrators to account for crimes in Syria. And, I have argued that human rights law does not function in the same way as does criminal law, and thus the former is insufficient in dealing with war crimes. Calls for criminal accountability direct our attention to punishment; it is often assumed that the criminal justice system is designed to penalize wrongdoers and to remedy specific wrongdoings. In other words, it is assumed that calls for criminal accountability are ultimately calls for punishment. Perhaps it is thought that wrongdoing must be punished because retribution has intrinsic value, or because punishment has a deterrent effect, or because punishment expresses society’s values. In the end, without justification, punishment is an unacceptable burden insofar as it entails harsh treatment. Therefore, in this chapter, I have discussed the values of the criminal justice system when its components – fact-finding, trials, and punishment – complement one another. I have addressed three different theories, each of which justifies punishment in its own way. I have referred to the literature on both domestic and international criminal law.

⁴⁰⁵ Duff, *Authority and Responsibility*, 2010, *supra* note 17 at 598.

⁴⁰⁶ *Ibid* at 599.

In the fact-finding process, the system adopts certain standards and procedures to find evidence about criminal wrongdoing. Using his or her discretion, the prosecutor then refers suspects to the court, which has jurisdiction. The court then examines the evidence, listens to victims and witnesses, and punishes perpetrators if they are found guilty. Each of three components to the system has its own values and justifications, and they complement one another. What distinguishes punishment is that it is the response that people expect when they call for criminal accountability, and it is what gives such special significance to the criminal justice system. It is the element that distinguishes the criminal law response from the responses of other kinds of law, for example, human rights law. As I have demonstrated in this chapter, punishment carries values that are defined differently by the different theories.

Retributivists perceive punishment as the correct response to wrongdoing, in proportion to the seriousness of the wrongdoing. They argue that punishment is about desert; wrongdoers *deserve* the hard treatment of punishment. While retributivism is the predominant objective of international criminal punishment, I argue that there is also value in consequentialism and expressivism. Consequentialists believe that punishment must hinder the bad and promote the good in society in general and for perpetrators in particular; therefore, punishment's main value is deterrence, whether general or specific. Expressivists advocate that punishment works well to correct the wrong that crimes cause by correcting the equilibrium between victims and perpetrators; punishment restores the pre-crime balance between victims and perpetrators. For expressivists, punishment has a communicative aspect that works to reconcile wrongdoers with victims and with society. Punishment is a moral educator that strengthens the rule of law.

While criminal accountability, as we know it, is tied to the idea of punishment as an appropriate remedy for wrongdoing, the criminal justice system has other important components that must be pursued before imposing punishment. These components are trials and fact-finding, and they embody values over and above punishment. Trials involve prosecuting wrongdoers before authoritative bodies that have jurisdiction, and that can adjudicate guilt. In trials, wrongdoers are called to account – to explain themselves – to the polity. Sometimes, trials are more meaningful to society than punishment itself. Trials have their own rationales because they seek to find the truth. People generally prefer to maintain their good reputations among their peers, and trials provide wrongdoers with the opportunity to explain themselves. Because defendants have done something that society thinks is wrong, society needs to hear their explanations. Trials are more than a process that seeks the truth; trials are a communicative process that involves defendants, victims, witnesses, and society.⁴⁰⁷ Therefore, trials have a value that goes beyond punishment.

The Fact-finding process is where the facts of a given case are objectively ascertained. Fact-finding informs the polity about what has happened during a certain conflict, and it provides an important record of events, one that is essential during the prosecution process. Facts provide a historical archive because they authenticate conduct that has violated the law. Fact-finding educates the community, which will then endeavour to prevent repetition of similar wrongdoing in the future. The fact-finding process promotes human rights law and its application, it reinforces the rule of law, and it deters future wrongdoing. Sociologically

⁴⁰⁷ *RA Duff et al., 2007, supra note 14.*

speaking, fact-finding is valuable insofar as it gives victims and families the opportunity to tell their stories; thus, it can provide therapeutic support for both victims and the polity. Furthermore, fact-finding allows for the naming and shaming of perpetrators, and thus generates public support for victims, and may even foster peace and reconciliation. Fact-finding educates future generations so as to lessen inhumane and immoral wrongdoing from occurring in the future.

In this chapter, I have dealt with the question of who may call to account in the absence of a credible domestic criminal justice system. In situations when there are ongoing war crimes against civilians, does it really matter who makes the call for criminal accountability? According to some scholars, if no state institution exists to ensure criminal justice, then the natural justice approach may justify alternative institutional practices. To be precise, if the state is unable or unwilling to call wrongdoers to account, then whoever can do it, must do it, because justice demands it.

The theories presented in this chapter apply to fully functioning criminal justice systems; but, as we know from Chapter One, while the conflict in Syria rages, it does not have a functioning criminal justice system. Thus, punishment is unlikely to happen in this war-torn country. War crimes are ongoing and there is no credible domestic criminal justice system in place. Moreover, there is no clear non-domestic criminal justice system that has the jurisdiction and the standing to make enforceable legal decisions that could hold suspects of atrocity crimes accountable. The current Syrian circumstances that preclude punishment include: 1) the war is ongoing; 2) domestic institutions are unable or unwilling to handle the role of criminal

punishment; 3) international criminal institutions have no jurisdiction over crimes against civilians in Syria. Unless the political circumstances change, perpetrators are therefore unlikely to be punished. So, is there any value in making calls for criminal accountability?

Building on the discussion in this chapter, the next chapter will answer the question of this dissertation: given the significant unlikelihood of institutional punishment, are there justifications for calls for criminal accountability in the midst of ongoing Syrian war? I will use the theories and the literature discussed in this chapter to assess the values that have been expressed by calls for criminal accountability. I will argue that, when we call for criminal accountability, we are referring to the *possibility* of punishment, and that possibility is valuable even if punishment itself is not yet achievable.

CHAPTER THREE: ASSESSMENT

I. Introduction

In a perfect world, when the state is politically stable, and when its apparatuses are functioning as they should, calls for criminal accountability find their responses in the criminal justice system. The system provides fact-finding and investigation of crimes, it calls suspects to trials and, if suspects are found guilty, the system punishes them. In Chapter Two, I provided the justifications for each of three components of the criminal justice system in stable societies. However, as I explained, not all of the justifications that apply in the domestic criminal justice system apply internationally. Many scholars argue that international criminal law borrows its philosophy from domestic criminal law; in other words, it is something of an “afterthought.” What international criminal law lacks, significantly, is the third component – that of punishment.

As is well-established, Syria is a war-torn county where crimes are ongoing and there is no jurisdiction for a credible criminal justice system to hold suspects of atrocity crimes accountable. As established in Chapter One, calls for criminal accountability during the ongoing war have been loud and insistent, coming from Syrian citizens, foreign governments, intergovernmental organizations, NGOs, international lawyers, scholars, politicians, human rights activists, and many others. But, given the significant unlikelihood of institutional punishment, are such calls of any value?

The Syrian case reveals a lack of political will to refer the crimes to the UNSC, which could, in case of international atrocity crimes, draft a resolution to refer the case to the ICC or to establish a special international tribunal. But, since the Syrian government is not a signatory to the Rome Statute, the ICC does not have jurisdiction over crimes in Syria. Ideally, domestic courts would be the best place to investigate crimes within their territories, but in the case of Syria, the domestic criminal justice system is both unwilling and unable – it is not impartial, given that the Syrian government stands accused of war crimes. So, without standing for international courts to investigate, and without a willing and able domestic criminal justice system, there is an impasse. Given the impasse, what is the value of calls for criminal accountability?

Fact-finding efforts are taking place internationally. Organizations such as the COI and the IIM are investigating and documenting the crimes in order to provide the UNSC and the international community with enough evidence to call perpetrators to account. But courts tend not to call suspects to account unless they have jurisdiction to do so, even under the principle of universal jurisdiction. While some measures have been taken with respect to the principle of universal jurisdiction by states in Europe, these measures are not expected to go beyond issuing arrest warrants against suspects; in the Syrian case, suspects include high-ranking officials who reside in Syria and are unlikely to leave the country and thus expose themselves to foreign judicial systems. These shortcomings were obvious in the case of Sudan's President

Omar al-Bashir, who was accused of war crimes. The ICC failed to seize him, although, at the time, he was travelling freely among the territories of state parties to the Rome Statute.⁴⁰⁸

Given the unlikely possibility of punishing war criminals during the ongoing Syrian war, let's try a thought experiment. Let's imagine that the al-Assad government wins the war and that the political situation remains the same, meaning that the prospect of punishment is almost nil. The question remains: is there any value in issuing calls for criminal accountability? For such calls to be credible, they must have a normative connection to possible avenues of justice. But, in the absence of such avenues, what would be the point of these calls? Are they even justified?

In this dissertation, I argue that calls, even in the absence of a criminal justice system with which to deal with them, are intrinsically valuable because they express a *willingness* to punish perpetrators. Calls open up the *possibility* of punishment. Although calls are not as strong as punishment, they carry similar values. Calls do not punish, but they aim to create the possibility of punishment. The language that is expressed by these calls for criminal accountability has value to societies. Moreover, calls have encouraged the process of pursuing criminal liability, which is another reason that they are important.

As I stated in Chapter One, my overarching goal in this dissertation is to open the debate for a new way of thinking that can contribute to the philosophy of criminal law. Using the case of the ongoing conflict in Syria, I aim to establish an account of criminal accountability that

408 *Supra note 151.*

merits the language of calls for criminality, even where physical punishment is unlikely. This proposed account is important because it opens the door to criminal law being able to respond to the era in which we are living. Our modern lifestyle is increasingly virtual, and punishment may too transform from its physical form to a more virtual one. During COVID-19, courts have started to take a virtual form, and it is conceivable that punishment might similarly transform. In situations where physical punishment is unlikely, its moral values remain. I argue that punishment is not only about its physical aspect. Although that aspect is important, there are moral values associated with calling someone as criminal; it is not punishment as we know it, but it delivers some of the same values. As the world shifts to become increasingly online, the philosophy of criminal law must adapt.

In Section II, I provide what I argue are the justifications for calls for criminal accountability in the midst of the ongoing war. Also, I set out the reasons that the messages expressed by calls are valuable.

In Section III, I suggest the kind of messages that calls send and I identify who has standing to call criminals to account for crimes in Syria in the absence of criminal institutions. I argue that using the proper message is essential. I argue for using the language of criminal law as opposed to the language of human rights; by labelling the violation a “crime” and the violator a “criminal,” we change the message from one that condemns human rights violations but that has undefined legal responses, to a message that expresses the willingness to punish perpetrators. Calls send the message – to criminals, victims, local societies, and to the international community – that, if we could, we would punish perpetrators for their criminal

behaviour, and, moreover, that the time will come when perpetrators of atrocity crimes in Syria will be held accountable. Crimes hurt us and they violate the values that we all share as human beings. Whoever violates these values, violates our humanity. Therefore, I argue that our shared humanity is what provides the standing for our calls for criminal accountability.

In Section IV, I highlight what has been achieved as a result of calls for criminal accountability in Syria, and I argue that, even given the unlikelihood of physical punishment, the process of pursuing criminal liability is nonetheless valuable. Calls put pressure on the international community to advance the criminal justice file on Syria, as is evident by some states' responses – such as the cases in Europe and the US' Caesar Syria Civilian Protection Act.

II. Justifications of Calls for Criminal Accountability in Syria

In the previous chapter, I pointed to the justification for the criminal justice system when all of its components complement one another. In this section, I will argue that, even if the system is unable to function as it should, there are nonetheless justifications for calls for criminal accountability in the midst of conflict. I suggest the following goals.

Calls aim to send a message to criminals that they should be punished because of the wrongs they have committed, i.e., punishment is their *just deserts*. Calls inform them about the wrongs they have done, convince them to accept condemnation, and deter them from committing crimes in the future. Calls also send a *message of acknowledgement* to victims – acknowledgement of their suffering; calls also let victims know that they are not alone and that

society wants to alleviate their pain, and payback offenders for the suffering they have caused. Calls inform offenders that their wrongdoings are abhorrent, that they should feel *remorse*, that they should seek forgiveness from those they have wronged, and that they should compensate their victims and do what they can to correct their wrongdoings. Calls aim to send a message of *apology* to victims and to society. If calls are able to achieve these goals, they will help to bring about cohesion to the society in conflict. That itself has value during times of conflict.

Calls serve as a *moral communicator* between victims, criminals, and society. They reveal the wrongs and open channels for communications and confrontations. They also send a strong message to the international society: never again! As David Luban states, “The fundamental message of international criminal norms is that the Great Game of politics, deeply embedded in the human condition, must never again cross moral lines that heretofore it has always crossed.”⁴⁰⁹ Calls for accountability embrace the moral message that there are lines that must not be crossed, and that message itself enhances trust in justice and the rule of law.

Based on Kant’s notion that all human beings have intrinsic worth, and on Jean Hampton’s account, calls for criminal accountability aim to *reinstate the value of the victim*. They aim to correct the equilibrium that has been upset by atrocity crimes. When parties to the Syrian conflict commit their atrocity crimes – attacking victims with chemical weapons, and other heinous crimes – they send a message of degradation to those victims, telling them that they worth less than perpetrators, that perpetrators have a higher standard, and that their lives

409 David Luban, “State Criminality and the Ambition of International Criminal Law” in Tracy Isaacs & Richard Vernon, eds, *Accountability for Collective Wrongdoing* (Cambridge: Cambridge University Press, 2011) at 75.

are worth less. Calls to account respond with a message that wrongdoers should repent their crimes. Calls are *symbols that aim to correct the pre-crime equilibrium*; they are an effort to rebalance the relationship between perpetrators and victims. Despite the fact that the war in Syria continues, these calls have value. They convey the message that, despite the fact that punishment is not possible during the ongoing war, it will happen when the war is over. They send a message of condemnation.

Calls for criminal accountability aim to serve as a *long-term moral educator* to perpetrators in particular, and to society in general. They aim to have a long-term role in influencing, improving, and teaching values, which aim to promote the advancement of habitual and internal limits. Although the Syrian war is ongoing, calls for criminal accountability express a message that attempts to change not only the attitudes of criminals, but also those of society in general. That change may not be immediate, but in the long run calls work as a moral educator because they send a strong message of condemnation and stigmatization to change the mainstream view of how we should react to heinous crimes and prevent them from recurring.

Calls for criminal accountability have a *historical justification* that goes beyond punishment. Although Syrian war criminals may never be punished, the major goals of calls for accountability include producing chronological narratives, verifying those narratives as truth, and disseminating those narratives to the public.⁴¹⁰ Calls aim to prevent future crimes.

410 Drumbl, 2007, *supra* note 277 at 173.

They aim to *reduce undesirable behaviour*, point out wrongdoing, and discredit perpetrators – even if they are never punished. They aim to promote morality, and to increase insight.⁴¹¹

Calls uphold a cultural aspect or “a cultural performance – which communicates with a variety of social audiences and conveys an extended range of meanings.”⁴¹² Although audiences in the international community might disagree about who is responsible for crimes, calls point out the wrong. Calls make us aware of the conduct of war, they promote the rule of law, and, more importantly, they aim to *avoid normalization* of mass atrocities. They make it difficult for the audience to forget about the crimes. They encourage additional justice-like practices, looking to avoid legal gaps that might allow perpetrators to evade criminal accountability.⁴¹³ Calls for criminal accountability aim to investigate wrongful practices in order to prevent perpetrators from enjoying impunity. Calls aim to stamp red marks in the minds of the public, showing that in Syria there are grave crimes against humanity being committed, and if not immediately, one day when the political situation allows, perpetrators must be punished.

During times of war, calls also aim to be *sensible indicators* about right and wrong. They aim to signal human moral values that have been violated by ongoing crimes. They open the door for humanity to take a stand against wrongdoing, they give us the opportunity to think about the legitimacy or illegitimacy of the perpetrators’ conduct, and to make our own

411 Payam Akhavan, “Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal” (1998) 20:4 *Hum Rts Q* at 741.

412 Garland, 2012, *supra* note 325 at 252-253.

413 See Drumbl, 2007, *supra* note 277 at 163. Drumbl claims that: “it seems somewhat more plausible to inhibit the mainstreaming of hatemongering as politics owing to the consolidation, through law and punishment, of a social consensus regarding the moral unacceptability of such politics.”

judgements about it, all while the war is ongoing. Calls for criminal accountability “tell us where to locate social authority, how to preserve order and community, where to look for social dangers, and how to feel about these matters.”⁴¹⁴ Calls open the door for us to think about crimes through broader debates about the rule of law, politics, moral values, and the social system. Calls aim to reinforce the power of law within society.

Calls for criminal accountability aim to *strengthen people’s faith in the rule of law* that is diminished during war. Calls address the wrongs that have been committed and assist in ending perpetrators’ impunity. Physical punishment is important, but in the absence of criminal institutions that are willing and able to perform the tasks involved in criminal justice, calls express a message that aims to re-establish trust in the rule of law. While the existence of criminal justice institutions enhances the rule of law and makes laws genuine in the eyes of society, in the absence of such institutions, calls for criminal accountability encourage people not to be silent about the evil. Calls have generated some undeniable efforts toward preserving the rule of law during war; for example, in the absence of a criminal justice system, local councils in small liberated areas inside Syria have established their own justice systems, aiming to keep order and sustain faith in the rule of law inside their society. In major cities, judges and lawyers who have deserted the government have established an alternative court system and have guaranteed fair trials during the war. With the military advancement, these judges and lawyers were forced to flee to other countries, but their adherence to justice has not stopped.

414 Garland, 2012, *supra* note 325 at 252-253.

Rather, they continue to offer their legal efforts to hold perpetrators accountable, and their practices are significant examples of preserving the rule of law during the war.

Earlier, I flagged the fact that deterrence is unlikely to be the major justification of international criminal justice, but calls for criminal accountability go beyond habituation of legal systems, and beyond the political considerations and institutional constraints that are faced during the process of holding war criminals to account. Calls point to wrongdoings as a fact, regardless of whether there is a criminal justice system to carry out the task of punishment. The implied message of these calls is one of *deterrence*. While they may not hinder specific individuals, their message tells society that there are values that have been violated and that we are committed to holding their perpetrators accountable. The deterrent impact that the message expresses might equate to the condemnation and censure expressed by calls for criminal accountability. Moreover, the stronger the calls, the more they deter, and during the war in Syria, calls have been strong. Although it is difficult to measure the deterrent effect during the ongoing war, some measures that have been taken by states seem to correspond to these calls. For example, the US enacted the Caesar Syria Civilian Protection Act of 2019 to hold individuals of the Syrian regime accountable.

Referring now to trial component of the criminal justice system, calls have pushed both Syrian civil society and the international community to investigate and document atrocity crimes. According to Martha Mino, destroying citizens does not destroy their memories; therefore, documentation and investigation have a positive impact on society during the war and in the long term. Telling perpetrators that there is evidence of their crimes is in itself

important because it makes them feel exposed. Documentation and investigation are the best ways to inform citizens about what has occurred during the war and they ensure that evidence of crimes is not eviscerated. Keeping records and evidence of what happened is essential so that, when circumstances allow for legal action, they can be presented in court. Society wants to ensure that the law is obeyed. Documentation and investigation sustain the rule of law, and they play an educational role; they tell society the truth and give it the opportunity to evaluate it.

Investigation and documentation carry a communicative aspect; they provide additional ways to communicate with offenders, victims, and society as a whole. Documentation and investigation help society to avoid repetition of violence, they teach Syrians about the current regime's wrongdoings, and they make society cautious when choosing future leaders. Documentation allows for naming and shaming because it records the names of perpetrators so, once the war is over, their actions will not go unknown and undocumented. Naming and shaming assists in the delivery of a message of condemnation and censure to perpetrators and their allies. In fact, one of the notable practices during the Syrian war is the intensive effort to document atrocity crimes. To briefly recap some of the many examples raised in Chapter One, 55,000 photos of the corpses of detainees at the Syrian regime's detention centres were smuggled out of Syria by a defected officer, referred to as "Caesar," who compiled them as evidence of the regime's crimes. Founder of the Commission for International Justice and Accountability, William Wiley collected and documented more than 600,000 official governmental documents that implicate al-Assad and 24 senior figures from his regime in war crimes. Similarly, David Crane prepared and documented a list of names of alleged perpetrators

of war crimes. Moreover, calls have generated the international community's interest in the situation in Syria, and they put pressure on it to investigate atrocity crimes. The international community has made certain efforts, such as establishing the COI, which focuses on fact-finding violations of human rights, and establishing the IIIM, which is mandated with collecting data and preparing for future trials.

Calls for criminal accountability have also encouraged many states in Europe to establish trials. Trials in absentia re-establish trust in the rule of law and justice, irrespective of the fact that the war is not over. Calls express censor, they open the door for people – whether perpetrators, victims, or witnesses – to tell the truth. During the trial process, defendants confront their victims, and they answer to the wrongs for which they are responsible. Calls express a message that says: “even though our efforts might not generate immediate results (arrests and holding perpetrators accountable), they will produce results when the political situation allows.” Calls for criminal accountability are, in fact, generating actions on the ground, and that is important because they put pressure on the international community to accept some justice-like practices that would not happen if people did not call to hold perpetrators of the Syrian war accountable.

III. What Kind of Message and Who May Call to Account?

In the Syrian case, when suspects are called to account, it's already quite clear that they will not be punished, at least not while the conflict continues. Accountability during conflict is difficult. Instead, calls during conflict are made so as to push for action to be taken toward criminal justice. Therefore, for calls to be effective, they must contain a strong message that

those who are targeted by them cannot ignore, a message that generates punitive responses and not merely the moral condemnations like those associated with human rights law. It is for this reason that I argue that, for calls to be effective, they must use the language of the criminal law. In labelling wrongdoings as “crimes” and wrongdoers as “criminals,” these calls send a message that, if we could, we would punish those who commit war crimes against innocent civilians. The language of the criminal law by itself has values, even if there is no likelihood of physical punishment during the conflict. We must recognize that these wrongs are crimes, regardless of the lack of criminal justice institutions with which to deal with them. The values that will be generated by using the language of the criminal law in response to the Syrian war, I suggest, are the following:

- (1) Using the language of the criminal law might change or re-frame the public discourse by encouraging people or groups who deal with criminals to think twice about their relationships with them, to recognize that they are dealing with criminals. In our case, calls to hold *A* (a party on the battlefield) criminally accountable might change the way *A*'s allies behave. It might hinder others who have not yet determined to support *A*. The language might obstruct those who supply *A* with weapons and other tools that allow him to perpetuate crimes. Calls for accountability would force governments to stop selling weapons to *A*, because it makes them aware that they will be involved in illegal actions. By calling *A* a criminal, we point to the fact that *A* has done something gravely wrong that violates the values that all humanity share. That might cause allies to recognize that they are, in fact, aiding and abetting perpetrators of atrocity, and one day – when legal and political circumstances allow – they may have to justify their support before a

criminal justice institution. With calls for accountability, while *A* may go unpunished, there will be no forgetting that *A* is a criminal; while *A* may escape justice, the general public will nonetheless know about *A*'s crimes. When people think of *A*, they will think of a person who has done wrong, and of someone who should be apprehended, removed from office, tried, and punished as an example to others. It is here that the general public begins to recognize the values that punishment can bring. The message that is expressed by calls for accountability might change the way people come to think of the parties to the conflict, even while the war continues.

- (2) Using the language of the criminal law may put pressure on the international community to take immediate action to stop the ongoing crimes. While the UNSC was unsuccessful in referring crimes in Syria to the ICC, they nonetheless sent the COI to investigate war crimes. The UNSC might, with time, take more comprehensive punitive measures. Individual states in Europe have already taken some steps toward criminal trials, which I will discuss in the next section.
- (3) Calls for criminal accountability might provide legitimacy to other criminal justice institutions that would otherwise lack it. As explained, in the absence of criminal justice institutions that have standing to call criminals to account, our shared humanity provides that standing. In the Syrian case, criminals are answerable to *humanity*, and in the absence of a legitimate domestic criminal institution, efforts to hold criminals accountable by criminal institutions of states in Europe might be acceptable, because these institutions are responding to human suffering. The suffering that Syrians citizens are enduring goes beyond the problem of court legitimacy.

(4) Calls might satisfy citizens, victims, groups, and NGOs who are working toward unveiling crimes in Syria. They might provide vindication for their position in the absence of prosecutorial avenues. The general public often doubts the position of those who work on uncovering the truth. Therefore, investigation and documentation invite society to take seriously the work of those working to unveil crimes. Calls would lend support to their work.

The question is: who has standing to call perpetrators to account? In the case of the Syrian conflict, where atrocity crimes are ongoing and where there is no credible domestic criminal justice institution in place, I argue that foreign institutions have the authority, the standing, based on the shared values of all humanity – values of care and respect.

Canada recognizes the suffering of refugees who have fled Syria seeking a safe refuge. Canada, as do other nations around the world, does so because crimes in Syria violate the values that are common to all humanity *qua* their humanity. Antony Duff says, “the existence of a community is often a matter more of aspiration than of achieved fact, and a recognition of human community could be a recognition of what we should aspire to create.”⁴¹⁵ I am not claiming that the world is one society; rather, I am suggesting that, in cases of disasters, we often *feel* as if we belong to one community – our response is defined by our humanity. Perpetrators of the war in Syria are answerable to the whole of humanity, because their crimes have violated the values of all human beings, not only those of Syrians. In fact, there is a virtual *human community* that has the standing to call perpetrators to account in the absence of

415 Duff, *Authority and Responsibility*, 2010, *supra* note 17 at 601.

legitimate institutions. According to Victor Tadros, in the absence of a credible domestic criminal justice system, whoever can punish, should do so. Similarly, in the absence of a domestic criminal justice system in Syria, calls for criminal accountability might provide legitimacy to some international institutions or bodies to whom perpetrators must answer.

It is important, however, to concentrate on both the message and on who expresses it, and to distinguish between domestic and international messages. Because suspects may deny the truth of calls for their accountability, calls may have a negative effect and may be perceived incorrectly by the public. In other words, if the message comes from the wrong source, it might have the opposite effect to that intended. Suspects of crimes might say, “who are you to call me to account?” For example, US President Donald Trump called for al-Assad’s accountability when he signed the Caesar Syria Civilian Protection Act of 2019, which sanctions the Syrian government and implies a coercive measure that “means should be utilized to compel the government of Bashar al-Assad to halt its murderous attacks on the Syrian people and to support a transition to a government in Syria that respects the rule of law, human rights, and peaceful co-existence with its neighbors.”⁴¹⁶ Although the Act has been well received by many activists and jurists, as it is said to provide a glimmer of hope in the midst of an impasse with respect to the international community’s ability to provide a legal response, the Syrian government’s proponents loudly demanded to know what right Trump had to sanction it. The Syrian government further claimed that the US has interests in Syria and that calls for justice are merely strategic and political. al-Assad may argue that such a call would be an instance of

416 *Caesar Syria Civilian Protection Act of 2019, supra note 126.*

a foreign country intervening in Syrian affairs and impinging on its sovereignty. Moreover, some members of the public have become concerned about the negative impact of the Act on civilians in Syria.⁴¹⁷ To avoid a similar situation, and for calls to be credible, they are best initiated by the Syrian people, with the international community and individual states supporting their efforts for criminal justice.

IV. What Have the Calls Achieved?

In 2020, three important justice-like efforts are taking place internationally, in relation to the crimes committed in Syria. Neither of these efforts is expected to generate punishment, but these efforts might mean that calls for criminal accountability are pushing for some kind of response.

A. Claim at the ICC

As explained in Chapter One, the ICC has no authority over crimes in Syria, but it could initiate a preliminary examination based on information provided to it by individuals or groups. Preliminary examinations include “analyses [of] whether or not the ICC has jurisdiction; ... whether an investigation would be admissible (a national court is not already dealing with it);

417 See Ghuna Bdiwi, “Conflict in Syria: Is There Any Hope for Justice for Victims of War?” (22 April 2020) Tahrir Institute for Middle East Policy, online: <https://timep.org/%d8%b9%d8%b1%d8%a8%d9%89/%d8%a3%d9%8a%d9%86-%d9%88%d8%b9%d9%88%d8%af%d9%8f-%d8%a7%d9%84%d8%b9%d8%af%d8%a7%d9%84%d8%a9%d9%90-%d9%85%d9%90%d9%86-%d8%a2%d9%84%d8%a7%d9%85%d9%90-%d8%b6%d8%ad%d8%a7%d9%8a%d8%a7-%d8%a7%d9%84%d8%ad/>. [Bdiwi, 2020].

and whether or not an investigation would be in the interests of justice and of the victims.”⁴¹⁸ According to the procedures of the ICC, if its prosecutors receive information about serious crimes in any state, they can initiate a preliminary examination. The prosecutor can obtain information from trustworthy international organizations to help in the examination process, and if a reasonable basis is found, the prosecutor may start *proprio motu* investigations, after obtaining the authorization of the ICC’s Pre-Trial Chamber. For example, in 2016, the ICC conducted a preliminary examination of alleged crimes committed by the US army in Afghanistan, despite the fact that the US refused the investigation, claiming that the ICC had no jurisdiction over these crimes.⁴¹⁹ The prosecutor of the ICC, Fatou Bensouda, found credible evidence of the alleged crimes, and in November 2017 requested the permission of the Pre-Trial Chamber to start investigation of those alleged crimes committed by the US army.⁴²⁰

In September 2018, the ICC opened a preliminary investigation against leaders of the Republic of the Union of Myanmar, to investigate alleged crimes against humanity and the forced displacement of 1.6 million Rohingya Muslim citizens who were forced to migrate from Myanmar to the neighbouring People’s Republic of Bangladesh. Myanmar is not party to the

418 ICC, *supra* note 1.

419 “The US army and CIA may be guilty of war crimes in Afghanistan, says ICC” (15 November 2016) *The Guardian* online: <<https://www.theguardian.com/law/2016/nov/15/us-army-and-cia-may-be-guilty-of-war-crimes-afghanistan-says-icc>>.

420 “The Prosecutor of the International Criminal Court, Fatou Bensouda, requests judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan” ICC (20 November 2017), online: <<https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh>>. Also see “Pre-Trial Chamber III Before: Presiding Judge Antoine Kesia-Mbe Mindua, Judge Chang-ho Chung Judge Raul C. Pangalangan – SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN” No. ICC-02/17 (20 November 2017), online: <https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF>.

Rome Statute, but Bangladesh has ratified it, and because some of the alleged crimes happened on the territory of Bangladesh, the ICC prosecutor announced its jurisdiction to conduct a preliminary investigation.⁴²¹ In November 2019, and as a result of the information found during the preliminary investigation, Pre-Trial Chamber III of the ICC authorized the prosecutor “to proceed with an investigation for the alleged crimes within the ICC’s jurisdiction in the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar.”⁴²²

Syrians found, in the case of Myanmar, a legal precedent to request that the ICC initiate a preliminary investigation of alleged crimes in Syria.⁴²³ In March 2019, a claim was submitted to the prosecutor of the ICC on behalf of 28 Syrian citizens who were deported or forcibly displaced to Jordan.⁴²⁴ The ICC confirmed receiving the claim, announcing that they “will analyse the materials submitted, as appropriate, in accordance with the Rome Statute and with full independence and impartiality. As soon as we reach a decision on the appropriate next step, we will inform the sender and provide reasons for our decision.”⁴²⁵ At the end of September 2020, the ICC has still not reached its decision; when I met Bensouda at the 18th Assembly of State Party in November 2019, she said that she is unlikely to take any decision on the claim

421 “Syria war: Lawyers submit first war crimes cases against Assad,” *BBC News*, (7 March 2019) online: <<https://www.bbc.com/news/world-middle-east-47483714>>.

422 “ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar,” ICC, online: <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>>.

423 Owen Bowcott, “Syrian refugees launch legal bid to try Assad for crimes against humanity, International criminal court asked to rule in case brought by 28 people who fled civil war.” (7 March 2019) *The Guardian*, online: <<https://www.theguardian.com/law/2019/mar/07/syrian-refugees-launch-legal-bid-to-try-assad-for-crimes-against-humanity>>. [Bowcott].

424 Josie Ensor, “Assad accused of crimes against humanity in ‘breakthrough’ case at The Hague” (7 March 2019) *The Telegraph*, <<https://www.telegraph.co.uk/news/2019/03/07/human-rights-lawyers-file-first-case-against-assad-hague-breakthrough/>>.

425 Bowcott, *supra* note 423.

during her term, which ends in 2020. Nonetheless, for the Court to even accept the submission of the claim is a step forward and an indicator that, given the lack of legitimacy of domestic criminal justice institutions, international institutions are making alternative efforts to find ways to achieve justice in Syria. I argue that these efforts have only succeeded because of calls for criminal accountability. Calls bring hope to victims, they aim to deter perpetrators and their allies, and they help to bring perpetrators to account.

B. The International Court of Justice

The CAT was adopted by UNGA Resolution Nr. 39/462 of 10 December 1984. The CAT aims to prevent conduct of torture in any territory within its jurisdiction, and regardless of whether a state is in war or in a stable situation.⁴²⁶ Article 30 declares that:

Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.⁴²⁷

⁴²⁶ CAT, *supra* note 100, Article 2 (1) & (2).

⁴²⁷ *Ibid*, Article 30.

The ICJ, the exclusive judicial institution of the UN, rules over legal disputes that emerge among countries in accordance with international law. Notwithstanding the fact that Syria ratified the CAT in 2004, evidence shows that the Syrian government has, since 2011, committed crimes of torture against its citizens; torture is, in fact, the distinct mark of the government's crimes. Because Syria is a state party to the CAT, any state can refer the Syrian file to the ICJ. While the ICJ is not a criminal court, there are benefits to pursuing this option: it will allow an exceptional forum for keeping evidence of heinous crimes in a trustworthy judicial process; it may put pressure to allow access to the government's detention centres; and it could help in the process of naming and shaming, as it might identify names of some criminals who should not be part of the future transition in Syria.⁴²⁸ Moreover, the ICJ's involvement might bring a glimmer of hope to victims. It might help to rebalance the equilibrium between perpetrators and victims that has been upset as a result of crimes. Consider, for example, the ICJ's decision to accept the case filed by Gambia against Myanmar. Gambia accused Myanmar of committing crimes against humanity related to the Rohingya Muslims, as well as of violating the Convention on the Prevention and Punishment of the Crime of Genocide (1948). The Court decided that Myanmar must take "temporary measures" to stop genocide against the Rohingya. The Court did not criminalize perpetrators, but its involvement was symbolic and moved efforts toward justice.⁴²⁹ It is possible for any state, such as Gambia in the case of Myanmar, to ask for the opening of an investigation of such crimes. As Syria is

428 Andrew Stobo Sniderman & Payam Akhavan, "Akhavan and Sniderman: Here's how we can hold Syria responsible for its crimes" (3 September 2017) *Ottawa Citizen*, Online: <<http://ottawacitizen.com/opinion/columnists/akhavan-and-sniderman-heres-how-we-can-hold-syria-responsible-for-its-crimes>>.

429 Bdiwi, *supra* note 417.

a state party of the CAT, any country can refer the case to the ICJ, naming the Syrian government as a violator of the CAT because of its continuous acts of violence and torture against civilians. The main advantage of referring the Syrian file to the ICJ is the pressure that would be exerted on the international community to force the Syrian government to allow access to its detention centres for investigation and documentation of the situation.

C. National Proceedings in Europe

Another outcome of calls for criminal accountability find its responses in Europe. Between May and October 2018, the national criminal justice systems have launched investigations of 16 criminal cases submitted against President Bashar al-Assad.⁴³⁰ It as well issued three arrest warrants by French judges against three high-ranking officials in the al-Assad regime, namely: Ali Mamlouk, Jamil Hassan, and Abdel Salah Mahmoud. Notably, Mamlouk is the special security adviser to al-Assad and one of his most trusted men. He is also head of the National Security Bureau of the Ba'ath Party, and there are rumours that he has been nominated by Russia for presidency following al-Assad. Hassan is the head of the Syrian Air Force Intelligence Directorate and a close adviser to al-Assad and Mahmoud is the Director of Investigation at the Air Force Intelligence Branch in Damascus. It is not clear yet how the French judicial criminal system plans to arrest these notable figures of the al-Assad regime while they are located in Syria, and unlikely to leave.⁴³¹ These cases are not expected to go

430 “16 Torture Survivors From Syria File Criminal Complaint In Austria Against Senior Officials In Assad Government” (29 May 2018) ECCHR, online: <<https://www.ecchr.eu/en/press-release/16-torture-survivors-from-syria-file-criminal-complaint-in-austria-against-senior-officials-in-assad-government/>>.

431 “Q&A on the Dabbagh Case: French judges issue 3 international arrest warrants against top

beyond investigations, and at most, courts may issue arrest warrants, but such initiatives should be considered to be an advancement on the previous impasse of the UNSC. These initiatives provide some hope to victims, they sustain the general public's believe in the rule of law, and most importantly, they aim to send a message to perpetrators, and that message is valuable.

*Syrian officials” (5 November 2018) international federation for human rights, online:
<<https://www.fidh.org/en/issues/litigation/q-a-on-the-dabbagh-case-french-judges-issue-3-international-arrest>>.*

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