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## JUSTICE IN SYRIA: INDIVIDUAL CRIMINAL LIABILITY FOR HIGHEST OFFICIALS IN THE ASSAD REGIME

*Seema Kassab*

*Seven years have passed since revolution broke out in Syria in March of 2011. During those six years, hundreds of thousands of Syrians lost their lives,<sup>1</sup> millions of Syrians were internally displaced or left the country seeking refuge,<sup>2</sup> and a beautiful and diverse country was hijacked and terrorized by civil war. Every day in Syria, people are detained, tortured, raped, and killed. Attacks on homes, hospitals, markets, and schools are common occurrences. At this stage of the conflict, there is little doubt that it is the most horrific and dire humanitarian crisis since World War II.<sup>3</sup> The conflict began as an uprising in protest of the authoritarian Assad regime, which has ruled Syria for over four decades.<sup>4</sup> Unfortunately, it has escalated into a brutal civil war between the Assad regime, several rebel factions, and an Islamic extremist infiltration. Bloodshed and terror are now Syria's everyday reality. When and how will those responsible be held accountable for these atrocities?*

### WHAT INTERNATIONAL CRIMES ARE BEING COMMITTED IN SYRIA?

#### *Targeting Civilians and Indiscriminate Attacks*

The targeting and killing of civilians is a crime against humanity under article 7(1)(a) and a war crime under articles 8(2)(a)(i), 8(2)(c)(i), and 8(2)(e)(i) of the Rome Statute.<sup>5</sup> Syrian and Russian airstrikes have been indiscriminately directed at civilian areas, including homes, schools, markets, and hospitals.<sup>6</sup> The government has used barrel bombs, cluster muni-

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1. The Syrian Center for Policy Research recorded 470,000 deaths as of February 2016. *Syria Events of 2016*, HUMAN RIGHTS WATCH (2017), <https://www.hrw.org/world-report/2017/country-chapters/syria>.

2. The UN Office for the Coordination of Humanitarian Affairs recorded 6.1 million internally displaced people and 4.8 million people seeking refuge abroad. *Id.*

3. UN High Commissioner for Human Rights Zeid Ra'ad al-Hussein described the conflict as "the worst man-made disaster the world has seen since World War II." *Syria 'worst man-made disaster since World War II' – UN rights chief*, UN NEWS CENTRE (Mar. 14, 2017), <http://www.un.org/apps/news/story.asp?NewsID=56349#.WaRYF1GGN3g>.

4. Neil Quilliam, *Hands of Power: The Rise of Syria's Assad Family*, CHATHAM HOUSE (Nov. 4, 2015), <https://www.chathamhouse.org/expert/comment/hands-power-rise-syrias-assad-family>.

5. Rome Statute of the International Criminal Court (Rome, 17 July 1998), art 7-8, U.N. Doc. A/CONF.183/9 of 17 July 1998 [hereinafter *The Rome Statute*].

6. HUMAN RIGHTS WATCH, *supra* note 1.

tions, and flammable incendiary weapons in attacking civilian areas.<sup>7</sup> On April 27, 2016, the Syrian-Russian Coalition launched an airstrike on al-Quds Hospital killing 58 civilians and patients. In August alone, government forces bombarded health facilities in Idlib, Aleppo, Hama, and Homs.<sup>8</sup>

### Rape

Sexual violence and rape, which have been rampant throughout the Syrian Conflict,<sup>9</sup> are war crimes under article 8(2)(e)(vi) and crimes against humanity under article 7(1)(g) of the Rome Statute.<sup>10</sup> In 2013, only two years into the war, the UN treated 38,000 victims of sexual violence in Syria, along with large numbers of other victims who fled to Jordan and Lebanon.<sup>11</sup> The UN Independent International Commission of Inquiry on the Syrian Arab Republic (COI) was established in August 2011 by the Human Rights Council with a mandate of investigating alleged violations of international human rights law in Syria since March 2011.<sup>12</sup> The COI verified that Syrian government forces and government-controlled militia (Shabbiha) have used sexual violence as a war weapon.<sup>13</sup> Sexual violence occurs during raids, at checkpoints, in detention centers and prisons.<sup>14</sup> The threat of rape is also used as a tool to coerce confessions.<sup>15</sup> Furthermore, human rights groups have documented numerous reports of rape by regime forces against women and girls believed to be associated with the opposition. According to a report by the Syrian Accountability Project, a student-run and internationally recognized organization based at Syracuse University College of Law, rape and sexual assault have been rampant in Syria since the start of the conflict.<sup>16</sup> Their findings report that 62% of incidents of rape and sexual violence were committed by the regime between 2011 and 2012 and 23% were commit-

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7. *Id.*

8. *Id.*

9. Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, ¶ 95, U.N. Doc. A/HRC/24/46 (2013).

10. The Rome Statute, *supra* note 5, art. 7-8

11. 26th Session of the UPR Working Group of the HRC, *Submission: Human Rights Violations Against Women and Girls in Syria* at ¶ 6 (March 24, 2016).

12. Indep. Int'l Commission of Inquiry on the Syrian Arab Republic, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx>.

13. UPR Working Group, *supra* note 11, ¶ 6.

14. Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, *supra* note 9, ¶ 95-100.

15. *Id.*

16. Peter Levrant, *Looking through the Window Darkly, A Snapshot Analysis of Rape in Syria*, SYRIAN ACCOUNTABILITY PROJECT, 4 (2015) <http://syrianaccountabilityproject.syr.edu/wp-content/uploads/looking-through-the-window-darkly-a-snapshot-analysis-of-rape-in-syria-by-syrian-accountability-project.pdf>.

ted by Shabbiha, while only 2% were committed by the Free Syrian Army.<sup>17</sup>

### *Restricting Humanitarian Assistance*

The Assad government has purposefully engaged in blocking humanitarian assistance from reaching besieged areas in Syria.<sup>18</sup> Intentionally directing attacks or obstructing the delivery of humanitarian assistance is considered a war crime under article 8(2)(e)(iii) of the Rome Statute.<sup>19</sup> Government forces have prohibited medical treatment items, such as emergency health kits and antibiotics, from reaching civilians in need.<sup>20</sup> Additionally, from 2012 until June 2016, the Assad regime blocked UN-facilitated food and medicine meant to reach four thousand civilians from entering Darayaa.<sup>21</sup> The government has also imposed unnecessary bureaucratic obstacles on aid agencies, refusing to grant visas to international aid workers and requiring that they obtain permits before entering besieged areas. The COI also discovered that the government detained many Red Crescent volunteers and medical staff on grounds of “having supported terrorists.” Additionally, the government continues to bombard healthcare facilities in opposition-held areas, including in Hama and Aleppo.<sup>22</sup>

### *Arbitrary Arrests, Enforced Disappearances, Torture, and Ill-Treatment*

Arbitrary arrests, detention, torture, and forced disappearances have been widespread and systematic in the Syrian Conflict. Arbitrary arrests, detention and kidnap are listed as crimes against humanity under article 7(1)(e).<sup>23</sup> The COI has reported that “since March 2011, a countrywide pattern emerged in which civilians, mainly males above the age of 15, were arbitrarily arrested and detained by the Syrian security and armed forces or by militia acting on behalf of the government during mass arrests, house searches, at checkpoints, and in hospitals.”<sup>24</sup> Arrests have targeted civilians perceived to be associated with the opposition or lacking sufficient government loyalty.<sup>25</sup>

Torture and ill-treatment are also crimes against humanity under article 7(1)(f) and war crimes under articles 8(2)(a)(ii) and (iii), as well as

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17. *Id.*

18. HUMAN RIGHTS WATCH, *supra* note 1.

19. The Rome Statute, *supra* note 5, art. 8.

20. HUMAN RIGHTS WATCH *supra* note 1.

21. U.S. Dep’t of State, Bureau of Democracy, H.R., and Lab., Syria 2016 Human Rights Report 26 (2016), <https://www.state.gov/documents/organization/265732.pdf>.

22. *Id.*

23. The Rome Statute, *supra* note 5, art. 7.

24. U.N. Human Rights Council, Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic, 4, U.N. Doc. A/HRC/31/CRP.1, (Feb. 3, 2016).

25. *Id.*

article 8(2)(c)(ii) of the Rome Statute.<sup>26</sup> Between March 2011 and June 2016, at least 12,679 people died in custody, from causes including starvation, torture, abuse, beatings and disease.<sup>27</sup> Human Rights Watch and the COI reported incidents of torture taking place in government detention facilities, including the Mezzeh airport detention facility, Military Security Branches 215, 227, 235, 248, and 291, Adra and Sednaya prisons, the Harasta Air Force Intelligence Branch, Harasta Military Hospital, Mezzeh Military Hospital 601, and Tishreen Military Hospital.<sup>28</sup> The COI also reported that the Counterterrorism Court (CTC) and field military courts use torture to obtain forced confessions.<sup>29</sup> Additionally, the COI reported that, “beginning in 2011 and continuing through the year, security forces subjected detainees to ill-treatment in military hospitals, purposely impeding medical care or exacerbating existing injuries as a method of abuse and interrogation.”<sup>30</sup> Furthermore, enforced disappearances are considered crimes against humanity under article 7(1)(i) of the Rome Statute.<sup>31</sup> In August 2016, the Syrian Network for Human Rights found that 96 percent of the estimated 75,000 forced disappearances were perpetrated by the government.<sup>32</sup>

These war crimes and crimes against humanity are merely a sample of the types of human rights violations that the Assad government has perpetrated on Syrian civilians over the past seven years. The quantity of crimes committed is uncountable and the severity indescribable. Additionally, there are provisions of the Rome Statute, other than the ones described as being violated above, that could be used to prosecute government officials. Although the substance of the Assad regime’s crimes can be delved into much more deeply, the focus of this paper is on accountability for these crimes. The rest of this paper seeks to evaluate the strength of the evidence that exists against the Assad regime and how Assad, as well as other regime officials, can be held individually liable for war crimes and crimes against humanity under Articles 25 and 28 of the Rome Statute.

#### WHAT EVIDENCE EXISTS IMPLICATING THE ASSAD REGIME?

There is no shortage of war crimes and crimes against humanity being committed in Syria by the multiple parties fighting for power on the ground. However, according to investigators, the Assad regime is committing many of them,<sup>33</sup> demonstrating that it is willing to defy international law and dispose of all sense of humanity in order to crush the rebellion.

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26. The Rome Statute, *supra* note 5, art. 7-8.

27. HUMAN RIGHTS WATCH, *supra* note 1.

28. U.S. Dep’t of State, *supra* note 20, at 6.

29. *Id.*

30. *Id.* at 8.

31. The Rome Statute, *supra* note 5, art. 7.

32. U.S. Dep’t of State, *supra* note 20, at 8.

33. See Ben Taub, *The Assad Files*, THE NEW YORKER (Apr. 18, 2016), <https://www.newyorker.com/magazine/2016/04/18/bashar-al-assads-war-crimes-exposed>.

These widespread war crimes and crimes against humanity in Syria have been documented by the UN and various human rights organizations throughout the conflict.<sup>34</sup> Not only has the evidence been documented, but it has been gathered with future prosecution efforts in mind. Over the past four years, the Commission for International Justice and Accountability (CIJA), an independent investigative body founded in 2012 in response to the Syrian war, has smuggled more than 600,000 government documents out of Syria; these documents link the Assad regime to war crimes and crimes against humanity.<sup>35</sup> CIJA's work has recently produced a four-hundred-page legal brief, known as *the Assad Files*, which links the Assad government to the systematic torture and murder of hundreds of thousands of Syrians.<sup>36</sup> The smuggled documents can be attributed to various levels within the government, ranging from local intelligence branches to the highest level of Assad's security committee, the Central Crisis Management Cell (Crisis Cell).<sup>37</sup>

The Crisis Cell was created after the uprising in order to quash the opposition, and is composed of Assad's most trusted confidants: members of the Baath party and his family.<sup>38</sup> The members met every night and determined strategies to approach every security issue the Assad government was facing.<sup>39</sup> Just five months into the uprisings, the Crisis Cell held its usual meeting and devised a plan to target specific categories of people. They decided that first, all security branches were "to launch daily raids against protest organizers" and "those who tarnish the image of Syria in foreign media."<sup>40</sup> Next they decided that "security agents would coordinate with Baathist loyalists, neighborhood militias, and community leaders" to keep the area free of opposition activists.<sup>41</sup> Third, they would "establish a joint investigation committee at the province level," comprised of representatives from all of the security branches to interrogate detainees.<sup>42</sup> The results of the interrogations were to "be sent to all security branches to be used in determining where to focus prosecution efforts."<sup>43</sup>

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34. See, e.g. Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/21/50 (2012); Oral Update of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, 20th Sess., paras. 62-87, U.N. Doc. A/HR/20/CRP.1 (2012); Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/19/69 (2012).

35. See *id.*

36. See *id.*

37. Wa'el Alzayat et al., *Prosecuting Assad: War Crimes, Mass Atrocities, and U.S. Policy*, THE WASHINGTON INSTITUTE, (Aug. 5, 2016), <http://www.washingtoninstitute.org/policy-analysis/view/prosecuting-assad-war-crimes-mass-atrocities-and-u.s.-policy>.

38. See Taub, *supra* note 33.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

All policies created during the Crisis Cell's meetings were converted into orders and passed down to operatives through the respective intelligence agencies. The documents show that detailed information was passed both up and down the chains of command.<sup>44</sup> For example, every piece of anti-government graffiti reached the Crisis Cell at the very top of the chain. The intense and structured coordination between the agencies reveals the degree to which these high-level officials were aware of everything that happened on the ground.<sup>45</sup> Not only do the documents discovered by CIJA reveal the specific orders of the regime, but they also expose the systematic policies behind them. After every meeting, Assad reviewed the proposed strategies, signed off on them, and returned the orders to the Crisis Cell for implementation.<sup>46</sup> Assad's required approval of every policy is direct evidence that he had knowledge of all the crimes being committed by his forces.

A man named Abdelmajid Barakat was hired to process all the paperwork that came out of the Crisis Cell. He also became the mole within the government, leaking documents to the Syrian Opposition, who then forwarded them to Arabic news agencies.<sup>47</sup> These documents, along with CIJA's 600,000 pages, revealed multiple parallel chains of command from the Crisis Cell.<sup>48</sup> Not only were documents smuggled out of Syria, but so were thousands of photographs depicting emaciated, mutilated, burned, shot, beaten, strangled, broken, and melted bodies. A military defector known by the alias, Cesar, fled Syria in August 2013 with flash drives hidden in his shoes containing 53,275 of these photographs.<sup>49</sup> At least 6,786 of the photographed bodies belong to detainees who either died in detention centers or after being transferred from detention to a military hospital.<sup>50</sup> The photos divulge the pervasiveness of torture, starvation, beatings, and illness in the government detention facilities.<sup>51</sup>

As regime agents began to defect from the government, CIJA investigators found these defectors and took witness statements. They interviewed about 250 victims across several Syrian provinces in order to secure pattern evidence and demonstrate that the regime perpetrated these crimes in a systematic manner.<sup>52</sup> As a result, CIJA was able to expose consistent patterns in interrogation practices across all branches of the security agencies.<sup>53</sup>

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44. *See id.*

45. *See id.*

46. *See id.*

47. *See* Taub, *supra* note 33.

48. *See id.*

49. *See Syria: Stories Behind Photos of Killed Detainees*, HUMAN RIGHTS WATCH (Dec. 16, 2015), <https://www.hrw.org/news/2015/12/16/syria-stories-behind-photos-killed-detainees>.

50. *Id.*

51. *Id.*

52. Taub, *supra* note 33.

53. *Id.*

Investigators suggest that the existing evidence that links the Assad regime to war crimes and crimes against humanity is more complete and incriminatory than any body of evidence that has been previously gathered during an active conflict.<sup>54</sup> Stephen Rapp, who led the prosecutions at the international criminal tribunals in Rwanda and Sierra Leone, claimed that CIJA's documentation is "much richer than anything I've seen, and anything I've prosecuted in this area."<sup>55</sup> Despite the thoroughness of the evidence, the Assad government continues to violate international law and perpetrate massive human rights abuses as the internal conflict persists throughout the country. Meanwhile, the international community has remained passive, essentially allowing Assad to continue perpetrating human rights abuses against civilians without consequence.

#### HOW CAN THE ASSAD REGIME BE HELD ACCOUNTABLE FOR THESE WIDESPREAD CRIMES?

Accountability in Syria is possible via three different avenues, however, not all of them are equally viable. The first avenue, also the least viable, is through domestic courts in Syria. Although Syrian authorities are obligated to investigate and prosecute international crimes on Syrian territory, the likelihood of this option being pursued is very low. The situation in Syria is still unstable, and the even if the conflict ends, it is likely that domestic courts will lack the capacity to oversee the prosecution and investigation of complex international crimes committed on Syrian territory.<sup>56</sup> Additionally, the internal conflict has broken Syria up into several regions dominated by a variety of parties on the ground. The Assad regime no longer controls the entire country. Due to the uncertainty in what the composition of governance in Syria will look like post-conflict, the capacity and ability of the domestic courts to prosecute crime is largely unknown.

The second venue for achieving justice in Syria is through the International Criminal Court (ICC). The ICC, governed by the Rome Statute, is limited in the cases that it can hear and the manner through which cases are brought before it.<sup>57</sup> The ICC hears cases involving four types of crimes: genocide, crimes against humanity, war crimes, and crimes of aggression.<sup>58</sup> Additionally, it only has jurisdiction over subjects who 1) have committed a crime in or against a party to the court, or 2) who are nationals of a party to the court, or 3) when each of these fails, the UN Security Council can refer the case to the ICC if the situation is particularly egre-

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54. Ben Taub, *Does Anyone in Syria Fear International Law*, THE NEW YORKER (Aug. 31, 2016), <http://www.newyorker.com/news/news-desk/does-anyone-in-syria-fear-international-law>.

55. Taub, *supra* note 33.

56. Annika Jones, *Seeking International Criminal Justice in Syria*, 89 Int'l L. Stud. 802, 804–805 Ser. US Naval War Col. (2013).

57. See The Rome Statute, *supra* note 5.

58. *Id.* at art. 5.

gious.<sup>59</sup> Since Syria has never ratified the Rome Statute, the ICC has no independent authority to investigate or prosecute crimes that take place within Syria's borders. Despite this, numerous attempts have been made by the international community to refer the situation in Syria to the ICC. The UN High Commissioner for Human Rights has recommended that the Security Council refer the situation in Syria to the ICC on many occasions.<sup>60</sup> Several Security Council resolutions have been drafted, which even included explicit language—calling out the crimes in Syria as “war crimes” and “crimes against humanity”—which would give the ICC jurisdiction.<sup>61</sup> Additionally, in January of 2013, almost sixty states called upon the Security Council to refer the situation in Syria to the ICC in an open letter. Despite all these referral attempts, none of them have succeeded due to the politicized nature of the Security Council.<sup>62</sup> Russia and China—close allies of the Syrian regime—have continuously blocked all Security Council resolutions that attempt to promote accountability efforts in Syria.<sup>63</sup>

Besides the issue with triggering the ICC's jurisdiction, the ICC's heavy dependence on the cooperation of the Syrian government is another significant obstacle for prosecution.<sup>64</sup> The ICC would need the cooperation of state officials in “gaining access to evidence, transferring perpetrators to the Court, protecting witnesses, and so on.”<sup>65</sup> Despite the many obstacles standing in the way of the ICC gaining jurisdiction over the Syrian conflict, the substance of the crimes being committed in Syria are exactly those that the ICC was created to prosecute.

The last potential avenue for accountability in Syria is through the establishment of an ad hoc international criminal tribunal, similar to those created for the former Yugoslavia and Rwanda. The likelihood of this option succeeding is also low because, again, it would be dependent on the will of the Security Council. Furthermore, it is, arguably, more efficient to refer the situation to the ICC as the ICC's entire purpose is to prosecute the types of crimes that the Assad regime, and others, are currently com-

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59. *Id.* at arts. 12–14.

60. *Syria and the International Criminal Court: Questions and Answers*, HUMAN RIGHTS WATCH (2013), [https://www.hrw.org/sites/default/files/related\\_material/Q%26A\\_Syria\\_ICC\\_Sept2013\\_en\\_0.pdf](https://www.hrw.org/sites/default/files/related_material/Q%26A_Syria_ICC_Sept2013_en_0.pdf).

61. UNSC Res 2165 and 2258

62. The permanent five member states of the UN Security Council (or the P-5) include the United States, Russia, China, France, and the United Kingdom. These are the only states that possess the veto power with regards to resolutions, allowing them to have determinative influence over which resolutions get passed.

63. See Michelle Nichols, *Russia blocks U.N. Security Council condemnation of Syria attack*, REUTERS, (Apr. 12, 2017) <https://www.reuters.com/article/us-mideast-crisis-syria-un-vote/russia-blocks-u-n-security-council-condemnation-of-syria-attack-idUSKBN17E2LK>; *Russia and China veto UN resolution to impose sanctions on Syria*, THE GUARDIAN (MAR. 1, 2017) <https://www.theguardian.com/world/2017/mar/01/russia-and-china-veto-un-resolution-to-impose-sanctions-on-syria>

64. Jones, *supra* note 56, at 808.

65. *Id.*

mitting in Syria.<sup>66</sup> Since the ICC already has the institutional capacity to prosecute the crimes being committed by the Assad government, it is more cost-effective to use that avenue rather than setting up a separate independent tribunal.

Although there are a variety of obstacles with all three avenues for pursuing justice in Syria, the ICC would be the most appropriate forum for prosecuting the Assad regime for the widespread crimes committed in the context of the conflict. The ICC has the capacity to investigate and prosecute international crimes of such complexity. It is also less susceptible to bias than domestic courts, and would be less likely to spark further conflict in the region.

#### INDIVIDUAL CRIMINAL LIABILITY

If the ICC were to somehow acquire jurisdiction over the Syrian conflict and oversee the investigation and prosecution of the crimes at issue, Assad and high-ranking officials within his government could be found individually liable under Rome Statute Article 25, which details the various modes of individual criminal responsibility, and Article 28, which specifically delves into the responsibility of commanders and other superiors.<sup>67</sup>

The incriminating evidence that exists is likely sufficient to attribute individual criminal liability to Assad and high-ranking officials within the regime under these provisions of the Rome Statute. In addition to witness testimony and UN and media reports, the increased use of digital media, including social media, will be tremendously valuable to international war crime prosecutors as it will provide much more evidence at their disposal. For example, anti-government protesters and activists have been documenting evidence via social media outlets since the start of conflict in March 2011. Additionally, CIJA's evidence gathering efforts will also strengthen the prosecution's case immensely. Not only is Assad as culpable as other war crime perpetrators prosecuted before him at the ICC, he may be even more culpable. The evidence that exists against him is more extensive than that used to prosecute other war crime perpetrators before him. Because the case against Assad is stronger than that of previous cases the ICC has tried, these previous cases can be used as blueprints in prosecuting Assad at the ICC. The cases that are helpful in developing theories of individual criminal liability against Assad include *The Prosecutor v. Germain Katanga*, *The Prosecutor v. Thomas Lubanga Dyilo*, and *The Prosecutor v. Jean-Pierre Bemba Gombo*.

Article 25(3) of the Rome Statute lists six forms of individual criminal responsibility. It is different from prior legal frameworks in the sense that it systemizes modes of participation into levels. The first level encompasses both direct and indirect commission, the highest degree of individual responsibility. The second level attributes individual liability to those

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66. *Id.* at 811.

67. The Rome Statute, *supra* note 5, arts. 25 and 28.

who order or instigate crimes within the jurisdiction. The third level is designed for aiders and abettors, and the fourth covers any other contribution to a group crime.<sup>68</sup> The fifth level encompasses those who directly and publicly incite others to commit the crime of genocide in particular. Lastly, the sixth level covers individuals who take a substantial step towards the commission of a crime, but the crime does not occur due to circumstances independent of the individual's intentions.<sup>69</sup> Although all of these modes of liability could potentially be applied to the Assad regime's conduct, this paper will only apply articles (a) and (d), the first and fourth levels respectively, to the actions of the Assad regime. This paper also argues that Assad could also be found individually liable as a superior under article 28 of the Rome Statute.

#### ARTICLE 25(3)(A): INDIRECT COMMISSION

Article 25(3)(a) attributes individual criminal responsibility to a person who "commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible."<sup>70</sup> The third manner of commission listed within this subsection, "through another person," has been actively developed by the ICC through previous cases. This form of liability is applicable to indirect perpetrators and proving it requires proof of objective and subjective elements. These elements were clarified by the Trial Chamber II through its decision in *The Prosecutor v. Germain Katanga*<sup>71</sup> Although the accused in that case was not found individually responsible as an indirect perpetrator, the Chamber's application of article 25(3)(a) in the decision sheds light on how this provision could be used as a theory of Assad's individual criminal liability.

On March 7, 2014, the ICC convicted Germain Katanga for crimes he committed while attacking the village of Bogoro in the Democratic Republic of the Congo (DRC). He was found liable for murder as a crime against humanity, as well as for the war crimes of murder, attacking a civilian population, destruction of property, and pillaging.<sup>72</sup> The Chamber first evaluated his individual liability as an indirect perpetrator under article 25(3)(a), explaining that it incurs where a person "1) exerts control over the crime where the material elements were brought about by one or more

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68. Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. INT'L CRIM. JUST. 953, 957 (2007).

69. The Rome Statute, *supra* note 5, art. 25.

70. *Id.*

71. The ICC has three judicial divisions: the Pre-Trial Division (composed of seven judges), the Trial Division (composed of six judges), and the Appeals Division (composed of five judges). They are assigned to the following Chambers: the Pre-Trial Chambers (each composed of one or three judges), the Trial Chambers (each composed of three judges) and the Appeals Chamber (composed of the five judges of the Appeals Division).

72. *Prosecutor v. Katanga*, ICC-01/04-01/07-3436, Trial Chamber II's Judgment pursuant to article 74 of the Statute, (Mar. 7, 2014), [https://www.icc-cpi.int/CourtRecords/CR2015\\_04025.pdf](https://www.icc-cpi.int/CourtRecords/CR2015_04025.pdf).

persons, 2) meets the mental elements prescribed by article 30 of the Rome Statute and the mental elements specific to the crime at issue, and 3) is aware of the factual circumstances which allow the person to exert control over the crime.”<sup>73</sup> With regards to the first element, control may take various forms such as control over the will of the perpetrators, including those who act under duress or by mistake.<sup>74</sup> Exerting control over the crime can also include “the existence of an organized apparatus of power whose leadership may be assured that its members will carry out the material elements of the crime.”<sup>75</sup> The Pre-Trial Chamber held that where a crime is committed by members of an “organized and hierarchical apparatus of power, the highest authority does not merely order the commission of a crime, but through his control over the organization, essentially decides whether and how the crime would be committed.”<sup>76</sup> In such an apparatus of power, the superior’s orders are automatically executed since the inferiors within the apparatus are interchangeable—they will always be someone available to carry out the orders no matter what. Proving this requires that the person wielding control over the apparatus of power conceived of the crime, oversaw its preparation at different hierarchical levels, and controlled its performance and execution.<sup>77</sup> This is how the superior ensures control over the crime.

Although the Chamber found that Katanga was at the apex of the militia, it did not find that there was a centralized and effective chain of command. For that reason, the Chamber could not conclude that the militia was an organized apparatus of power and that Katanga exerted control over the crimes of that militia under article 25(3)(a) of the Statute. Unlike the circumstances in *Katanga*, Assad’s military apparatus is organized and integrated in a way that implicates the highest levels of the government’s armed security forces.<sup>78</sup> At the start of the Syrian conflict in 2011, “the Syrian Army was one of the largest and best-trained forces in the Arab world.”<sup>79</sup> It consisted of eight armored or mechanized divisions and five specialized divisions.<sup>80</sup> However, not all divisions have been deployed during the conflict; in fact, Assad has made a conscious effort to deploy only those factions that are most loyal to him in order to avoid as many defections as possible.<sup>81</sup> In addition to controlling the military apparatus, Assad also maintains full control over his security-intelligence agencies. Although the security-intelligence agencies develop many of the policies,

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73. *Id.* ¶ 1399.

74. *Id.* ¶ 1402.

75. *Id.* ¶ 1403.

76. *Id.* ¶ 1405.

77. *Id.* ¶ 1412.

78. *See* Taub, *supra* note 33.

79. Joseph Holliday, *The Assad Regime: From Counterinsurgency to Civil War*, INST. FOR THE STUDY OF WAR (2013), <http://www.understandingwar.org/sites/default/files/TheAssadRegime-web.pdf>.

80. *Id.* at 42.

81. *Id.* at 43.

none of them are implemented without Assad's signature. Once Assad approves an order or a policy, the security-intelligence agency leaders send instructions down to the regional branch leaders who then pass the orders to local security agents for implementation.<sup>82</sup> All of this evidence is material that an ICC prosecutor could use to prove that Assad was in full control of the crimes being committed by his forces.

The second criterion for the indirect commission of a crime—that the mental element of indirect commission must meet the elements of article 30 of the statute,<sup>83</sup> as well as the mental elements specific to the crime at issue—can also be proven through existing evidence. The prosecutor must prove that the material elements of the crimes were committed with knowledge and intent. Assad's knowledge of any of the crimes detailed previously can be proven through the documentary evidence that CIJA investigators have smuggled out of the country. These documents prove Assad's knowledge; Assad personally signed policies that involve arbitrary arrests and sexual violence in detention centers, among other crimes. Furthermore, human rights organizations have documented many of the crimes that have occurred within government-controlled detention facilities, prisons and hospitals. That circumstantial evidence is sufficient to prove that Assad was aware of the abuses that occurred within organizations under the control of his own security forces.

With regard to the third criterion, Assad must be aware of the factual circumstances which allow him to exert control over the crime. In the Chamber's words, this means Assad must know of the "ingredients fundamental to his exertion of control over the crimes."<sup>84</sup> Although many soldiers have defected from Assad's army since the start of the conflict, the soldiers that remain are extremely loyal to Assad. Assad is aware of that fact, and there is documentary evidence to prove it. If Assad signs off on a policy allowing his soldiers to use rape as a war weapon, he is close to certain that his soldiers will carry through with the order. In other words, he is aware of the factual circumstances that allow him to exert control over his soldiers' actions.

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82. *Supra* note 5.

83. The Rome Statute, *supra* note 5, art. 30.

"1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly."

84. Katanga, ICC-01/04-01/07-3436, ¶1415.

## ARTICLE 25(3)(A): JOINT COMMISSION

*Katanga* demonstrates how the ICC has developed liability through another person under 25(3)(a).<sup>85</sup> The ICC's decision in *The Prosecutor v. Thomas Lubanga Diol* clarifies the law on committing a crime jointly with another person also under 25(3)(a) of the Statute.<sup>86</sup> The ICC's development of the law on this mode of liability, in particular, also supports a future conviction for Assad. On March 14, 2012, the ICC found Lubanga guilty of war crimes of enlisting and conscripting child soldiers during the Ituri Conflict that occurred in the DRC between 1999 and 2007. Finding him individually liable for these crimes as a co-perpetrator, the ICC applied the "control over the crime" doctrine. The Chamber focused its decision on the co-perpetrator's level of contribution to the commission of the crime, which recognizes as principals those who decide the method of execution of the crime and not just those who actually perpetrate it.<sup>87</sup> The Pre-Trial Chamber specified that co-perpetration consists of two objective elements, the first being the existence of a common plan between two or more persons, and the second being the essential contribution by each co-perpetrator to the objective elements of the crime.<sup>88</sup> A contribution is considered "essential" if the common purpose cannot be realized without it.<sup>89</sup> An essential contribution could consist of planning or organizing the commission of the crime and does not necessarily have to be the physical perpetration of it; planning or organizing has an element of control.

Additionally, the Pre-Trial Chamber clarified the subjective elements required for co-perpetration by applying article 30 of the Rome Statute—that a co-perpetrator must act with intent and knowledge. This can be established if "1) the person is aware that a circumstance exists or a consequence will occur in the ordinary course of events and 2) the person intends to engage in the relevant conduct and cause the relevant consequences or is aware that it will occur in the ordinary course of events."<sup>90</sup>

Lubanga was President of the Union of Congolese Patriots (UPC), and established its military wing, the Patriotic Force for the Liberation of the Congo (FPLC). He was also commander in chief of the army.<sup>91</sup> Although he was not directly involved with recruiting and training child soldiers—since that fell to the responsibility of military authorities—Lubanga was still well-informed on military matters and endorsed recruitment initiatives. There was evidence that he gave orders on military affairs.<sup>92</sup> The Chamber concluded that he shaped the policies of the UPC/

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85. *See Id.*

86. *See Prosecutor v. Lubanga*, ICC-01/04-1/06, Judgment pursuant to Art. 74 of the Statute, ¶ 921 (Mar. 14, 2012), [https://www.icc-cpi.int/CourtRecords/CR2006\\_02329.pdf](https://www.icc-cpi.int/CourtRecords/CR2006_02329.pdf).

87. *Id.* ¶ 920.

88. *Id.* ¶ 923.

89. Werle, *supra* note 68, at 962.

90. Lubanga, ICC-01/04-1/06, ¶ 926.

91. *Id.* ¶ 1142.

92. *Id.* ¶ 1266.

FPLC and directed the activities of his co-perpetrators.<sup>93</sup> His role was essential to the implementation of a common plan. The Chamber also concluded that Lubanga fulfilled the mental element of the crime by intending to participate in implementing the common plan, and that he was aware that the conscription and enlistment of children less than 15 years of age will occur “in the ordinary course of events as a result of the implementation of the common plan.”<sup>94</sup>

Although the substance of Assad’s crimes varies from those of Lubanga, both leaders played very similar roles in the perpetration of the crimes that occurred in their respective countries. Assad had a common plan with the officials in his security-intelligence and military apparatuses. That plan was to carry out torture tactics in detention facilities, use rape as a war weapon, and commit other atrocities in order to crush the rebellion against him. Assad’s contribution was absolutely essential to the implementation of the common plan because he approved every action committed by his forces. Nothing occurred without his direction or consent. Other top leaders in his regime were also essential because they gave direct orders to people on the ground.

Assad and Lubanga were both commanders in chief during a period of civil war, as well as top commanders of hierarchical armies. Their leadership in planning military operations made both of their roles essential to the implementation of the common plan to defeat their opposition. They also both shaped the policies and strategies of the military, essentially acting as the masterminds behind their military’s activities. Lubanga communicated frequently with his co-perpetrators<sup>95</sup> in the same way that Assad maintained constant communication with the Crisis Cell. Therefore, Lubanga’s conviction under article 25(3)(a) can be used as a blueprint in prosecuting Assad.

#### ARTICLE 25(3)(D): CONTRIBUTION TO A GROUP CRIME

Article 25(3)(a) of the Rome Statute offers two routes of prosecuting the officials at the highest levels of the Assad regime, including Assad himself. Alternatively, Article 25(3)(d) could be applied to Assad’s conduct throughout the conflict. *Katanga* clarifies the law in this area, since *Katanga* was convicted of murder as a crime against humanity under Article 7(1)(a) and murder as a war crime under article 8(2)(c)(i) of the Rome Statute and found individually liable under article 25(3)(d). This article deals with contributions in “any other way.” It is a residual form of accessoryship, used for conduct that is not considered aiding and abetting under 25(3)(c).<sup>96</sup> Although Assad is certainly a principal to the crimes committed in Syria, subsection (d) could be used as an alternative theory to prosecute him.

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93. *Id.* ¶ 1270.

94. *Id.* ¶ 1274 (internal quotation marks omitted).

95. *Id.* ¶ 1216.

96. *Katanga*, ICC-01/04-01/07-3436, ¶ 1618.

Katanga was found guilty of murder as a crime against humanity when the Chamber applied the following objective elements: “1) the accused committed or attempted to commit a crime within ICC jurisdiction, 2) the commission of such crime was by a group of persons acting with a common purpose, and 3) the accused made a significant contribution to the crime.”<sup>97</sup> The Chamber specified that it is necessary for the crime to be a part of the common purpose.<sup>98</sup> Furthermore, the accused’s contribution must be “connected to the commission of the crime and not solely to the activities of the group in a general sense.”<sup>99</sup> For the contribution to be significant, it must influence the commission of the crime, but it does not have to directly influence it.<sup>100</sup> In other words, the accused does not have to be a physical perpetrator to be considered an accessory to the crime. The subjective elements that the Chamber took into account include that the contribution by the accused was intentional, and that one of the specific mental elements specified in paragraphs (i) and (ii).<sup>101</sup> Either the accused’s contribution must be “made with the aim of furthering the criminal activity or criminal purpose of the group” or “be made with knowledge of the intention of the group to commit the crime.”<sup>102</sup> The Chamber relied on the second alternative in finding Katanga guilty.

The Chamber found that all of these elements existed in *Katanga*. It found first of all that the Ngiti combatants committed murder as crimes against humanity and war crimes, both crimes within the ICC’s jurisdiction. It also found that the Ngiti combatants were a part of a militia, which is a group of persons, and they were acting with a common purpose when they attacked the village of Bogoro and killed the Hema population. It also established that Germain Katanga made a significant contribution to the commission of the crimes as the president of the Ngiti militia by contributing to the planning of the attack on Bogoro among other acts. It further found that Katanga intended his contribution since he testified to the fact that he “acted deliberately and was fully aware that his conduct contributed to the activities of the Ngiti militia.”<sup>103</sup> The Chamber also found that he knew of the intention of the group to commit the crimes which formed their common purpose. The evidence showed that he knew the weapons and ammunition was intended for the attack because he facilitated its delivery and distribution.<sup>104</sup>

Although the Chamber did not find that Katanga was an accessory to rape and sexual slavery as war crimes and crimes against humanity under article 25(3)(d), it is likely that there is enough evidence for Assad to be

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97. *Id.* ¶ 1620.

98. *Id.* ¶ 1630.

99. *Id.* ¶ 1632.

100. *Id.*

101. *Id.* ¶ 1638.

102. *Id.* ¶ 1640 (internal quotation marks omitted).

103. *Id.* ¶ 1683.

104. *Id.* ¶ 1684.

prosecuted for such crimes at the ICC. Because it is almost certain that Assad could be prosecuted as a principal under article 25(3)(a), proving that Assad was an accessory to crimes is simpler since it requires a lower showing of responsibility by the accused. Focusing on his crimes of rape and sexual assault for example, the prosecutor would first have to show that the rape was committed as a war crime or crime against humanity. As was previously discussed, reports of rape by regime soldiers have been heavily documented. Second, the prosecutor would have to show that Assad committed that crime as a part of a group with a common purpose. He would not have to show that Assad physically perpetrated any instances of rape or sexual violence. He would only have to show that part of the Assad regime's common purpose was to use rape as a war tool, targeting women known to be associated with the opposition. The prosecutor would next have to prove that Assad made a significant contribution to the commission of the crime. Assad's contribution is not only significant, but it is essential to all the crimes that were committed. Without Assad, no official within his regime would have the authority to do anything. Additionally, Assad had the requisite mens rea as everything that he ordered was done with the goal of quashing the rebellion and destroying certain groups of people in Syria. In conclusion, article 25(3)(d) would be the easiest way of prosecuting Assad because it requires the lowest burden for the prosecutor.

#### ARTICLE 28: SUPERIOR RESPONSIBILITY

Article 28 of the Rome Statute assigns individual criminal responsibility to commanders and superiors specifically. The article attributes individual criminal responsibility to a military commander or person effectively acting as a military commander "for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces."<sup>105</sup> That military commander or person "either knew. . .or should have known that the forces were committing or about to commit such crimes [and] failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."<sup>106</sup> The article also assigns individual liability to superiors not considered military commanders.

The ICC first addressed liability of an accused under superior responsibility in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*.<sup>107</sup> The ICC convicted Bemba, under article 28(a) of the Statute, as a person effec-

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105. The Rome Statute, *supra* note 5, art. 28.

106. *Id.*

107. Alexandre Skander Galand, *First Ruling on Command Responsibility before the ICC*, CASE MATRIX NETWORK (2016) [http://blog.casematrixnetwork.org/toolkits/eventsnews/news/first-ruling-on-command-responsibility-before-the-icc/?doing\\_wp\\_cron=1520552961.8478660583496093750000](http://blog.casematrixnetwork.org/toolkits/eventsnews/news/first-ruling-on-command-responsibility-before-the-icc/?doing_wp_cron=1520552961.8478660583496093750000)

tively acting as a military commander of the crimes of murder and rape as both war crimes and crimes against humanity.<sup>108</sup> Unlike Lubanga and Katanga, Bemba was actually convicted for crimes of using sexual violence against men, women, and children as a tool to terrorize the civilian population in the Central African Republic (CAR). In *Bemba*, the Chamber found that Movement for the Liberation of the Congo (MLC) forces committed crimes within the jurisdiction of the court beyond a reasonable doubt. Bemba was Commander in Chief of the Liberation Army of the Congo (ALC) and President of the MLC throughout the period of the relevant charges. They found that he had “ultimate decision-making authority” and “broad formal powers”.<sup>109</sup> Bemba additionally directed the MLC’s funding, communicated directly with commanders in the field, had well-established reporting methods set up, received operational and technical advice from the MLC General Staff, and issued operational orders.<sup>110</sup> He also had disciplinary authority over MLC troops.

The Chamber further found that Bemba knew that MLC forces were committing these crimes. Although he was not physically at the location of the atrocities, he was the leader of his forces and had ultimate authority over all military operations. Bemba was constantly informed via military and civilian intelligence services with “information on the combat situation, troop positions, politics, and allegations of crimes.”<sup>111</sup> Additionally, the Chamber found that Bemba “failed to take necessary and reasonable measures to prevent or repress the commission of the crimes, or to submit the matter to competent authorities for investigation and prosecution.”<sup>112</sup> Instead, Bemba merely warned his troops not to mistreat civilians, created two investigative commissions, and had seven low-ranking soldiers tried on trivial pillaging charges. He also set up the Sibut Mission, which was supposed to be an investigation of the alleged crimes, but it did not fulfill that purpose.<sup>113</sup> Bemba could have withdrawn troops from CAR at any time, but did not do so until March 2003. Lastly, the Chamber found that the crimes were committed as a result of Bemba’s failure to “exercise control properly” over the MLC forces, including remedying deficiencies in training and taking necessary and reasonable measures to prevent the commission of crimes, and submit the matter to competent authorities.<sup>114</sup>

As president and commander in chief, Assad could similarly be found individually liable for war crimes and crimes against humanity under article 28 of the Rome Statute. Although the Assad regime has its own military apparatus and a hierarchy of power within it, Assad represents the

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108. Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61 (7) (a) and (b) (Confirmation of Charges), ¶ 697, (Jun. 15, 2009).

109. *Id.*

110. *Id.*

111. *Id.* ¶ 708.

112. *Id.* ¶ 718.

113. *Id.* ¶ 726.

114. *Id.* ¶ 737.

ultimate authority over the military. His military is under his complete command and control. In July of 2012, a bomb attack killed Assad's inner circle security leadership, including his brother-in-law and defense minister.<sup>115</sup> At that point, Assad assumed personal command over his military, assuming day-to-day decision-making authority.<sup>116</sup> There is no possible way that Assad was unaware of crimes committed by his forces, since everything they did was integrated into a statewide policy that Assad ultimately approved. Furthermore, Assad failed to take any measures to prevent the commission of war crimes and crimes against humanity; rather, he did the opposite in encouraging and approving of them. Once again, the proof exists within the documents that CIJA stole, known as the Assad Files. Looking at the cases that have been mentioned throughout this paper, one lesson remains clear—the degree of criminal responsibility does not decrease as distance from the actual act increases; in fact, it is often the exact opposite.

#### CONCLUSION

In conclusion, finding Assad and top officials within his regime individually criminally liable for war crimes and crimes against humanity is possible through prosecution at the ICC. Articles 25 and 28 provide several modes of liability that are potential pathways for their prosecution. The evidence exists. The blueprints exist. The only thing left is for jurisdiction to take hold, and that cannot happen without support from the entire international community. If politics continues to trump humanity, the Syrian people will never attain the justice they deserve.

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115. Samia Nakhoul, *In shifting Syria Conflict, Assad assumes command of forces*, REUTERS (Oct. 10, 2012), <http://www.reuters.com/article/us-syria-crisis-assad-asma-idUSBRE8990U220121010>.

116. *Id.*