

H U M A N
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SYRIA

**CRIMINAL JUSTICE FOR SERIOUS
CRIMES UNDER INTERNATIONAL LAW**



Syria: Criminal Justice for Serious Crimes under International Law

December 2013

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Introduction

Individuals on all sides of the conflict in Syria have committed serious violations of international human rights and humanitarian law on a vast scale. Human Rights Watch has concluded on the basis of its investigations that government and pro-government forces have committed crimes against humanity and war crimes.¹ The government continues to conduct indiscriminate air and artillery strikes on residential areas² and to arbitrarily detain, torture, and extra-judicially execute civilians and combatants.³ In August, chemical weapons attacks killed hundreds of civilians, including many children, near Damascus.⁴ A United Nations investigation determined that the nerve agent Sarin was used.⁵ While the government denies responsibility, available evidence strongly suggests that its forces were responsible for the attacks.⁶

Human Rights Watch has also documented serious abuses amounting to war crimes by some opposition groups, including the indiscriminate use of car bombs, kidnapping, torture, and extrajudicial executions.⁷ Foreign fighters and groups linked to Al-Qaeda have been among the worst perpetrators of these abuses.⁸ In one opposition offensive documented by Human Rights Watch in the Latakia countryside of Syria in August, evidence strongly suggests that the abuses committed by five armed opposition groups rise to the level of

¹ See, for example, Human Rights Watch, *"No One's Left": Summary Executions by Syrian Forces in al-Bayda & Baniyas*, September 2013, <http://www.hrw.org/reports/2013/09/13/no-one-s-left>; Human Rights Watch, *Safe No More: Students and Schools Under Attack in Syria*, June 2013, <http://www.hrw.org/reports/2013/06/06/safe-no-more>; Human Rights Watch, *Torture Archipelago: Arbitrary Arrests, Torture, and Enforced Disappearances in Syria's Underground Prisons Since March 2011*, July 2012, <http://www.hrw.org/reports/2012/07/03/torture-archipelago>; Human Rights Watch, *"We've Never Seen Such Horror": Crimes Against Humanity by Syrian Security Forces*, June 2011, <http://www.hrw.org/reports/2011/06/01/we-ve-never-seen-such-horror>.

² See, for example, Human Rights Watch, *Syria – Death from the Skies: Deliberate and Indiscriminate Air Strikes on Civilians*, April 10, 2013, <http://www.hrw.org/reports/2013/04/10/death-skies>. See also "Syria: Ballistic Missiles Killing Civilians, Many Children," Human Rights Watch news release, August 5, 2013, <http://www.hrw.org/news/2013/08/04/syria-ballistic-missiles-killing-civilians-many-children>.

³ See, for example, Human Rights Watch, *No One's Left*. See also Human Rights Watch, *Torture Archipelago*.

⁴ Human Rights Watch, *Attacks on Ghouta: Analysis of Alleged Use of Chemical Weapons in Syria*, September 10, 2013, <http://www.hrw.org/reports/2013/09/10/attacks-ghouta>.

⁵ United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, "Report on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013," September 14, 2013, http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf (accessed November 20, 2013).

⁶ Human Rights Watch, *Attacks on Ghouta*, p. 20.

⁷ See, for example, Human Rights Watch, *Syria – 'You Can Still See Their Blood:' Executions, Indiscriminate Shootings, and Hostage Taking by Opposition Forces in Latakia Countryside*, October 11, 2013, <http://www.hrw.org/reports/2013/10/11/you-can-still-see-their-blood>. See also "Syria: End Opposition Use of Torture, Executions," Human Rights Watch news release, September 17, 2012, <http://www.hrw.org/news/2012/09/17/syria-end-opposition-use-torture-executions>.

⁸ See, for example, Human Rights Watch, *You Can Still See Their Blood*, pp. 61-73 (Jabhat al-Nusra maintains a religious allegiance to al-Qaida leader Sheikh Ayman al-Zawahiri; Jaish al-Muhajireen wal-Ansar is made up of several nationalities, including Chechens, Turks, Tajiks, Pakistanis, French, Egyptians, and Moroccans.)

crimes against humanity.⁹ Some armed opposition groups fighting in Syria are also using children for combat and other military purposes.¹⁰

This paper addresses the issue of accountability for these grave violations. An essential track toward this goal involves the credible investigation and prosecution in a court of law of those individuals responsible for serious crimes under international law.

Criminal justice can yield short- and long-term benefits:¹¹

- First, the fair prosecution of persons for serious crimes under international law may assist in restoring dignity to victims by acknowledging their suffering.
- Secondly, the due punishment of perpetrators by means of fair prosecutions also serves to channel condemnation and outrage at the commission of these violations.
- Thirdly, by providing means of redress for victims and punishment for perpetrators, criminal justice may deter future violations¹² and build respect for, and confidence in, the rule of law.¹³ Where crimes are ongoing in a given situation, the realistic prospect of future criminal prosecutions could also serve as a warning to perpetrators and would-be perpetrators that they may be held to account. In some circumstances this could help to prevent crimes. On the other hand, the failure to hold to account those responsible for the most serious international crimes can fuel future abuses.¹⁴
- Finally, fair trials can contribute to a historical record that protects against revisionism by those who will seek to deny that atrocities occurred.¹⁵

Inevitably, criminal prosecutions of serious crimes present immense challenges. Most significantly, political will to permit independent and impartial criminal prosecutions is often in short supply in countries like Syria affected by conflict or an intense period of violence, particularly when persons in positions of authority or close to those in power are implicated.¹⁶ In some situations, pursuing justice may also turn out to be deeply unpopular,

⁹ Human Rights Watch, *You Can Still See Their Blood*, pp. 6, 61-73.

¹⁰ "Syria: Opposition Using Children in Conflict," Human Rights Watch news release, November 29, 2012, <http://www.hrw.org/news/2012/11/29/syria-opposition-using-children-conflict>.

¹¹ For a fuller discussion, see Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, July 7, 2009, <http://www.hrw.org/reports/2009/07/07/selling-justice-short>. See also United Nations Security Council, "The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary General," S/2004/616*, August 23, 2004, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No4/395/29/PDF/No439529.pdf?OpenElement> (accessed November 20, 2013), para.39.

¹² For a fuller discussion of deterrence, see: Human Rights Watch, *Selling Justice Short*, pp. 123-127; Human Rights Watch, "Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to 'Situations Under Analysis,'" briefing paper, June 2011, <http://www.hrw.org/news/2011/06/16/icc-course-correction>.

¹³ Human Rights Watch, *Selling Justice Short*, pp. 93-116.

¹⁴ Human Rights Watch's research in many countries has shown that the failure to hold perpetrators of the most serious international crimes to account can fuel future abuses. For a fuller discussion, see Human Rights Watch, *Selling Justice Short*.

¹⁵ Human Rights Watch, *Selling Justice Short*, pp. 117-122.

¹⁶ Based on Human Rights Watch's research in countries affected by conflict, including Côte d'Ivoire and Guinea, judicial independence often exists on paper but in reality there is a longstanding history of political interference by the executive or general corruption, or both. This means that pursuing sensitive serious cases, which may implicate governmental policies or

including among segments of the population who believe that those who committed serious crimes were justified in doing so, or because some believe that pursuing criminal justice is not necessary or desirable in the face of other competing priorities.¹⁷

Moreover, countries immersed in or emerging from conflict rarely have the domestic capacity or resources to initiate complicated judicial proceedings for international crimes. Even in the unlikely event that there is political will to try these cases, legislation may need to be enacted to establish a legal basis for prosecutions; staff need to be assigned and trained; witness protection and support measures considered; and evidence gathered. Police and prison systems may also require serious institutional reform. It will also be difficult to carry out fair proceedings involving these crimes if the broader justice system is itself not capable of functioning in a credible manner. Therefore, the effective and fair criminal prosecution of serious crimes under international law may also depend on and influence the functioning of the general criminal justice system. Indeed, the reforms necessary to undertake such proceedings will have major implications for the wider justice sector and cannot not be viewed or treated in isolation from that larger picture.

It is this complex landscape that frames the pursuit of criminal justice for grave abuses in Syria from the outset. With this briefing paper, Human Rights Watch seeks to focus attention on the urgent need for the credible prospect of criminal justice for the crimes committed. The paper also aims to contribute to ongoing discussions on how *concretely* this should be realized. In particular, Human Rights Watch believes that to fill the existing impunity gap in Syria a multi-tiered, cross-cutting approach will be needed which includes prosecutions by Syrian courts, the potential contribution of a specialized “bridging” mechanism embedded in the Syrian justice system, the involvement of the International Criminal Court (ICC), as well as national courts outside of Syria working under the principle of universal jurisdiction. We outline and critically assess each of these criminal justice measures below.

While this paper focuses primarily on criminal prosecutions, it is important to note that these are only one element of a larger justice and accountability process. Experience from other situations has shown that broader truth-telling mechanisms, in addition to reparations, vetting of “bad actors” from positions in government and security forces, economic development, institutional reform, and reconstruction all have an important role to play as part of a broad approach to redressing mass crimes and are essential elements of efforts to move society forward in a way that respects human rights and ensures accountability for

actors, may be impossible, at least initially, as judges and prosecutors lack the institutional culture and support needed to try allegations without fear of professional or personal retribution. See, for example, Human Rights Watch, *Turning Rhetoric into Reality: Accountability for Serious International Crimes in Côte D’Ivoire*, April 4, 2013, <http://www.hrw.org/reports/2013/04/04/turning-rhetoric-reality>; Human Rights Watch, *Waiting for Justice: Accountability Before Guinea’s Courts for the September 28, 2009 Stadium Massacre, Rapes, and Other Abuses*, December 5, 2012, <http://www.hrw.org/reports/2012/12/05/waiting-justice-o>.

¹⁷ For a discussion of case studies where efforts at accountability have been sidelined in the interest of peace and stability, see Human Rights Watch, “Seductions of ‘Sequencing’: The Risks of Putting Justice Aside for Peace” briefing paper, <http://www.hrw.org/news/2011/03/18/seductions-sequencing>.

abuses.¹⁸ Given the social and sectarian context of Syria's conflict, a transparent and inclusive consultation with the communities most affected will be a particularly important element of efforts to achieve accountability.¹⁹

That said, these complementary measures are, by themselves, an inadequate response to grave human rights abuses and should not be treated as a substitute for criminal justice. Credible and impartial investigations and the just prosecution of those implicated in abuses remain essential. Indeed, states have a duty under international law to prosecute serious crimes and impose individual criminal liability.²⁰

I. The International Criminal Court

For two-and-a-half years, Human Rights Watch called on the Syrian government to investigate allegations of grave abuses and to prosecute those responsible, regardless of rank, before courts that meet international fair trial standards.²¹ However, there is no indication that anyone has been credibly brought to justice for the crimes committed in Syria.²² Indeed, the Syrian government's unwillingness to ensure credible criminal prosecutions is likely deeply rooted in the authorities' desire to maintain power and to shield senior officials, military commanders, and others in positions of authority against whom there is strong evidence of responsibility or complicity in serious international crimes from justice.²³ This means that pursuing sensitive cases, which may implicate governmental policies or actors, is impossible in the current political landscape. For their part, opposition forces have not adequately addressed accountability for abuses committed by their

¹⁸ United Nations Security Council, "The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary General," August 23, 2004, para. 8.

¹⁹ International Center for Transitional Justice, "Towards a Transitional Justice Strategy for Syria," October 2, 2013, <http://ictj.org/publication/towards-transitional-justice-strategy-syria> (accessed November 6, 2013).

²⁰ As a matter of both treaty and customary international law, there is a duty to prosecute serious international crimes or to extradite to a jurisdiction that will prosecute. International treaties, such as the Geneva Conventions of 1949 and its Additional Protocols, obligate parties to ensure alleged perpetrators of serious crimes are prosecuted, including those who give orders for these crimes. See Geneva Convention Relative to the Protection of Civilian Persons in Times of War, adopted August 12, 1949, 75 U.N.T.S. 287, entered into force October 21, 1950, art. 146. For a full discussion of the duties states have under international law, see Human Rights Watch, *Selling Justice Short*, pp.10-19. See also Human Rights Watch, *The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute*, June 1, 2005, <http://www.hrw.org/node/83018>, pp. 9-11.

²¹ See, for example, Human Rights Watch, *We've Never Seen Such Horror*; Human Rights Watch, *By All Means Necessary: Individual and Command Responsibility for Crimes Against Humanity in Syria*, December 16, 2011, <http://www.hrw.org/reports/2011/12/15/all-means-necessary>; Human Rights Watch, *Torture Archipelago*; Human Rights Watch, *No One's Left*.

²² United Nations Human Rights Council, "Report of the independent international commission of inquiry on the Syrian Arab Republic," A/HRC/24/46, August 16, 2013, http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A_HRC_24_46_en.DOC (accessed November 6, 2013), paras. 193-95.

²³ See, for example, Human Rights Watch, *By All Means Necessary*; Human Rights Watch, *Torture Archipelago*.

members.²⁴ A pervasive climate of impunity therefore prevails in the midst of ongoing grave abuses.

In principle, national authorities have the primary responsibility to bring those responsible for international crimes to account. In Syria, it is clear that this will not happen in the short-term given the demonstrated absence of political will to permit the independent and impartial prosecution of the serious crimes committed in the past two-and-a-half years. Against this background and considering the evidence that serious international crimes have been committed and the grave nature of many of the abuses, the involvement of the ICC in Syria is essential. Human Rights Watch believes the court could have a positive impact in a number of respects.

A. *The ICC's Value-Added in Syria*

First, the court's involvement in the course of the *ongoing* conflict in Syria would send a clear message to all parties that the commission of grave crimes will not be tolerated and will lead to serious consequences. In the short-term, it would therefore put those in senior positions, no matter their political allegiance, on notice that they could be held responsible for crimes they order or commit, or for crimes they fail to prevent or punish, whatever the outcome of the conflict, and that they would face such threat of prosecutions indefinitely. This credible threat of prosecution may help stem further abuses.²⁵ In addition, the record from other conflicts, such as those in the Balkans or West Africa, indicates that criminal indictments of senior political, military, and rebel leaders while conflicts are ongoing can strengthen peace efforts by delegitimizing and marginalizing those who stand in the way of resolving the conflict.²⁶ Turning a blind eye to international crimes, on the other hand, contributes to ongoing human rights abuses. Moreover, experience shows that all too often a peace that is conditioned on providing immunity for these most serious crimes is not sustainable. Worse, it sets a precedent of immunity for atrocities that encourages even more abuses.²⁷

Once the ICC has the mandate, it could begin collecting evidence immediately that will be vital to the conduct of future criminal proceedings (at the ICC and potentially at the domestic level),²⁸ while further delays in beginning investigations could lead to a number of practical

²⁴ Under international humanitarian law, only a regularly constituted court meeting international fair trial standards is allowed to hand down sentences. See International Committee for the Red Cross, "Rules of Customary International Humanitarian Law," http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule100, Rule 100 (accessed November 20, 2013).

²⁵ Human Rights Watch, *Selling Justice Short*, pp.123-127; Human Rights Watch, "Course Correction."

²⁶ Human Rights Watch, *Selling Justice Short*, pp.20-27.

²⁷ *Ibid.*, pp. 57-68.

²⁸ See Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art. 93(10) which authorizes the ICC to provide assistance to a state party (and potentially non-member states) that is prosecuting crimes within the ICC's jurisdiction or a serious crime under the state's national law. This includes the transmission of statements, documents or other types of evidence obtained in the course of an ICC investigation or trial, as well as the questioning of a person detained by the court. However, the ICC is not under an obligation to grant such requests for assistance.

problems that render justice even more difficult to achieve. For example, memories fade over time, witnesses move, disappear or pass away, and documentary or physical evidence can be lost.

In a post-conflict period, the ICC can play a vital role given that the Syrian justice sector will likely be ill-equipped to process complex and politically charged cases.²⁹ Lessons learned from other situations, such as Libya, indicate that justice should not be postponed during a transition from conflict to peace. In particular, long delays in the delivery of justice could lead to a rise in vigilantism or private retribution. Indeed, serious crimes can take place when the rule of law breaks down during violent transitions.³⁰ Ensuring credible and impartial justice in the aftermath of the Syria crisis will therefore be imperative. In such circumstances, the ICC can function as an independent, impartial judicial body that can investigate and, quite possibly, deter further serious crimes, and identify and charge the key perpetrators, no matter what side of the political divide they are on.

Past experience shows that over a longer term, the ICC can potentially catalyze future national proceedings.³¹ For example, the ad hoc tribunals for the former Yugoslavia and Rwanda played a beneficial role in this regard. The desire to have cases transferred from the international ad hoc tribunals propelled both Rwanda and the countries of the former Yugoslavia to engage in serious domestic legal reform in order to meet the tribunals' standards to have cases transferred to their national courts.³² Some of these countries even created specialized judicial chambers and prosecutorial mechanisms to address atrocity crimes.³³ To date, the ICC prosecutor has pursued a smaller number of cases in each country under investigation, and this may limit the catalyzing effect it can ultimately have on national proceedings or the evidence it has to share with national jurisdictions. Nonetheless, in some countries where the ICC is carrying out an investigation, steps have been taken—at least nominally—to start domestic proceedings.³⁴ Even in countries where ICC investigations

²⁹ United Nations Human Rights Council, “Report of the Independent International Commission of Inquiry on the Syrian Arab Republic” (Syria Commission Report), A/HRC/22/59, February 5, 2013, <http://www.ohchr.org/EN/HRBodies/HRC/IICT/Syria/Pages/IndependentInternationalCommission.aspx> (accessed November 18, 2013), Annex XIV.

³⁰ See, for example, “Libya: Stop Revenge Crimes Against Displaced Persons,” Human Rights Watch news release, March 20, 2013 (referring to serious and ongoing human rights violations against inhabitants of the town of Tawergha in Libya), <http://www.hrw.org/news/2013/03/20/libya-stop-revenge-crimes-against-displaced-persons>. See also, “Libya: Displaced Camp Residents Need Immediate Protection,” Human Rights Watch news release, November 19, 2013, <http://www.hrw.org/news/2013/11/19/libya-displaced-camp-residents-need-immediate-protection>.

³¹ For a full analysis of the ICC Office of the Prosecutor’s efforts to catalyze national prosecutions, see Human Rights Watch, “Course Correction.”

³² See Human Rights Watch, *Selling Justice Short*, pp. 93-99.

³³ *Ibid.*, pp. 93-99.

³⁴ See, for example, Human Rights Watch, *Justice for Serious Crimes Before National Courts: Uganda’s International Crimes Division*, January 16, 2012, <http://www.hrw.org/reports/2012/01/16/justice-serious-crimes-national-courts> (for a discussion of Uganda’s International Crimes Division). See also “Côte d’Ivoire: ICC Seeking Militia Leader,” Human Rights Watch news release, October 3, 2013, <http://www.hrw.org/news/2013/10/03/cote-d-ivoire-icc-seeking-militia-leader> (referring to national charges against ICC suspect Simone Gbagbo in Côte d’Ivoire). See also “Libya: A Rebuff to the ICC,” Human Rights Watch news release, September 19, 2013, <http://www.hrw.org/news/2013/09/19/libya-rebuff-icc> (referring to national proceedings in Libya against ICC suspects Saif al-Islam Gaddafi and Abdullah Sanussi, as well as other senior Gaddafi-era officials).

are being considered but have not been opened, efforts have been made to hold perpetrators to account that otherwise may not have occurred in order to keep the cases in national courts.³⁵

B. The Need for Increased Support for the ICC

In spite of the positive impact the ICC could have in Syria, it is important to acknowledge that given its daunting mandate, the lack of sufficiently robust state support afforded the institution to date,³⁶ and some performance failings over its first ten years,³⁷ there have been shortcomings in the court's practice. With investigations in eight country situations, the court is overextended and Syria would pose a steep challenge to the institution.

Practically speaking, an ICC intervention in Syria will be time and resource-intensive. Meaningful justice delivered by the ICC typically requires multiple investigations of all relevant allegations regardless of the affiliation of the perpetrator and trials of those most responsible for the most serious crimes on charges representative of the underlying patterns of ICC crimes.³⁸ A robust approach will also mean presence in the field and engagement with affected communities in order to inform ICC policy decisions, to ensure that justice is not only done but seen to be done through public information and outreach activities, and to facilitate witness protection, fair trial rights, and the right to victim participation afforded under the court's founding treaty. In Syria, it is unrealistic to assume that field engagement activities can take place in the absence of a stable security environment and the agreement of the authorities on the ground. The ICC prosecution will therefore need to ensure its investigative methodologies can be adapted accordingly.

For the court to be able to vigorously implement its mandate in Syria, then, the ICC will likely need consistent and sustained expressions of political commitment—whether at meetings of its states parties, in strategic forums such as the United Nations Security Council (Security Council) and regional organizations, or in bilateral contacts—and the implementation of that political commitment in practice.³⁹ Additional resources will also be needed to support

³⁵ See, for example, Human Rights Watch, *Waiting for Justice* (regarding national efforts to hold perpetrators of the September 28, 2009 crimes in Guinea to account).

³⁶ Human Rights Watch, "Memorandum for the Eleventh Session of the International Criminal Court Assembly of States Parties," November 7, 2012, <http://www.hrw.org/news/2012/11/07/human-rights-watch-memorandum-eleventh-session-international-criminal-court-assembly>.

³⁷ Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, September 15, 2011, <http://www.hrw.org/reports/2011/09/15/unfinished-business> (assessing the ICC Office of the Prosecutor's choice of cases in the court's first five investigations).

³⁸ *Ibid.*

³⁹ Human Rights Watch, "Memorandum for the Eleventh Session of the International Criminal Court Assembly of States Parties," November 7, 2012.

investigations and cases in Syria.⁴⁰ Moreover, court officials and staff will also need to heighten their efforts to ensure that the ICC can meet its full potential.

C. The Imperative of an “ICC referral”

For now, the ICC cannot prosecute grave abuses committed in Syria since Syria is not a member state of the Rome Statute, the treaty that established the ICC.⁴¹ Unless the Syrian government ratifies the treaty or accepts the jurisdiction of the court through a declaration, both highly unlikely in the current political climate, the ICC could only obtain jurisdiction if the Security Council refers the situation there to the court.⁴² The Security Council, with what is called an “ICC referral,” could give the court jurisdiction stretching back to any date up to the day the Rome Statute entered into force on July 1, 2002.⁴³ The ICC would have jurisdiction to investigate war crimes, crimes against humanity, or genocide committed by *all* sides to this conflict, whether by government forces, opposition fighters, or other militias.⁴⁴

A total of 64⁴⁵ countries have called for an ICC referral by the Security Council, including six members of the Security Council itself: France, the United Kingdom, Luxembourg, Argentina, Australia, and South Korea.⁴⁶ Neither the United States nor China has expressed public support for a referral.⁴⁷ Russia has said an ICC referral would be, “ill-timed and counterproductive.”⁴⁸ However, blockage at the Security Council is not necessarily permanent and irreversible. To successfully press reluctant Security Council members, a

⁴⁰ See Human Rights Watch, “Memorandum for the Twelfth Session of the International Criminal Court Assembly of States Parties,” November 12, 2013, <http://www.hrw.org/news/2013/11/12/human-rights-watch-memorandum-twelfth-session-international-criminal-court-assembly->.

⁴¹ International Criminal Court, “The States Parties to the Rome Statute,” http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (accessed November 20, 2013).

⁴² Rome Statute, arts. 12-13.

⁴³ *Ibid.*, art. 11.

⁴⁴ *Ibid.*, art. 5.

⁴⁵ UN Human Rights Council, Cross-Regional Joint Statement delivered by Libya during Interactive Dialogue with the UN Commission of Inquiry on Syria on behalf of 64 states, March 11, 2013 (on file at Human Rights Watch). See also Letter from Thomas Gurber, Charge d'affaires, Switzerland, to H.E. Mohammad Masood Khan, President, Security Council for January 2013, January 14, 2013, <http://www.news.admin.ch/NSBSubscriber/message/attachments/29293.pdf> (accessed November 20, 2013) (in which 58 countries call on the Security Council to refer the situation in Syria to the ICC).

⁴⁶ See Joint Statement by Australia, France, Luxembourg, the Republic of Korea, and the United Kingdom, January 18, 2013, <http://www.franceonu.org/france-at-the-united-nations/press-room/speaking-to-the-media/remarks-to-the-press/article/18-january-2013-syria-icc-joint> (accessed November 20, 2013) (calling for a referral to the ICC). See also La Argentina Pidió en el Consejo de Seguridad una Solución Política a la Crisis Siria y que los Estados Dejen de Suministrar Armas a las Partes, <http://www.mrecic.gov.ar/es/en-el-consejo-de-seguridad-de-la-onu-la-argentina-pidio-una-solucion-politica-la-crisis-siria-y-qu-o> (accessed November 20, 2013) (reporting that Argentina supports a referral of the situation in Syria to the ICC).

⁴⁷ “Q&A: Syria and the International Criminal Court,” Human Rights Watch Q&A, September 17, 2013, <http://www.hrw.org/news/2013/09/17/qa-syria-and-international-criminal-court>.

⁴⁸ “Update 1-Russia opposes Syria crisis war crimes court referral,” *Reuters*, January 15, 2013, <http://www.reuters.com/article/2013/01/15/syria-crisis-russia-idUSL6NoAKCNB20130115> (accessed November 20, 2013); Rick Gladstone and Hwaida Saad, “Dozens reported dead at Syrian campus,” *International Herald Tribune*, January 16, 2013 (accessible on Factiva.com).

global coalition of countries needs to consistently make known its strong support for an ICC referral.

The ICC is by no means a panacea for the situation in Syria, and nobody claims that the court's involvement will stop the killing overnight. Others will have vital parallel roles in resolving the crisis there, including through diplomatic and humanitarian activities. But a Security Council decision to support a role for the ICC in Syria would signal that the body and its individual members are serious about ending the current state of impunity.

D. The Drawbacks of an Ad Hoc Tribunal for Syria

Some have argued that establishing a separate ad hoc tribunal is a pragmatic alternative to the ICC. Indeed, US officials,⁴⁹ US Congress members,⁵⁰ and international criminal law practitioners⁵¹ are already involved in efforts to establish an ad hoc tribunal⁵² for Syria. The various plans for an ad hoc tribunal that are on the table should be assessed in light of their ability to deliver without significant delay credible, independent, and impartial investigations and prosecutions that adhere to international fair trial standards. Other important factors to consider include the practical, political, and financial feasibility of creating a new judicial institution and the ability of any such entity to outlast a stance of noncooperation by Syria or other concerned states.

Over the past 20 years, ad hoc tribunals of varying international and domestic character have been set up to prosecute genocide, crimes against humanity, and war crimes

⁴⁹ See, for example, Olivier Knox, "U.S. War Crimes Ambassador: Assad 'Absolutely' Should Be Tried for War Crimes," *Yahoo News*, September 18, 2013, <http://news.yahoo.com/u-s-war-crimes-ambassador--assad-%E2%80%98absolutely%E2%80%99-should-be-tried-for-war-crimes---231439748.html> (accessed November 20, 2013) (Ambassador Stephen Rapp, Ambassador-at-Large for War Crimes Issues at the Office of Global Criminal Justice in the US Department of State stating he has been doing extensive diplomatic work to solicit international support for Washington's preferred approach — a Sierra Leone-style war crimes court that would be a blend of national and international staff with the support of regional powers.); See also, video interview with Ambassador Rapp, posted June 13, 2013, <http://www.youtube.com/watch?v=GAIHZJGSoHM> (accessed November 20, 2013) (Ambassador Rapp states: "We are working with Syrians on plans to stand up a court at some point in the future that could try these cases within Syria or in cooperation with other countries in some kind of hybrid or mixed approach like we've been able to do in Sierra Leone or in Cambodia. So there could be other alternatives to the ICC...We are looking for realistic ways to achieve accountability.").

⁵⁰ US Representative Chris Smith, "Immediate Establishment of Syrian War Crimes Tribunal Resolution," H. Con. Res. 51, submitted for consideration on September 4, 2013, <https://www.govtrack.us/congress/bills/113/hconres51/text> (accessed November 20, 2013) (a resolution directing the US government to work with other states to create an ad hoc tribunal for Syria).

⁵¹ See, for example, "The Chautauqua Blueprint for a Statute for Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes," policy paper, August 27, 2013, <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2013/09/Chautauqua-Blueprint1.pdf> (accessed November 20, 2013) (recommending an "'internationalized domestic tribunal' as a complement or alternative to an international tribunal").

⁵² A range of models have been proposed. For example, US Ambassador Stephen Rapp has referred to a "hybrid or mixed approach" reflecting the Special Court for Sierra Leone or the Extraordinary Chambers in the Courts of Cambodia models. Whereas US Congressman Chris Smith seems to suggest the establishment of an international ad hoc tribunal similar to the International Criminal Tribunal for the Former Yugoslavia. See Chris Smith, "Establish a Syrian War Crimes Tribunal," *Washington Post*, September 9, 2013, http://articles.washingtonpost.com/2013-09-09/opinions/41895454_1_syrian-court-war-crimes-tribunal-international-criminal-court (accessed November 20, 2013).

committed in different parts of the world.⁵³ Each of these efforts to prosecute serious crimes has been unique, although they tend to fall into three general categories, each with their own set of challenges.

One model is a stand-alone international tribunal like the ones established for the former Yugoslavia and Rwanda. These tribunals were created by Security Council resolutions and the judges, officials, and staff that make up the courts have typically been international experts not from the countries where the crimes were committed.⁵⁴ Moreover, these institutions have been based outside the countries where the crimes took place.⁵⁵

A second model is the hybrid or mixed national-international entity such as the Special Court for Sierra Leone (SCSL), set outside of the national judiciary, and the Extraordinary Chambers in the Courts of Cambodia (ECCC), set within the domestic system.⁵⁶ These courts have typically been created to some extent through agreements with the UN, have included both international and domestic judicial officials, and have been located in the countries where the crimes were committed.⁵⁷

⁵³ Human Rights Watch, *World Report 2004 - Beyond the Hague: The Challenges of International Justice* (New York: Human Rights Watch, 2004), <http://www.hrw.org/legacy/wrzk4/>, pp. 195-196, 201-203 (discussing developments in international justice). See also, for example, United Nations Security Council, Resolution 955 (1994) (ICTR Resolution), S/RES/955 (1994) [http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/955\(1994\)](http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/955(1994)) (accessed November 20, 2013); United Nations Security Council, Resolution 827 (1993) (ICTY Resolution), S/RES/827 (1993), [http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/827\(1993\)](http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/827(1993)) (accessed November 20, 2013); Rome Statute; Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (SCSL Agreement), January, 16, 2002, <http://www.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176> (accessed November 20, 2013); Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (UN/Cambodia Agreement), No. 41723, June 6, 2003, <http://www.unakrt-online.org/sites/default/files/documents/volume-2329-l-41723.pdf> (accessed November 20, 2013); Law of the Iraqi High Tribunal (IHT Statute), Official Gazette of the Republic of Iraq, No. 4006, October 18, 2005, http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf (accessed November 20, 2013).

⁵⁴ ICTY Resolution and ICTR Resolution. See, for example, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute), September 2009, http://icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (accessed November 20, 2013), art. 12.1; “About the ICTY: The Judges,” <http://icty.org/sid/151> (accessed November 20, 2013) (list of the ICTY judges); “About the ICTY: The Prosecutor,” <http://icty.org/sid/99> (accessed November 20, 2013) (information regarding the current ICTY prosecutor); “About ICTR: The Chambers,” <http://www.unict.org/tabid/103/Default.aspx> (accessed November 20, 2013) (list of the ICTR judges); “About ICTR: Office of the Prosecution,” <http://www.unict.org/tabid/104/default.aspx> (accessed November 20, 2013) (information regarding the current ICTR prosecutor).

⁵⁵ ICTY Statute, art. 31 (“The [ICTY] shall have its seat at The Hague.”). United Nations Security Council, Resolution 977(1995), S/RES/977 (1995), [http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/977\(1995\)](http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/977(1995)) (accessed November 20, 2013) (setting the seat of the ICTR in Arusha, Tanzania).

⁵⁶ See, for example, Statute of the Special Court for Sierra Leone (SCSL Statute), arts. 12.1, 15.3, 15.4, and 16.3; UN/Cambodia Agreement, preamble.

⁵⁷ SCSL Agreement, art. 10 (setting seat of the court in Sierra Leone). SCSL Statute, art. 12.1 (regarding international and domestic judges); “About SCSL: The Office of the Prosecutor,” <http://www.sc-sl.org/ABOUT/CourtOrganization/Prosecution/tabid/90/Default.aspx> (accessed November 20, 2013) (information regarding the current SCSL prosecutor); UN/Cambodia Agreement; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (ECCC Statute), NS/RKM/1004/006, as amended October 27, 2004, http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (accessed November 20, 2013), arts. 9-13 (regarding international and domestic judges) and 43 (setting location of the court as Phnom Penh); “Organs of ECCC: Co-Prosecutors,”

The ratio of international to national staff has varied with these entities. For example, the SCSL Chambers include a mix of international and local judges, with a majority of appointments made by the UN Secretary-General and a minority of appointments made by the Sierra Leone government.⁵⁸ On the other hand, a majority of Cambodian judges sit alongside a minority of international judges at the ECCC.⁵⁹ The ECCC's practice has demonstrated that this ratio risks making the tribunal susceptible to politically motivated interference by the executive.⁶⁰

Lastly, a domestic tribunal, such as the Iraqi High Tribunal (IHT), is another model that might be utilized. Here serious crimes trials are conducted in the domestic courts of the country where the crimes were committed. Further, judicial officials are from the country where the abuses took place and these courts have utilized international assistance in a more limited way, such as in the form of advisers.⁶¹ In the specific case of the IHT, the institutional design of the tribunal made the nonbinding advice of international advisers the principal mechanism to address the underlying lack of capacity of the Iraqi legal system in respect of trying international crimes.⁶² The IHT Statute envisaged advisers in each of the branches of the court—judicial, prosecutorial, and defense (but not the administration)—as an alternative to direct participation of international personnel.⁶³ Ultimately, however, advisers were unable to correct or prevent the significant fair trial shortcomings that arose over the course of the tribunal's proceedings.⁶⁴ In Human Rights Watch's assessment, advisers proved a poor substitute for direct international involvement as co-counsel, judges, and administrators.⁶⁵

While fully analyzing the benefits and drawbacks of each of these models is beyond the scope of this briefing paper, Human Rights Watch believes that the ICC is the most appropriate judicial institution for the fight against impunity in Syria.⁶⁶ What is more, Human Rights Watch believes that setting up a new and temporary entity from the ground up comes with a number of practical disadvantages. The Independent International Commission of

<http://www.eccc.gov.kh/en/ocp/office-co-prosecutors> (accessed November 20, 2013) (information regarding the co-prosecutors of the ECCC).

⁵⁸ SCSL Statute, art. 12.

⁵⁹ ECCC Statute, arts. 9-13.

⁶⁰ "Cambodia: Government Obstructs Khmer Rouge Court," Human Rights Watch news release, September 5, 2013, <http://www.hrw.org/news/2013/09/05/cambodia-government-obstructs-khmer-rouge-court>; see also Human Rights Watch, *World Report 2013 - Cambodia* (New York: Human Rights Watch, 2013), <http://www.hrw.org/world-report/2013/country-chapters/cambodia>, pp. 295-296.

⁶¹ IHT Statute, arts. 7 (regarding international advisers) and 28 (regarding judicial officials). See also Human Rights Watch, *Judging Dujail: The First Trial Before the Iraqi High Tribunal*, vol. 18, no. 9(E), November 2006, <http://www.hrw.org/reports/2006/11/19/judging-dujail>, p. 4.

⁶² Human Rights Watch, *Judging Dujail*, p. 84.

⁶³ *Ibid.*, p. 84.

⁶⁴ *Ibid.*, p. 84 (analyzing the role international advisers played in the Tribunal's first case).

⁶⁵ *Ibid.*, p. 85.

⁶⁶ "Q&A: Syria and the International Criminal Court," Human Rights Watch Q&A.

Inquiry on the Syrian Arab Republic⁶⁷ (hereafter Commission or UN Commission of Inquiry) came to the same conclusion in its February 2013 report, in which it enumerated reasons why an ad hoc entity would not present a viable option to adequately ensure accountability for crimes committed in Syria.⁶⁸

First, according to the Commission, establishing a separate, ad hoc entity comes with significant practical obstacles.⁶⁹ It pointed in particular to the delays inherent in creating another highly complex institution from scratch, as was done with the International Criminal Tribunals for Rwanda and the Former Yugoslavia (ICTR/Y) and the Special Court for Sierra Leone.⁷⁰ According to the Commission, “[d]efining a sound legal framework, finding appropriate facilities, recruiting competent personnel or ensuring cooperation of States *represent considerable challenges, require time and are likely to be more costly* than if a permanent institution is tasked with investigation and prosecution.”⁷¹ The Commission also noted that the delay involved in creating such an entity would remove any potential deterrent effect that could be achieved by examining crimes in Syria now, as abuses persist.⁷² In this respect, the Commission pointed out that the ICC could operate quickly to initiate investigations in Syria because it is an institution which is already up and running.⁷³

The Commission also highlighted funding as an issue of concern for mixed or hybrid judicial entities where financial contributions by states are not compulsory (as is the case for the SCSL and the ECCC).⁷⁴ According to the Commission, financial constraints, “drastically undermine the ability to effectively and independently provide justice for victims.”⁷⁵

The Commission also underlined the important issue of independence. According to the Commission, the example in Cambodia of the ECCC shows that, “internationalized structures which are integrated in the national justice system are exposed to a *considerable risk of*

⁶⁷ The Independent International Commission of Inquiry on the Syrian Arab Republic was established on August 22, 2011 by the United Nations Human Rights Council with a mandate “to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view of ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.” See resolution A/HRC/S-17/2, http://www.ohchr.org/Documents/Countries/SY/A.HRC.S-17.2.Add.1_en.pdf (accessed on November 20, 2013).

⁶⁸ Syria Commission Report, Annex XIV.

⁶⁹ *Ibid.*, p. 125.

⁷⁰ *Ibid.* The delay inherent in establishing such an institution from scratch could have an impact on the integrity and availability of evidence. In the case of the Special Court for Sierra Leone, nearly two years passed between the time the Security Council requested that the U.N. Secretary-General begin negotiations to create a court for crimes committed in Sierra Leone, and the beginning of the functioning of the court in Freetown. For the International Criminal Tribunal for the Former Yugoslavia, it took approximately a year to begin recruiting staff in the Office of the Prosecutor following authorization by the Security Council to create the tribunal.

⁷¹ *Ibid.*, p. 125.

⁷² *Ibid.*, p. 126.

⁷³ *Ibid.*, pp. 126-127.

⁷⁴ *Ibid.*, p. 125.

⁷⁵ *Ibid.*

undue influencing which impedes the impartial delivery of justice.”⁷⁶ With respect to Syria in particular, it stated that the current security situation there precluded the presence of such an entity and that, “it is unrealistic to assume that Syria would support the establishment of such a tribunal let alone fully respect its independence.”⁷⁷

II. National Prosecutions in Syria

Complementarity is the bedrock of the Rome Statute system.⁷⁸ Under this principle, a state party bears primary responsibility for investigating and prosecuting serious international crimes committed on its territory or by its nationals. The ICC only steps in as a court of last resort where national courts cannot or will not do so. But even when the ICC intervenes, fair and effective investigations and trials at the national level remain essential to achieving broad-based accountability; the court’s reach is generally limited to a handful of individuals considered to be most responsible for the crimes committed.⁷⁹ National prosecutions will therefore be necessary to narrow the impunity gap. States where grave crimes are committed, however, are often mired in or have recently emerged from conflict or otherwise lack the capacity and political will to conduct criminal proceedings that meet international fair trial standards.⁸⁰

So while the need for credible national justice is clear, the path to achieve it is by no means straightforward. Even where there is political will to see perpetrators held to account in a credible process—not always a given, particularly if the sitting government is implicated in abuses—the local justice sector may be in disarray. Even sophisticated legal systems may lack the capacity to effectively address serious crimes committed on a large scale. In these situations, international support can be essential to help national courts deliver justice and meet their obligation to close the impunity gap.⁸¹

⁷⁶ Ibid.

⁷⁷ Ibid., pp. 125-126. See also UN International Commission of Inquiry on Darfur, “Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General,” September 18, 2004, http://www.un.org/news/dh/sudan/com_inq_darfur.pdf (accessed November 20, 2013), para. 579 (In the case of Sudan, the Darfur commission concluded that “establishment of a special court by agreement between the actual Government and the United Nations for the investigation and prosecution of members of that very Government seems unlikely.”).

⁷⁸ Rome Statute, preamble and arts. 17-19.

⁷⁹ See, for example: (1) in the Libya situation, there is one case with two suspects – “ICC: Situation in Libya,” http://www.icc-cpi.int/EN_Menus/ICC/Situations%20and%20Cases/Situations/ICCo111/Pages/situation%20index.aspx (accessed November 20, 2013); and (2) in the Côte d’Ivoire situation, there are three cases pending against three suspects – “ICC: Situation in Côte D’Ivoire,” http://www.icc-cpi.int/EN_Menus/ICC/Situations%20and%20Cases/Situations/ICCo211/Pages/situation%20index.aspx (accessed November 20, 2013).

⁸⁰ See, for example, Human Rights Watch, *Turning Rhetoric into Reality*, pp. 39-56; Human Rights Watch, “Memorandum for the Twelfth Session of the International Criminal Court Assembly of States Parties,” pp. 36-37.

⁸¹ See, for example, Human Rights Watch, *Turning Rhetoric into Reality*, pp. 57-67.

A. Impediments to National Prosecutions in Syria

With respect to Syria specifically, the UN Commission of Inquiry has concluded that given the protracted and increasingly sectarian nature of the conflict there, it is very unlikely that independent, credible prosecutions that meet minimum international standards could be carried out there in the near term.⁸² The Commission held that this was due both to lack of willingness on the part of the Syrian authorities and the likely inability of the system to carry out such prosecutions.⁸³ Human Rights Watch agrees with this assessment.

Political will aside, cases involving grave crimes such as war crimes and crimes against humanity tend to be extremely complex to investigate, prove, defend against, and adjudicate. Extensive evidence and potentially hundreds of witnesses are usually involved.⁸⁴ Moreover, perpetrators may be individuals who once held or continue to hold senior positions in national armed forces or are powerful figures in rebel armies.⁸⁵ Prosecuting individuals who may have ordered the crime rather than those who personally committed it or were responsible as a matter of command responsibility is also difficult. International experience shows that identifying these individuals and proving links between acts on the ground and orders or acquiescence from above requires extensive prosecutorial and judicial experience.

In addition, stark deficiencies may exist in the national justice system which will aggravate these challenges and may lead to an abuse of fair trial rights, including a shortage of personnel, a lack of training in addressing serious criminal cases, concerns about the bias of national judges and prosecutors, limited court infrastructure, outdated rules of procedure, corruption, and limited case management.⁸⁶ Moreover, political dynamics can lead to grandstanding during trials, and individuals not involved in the process may seek to undercut it through intimidation, threats, and attacks.⁸⁷ The sensitivity of witness testimony can also place individuals who testify at substantial risk. Meanwhile, the justice system may

⁸² Syria Commission Report, Annex XIV, p.124. According to the Commission, international standards consist of “independence, impartiality, thoroughness, effectiveness and promptness of investigations and due process.”

⁸³ *Ibid.*

⁸⁴ For example, in the Charles Taylor trial at the Special Court for Sierra Leone, the prosecution called 94 witnesses to the stand, presented written statements from four other witnesses, and presented reports from two expert witnesses and the defense called 21 witnesses. “Charles Taylor: Q&A on The Case of Prosecutor v. Charles Ghankay Taylor at the Special Court for Sierra Leone,” Human Rights Watch Q&A, April 17, 2012, <http://www.hrw.org/news/2012/04/16/charles-taylor-qa-case-prosecutor-v-charles-ghankay-taylor-special-court-sierra-leon>.

⁸⁵ In Syria, security services currently benefit from extensive legal immunity. For example, Legislative Decree No. 14, of January 15, 1969, and Legislative Decree 69, provide immunity to members of the security forces, by requiring a decree from the General Command of the Army and Armed Forces to prosecute any member of the internal security forces, Political Security, and customs police. See Human Rights Watch, *Torture Archipelago*, p. 9, calling for an annulment of these decrees.

⁸⁶ See, for example, Human Rights Watch, “*We Have Lived in Darkness*”: A Human Rights Agenda for Guinea’s New Government, May 2011, http://www.hrw.org/sites/default/files/reports/guineao511webwcover_1.pdf, pp.19-44.

⁸⁷ See, for example, Human Rights Watch, *Judging Dujail*, pp. 20-24, 69-72.

lack the tools to properly educate local communities about judicial efforts to achieve accountability so as to make them relevant and understood by the population.⁸⁸

As such, if and when there is political will to pursue national trials, reforms and external assistance will be needed to equip the Syrian judicial system to carry out credible and independent domestic proceedings which are meaningful to the local population, including, for example, putting measures in place to ensure: the independence of judges and prosecutors; the full protection of witnesses, lawyers, and judicial personnel; as well as the ability of investigators to gather evidence. Financial and diplomatic support for such future efforts could assist in bolstering national capacity to handle these violations, but this will all take time.

B. An Internationalized Court or Chamber Set Within the National System

While judicial reform is underway, the addition of a dedicated and specialized judicial mechanism embedded in the national justice system with support from international judicial experts could work to narrow the existing impunity gap. If appropriately structured and working in concert with the ICC and other national courts in Syria that may eventually adjudicate mass atrocity cases, as well as any broader plan for judicial reform in the country, such a mechanism could also strengthen the broader capacity of the national justice system to handle grave international crimes. The War Crimes Chamber in Bosnia and Herzegovina's State Court and the Special Department for War Crimes in the Prosecutor's Office in Bosnia offer important lessons for policymakers and donors in this regard.⁸⁹

For such an entity to successfully achieve these objectives, certain key components must be present. First, this mechanism should have primary but not exclusive jurisdiction in the national system over the crimes it addresses because the need for justice in Syria will be immense.⁹⁰ It is therefore important to establish a positive dynamic between the specialized mechanism and ordinary courts, in order to address the greatest possible number of cases.⁹¹ Shared jurisdiction would also enable bridges to be developed between the entity and the ordinary courts in terms of sharing training, knowledge, and experience, which in turn will bolster the capacity of the entire Syrian justice system.⁹²

⁸⁸ See, for example, Human Rights Watch, *Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division*, January 2012, http://www.hrw.org/sites/default/files/reports/uganda0112ForUpload_o.pdf, pp. 22-25.

⁸⁹ Human Rights Watch, *Justice for Atrocity Crimes: Lessons of International Support for Trials Before the State Court of Bosnia and Herzegovina*, March 2012, http://www.hrw.org/sites/default/files/reports/bosnia0312_o.pdf. Though also a hybrid national-international entity set within the domestic system, it can be distinguished from the ECCC model in a number of respects. Importantly, the entity would not have a time-limited mandate. In addition, international involvement would be subject to a phase-out, to ensure both that sufficient expertise is available to conduct trials that meet international standards, and that local ownership is achieved over time. See discussion that follows below.

⁹⁰ Human Rights Watch, *Justice for Atrocity Crimes*, pp. 7, 26, 41-43.

⁹¹ *Ibid.*

⁹² *Ibid.*

Second, in addition to Syrian experts, non-Syrian practitioners with experience adjudicating complex cases of serious international crimes and who have a demonstrated record of independence should be involved in the mechanism at the outset.⁹³ Specific benchmarks linked to progress in handling cases and to the development of an institutional framework could then be set which, when satisfied, would trigger the phasing out of non-Syrian personnel.⁹⁴ International staff should be included as regular judicial staff (i.e. not as separate advisers or experts) and should be involved in all aspects of the mechanism's work, including witness protection, outreach and defense rights.⁹⁵ In addition to possessing the expertise needed for the relevant position, international staff members should ideally also have experience in capacity-building and transferring skills.⁹⁶ Effective collaboration between the Syrian and international personnel is central.

The experience of the Bosnia War Crimes Chamber indicates that the involvement of international jurists and experts with experience in trying complex cases can bring a number of crucial benefits. First, it could contribute significantly to enhancing the short- and long-term capacity of professionals and institutions in Syria to conduct fair and effective trials of serious crimes.⁹⁷ Moreover, the presence of international staff could also help insulate the mechanism from political interference and strengthen its perceived and actual independence.⁹⁸ Third, presence of international staff may bolster victims' and witnesses' willingness to give testimony, as well as witness protection.⁹⁹ Expertise in adjudicating serious crimes cases is also valuable to promote procedures that provide guarantees of a fair trial. Syrian practitioners will be critical in terms of their understanding of local law, culture, and history.

Given that such a mechanism would need to have a clear role in capacity building, promoting strong working relationships between international and national staff will be central to its success. Experience from Bosnia shows that the mere presence of international and national staff does not guarantee that this will occur.¹⁰⁰ The challenges associated with effective capacity-building could be addressed through making this role a clear part of its mandate, recruiting international staff with the necessary training and experience, regularly evaluating international staff on their effectiveness in sharing the expertise with Syrian colleagues, and requiring an adequate length of contract to provide for greater cooperation.

If such a mechanism is pursued, all efforts should be made to ensure that it ultimately contributes to and enhances reform of the national justice sector, rather than distracts from

⁹³ *Ibid.*, pp. 12-20.

⁹⁴ *Ibid.*, pp. 32-35.

⁹⁵ *Ibid.*, pp. 12-40.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, pp. 12-43.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, pp. 16-20, 22-28.

it. Indeed, any such mechanism should only be set up in conjunction and with full understanding of comprehensive plans for broader judicial reform in Syria. As such, policymakers, donors, and national authorities will need to give careful consideration from the beginning to allocating resources and expertise to improve the capacity of all courts trying atrocity crimes in Syria. National authorities, with support from donors, will need to ensure effective coordination between the central court staffed with international experts and other national courts in a situation like Syria where the sheer volume of cases makes jurisdiction sharing necessary.

It cannot be stressed enough though that without the necessary political commitment to fair and impartial trials at the outset, it will not be possible to legitimately pursue broader national prosecutions, let alone establish a meaningful “bridge building” mechanism. The success of any effort to bolster the national justice system will hinge on the authorities of the day. Overcoming obstacles related to political will requires long-term attention, support, and investment. This is a salient reminder as to why the ICC was created in the first place.

III. National Prosecutions in Foreign Courts (“Universal Jurisdiction”)¹⁰¹

In addition to criminal prosecutions at the ICC and in Syria, certain categories of grave crimes that violate international law, such as war crimes and torture, are subject to “universal jurisdiction.” This involves the legal authority of national judicial systems to investigate and prosecute certain crimes, even if they were not committed on its territory, by one of its nationals or against one of its nationals. Certain treaties, such as the 1949 Geneva Conventions and the Convention against Torture, oblige states parties to extradite or prosecute suspected offenders who are within that country’s territory or otherwise under its jurisdiction.

Under customary international law, it is also generally agreed that countries are permitted to try those responsible for other grave crimes, such as genocide or crimes against humanity, no matter where these crimes took place. Whether cases under universal jurisdiction can actually be pursued in a particular country depends on the national criminal system and domestic laws as well as the evidence available that is admissible in that country’s courts.

It is possible that individuals responsible for grave international crimes in Syria, such as torture, war crimes, or crimes against humanity, have traveled or may travel to other countries in the future. Most countries have obligations under international law to investigate or prosecute all or some of these serious crimes under the legal principle of universal jurisdiction.

¹⁰¹ See “Basic Facts on Universal Jurisdiction,” Human Rights Watch, October 19, 2009, <http://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction>. See also, Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art*,” vol. 18, no. 5(D), June 2006, <http://www.hrw.org/reports/2006/06/27/universal-jurisdiction-europe>.

While it would normally be preferable for victims of grave international crimes to find redress in the courts of the state where the crimes were committed, universal jurisdiction acts as a “safety net” when the territorial state is unable or unwilling to conduct an effective investigation and trial. The application of universal jurisdiction reduces the existence of “safe havens” where a person responsible for grave crimes could enjoy impunity. In past years, as states have acknowledged the importance of fighting impunity for the most serious crimes under international law, governments have increased the application of universal jurisdiction, which represents a further avenue for victims who have nowhere else to turn for redress.

At the same time, the fair and effective exercise of universal jurisdiction is far from easy. The cases are significantly more complex and resource-intensive than most ordinary criminal cases and frequently raise novel legal questions for domestic courts. Indeed, from the initial complaint to the conclusion of the trial and any appeal, universal jurisdiction cases pose their own special demands on police, prosecutors, defense counsel, and courts. Because the acts in question will have occurred in a foreign country, and often many years earlier, cases rarely arise in the manner to which local authorities are accustomed, such as through a victim simply reporting to a police station. Investigators and prosecutors may lack familiarity with both the historical and political context of the alleged crime, and the applicable international law. Witnesses may be dispersed across several countries, or the state in which the crime was committed may decline to cooperate with investigative requests. For similar reasons, defendants may also face considerable problems gaining access to witnesses or evidence that exculpates them.

Despite these and other difficulties, universal jurisdiction cases have been opened and have proceeded to trial and conviction. These developments have generally occurred where law enforcement and judicial authorities in the relevant countries have made an organizational and institutional commitment to take potential universal jurisdiction cases seriously. More and more countries have started using their universal jurisdiction laws over the past 15 years. For example, Rwandan, Afghan, Argentine, Bosnian, Serbian and Congolese perpetrators—among others—have been successfully prosecuted after leaving the country where their crimes took place. National experiences in different countries show that the fair and effective exercise of universal jurisdiction is achievable where there is the right combination of appropriate laws, adequate resources, institutional commitments and political will. The same will be necessary for universal jurisdiction to be an effective tool in the fight against impunity in Syria.

IV. Conclusion and Recommendations

Various accountability measures are needed to address the devastation that is befalling Syria. Criminal justice is one difficult, contentious, but absolutely necessary component of the picture. Successful implementation of these measures requires learning lessons from various other country situations. As difficult as the challenges will be, Syrians, the UN, and

concerned states need to get this right in a way that is both comprehensive and meaningfully addresses the grave violations which victims in Syria have suffered.

It is long overdue for the international community, and the Security Council in particular, to take prompt and concrete steps to combat the pervasive climate of impunity that currently plagues Syria. As a first step, the Security Council should refer the situation there to the ICC. More countries should join the call and impress on reluctant Council members the urgency of taking up the issue of accountability. Human Rights Watch believes that the ICC is the forum most capable of effectively investigating and prosecuting those bearing the greatest responsibility for abuses in Syria, and that the court can play a central role in the absence of the prospect of meaningful action by national authorities in Syria.

Over the long-term, national trials will also be needed to narrow the impunity gap. However, it is clear that concerted international and domestic efforts will be needed to strengthen and better enable the Syrian criminal justice system to conduct credible and effective national investigations and prosecutions if and when the political will exists to pursue them. This will ideally entail increased international political support and logistical assistance to strengthen national capacities to prosecute serious international crimes, including potentially through the development of a dedicated and specialized mechanism in the Syrian justice system.

Finally, in combating impunity for grave human rights violations in Syria, a critical role also exists for foreign national courts through the exercise of universal jurisdiction. Universal jurisdiction makes it possible to prosecute the perpetrators of grave crimes when they have fled the country, when national authorities do not wish to prosecute them, and when no international court exists for the crimes involved, or none will hear the case.

With the foregoing in mind, and in the midst of the ongoing conflict in Syria, concerned states could take some initial concrete steps to signal greater support for justice there:

- Call on the UN Security Council to refer the situation in Syria to the ICC, as the forum most capable of effectively prosecuting those bearing the greatest responsibility for abuses, and which can act as a critical reference point for the domestic system over the long-term;
- Take all available steps to encourage Russia and others to drop their opposition to the ICC's involvement in Syria, including by publically stating support for an ICC referral;
- Ensure that accountability for serious abuses is central to any transition plan for Syria;
- Reject any effort to grant immunity to individuals who are implicated in serious violations of international human rights or humanitarian law.

- Support professional documentation efforts by neutral experts, including the preservation of potential evidence that could be used in a future accountability process;
- Support an independent review of Syrian criminal and procedural law with a view to establishing whether (and what) amendments need to be made to ensure that the laws and domestic prosecutions meet international fair trial standards;
- Ensure that any plans on accountability for crimes in Syria include a commitment to ensuring impartial and independent justice; and
- Investigate and prosecute individuals suspected of committing serious crimes under the principle of universal jurisdiction and in accordance with national laws.

SYRIA

CRIMINAL JUSTICE FOR SERIOUS CRIMES UNDER INTERNATIONAL LAW

Over the last two-and-a-half years, Human Rights Watch has extensively documented abuses by Syrian government and pro-government forces and concluded that they have committed crimes against humanity and war crimes. The government continues to conduct indiscriminate air and artillery strikes on residential areas and to arbitrarily detain, torture, and extrajudicially execute civilians and combatants. Human Rights Watch has also documented serious abuses amounting to war crimes by some opposition groups, including the indiscriminate use of car bombs and mortars, kidnapping, torture, and extrajudicial executions. Human Rights Watch has also documented systematic kidnapping and intentional killings of civilians by some opposition groups that may amount to crimes against humanity.

This report underlines the urgent need for accountability in Syria and examines a number of concrete measures that would contribute to the fair investigation and prosecution, in a properly constituted court, of people responsible for these abuses. The document outlines short-term actions as well as longer-term policies and practices that countries should adopt to demonstrate their commitment to justice. In particular, Human Rights Watch lays out a series of recommendations, including on the involvement of the International Criminal Court, criminal prosecutions by Syrian courts, and national prosecutions in foreign courts outside of Syria under the principle of universal jurisdiction. The report also discusses the potential benefits of a specialized court or chamber within the national justice system that would have both international and Syrian staff and would work with the ICC and other Syrian courts on mass atrocity cases.