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## Improving the Odds: Strengthening the Prospects for Accountability in the Syrian Conflict by Regulating the Marketplace for Information on Atrocity Crimes

Kaitlin Owens

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IMPROVING THE ODDS: STRENGTHENING THE PROSPECTS FOR  
ACCOUNTABILITY IN THE SYRIAN CONFLICT BY REGULATING THE  
MARKETPLACE FOR INFORMATION ON ATROCITY CRIMES

*Kaitlin Owens*<sup>1</sup>

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## I. INTRODUCTION

A list of the atrocities committed by the various parties to the Syrian conflict, now entering its ninth year, resembles an encyclopedia of international crimes and human rights violations: deliberate and indiscriminate attacks on civilians, arbitrary detentions, enforced disappearances, torture, use of child soldiers, extrajudicial executions, sexual violence, use of prohibited weapons, and resort to starvation as a tool of warfare.<sup>2</sup> The staggering number of offences is reflected in the sheer volume of information about the conflict, including in the form of images, videos, interviews, reports, and other types of documentation.

The Syrian conflict exemplifies the new reality of investigations into the commission of atrocity crimes, one where many diverse parties act as “suppliers”, collecting, preserving, and distributing information on these offences. With the ever-growing dissemination of technology and importance of the Internet, this trend is likely to continue in future conflicts.

The increase in the number of suppliers has presented new and significant challenges for those seeking justice for international crimes and gross human rights abuses. Duplication of efforts results in the inefficient use of resources and the endangerment of witnesses. Prosecutors and other “demanders” of information must waste time navigating a

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<sup>2</sup> See Syria, HUMAN RIGHTS WATCH, <https://www.hrw.org/middle-east/n-africa/syria> (last visited Apr 2, 2018); Justice for Syria, AMNESTY INTERNATIONAL (2017), <https://www.amnesty.org/en/latest/campaigns/2017/03/justice-for-syria/> (Apr 2, 2018); SARAH CHYNOWETH, “WE KEEP IT IN OUR HEART”: SEXUAL VIOLENCE AGAINST MEN AND BOYS IN THE SYRIA CRISIS (2017).

complex web of suppliers. Suppliers' self-determination of applicable standards means information gathered may be of no use to, or even hinder, future accountability efforts. And the ever-changing landscape of investigating bodies renders difficult the provision of informed consent for future sharing of information.

If these challenges could be overcome, however, the increase in suppliers of information has the potential to improve the odds of obtaining accountability for victims of atrocity crimes. What the investigative landscape requires is a regulatory framework so that suppliers will provide credible and reliable information that has been gathered in an ethical manner, and demanders will have more efficient access to that information.

This paper provides that framework. Its foundation lies in Mark Kersten's discussion of the "market place for the collection of atrocity evidence".<sup>3</sup> In examining this marketplace, Kersten focuses on the Syrian context and highlights other actors on the supply side, potential coordination and collaboration problems within the marketplace, as well as the potential for the United Nations'

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<sup>3</sup> Mark Kersten, *What counts as evidence of Syria's war crimes?*, WASHINGTON POST, October 28, 2014, <https://www.washingtonpost.com/news/monkey-cage/wp/2014/10/28/what-counts-as-evidence-of-syrias-war-crimes/> (last visited Apr 2, 2018).

IIIM<sup>4</sup> to play a role in coordinating amongst the various actors involved.<sup>5</sup>

This paper builds upon Kersten's initial exploration of the market,<sup>6</sup> examining the reasons for an increase in suppliers, the key players involved in the Syrian context, and the unique challenges and opportunities associated with the market for information about these crimes. It then provides a new regulatory framework responsive to these challenges. This model, combining elements of the United Nations' IIIM, the regulatory framework for private military companies, and the humanitarian cluster approach, would endure beyond the Syrian context to provide a stronger foundation for accountability in future conflicts.

## II. THE CONDITIONS ENCOURAGING AN INCREASE IN SUPPLIERS

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<sup>4</sup> The "International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011", which is discussed in further detail in Chapter Two-IV-B and Chapter Four-II.

<sup>5</sup> Kersten, *supra* note 3; Mark Kersten, *How a new U.N. resolution could – someday – bring justice to Syria*, WASHINGTON POST, December 30, 2016, <https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/30/how-a-new-u-n-resolution-could-someday-bring-justice-to-syria/> (last visited Apr 2, 2018).

<sup>6</sup> The paper will refer to a market for "information" rather than for "evidence", however, to distinguish the role of individuals, organizations, and institutions involved in information-gathering and fact-finding from that of judicial organs involved in collecting, producing or assessing evidence.

Central to any marketplace is its product. The basic product within the marketplace for the investigation of atrocities is what one would expect: information about massive human rights violations and/or international crimes. An analysis of the nature of this product illustrates why it is that such a large variety of actors can produce it. That they can produce it, however, does not explain why they choose to do so. Consideration is therefore given to the purposes for which such information may be produced, and how the shortcomings of the traditional investigative framework create space for new actors to enter.

An initial point is necessary before launching into the discussion. As is noted below, information may be collected for a number of purposes. The standard of proof in criminal proceedings is exactingly high, requiring proof beyond a reasonable doubt. Not all actors will be able to collect information admissible in criminal proceedings, nor will they necessarily collect information with future criminal proceedings in mind. This paper does not suggest that they should. Information is not only useful for prosecutions if it can itself be admitted and relied upon in a criminal proceeding. Reports by non-governmental organizations (NGOs), which may have limited utility within a criminal trial,<sup>7</sup> may still provide significant assistance in identifying

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<sup>7</sup> For instance, although the International Criminal Court's Pre-Trial Chamber criticized the Office of the Prosecutor's reliance on NGO reports and press articles as evidence establishing key elements of its case, it noted they might provide "a useful introduction to the historical context of a conflict situation": Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11, Decision adjourning the hearing on the confirmation of the charges ¶ 35 (June 2013) [https://www.icc-cpi.int/CourtRecords/CR2015\\_04878.pdf](https://www.icc-cpi.int/CourtRecords/CR2015_04878.pdf). In Sweden,

crimes to be investigated and highlighting where evidence and/or witnesses may be located.<sup>8</sup> Additionally, actors are likely to be investigating the same crimes and potentially speaking with the same witnesses regardless of the standard of proof applied. As such, this paper does not limit the marketplace to those actors who collect information specifically with future criminal proceedings in mind.

#### A. NATURE OF THE PRODUCT

The information produced for this marketplace can take a number of different forms, each with its own benefits and shortcomings when it comes to its use in criminal investigations and prosecutions. Hearsay, for instance, may be a highly useful tool early on in investigations, providing background context and directing investigators to potential witnesses and evidence.<sup>9</sup> It also does not necessarily present the same challenges for witness protection, given the lack of a specific original source, although care should be given to whether the hearsay is capable of placing individuals or groups in danger. As a form of evidence in court or a source for advocacy, however, hearsay is likely far less credible and reliable than other direct forms of evidence.<sup>10</sup>

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NGO reports have been admitted and considered to be credible background evidence: HUMAN RIGHTS WATCH, "THESE ARE THE CRIMES WE ARE FLEEING": JUSTICE FOR SYRIA IN SWEDISH AND GERMAN COURTS 58 (2017).

<sup>8</sup> PANEL OF INDEPENDENT EXPERTS, EXPERT INITIATIVE ON PROMOTING EFFECTIVENESS AT THE INTERNATIONAL CRIMINAL COURT 67 (2014).

<sup>9</sup> *Id.*

<sup>10</sup> Although it is important to note that, unlike in common law jurisdictions, there is no presumption of inadmissibility of hearsay before the ICC and the international tribunals. See the discussion in David

Direct witness interviews are another form of information, and one that is considered to be highly valuable.<sup>11</sup> Interviews may have widely varied characteristics. They may consist of sworn or affirmed testimony, or they may be unsworn. They may be recorded by audio or video, or written notes may be taken on the content of the interview. The nature of the questions asked may be open-ended or leading. Interviews may be conducted of individuals, or of groups. How an interview is conducted is likely to impact the overall credibility and reliability of the information given. While direct witness testimony is potentially more valuable than hearsay, witnesses may be endangered due to their providing information. Assuming that they can even be located after the initial interview, which may take places years prior to any potential criminal trial, they may also be unwilling or unable to testify.

Documents collected during an investigation may include “autopsy reports, court records, military personnel records, official press statements and public speeches”.<sup>12</sup> This information removes some of the concerns with respect to witness availability and witness protection. It may also be highly reliable, provided it can be authenticated. However, preserving this form of information requires infrastructure, institutional support and, where the documents are to be used

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Weissbrodt, Ferhat Pekin & Amelia Wilson, *Piercing the Confidentiality Veil: Physician Testimony in International Criminal Trials Against Perpetrators of Torture*, 15 MINN. J. INT’L L. 43, 58–60 (2006).

<sup>11</sup> See e.g. OHCHR, COMMISSIONS OF INQUIRY AND FACT-FINDING MISSIONS ON INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: GUIDANCE AND PRACTICE 43 (2015).

<sup>12</sup> *Id.* at 44.



in a future criminal trial, a clear outline of the “chain of custody”.<sup>13</sup>

Information may also take the form of videos and photographs. Investigators may look to satellite photographs, sourced from commercial providers, to examine a landscape before and after an alleged event.<sup>14</sup> Photos and videos may also be taken on smartphones by individuals present at the scene of an event, who may then provide them directly to investigators or post them to online platforms such as Facebook, Twitter, or YouTube.<sup>15</sup> Perpetrators may also take or post photographs or videos.<sup>16</sup> This type of information may provide compelling indicia of previously unknown crimes or additional perspectives on those which have already been documented.<sup>17</sup> However, determining the authenticity and veracity of these sources requires significant time and financial resources.<sup>18</sup>

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<sup>13</sup> ELIZABETH MILLER & CHRISTINA SCHICIANO, DESIGNING COMMISSIONS OF INQUIRY WITH A VIEW TOWARDS PROMOTING ACCOUNTABILITY: A REPORT TO THE OFFICE OF GLOBAL CRIMINAL JUSTICE (J/GCJ) & THE BUREAU OF INTERNATIONAL ORGANIZATION AFFAIRS (IO) 16 (2016).

<sup>14</sup> OHCHR, *supra* note 11 at 45.

<sup>15</sup> See *Id.* at 44.; KELLY MATHESON, VIDEO AS EVIDENCE: FIELD GUIDE 178 (2016).

<sup>16</sup> See e.g. the ICC’s recent arrest warrant for Mahmoud Mustafa Busayf Al-Werfalli, which appears to have been based in part on materials posted on social media by the Media Centre of the Al-Saiqa Brigade: Prosecutor v. Mahmoud Mustahfa Busayf Al-Werfalli, Case No.ICC-01/11-01/17, Warrant of Arrest ¶ 3 (15 August 2017) [https://www.icc-pi.int/CourtRecords/CR2017\\_05031.PDF](https://www.icc-pi.int/CourtRecords/CR2017_05031.PDF).

<sup>17</sup> OHCHR, *supra* note 11 at 44.

<sup>18</sup> See *Id.* at 44.; MATHESON, *supra* note 15 at 172–175. for steps to take in verifying open source video.

Where photos or videos are shared online, they fall within the broader category of “open source intelligence”, that is, information and sources generally available to the public.<sup>19</sup> Other forms of open source intelligence include news reports and academic publications.<sup>20</sup> This form of information provides a number of benefits: it does not require investigators to travel to dangerous locations; it allows for online collaboration in determining veracity and authenticity; and it potentially allows for fewer witnesses to testify, while bolstering the credibility of those who do.<sup>21</sup> A key challenge, however, concerns the reliability of open source intelligence – these materials are often circumstantial, and are likely to require corroboration or interpretation in order to be utilized at a criminal trial.<sup>22</sup> There is also significant uncertainty surrounding its potential admissibility as evidence, given it has been largely untested in front of international tribunals.<sup>23</sup>

What emerges from this brief overview of the nature of the product is the ease with which actors of varying sizes and levels of sophistication can produce it. While storing and authenticating information is likely to be more resource-intensive, taking a video simply requires a camera or a smartphone. Conducting an interview requires only a subject. The product is therefore such that it can be produced by a wide variety of actors. The question is why these actors choose to do so.

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<sup>19</sup> Keith Hiatt, *Open Source Evidence on Trial*, 125 YALE L.J. FORUM 323, 324.

<sup>20</sup> *Id.* at 324.

<sup>21</sup> *Id.* at 325.

<sup>22</sup> *Id.* at 326–327.

<sup>23</sup> *Id.* at 327.

## B. PURPOSES OF THE PRODUCT

Actors who look to gather information on human rights violations and/or international crimes may do so to establish an evidentiary basis for future criminal trials.<sup>24</sup> But this is not the only reason for collecting information about atrocities. Actors may seek to shine a light on crimes or human rights violations, perhaps to spur action or to shame a government into changing its behavior.<sup>25</sup> They may feel that certain incidents or regions are being ignored or given insufficient attention by other actors or the international community. Actors may also want to create an historical record, so that events cannot be denied in the future, or they may want to contradict an official narrative of events. Or actors may be influenced by a combination of these factors,<sup>26</sup> or other factors not listed. What allows them the space to enter the marketplace, in addition to the ease of producing the product, are the limitations associated with traditional suppliers in the international criminal law field.

## C. SHORTCOMINGS OF TRADITIONAL SUPPLIERS

When one thinks about who is responsible for investigating serious crimes, the actor that immediately springs to mind is the state. This may be via its police force, its security apparatus, or other state institutions tasked with

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<sup>24</sup> See the discussion of the Commission for International Justice and Accountability (CIJA) in Chapter Two-I-C.

<sup>25</sup> Human Rights Watch and Amnesty International are examples of organizations applying this “naming and shaming” approach.

<sup>26</sup> See the discussion of the Syrian Network for Human Rights (SNHR) in Chapter Two-I-B below.

conducting investigations. In situations of conflict or repression, however, those institutions may face significant challenges to their ability to carry out meaningful investigations. In extreme cases, institutions may virtually cease to exist. In others, the institutions may remain but turn a blind eye to atrocities perpetrated by state actors, including those in the security sectors.

Who then conducts investigations? With the emergence of international criminal law, investigators tied to international criminal tribunals,<sup>27</sup> hybrid criminal tribunals,<sup>28</sup> and the International Criminal Court (ICC) have at times attempted to fill the void. It is beyond the scope of this paper to consider how each of these institutions has conducted its investigations. The case of the ICC, however, provides a clear example of this approach as well as the limitations attached.

*i. Investigations at the ICC*

In order for the Office of the Prosecutor (OTP) at the ICC to conduct an investigation, the ICC must have jurisdiction over a situation. The ICC has jurisdiction over four categories of crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>29</sup> Its jurisdiction is limited to situations where: (1) the crime is committed on the territory of a State Party; (2) the crime is committed by the

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<sup>27</sup> E.g. the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR).

<sup>28</sup> E.g. the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon (STL).

<sup>29</sup> Rome Statute of the International Criminal Court, art. 13, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute] at art. 5.

national of a State Party; or (3) a non-State Party accepts the Court's jurisdiction "with respect to the crime in question".<sup>30</sup> Additionally, the crime must have been committed within the temporal jurisdiction of the court.<sup>31</sup>

The ICC may exercise its jurisdiction where: (1) a State Party refers a situation involving the alleged commission of one or more crimes to the OTP; (2) the United Nations (UN) Security Council refers such a situation to the OTP; or (3) the Prosecutor initiates an investigation on her own initiative.<sup>32</sup> Where the UN Security Council refers a matter, the ICC may exercise its jurisdiction regardless of the territory on which the crimes have allegedly been perpetrated, or the nationalities of the alleged perpetrators.<sup>33</sup> In other words, the Security Council has the authority to refer to the ICC both State Parties and non-States Party.

In exercising its jurisdiction, the OTP will conduct a preliminary examination of the situation and, upon the satisfaction of certain criteria,<sup>34</sup> open an investigation.<sup>35</sup> During the course of that investigation, and provided it is permitted to by the state in question, the OTP will typically send missions to the country being investigated; collect

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<sup>30</sup> *Id.* at art. 12.

<sup>31</sup> *Id.* at art. 11.

<sup>32</sup> *Id.* at art. 13.

<sup>33</sup> *Id.* at art. 13(b).

<sup>34</sup> These include, among others, "if the crimes were committed after 1 July 2002...; if they amount to war crimes, crimes against humanity or genocide; the gravity of these crimes; if there are no genuine investigations or prosecutions for the same crimes at the national level; and if opening an investigation would not serve the interests of justice and of victims": Office of the Prosecutor, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/about/otp> (last visited Apr 2, 2018).

<sup>35</sup> *Id.*

evidence; and interview alleged perpetrators, victims, and witnesses.<sup>36</sup> As perhaps goes without saying, any investigation and evidence-gathering will require cooperation from the state concerned, including from its domestic police forces.<sup>37</sup> The OTP is then responsible for determining whether to seek to proceed to trial, and for conducting any eventual prosecutions.<sup>38</sup>

ii. *Limitations of the ICC's investigative capacities*

Even from this cursory overview of the ICC's jurisdiction and investigative procedures, several challenges are immediately apparent. The first relates to the ICC's lack of jurisdiction over non-States Parties. In cases of non-States Parties, absent a Security Council resolution, the ICC will not have jurisdiction to commence a preliminary examination, let alone an investigation. Syria, which is not party to the Rome Statute, provides such an example. While the ICC has jurisdiction over nationals of State Parties participating in the Syrian conflict, it would need a Security Council referral in order to have jurisdiction over crimes committed by Syrians or nationals of other non-States Party in Syria.<sup>39</sup> Given the certainty of a Russian veto of any ICC referral, the first three

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<sup>36</sup> *Id.*

<sup>37</sup> Zhu Wenqi, *On co-operation by states not party to the International Criminal Court*, 88 IRRC 87, 96 (2006).

<sup>38</sup> Office of the Prosecutor, *supra* note 34.

<sup>39</sup> See the discussion in Jennifer Trahan, NEW PATHS TO ACCOUNTABILITY FOR CRIMES IN SYRIA AND IRAQ (INCLUDING ICC JURISDICTION OVER FOREIGN FIGHTERS) JUST SECURITY (2014), <https://www.justsecurity.org/17308/paths-accountability-crimes-syria-iraq-including-icc-jurisdiction-foreign-fighters/> (May 27, 2018).

years of the Syrian conflict passed without any such vote.<sup>40</sup> An eventual referral resolution was proposed in May 2014, but rejected due to vetoes by Russia and China.<sup>41</sup> Consequently, the ICC's ability to investigate crimes committed in the Syrian conflict is limited.

Even if the ICC acquires jurisdiction over the broader Syrian conflict and the OTP ultimately commences an investigation, significant challenges to the collection of evidence remain. One such challenge stems from the ICC's reliance on state cooperation. The ICC may accept voluntarily-provided information from NGOs, but it must obtain permission from the state concerned before its investigators travel to obtain these materials.<sup>42</sup> The ICC may never obtain that cooperation or may obtain cooperation at a time far removed from the commission of the crimes in question. For instance, the Security Council referred Libya to the ICC in February 2011.<sup>43</sup> Although the ICC issued arrest warrants in May 2011, investigators were only deployed to Libya in October of that year.<sup>44</sup> The government of Sudan has refused to cooperate with the OTP, including by denying it access to its territory.<sup>45</sup> The inability to be on the ground right

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<sup>40</sup> Stephen J. Rapp, *Overcoming the Challenges to Achieving Justice for Syria*, 30 EMORY INTL. L. REV. 155, 158 (2015).

<sup>41</sup> *Id.*

<sup>42</sup> Alex Whiting, *Dynamic Investigative Practices at the International Criminal Court*, 76 L. AND CONTEMPORARY PROBLEMS 163, 183 (2013).

<sup>43</sup> Kersten, *supra* note 3.

<sup>44</sup> *Id.*

<sup>45</sup> See OFFICE OF THE PROSECUTOR, TWENTY-SIXTH REPORT PURSUANT TO PARAGRAPH 8 OF THE UN SECURITY RESOLUTION (UNSCR) 1593 (2005) 37 (2017); Statement of ICC Prosecutor, Fatou Bensouda, before the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), INTERNATIONAL CRIMINAL COURT (2016), <https://www.icc->

away, or even at all, limits the ICC's access to information and evidence.

Another challenge stems from the significant complexity and cost of international criminal investigations and the resource constraints facing the ICC. Stuart Ford examines the nine situations that the ICC was investigating or had investigated as of July 2015, making the following observations:

To put this all together, the typical ICC investigation covers a variety of war crimes and crimes against humanity committed during the course of an armed conflict. The ICC will usually investigate crimes committed at between twenty and thirty separate crime sites over a period of several months to several years. These crimes are typically carried out by sophisticated, hierarchically organized armed groups, and the resulting violence is systematic and widespread. In most cases, the ICC will investigate more than one perpetrator group. The typical ICC investigation will cover crimes that resulted in the murder of more than a thousand people, the rape of anywhere from hundreds to thousands of people, serious injury to thousands, and the displacement by violence of hundreds of thousands to millions of people. The victims of these crimes will overwhelmingly be civilians, including many women and children. Usually, the perpetrators commit their crimes with a discriminatory motive. Moreover, the



violence is often carried out in particularly cruel or brutal ways.<sup>46</sup>

One investigation with these characteristics would, on its own, present manifold challenges. As of February 2019, the OTP was investigating situations in eleven countries.<sup>47</sup> As Nicole De Silva points out, conducting these types of investigations “demands substantial local knowledge and access, as well as considerable financial resources and personnel.”<sup>48</sup> As discussed above, the OTP may not have local access. It additionally tends to have limited local experience.<sup>49</sup>

The OTP also lacks the requisite financial resources and personnel. Part of this was an institutional choice – states designed the ICC to be relatively small in size, to possess limited investigative capacities, and to encourage states to prosecute their own cases rather than have such cases proceed at the ICC.<sup>50</sup> Even as the ICC’s caseload has grown, it has been given limited financial support from the ICC’s Assembly of States Parties.<sup>51</sup> And its budget is simply not commensurate

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<sup>46</sup> Stuart Ford, *What Investigative Resources does the International Criminal Court Need to Succeed? A Gravity-Based Approach*, 16 WASHINGTON UNIVERSITY GLOBAL STUDIES L. REV. 1, 35 (2017).

<sup>47</sup> Situations under investigation, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/Pages/Situations.aspx> (last visited Feb 10, 2019). The countries being investigated were: Burundi, Georgia, Central African Republic (two situations), Mali, Côte d’Ivoire, Libya, Kenya, Sudan, Uganda, and the Democratic Republic of the Congo.

<sup>48</sup> Nicole De Silva, *Intermediary Complexity in Regulatory Governance: The International Criminal Court’s Use of NGOs in Regulating International Crimes*, 670 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 170, 177 (2017).

<sup>49</sup> *Id.*

<sup>50</sup> Whiting, *supra* note 42 at 176.

<sup>51</sup> De Silva, *supra* note 48 at 177.

with the gravity of the crimes it investigates. Ford ultimately concludes that, in comparison with similarly grave domestic investigations in Western Europe and the United States, the ICC is “enormously under-resourced”.<sup>52</sup>

This lack of resources limits the number of investigators available to any particular investigation, and requires the OTP to make choices as to which investigations to prioritize given the reality of limited resources.<sup>53</sup> It has also contributed to criticism by judges at the ICC when the OTP has been unable to meet the high standards demanded by the Court in conducting its investigations and presenting evidence.<sup>54</sup>

The case study of the ICC therefore illustrates many of the challenges facing international criminal prosecutors looking to investigate and ultimately prosecute atrocity crimes. The requirement of jurisdiction, the need for cooperation from the states in question, and the high cost of international criminal proceedings coupled with resource constraints limit these institutions’ ability to carry out efficient investigations.

The ICC also provides an illustration of the response to these challenges. As De Silva points out, the Court relies heavily on assistance provided by NGO intermediaries, including in collecting information and identifying witnesses.<sup>55</sup> The shortcomings of international criminal investigations therefore create an opening through which other actors may enter the marketplace. The results of this

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<sup>52</sup> Ford, *supra* note 46 at 65.

<sup>53</sup> Whiting, *supra* note 42 at 176–177.

<sup>54</sup> PANEL OF INDEPENDENT EXPERTS, *supra* note 8 at 62–63.

<sup>55</sup> De Silva, *supra* note 48 at 181–182.

opening can be seen in the context of the Syrian conflict, in which the marketplace features a large number of different types of suppliers.

### III. THE MARKETPLACE IN THE SYRIAN CONFLICT

The Syrian conflict provides a clear example of the marketplace for investigating atrocity crimes. This section of the paper examines the actors involved in that particular marketplace to provide a context that can be used to understand how an increase in the number of suppliers impacts the product in the marketplace as well as how its participants interact with each other and with sources.

#### A. ACTORS ON THE SUPPLY SIDE

There are four general subgroups which can be identified on the supply side: individuals, human rights organizations, private investigative organizations, and international institutions/mechanisms. The sections below provide a general overview of each subgroup, as well as a specific example of an actor within the category.

##### *i. Individuals*

Individuals provide crucial documentation of human rights violations and international crimes in Syria. A significant amount of these materials consist of open source intelligence. For example, activists uploaded videos of the initial peaceful protests as well as ones capturing the fallout

of chemical attacks and aerial bombings.<sup>56</sup> Additionally, militant groups have disseminated videos of beheadings, and government supporters have uploaded their own images.<sup>57</sup>

One key individual source of documentation of international crimes in Syria is a man code-named “Caesar”. Caesar worked as a photographer with the Syrian military police in Damascus, taking photographs of crime scenes and accidents.<sup>58</sup> Following the start of the Syrian conflict, Caesar was ordered to photograph the bodies of detainees who had been killed in custody, in order to document their deaths.<sup>59</sup> During the three years he spent taking these photographs, he surreptitiously made copies which he subsequently smuggled outside of Syria.<sup>60</sup> Between Caesar and others engaged in similar acts, approximately 55,000 images had been made available outside of Syria as of January 2014.<sup>61</sup> At least 11,000 bodies are depicted in the photographs, which

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<sup>56</sup> Sarah El Deeb, *History of Syria's War at Risk as YouTube Reins In Content*, BLOOMBERG TECHNOLOGY, September 13, 2017, <https://www.bloomberg.com/news/articles/2017-09-13/history-of-syria-s-war-at-risk-as-youtube-reins-in-content> (last visited Apr 5, 2018).

<sup>57</sup> *Id.*

<sup>58</sup> Garance le Caisne, *‘They were torturing to kill’: inside Syria’s death machine*, THE GUARDIAN, October 1, 2015,

<https://www.theguardian.com/world/2015/oct/01/they-were-torturing-to-kill-inside-syrias-death-machine-caesar> (last visited Apr 5, 2018); A REPORT INTO THE CREDIBILITY OF CERTAIN EVIDENCE WITH REGARD TO TORTURE AND EXECUTIONS OF PERSONS INCARCERATED BY THE CURRENT SYRIAN REGIME, 4 (2014),

[http://www.carter-ruck.com/images/uploads/documents/Syria\\_ReportJanuary\\_2014.pdf](http://www.carter-ruck.com/images/uploads/documents/Syria_ReportJanuary_2014.pdf) (last visited Dec 29, 2017). [hereinafter CAESAR CREDIBILITY REPORT].

<sup>59</sup> le Caisne, *supra* note 58; CAESAR CREDIBILITY REPORT, *supra* note 58.

<sup>60</sup> le Caisne, *supra* note 58; CAESAR CREDIBILITY REPORT, *supra* note 58.

<sup>61</sup> CAESAR CREDIBILITY REPORT, *supra* note 58 at 4.

also contain the number associated with the Syrian prison facility at which death occurred.<sup>62</sup>

*ii. Human rights organizations*

Human rights organizations are also key suppliers of information about human rights violations and international crimes occurring in the context of the Syrian conflict.

It is important to note at the outset that these groups vary enormously in size, scale of operation, and overall sophistication. Robert Charles Blitt provides a succinct summary of the diversity of human rights NGOs more broadly:

First, human rights NGOs may operate on international, regional or national levels. Second, the activities of these organizations vary from international advocacy to pure fact-finding and research. Third, human rights NGOs may be membership-driven, or alternatively rely on foundational or corporate support to maintain operating budgets. Fourth, these organizations may use volunteers to undertake projects or insist on employing professional, paid staff members. Finally, the size of these organizations ranges from multimillion dollar international NGOs to small, one or two person operations with little or no real budget.<sup>63</sup>

There are numerous human rights NGOs working on documenting the Syrian conflict. Examples of organizations focused specifically on Syria include the Violations

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<sup>62</sup> Rapp, *supra* note 40 at 163.

<sup>63</sup> Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 *BUF. HUMAN RIGHTS L. REV.* 261, 281 (2004).

Documentation Center in Syria (VDC), the Syrian Observatory for Human Rights (SOHR), the Syria Justice and Accountability Centre (SJAC), the Syrian Human Rights Committee (SHRC), the Syrian Center for Media and Freedom of Expression (SCM), Syrians for Truth and Justice, the Syrian Institute for Justice, the Syrian Center for Studies and Human Rights, the Syrian Center for Statistics and Research, the Syrian Archive, and the Syrian Network for Human Rights (SNHR). Other organizations such as Human Rights Watch and Amnesty International, which do not focus solely on the Syrian conflict, have also conducted investigations into atrocities within Syria.<sup>64</sup>

SNHR provides an example, although by no means an exhaustive one, of the type of work carried out by these organizations. Founded in June 2011, SNHR characterizes itself as “an independent, non-partisan, non-profit organization [which] doesn’t work by any ideology.”<sup>65</sup> It is registered as a non-profit limited liability company in the United Kingdom, and a non-profit organization in the United

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<sup>64</sup> See e.g. HUMAN RIGHTS WATCH, *DEATH BY CHEMICALS, THE SYRIAN GOVERNMENT’S WIDESPREAD AND SYSTEMATIC USE OF CHEMICAL WEAPONS* (2017), <https://www.hrw.org/report/2017/05/01/death-chemicals/syrian-governments-widespread-and-systematic-use-chemical-weapons> (Dec 31, 2017); AMNESTY INTERNATIONAL, *HUMAN SLAUGHTERHOUSE: MASS HANGINGS AND EXTERMINATION AT SAYDNAYA PRISON, SYRIA* (2016), [https://www.amnestyusa.org/wp-content/uploads/2017/04/human\\_slaughterhouse.pdf](https://www.amnestyusa.org/wp-content/uploads/2017/04/human_slaughterhouse.pdf) (last visited Dec 31, 2017).

<sup>65</sup> About Us, SYRIAN NETWORK FOR HUMAN RIGHTS, <http://sn4hr.org/about-us/> (Oct 20, 2017).

States.<sup>66</sup> It is governed by a five-member Board of Directors, with an administrative structure consisting of an executive director who manages seven divisions.<sup>67</sup> It employs 27 full-time staff, and relies on the support of over 70 volunteers, including activists and human rights defenders in Syria, Lebanon, Turkey, Jordan, and other countries.<sup>68</sup>

SNHR describes its goals as preserving the rights of victims, working towards criminal accountability, supporting transitional justice, memorializing victims, and supporting social and political advocacy.<sup>69</sup> It focuses on documentation, including of the civilian death toll, those who have been detained or forcibly disappeared, deaths due to torture, deaths of medical personnel, and the use of barrel bombs.<sup>70</sup> It

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<sup>66</sup> SNHR, A PROFILE ON THE SYRIAN NETWORK FOR HUMAN RIGHTS 1, [http://sn4hr.org/wp-content/pdf/A\\_Profile\\_on\\_the\\_Syrian\\_Network\\_for\\_Human\\_Rights\\_en.pdf](http://sn4hr.org/wp-content/pdf/A_Profile_on_the_Syrian_Network_for_Human_Rights_en.pdf) (last visited Jan 4, 2017).

<sup>67</sup> SNHR, SYRIAN NETWORK FOR HUMAN RIGHTS: ORGANIZATIONAL STRUCTURE 3-4, [http://sn4hr.org/public\\_html/wp-content/pdf/english/Organizational\\_Structure\\_en.pdf](http://sn4hr.org/public_html/wp-content/pdf/english/Organizational_Structure_en.pdf) (last visited Oct 20, 2017). These divisions are Victims, Detainees and Enforced Disappearances, Reports, Research, Administrative, Advocacy and Outreach, and Volunteer Network.

<sup>68</sup> *Id.* at 4.

<sup>69</sup> SNHR, WORK METHODOLOGY, [http://sn4hr.org/public\\_html/wp-content/pdf/english/SNHR\\_Methodology\\_en.pdf](http://sn4hr.org/public_html/wp-content/pdf/english/SNHR_Methodology_en.pdf) (last visited Jan 4, 2017).

<sup>70</sup> SNHR, *supra* note 66 at 2-4; Death Toll, SYRIAN NETWORK FOR HUMAN RIGHTS, <http://sn4hr.org/blog/category/report/monthly-reports/victims-death-toll/> (Jan 4, 2017). for examples of reports cataloguing monthly civilian death totals.

also provides training to human rights defenders in Syria, and works to raise awareness of applicable international law.<sup>71</sup>

*iii. Private investigative organizations*

The Commission for International Justice and Accountability (CIJA) is an example of a relatively new type of actor in the marketplace. CIJA is a private NGO which investigates and documents crimes committed in the Syrian conflict.<sup>72</sup> It also looks to crimes committed by the Islamic State in Iraq and Syria (ISIS), which involves conducting investigations in both Syria and Iraq. CIJA was started in late 2011, with the organization formalized in 2012.<sup>73</sup> It is registered as a non-profit organization in The Hague.<sup>74</sup>

CIJA employs approximately the same number of investigators as the ICC, as well as military and political analysts, lawyers, and translators, for a total staff of around 140.<sup>75</sup> A significant portion of its staff is made up of Syrians and Iraqis working in Syria, Iraq, and other countries.<sup>76</sup> Thirty

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<sup>71</sup> SNHR, *supra* note 66 at 7–8.

<sup>72</sup> Kersten, *supra* note 3.

<sup>73</sup> Interview with Nerma Jelacic, Head of External Relations and Communications at the Commission for International Justice and Accountability (April 4, 2018), .

<sup>74</sup> Julian Borger, *Syria's truth smugglers*, THE GUARDIAN, May 12, 2015, <https://www.theguardian.com/world/2015/may/12/syria-truth-smugglers-bashar-al-assad-war-crimes> (last visited Oct 1, 2017).

<sup>75</sup> Interview with Nerma Jelacic, *supra* note 73; Ben Taub, *The Assad Files*, THE NEW YORKER, April 18, 2016, <https://www.newyorker.com/magazine/2016/04/18/bashar-al-assads-war-crimes-exposed>.

<sup>76</sup> Interview with Nerma Jelacic, *supra* note 73.



analysts and legal experts work at the organization's European headquarters.<sup>77</sup>

CIJA has an annual budget of €5 million for its investigations in Syria and Iraq, with €4 million directed specifically at Syria.<sup>78</sup> It receives funding from the development programs of a number of Western countries, including Canada, Denmark, Germany, Norway, and the United Kingdom; as well as from the European Union.<sup>79</sup> It previously received funding from the United States, but this was cut in 2014.<sup>80</sup>

CIJA focuses its attention on understanding the institutions and organizations responsible for perpetrating crimes in order to establish the criminal liability of those near or at the top of the chain of command.<sup>81</sup> To do so, the organization focuses on "linkage evidence", which looks to connect high-ranking officials to the plethora of abuses that have been documented by the media and other organizations.<sup>82</sup> CIJA then uses this information to compile legal briefs for future prosecutions.<sup>83</sup> As of April 2018, the

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<sup>77</sup> *Id.*

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

<sup>79</sup> *Id.*

<sup>80</sup> Colum Lynch, *Washington Cuts Funds for Investigating Bashar al-Assad's War Crimes*, FOREIGN POLICY (November 3, 2014), <http://foreignpolicy.com/2014/11/03/exclusive-washington-cuts-funds-for-investigating-bashar-al-assads-war-crimes/> (last visited Oct 1, 2017).

<sup>81</sup> Borger, *supra* note 74.

<sup>82</sup> Interview with Nerma Jelacic, *supra* note 73.

<sup>83</sup> Associated Press, *Long Road Ahead for Justice and Accountability in Syria*, VOICE OF AMERICA (February 22, 2017), <https://www.voanews.com/a/long-road-ahead-for-justice-and->

organization had compiled ten case files addressing crimes committed by the Syrian regime in Syria, as well as by ISIS in both Syria and Iraq.<sup>84</sup> Each case file covers a different number of alleged perpetrators, for a total of approximately 60-70 individuals.<sup>85</sup> While some focus on specific Syrian governorates, others look to the top of the governing structure including President Bashar al-Assad and his inner circle.<sup>86</sup>

As a result of its focus on linkage evidence, CIJA's primary emphasis is on documentation produced by state organs involved in the crimes in question as opposed to interviews of victims and witnesses.<sup>87</sup> As of April 2018, CIJA had extracted over 800,000 pages of documents from Syria.<sup>88</sup> The documentation is stored, scanned, and reviewed by CIJA analysts.<sup>89</sup> In order to obtain the documents, CIJA has needed to cooperate with opposition forces.<sup>90</sup> As a result, much of its focus is on crimes linked to the Syrian regime or to ISIS, and not opposition forces.<sup>91</sup> This is not to say, however, that CIJA focuses exclusively on documentation, or that it never investigates opposition forces. The organization also collects and analyzes videos downloaded to its servers, documenting key data including the location of the video and any

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accountability-in-syria/3734779.html (last visited Oct 1, 2017); Rapp, *supra* note 40 at 162.

<sup>84</sup> Interview with Nerma Jelacic, *supra* note 73.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*; Borger, *supra* note 74.

<sup>88</sup> Interview with Nerma Jelacic, *supra* note 73.

<sup>89</sup> Associated Press, *supra* note 83.

<sup>90</sup> Kersten, *supra* note 3; Kersten, *supra* note 5.

<sup>91</sup> Kersten, *supra* note 5.

identifiable victims or perpetrators.<sup>92</sup> The videos are then utilized in investigating opposition crimes.<sup>93</sup>

The organization's secondary focus is on "collaborating evidence", meaning information gathered from regime officials who either continue to operate within the regime or who have defected.<sup>94</sup> It relies the least on information from the direct victims of atrocities, as this is perceived as less useful for building links between the immediate perpetrators to individuals further up the chain of command.<sup>95</sup> When it does interview victims, CIJA focuses on those who have remained in Syria, who have not previously spoken to reporters or other organizations, and who are able to help establish "pattern evidence" illustrating the systematic nature of the crimes perpetrated.<sup>96</sup>

*iv. International institutions/mechanisms*

The Independent International Commission of Inquiry on the Syrian Arab Republic (COI) is an international body that supplies information on atrocities committed in the Syrian conflict. The UN Human Rights Council (HRC) created the COI in a special session in August 2011,<sup>97</sup> after a fact-finding mission by the Office of the UN High Commissioner for Human Rights (OHCHR) found that incidents in Syria

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<sup>92</sup> Borger, *supra* note 74., who notes that as of May 2015, CIJA had downloaded over 470,000 videos.

<sup>93</sup> *Id.*

<sup>94</sup> Interview with Nerma Jelacic, *supra* note 73.

<sup>95</sup> *Id.*

<sup>96</sup> Taub, *supra* note 75.

<sup>97</sup> Rapp, *supra* note 40 at 159.

might amount to crimes against humanity.<sup>98</sup> The HRC mandated the COI 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 to ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable”.<sup>99</sup> It focuses on providing public reports on “recent incidents and broad patterns of violations and abuses.”<sup>100</sup>

In interpreting its mandate, the COI determined it was to act as a fact-finding body, using the standard of proof of “reasonable suspicion”.<sup>101</sup> This is a lower standard of proof than beyond a reasonable doubt. To establish facts, the COI has reached out to a number of actors, including states, regional groups and organizations, experts, NGOs, activists, and members of the media.<sup>102</sup> It has also looked to reports, academic works, media reports, audio materials, and videos.<sup>103</sup>

Syria has refused to cooperate with the COI, and so the COI has completed its investigations primarily through

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<sup>98</sup> Human Rights Council, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, ¶ 1, U.N. Doc. A/HRC/S-17/2/Add.1 (2011).

<sup>99</sup> Human Rights Council, *Report of the Human Rights Council on its seventeenth special session*, ¶ 13, U.N. Doc. A/HRC/S-17/2 (2011).

<sup>100</sup> Beti Hohler & Elizabeth Pederson, *THE SYRIA MECHANISM: BRIDGE TO PROSECUTIONS OR EVIDENTIARY LIMBO? E-INTERNATIONAL RELATIONS* (2017), <http://www.e-ir.info/2017/05/26/the-syria-mechanism-bridge-to-prosecutions-or-evidentiary-limbo/> (last visited Apr 5, 2018).

<sup>101</sup> A/HRC/S-17/2/Add.1, *supra* note 85 at ¶ 5.

<sup>102</sup> *Id.* at ¶ 8.

<sup>103</sup> *Id.*

interviews conducted from outside of the country.<sup>104</sup> It has, however, also interviewed victims and witnesses inside Syria via telephone and Skype.<sup>105</sup> As of April 2018, the COI had conducted interviews with more than 6,000 individuals.<sup>106</sup>

#### B. INTERMEDIARY ACTORS

This paper uses the term “intermediary actors” to refer to those actors in the marketplace who both supply and demand information concerning human rights violations and international crimes. This may seem like an artificial distinction at first, seeing as many of the suppliers listed above demand information as well – an NGO or the COI may look to individuals for information or documentation for example, or individuals may look to other individuals. However, the entities discussed in this section can be distinguished from pure suppliers given their emphasis on the collection of previously gathered information as opposed to the creation or initial gathering of information. As a result, these actors take on more of a “middleman” role.<sup>107</sup>

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<sup>104</sup> Rapp, *supra* note 40 at 159.

<sup>105</sup> Independent International Commission of Inquiry on the Syrian Arab Republic: About the Commission of Inquiry, UNITED NATIONS HUMAN RIGHTS COUNCIL, <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/AboutCOI.aspx> (last visited Apr 2, 2018).

<sup>106</sup> *Id.*

<sup>107</sup> CIJA overlaps with this category, based on its efforts to consolidate and analyze open-source video materials. Given its significant focus on gathering documentary evidence, however, it has been placed in the supply actors category.

i. *NGO intermediaries*

The Syrian Accountability Project (SAP) is an example of an NGO intermediary actor. SAP is “a cooperative effort between activists, non-governmental organizations, students, and other interested parties to document war crimes and crimes against humanity in the context of the Syrian crisis.”<sup>108</sup> It consists of a project leader, chief of staff, three teams (research, investigation, and unit mapping), a special investigator for sexual crimes, and a special researcher for civil liability.<sup>109</sup> It was founded in 2011, and is based out of Syracuse University College of Law.<sup>110</sup>

SAP compiles and analyzes open source intelligence, “walk-in information”<sup>111</sup>, and information provided by a clandestine network within Syria.<sup>112</sup> It also looks to eyewitness, government, media, and NGO reports.<sup>113</sup> SAP’s database contains crimes allegedly perpetrated by the Syrian

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<sup>108</sup> Syrian Accountability Project, I AM SYRIA, <http://www.iamsyria.org/syrian-accountability-project.html> (last visited Jan 5, 2018).

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

<sup>110</sup> *Id.*

<sup>111</sup> Where individuals provide SAP with reports on particular incidents or situations.

<sup>112</sup> Kim Bode, *Collecting Evidence of War Crimes in Syria*, NEWS DEEPLY, May 18, 2017, <https://www.newsdeeply.com/syria/community/2017/05/18/collecting-evidence-of-war-crimes-in-syria> (last visited Jan 5, 2017).

<sup>113</sup> Susanne Koelbl, *The War-Crimes Lawyer Hunting Syrian War Criminals*, SPIEGEL ONLINE (June 6, 2016), <http://www.spiegel.de/international/world/david-crane-is-creating-database-of-assad-war-crimes-a-1095735.html>.

regime, ISIS, members of the Free Syrian Army (FSA), and others.<sup>114</sup>

SAP consolidates the information it gathers into two primary documents: the “Conflict Narrative”, which tells the story of the conflict as a series of events; and the “Crime Base Matrix”, which sorts events based on whether they constitute crimes under Syrian or international law.<sup>115</sup> It also drafts sample indictments, and is attempting to use the Conflict Narrative and other reports to map the movement of armed units and determine which commanders are criminally responsible for specific incidents.<sup>116</sup> SAP further uses the information gathered to produce “trial packages” for future prosecutors and, in some cases, to draft white papers on particular incidents.<sup>117</sup>

ii. *International intermediaries*

An example of an international intermediary actor is the IIIM. In December 2016, the UN General Assembly adopted a resolution creating the “International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011”.<sup>118</sup> It mandated the IIIM to:

collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human

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<sup>114</sup> *Id.*

<sup>115</sup> Syrian Accountability Project, *supra* note 108.

<sup>116</sup> *Id.*

<sup>117</sup> Koelbl, *supra* note 113.

<sup>118</sup> UNGA, *Resolution adopted by the General Assembly on 21 December 2016*, U.N. Doc. A/RES/71/248 (2017).

rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law[.]<sup>119</sup>

This focus on criminal law standards distinguishes the IIIM from other fact-finding bodies, including the COI.<sup>120</sup> It also shapes the nature of the information to be collected by the IIIM, namely “evidence that establishes linkages, *mens rea*, and modes of criminal liability so that alleged crimes can be attributed to those responsible.”<sup>121</sup>

The IIIM will collect materials that already exist, some produced by the Syrian regime and others collected by individuals working alone or for NGOs.<sup>122</sup> It will gather information in the hands of states, civil society actors, the private sector, and other U.N. bodies.<sup>123</sup> It will also analyze gaps in the existing materials, and use its investigate powers to fill those gaps in creating case files.<sup>124</sup> Case files will include

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<sup>119</sup> *Id.* at ¶ 4.

<sup>120</sup> Hohler and Pederson, *supra* note 100.

<sup>121</sup> *Id.*

<sup>122</sup> Nahlah Ayed, *Even in world's most-documented war, justice is a 'long-term game*, CBC NEWS (September 7, 2017), <http://www.cbc.ca/news/world/syria-un-iiim-1.4276077> (last visited Nov 12, 2017).

<sup>123</sup> UNGA, *Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, ¶ 37, U.N. Doc. A/72/764 (2018).

<sup>124</sup> Catherine Marchi-Uhel, panelist at “Accountability for International Crimes in Syria and Beyond: A New UN Approach”, International Law



not only information, but also analysis based on criminal law methodologies so that the files can be used as the foundation for future prosecutions.<sup>125</sup>

It is important to note what the IIIM is not. It is not a court, nor is it a prosecuting body.<sup>126</sup> Rather, as an institution with a “quasi-prosecutorial function”, the IIIM will support efforts to achieve accountability in jurisdictions including national courts as well as any existing or future court(s) later given jurisdiction over the Syrian conflict.<sup>127</sup> In order for government prosecutors to obtain information or case files from the IIIM, they must demonstrate “a continuous and successful effort by their governments to uphold internationally recognized standards of human rights and due process.”<sup>128</sup> The IIIM will only share information where the death penalty would not apply.<sup>129</sup> The existence of the IIIM does not prevent NGOs from filing their own criminal cases.<sup>130</sup>

Considering the nature and breadth of its mandate, the IIIM has been equipped with a relatively lean staff and budget.<sup>131</sup> As of March 2018, its team included approximately 20 members but was expected to grow to a staff of 60 people

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Weekend, 21 October 2017, Fordham University School of Law, New York, Conference Presentation.

<sup>125</sup> U.N. Doc. A/72/764, *supra* note 123, at ¶ 8.

<sup>126</sup> *Id.* at ¶ 7.

<sup>127</sup> *Id.* at ¶ 7, 10.

<sup>128</sup> Responding to Misconceptions Regarding the IIIM, SYRIA JUSTICE AND ACCOUNTABILITY CENTRE (2017), <https://syriaaccountability.org/updates/2017/08/02/responding-to-misconceptions-regarding-the-iiim/> (last visited Dec 29, 2017).

<sup>129</sup> U.N. Doc. A/72/764, *supra* note 123, at ¶ 41.

<sup>130</sup> Responding to Misconceptions Regarding the IIIM, *supra* note 128.

<sup>131</sup> U.N. Doc. A/72/764, *supra* note 123, at ¶ 69.

as the year progressed.<sup>132</sup> Its budget for the year, based on voluntary contributions as the General Assembly had yet to approve regular budget funding for the Mechanism, was estimated to be \$14 million.<sup>133</sup> It does not accept funds from non-state actors.<sup>134</sup>

The IIIM has the legal capacity to enter into agreements with states and other actors.<sup>135</sup> Cooperation with the IIIM, however, is completely voluntary.<sup>136</sup> As it currently stands, the IIIM has no access to the Syrian territory.<sup>137</sup>

### C. ACTORS ON THE DEMAND SIDE

Just as actors may not only produce information of human rights violations and/or international crimes for the purpose of criminal proceedings, so too may demand actors have motivations for seeking out this product aside from criminal prosecutions. As a result, a range of actors can be identified on the demand side in addition to criminal prosecutors.

#### *i. Individuals*

Individuals may want information about human rights violations and international crimes for a variety of reasons. Journalists or media outlets, for example, may look to suppliers to produce news reports or stories. Activists may

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<sup>132</sup> *Id.* at ¶ 31.

<sup>133</sup> *Id.* at ¶ 66-67.

<sup>134</sup> Responding to Misconceptions Regarding the IIIM, *supra* note 128.

<sup>135</sup> Hohler and Pederson, *supra* note 100.

<sup>136</sup> *Id.*

<sup>137</sup> U.N. Doc. A/72/764, *supra* note 123, at ¶ 70.

want to obtain information in order to use it in lobbying for political or social change. Academics may seek out documentation of crimes in support of their analysis and publications. Individuals involved in the conflict may want information to identify and silence victims, witnesses, or sources. They may look to have materials destroyed or deleted.<sup>138</sup> They may also want to use information selectively or inaccurately in order to produce a biased or inaccurate narrative of the conflict.

*ii. Human rights organizations*

Human rights organizations may also provide demand for information on human rights violations and international crimes. For instance, Human Rights Watch gained access to the Caesar photographs for research purposes.<sup>139</sup> It then used these photographs to draft a report on mass death and torture in Syrian detention facilities.<sup>140</sup> Likewise, Amnesty International utilized information gathered by SNHR in a report outlining war crimes and human rights violations in Aleppo.<sup>141</sup> The U.S.-based Center for Justice & Accountability (CJA) relied in part on materials and analysis provided by CIJA to pursue a civil complaint against the Assad regime for

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<sup>138</sup> For example, both supporters and opponents of the Syrian regime have reported the others' YouTube channels or videos as containing inappropriate content, causing some channels to be closed and many videos to be lost: El Deeb, *supra* note 56.

<sup>139</sup> HUMAN RIGHTS WATCH, *IF THE DEAD COULD SPEAK: MASS DEATHS AND TORTURE IN SYRIA'S DETENTION FACILITIES* (2015).

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

<sup>141</sup> See AMNESTY INTERNATIONAL, *'DEATH EVERYWHERE': WAR CRIMES AND HUMAN RIGHTS ABUSES IN ALEPPO, SYRIA* (2015).

its role in the 2012 death of war correspondent Marie Colvin in Syria.<sup>142</sup> In January 2019, a U.S. federal court found the Syrian Arab Republic liable for Colvin's death, and issued an award of approximately U.S. \$302 million to Colvin's relatives.<sup>143</sup>

*iii. States*

States demand information on war crimes and human rights violations not only for prosecutions, which will be discussed in the subsection below, but also for their own policy decisions and for immigration matters. For example, SAP produced a white paper on the siege and destruction of Aleppo<sup>144</sup> so that policymakers and diplomats could have access to information about the ongoing atrocities while understanding their context and significance.<sup>145</sup> The U.S. State Department utilized information from SNHR in its 2015 Human Rights Report on Syria.<sup>146</sup> And CIJA regularly receives requests from European and North American

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<sup>142</sup> Interview with Nerma Jelacic, *supra* note 73. For additional information on the case, see Colvin v. Syrian Arab Republic, CJA - THE CENTER FOR JUSTICE & ACCOUNTABILITY,

<https://cja.org/what-we-do/litigation/colvin-v-syria>.

<sup>143</sup> *Colvin v. Syrian Arab Republic*, No. 16-1423 (A.B.J.) (D.D.C., Jan. 31, 2019).

<sup>144</sup> KAITLYN DEGNAN, ZACHARY LUCAS & SEAN MILLS, COVERED IN DUST, VEILED BY SHADOW: THE SIEGE AND DESTRUCTION OF ALEPPO (2017).

<sup>145</sup> Bode, *supra* note 112.

<sup>146</sup> Syria 2015 Human Rights Report, U.S. DEPARTMENT OF STATE (2016), <https://www.state.gov/j/drl/rls/hrrpt/2015/nea/252947.htm>.

governments for information to be used in immigration screening procedures.<sup>147</sup>

*iv. Domestic and international prosecutors*

As it currently stands, there is no international court with jurisdiction to try crimes committed in the Syrian conflict.<sup>148</sup> As noted above, the ICC does not have jurisdiction as Syria is not a State Party, and vetoes from Russia and China have prevented a UN Security Council referral. It is possible that, in the future, there could be an international justice option for Syria. This could be via the ICC, if the landscape changed such that Syria accepted the ICC's jurisdiction over the situation or the Security Council found a way to overcome its current paralysis. A draft statute has been proposed for a hybrid tribunal, should the ICC not acquire jurisdiction over the conflict.<sup>149</sup> In the past, the U.S. also advocated for the

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<sup>147</sup> Nick Robins-Early, *Inside One Group's Mission to Bring Assad's Regime to Justice*, HUFFINGTON POST (April 26, 2016), [https://www.huffingtonpost.com/entry/assad-war-crimes-cija\\_us\\_571ed6e6e4b0f309baee63e0](https://www.huffingtonpost.com/entry/assad-war-crimes-cija_us_571ed6e6e4b0f309baee63e0) (last visited Oct 1, 2017). In 2017, for example, CIJA provided information on over 490 individuals to national prosecutors, national security offices, and immigration officials in over 12 countries: Interview with Nerma Jelacic, *supra* note 73.

<sup>148</sup> Aside from the ICC's jurisdiction over nationals from State Parties participating in the Syrian conflict, as discussed above.

<sup>149</sup> THE CHAUTAUQUA BLUEPRINT FOR A STATUTE FOR A SYRIAN EXTRAORDINARY TRIBUNAL TO PROSECUTE ATROCITY CRIMES, (2014), <http://www.publicinternationallawandpolicygroup.org/wp-content/uploads/2014/01/Chautauqua-Blueprint-2014.pdf>; Ryan J. Suto, A RENEWED CASE FOR A SYRIAN TRIBUNAL ATLANTIC COUNCIL (2014), <http://www.atlanticcouncil.org/blogs/menasource/a-renewed-case-for-a-syria-tribunal> (last visited Jan 6, 2018).

eventual creation of a hybrid tribunal, similar to the Extraordinary Chambers in the Courts of Cambodia (ECCC).<sup>150</sup> All of these options, however, would require significant shifts in current political realities, and are unlikely to be realized in the foreseeable future. If an international prosecutorial body eventually emerges, however, it will provide a sizeable demand for information concerning atrocities.

In the interim, national prosecutors able to exercise universal jurisdiction<sup>151</sup> demand information on human rights violations and international crimes. National prosecutors in Sweden secured the first conviction of a member of the Syrian military in September 2017.<sup>152</sup> Prosecutors have laid charges in Norway, the Netherlands, Switzerland, and Germany.<sup>153</sup> And the sister of a man identified in the Caesar photographs has filed a criminal

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<sup>150</sup> Rapp, *supra* note 40 at 160.

<sup>151</sup> Universal jurisdiction allows states to prosecute offences regardless of whether a link exists between the prosecuting state and the offence, offender, or victim: Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 JICJ 735, 745–746 (2004).

<sup>152</sup> Anne Barnard, *Syrian Soldier is Guilty of a War Crime, a First in the 6-Year Conflict*, NEW YORK TIMES (October 3, 2017), [https://www.nytimes.com/2017/10/03/world/middleeast/syria-war-crime.html?\\_r=0](https://www.nytimes.com/2017/10/03/world/middleeast/syria-war-crime.html?_r=0) (last visited Jan 6, 2018).

<sup>153</sup> Patrick Kroker & Alexandra Lily Kather, JUSTICE FOR SYRIA? OPPORTUNITIES AND LIMITATIONS OF UNIVERSAL JURISDICTION TRIALS IN GERMANY EJIL: TALK! (2016), <https://www.ejiltalk.org/justice-for-syria-opportunities-and-limitations-of-universal-jurisdiction-trials-in-germany/> (last visited Jan 6, 2018); For a discussion of the use of universal jurisdiction in Europe and, in particular, its use in prosecuting international crimes in Germany, see Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond*, 16 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 165 (2018).

complaint in Spain against nine members of the Syrian regime.<sup>154</sup>

National prosecutors look to the suppliers listed above for information and materials to be used in building their cases. For instance, a sizeable portion of CIJA's operations involve providing assistance to primarily European jurisdictions looking to locate alleged perpetrators hiding amidst the large numbers of legitimate refugees entering Europe.<sup>155</sup> Prosecutors request both information regarding potential suspects as well as analysis of materials that have been collected.<sup>156</sup>

Information and materials provided by suppliers is crucial to national prosecutors' abilities to investigate cases, lay charges, and pursue convictions. As a result, it is important to understand how an increase in the number and variety of suppliers impacts the product and interactions within the marketplace.

#### IV. The Impact of Increased Suppliers on the Marketplace

The impact of an increase in suppliers on the marketplace can be seen in four key areas. The first is the quantity of the product available in the marketplace. The

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<sup>154</sup> Adam Entous, *A photo of her brother's corpse popped up on her phone. Now Syrian officials could be put on trial for war crimes.*, THE WASHINGTON POST, February 2, 2017, [https://www.washingtonpost.com/world/national-security/from-a-trove-of-grim-photos-a-case-against-assads-government/2017/02/01/728575d0-e8d7-11e6-bf6f-301b6b443624\\_story.html?tid=a\\_inl&utm\\_term=.489c3fc35c12](https://www.washingtonpost.com/world/national-security/from-a-trove-of-grim-photos-a-case-against-assads-government/2017/02/01/728575d0-e8d7-11e6-bf6f-301b6b443624_story.html?tid=a_inl&utm_term=.489c3fc35c12).

<sup>155</sup> Interview with Nerma Jelacic, *supra* note 73.

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

second relates to the quality of that product, with quality referring to the information's credibility and reliability, and, relatedly, whether it is likely admissible in future criminal proceedings or can provide the basis for future criminal investigations. The third is the ease with which demanders can access the information they seek. And the fourth concerns the ethical implications of how the product is created.

#### A. QUANTITY OF THE PRODUCT

It perhaps goes without saying that more suppliers mean a greater quantity of information in the marketplace. An increased number of suppliers allows for the broader coverage of topics, regions, and even time periods. Recall that investigators from the ICC, for example, often arrive in a conflict area after atrocities have taken place. With individuals on scene recording and uploading video as human rights violations or international crimes occur, materials are produced and available that may otherwise not have been. Additionally, an increased number of suppliers allows for the investigation of a broader range of perpetrators. While CIJA may place less emphasis on opposition crimes due to requiring opposition forces' assistance to secure documentation, other organizations such as SAP step in to fill that gap.

The number of suppliers involved also increases the variety of the types of information available. For instance, as noted above, the COI focuses on witness testimony. This is in part because Commissions of Inquiry typically lack the infrastructure and resources necessary to properly collect and categorize documents reviewed during their



investigations.<sup>157</sup> Additionally, COIs are not permanent bodies, and so do not provide an obvious source of storage for materials.<sup>158</sup> CIJA, in contrast, trains its investigators in how to secure documents, including maintaining chain of custody, and keeps the materials it has collected in storage facilities in Europe.<sup>159</sup> The IIIM will also be able to store materials, including documents, protecting valuable information from being lost or destroyed.<sup>160</sup>

Another example of a broadening of the types of information available is again linked to the operation of suppliers other than the COI. The COI typically records interviews in the third person “to provide additional protection to interviewees in the event that they become witnesses in future judicial proceedings.”<sup>161</sup> This form of witness statement is generally inadmissible in criminal prosecutions.<sup>162</sup> Conversely, CIJA takes witness statements in support of the creation of prosecution briefs, and so the statements may be more likely to have some evidentiary value.

The impact on quantity also stems from the actors’ abilities to preserve materials that might otherwise have been lost. A clear example of this can be seen in the area of open source intelligence. In 2017, YouTube implemented new

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<sup>157</sup> MILLER AND SCHICIANO, *supra* note 13 at 15–16.

<sup>158</sup> *Id.* at 16.

<sup>159</sup> Taub, *supra* note 75; Kersten, *supra* note 3.

<sup>160</sup> Alex Whiting, *An Investigative Mechanism for Syria: The General Assembly Steps into the Breach*, 15 JICJ 231, 236 (2017).

<sup>161</sup> MILLER AND SCHICIANO, *supra* note 13 at 12.; Human Rights Council, *Selected testimonies from victims of the Syrian conflict*, ¶ 5, U.N. Doc. A/HRC/27/CRP.1 (2014).

<sup>162</sup> *Id.* at 12.

policies targeting videos seen as “graphic or supporting terrorism”, causing hundreds of thousands of videos of the Syrian conflict to vanish.<sup>163</sup> The Syrian Archive, working alongside activists and media groups impacted by YouTube’s actions, helped recover approximately 400,000 videos by securing the return of some 20 channels.<sup>164</sup> It also downloaded some of the videos to its own server.<sup>165</sup> VDC has indicated it will take a different approach and set up its own method of storage and a platform to use instead of YouTube.<sup>166</sup> The variety in actors enables a variety of responses when information is threatened, and also allows for different methods of storage moving forward.

A potential area of concern as the number of suppliers increases is the production of duplicate products. Currently, there is no actor which coordinates where or what a particular supplier investigates. Instead, individual suppliers themselves determine the incidents, themes and regions on which they will focus.

This lack of coordination has benefits and drawbacks. On the one hand, it can be useful to have a variety of materials and information concerning one particular incident. For example, when multiple individuals record or photograph aspects of the same event, they capture different perspectives and share new details which may be invaluable in piecing together what happened and who is responsible.<sup>167</sup> On the

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<sup>163</sup> El Deeb, *supra* note 56.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> See e.g. Eliot Higgins, *PIECING TOGETHER OPEN SOURCE EVIDENCE FROM THE SYRIAN SARIN ATTACKS FIRST DRAFT* (2015), <https://medium.com/1st-draft/piecing-together-open-source-evidence-from-the-syrian-sarin->

other hand, suppliers operate in a world of finite resources. Where a large number of them all gather information about the same event, there is a risk that other events, in the Syrian conflict or in other contexts, may be left uninvestigated or insufficiently investigated.

#### B. QUALITY OF THE PRODUCT

More information does not necessarily mean better information. A particular supplier's sophistication and resources impact on the quality of the product it is able to create. Some actors may gather information with a high level of professionalization, producing information that is credible and reliable. Others may have fewer resources and have had little or no training in gathering information on human rights violations or international crimes.

In looking at the increase in citizen providers of information, Sam Gregory refers to what he calls "pain points" linked to "questions within the human rights community about how it manages the tensions between the professionalized practices of a core set of human rights organizations and the porous edges of the fugacious mesh of citizen participation in human rights documentation and activism, particularly as it occurs in crisis contexts."<sup>168</sup> He provides the example of the contrasting approach an

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attacks-9027f0238857 (last visited Apr 5, 2018)., where Higgins explains how he used, among other sources, a variety of images and videos shared by activists in putting together a case that the Syrian government was responsible for the August 21, 2013 sarin gas attacks in Damascus.

<sup>168</sup> Sam Gregory, *Ubiquitous witnesses: who creates the evidence and the live(d) experience of human rights violations?*, 18 INFORMATION, COMMUNICATION & SOCIETY 1378, 1381 (2015).

individual “first-hand responder” might take to an interview as opposed to that of a professional investigator:

When it comes to documenting an interview on video, an investigator will begin by asking ‘Should I even video this interview?’ (Matheson, 2014). One primary concern may be that if an interview is recorded, and then at a later date (months, years, down the line) the interviewee is asked to testify in court (extremely rarely will the initial videotaped interview be used as actual evidence unless there are extenuating circumstances such as the interviewee has died), then inconsistencies between the recorded interview and in-court testimony could undermine the witness’ credibility.... However, people in crisis are going to talk to other people (and nowadays they are going to film it) even if all the professional guidance in the world tells them not to interview or to record. So a key question emerges in terms of how one should bridge this gap between established professional practice and the realities of new entrants.<sup>169</sup>

Another example Gregory provides relates to the importance of “linkage evidence” to international criminal prosecutions. International criminal law tends to target individuals who were not necessarily themselves present when a crime was committed, but who are still individually responsible for the conduct.<sup>170</sup> Linkage evidence connects these higher-level perpetrators to the crime in question,

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<sup>169</sup> *Id.* at 1382.

<sup>170</sup> Morten Bergsmo & William H. Wiley, *Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes*, in *MANUAL ON HUMAN RIGHTS MONITORING: AN INTRODUCTION FOR HUMAN RIGHTS FIELD OFFICERS*, 11 (Siri Skåre, Ingvild Burkey, & Hege Mørk eds., 3rd ed. 2008).

illustrating the manner and mode of their participation.<sup>171</sup> Citizens, however, tend to produce “crime-based evidence”, which simply shows that a crime occurred.<sup>172</sup> This information may therefore be less useful in future prosecutions.

Quality concerns, however, are not limited to individuals who unexpectedly find themselves thrust into the role of first-hand responder and are understandably unfamiliar with investigatory best practices. Human rights organizations may also contribute information and documentation of varying quality.<sup>173</sup> This stems in part from the reality that no uniform standards for fact-finding exist,<sup>174</sup> creating a situation where organizations with vastly different levels of sophistication and resources are left to adopt their

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<sup>171</sup> Gregory, *supra* note 168 at 1382.

<sup>172</sup> *Id.* at 1382.

<sup>173</sup> This point was made in the IIIM’s recent report to the United Nations General Assembly, where it emphasized the importance of civil society actors but also noted the potential for evidentiary challenges arising from “collection techniques inconsistent with criminal law standards”: U.N. Doc. A/72/764, *supra* note 123, at ¶ 20. It is important to note, as Bergsmo and Wiley do, that it is not the central role of human rights organizations to help international criminal law actors investigate international crimes for the purpose of prosecution: Bergsmo and Wiley, *supra* note 170 at 13. This paper does not suggest that human rights organizations should be expected to conduct themselves as if they were operating within the international criminal law arena. However, as observed previously, the information gathered by these NGOs may assist in directing future investigations, and so its accuracy is important. Additionally, some human rights organizations may wish to conduct some or all of their work in a manner maximizing its potential utility to future prosecutions.

<sup>174</sup> Wolfgang Kaleck & Carolijn Terwindt, *Non-Governmental Organisation Fact-Work: Not Only a Technical Problem*, in *QUALITY CONTROL IN FACT-FINDING* 403–426, 404 (Morten Bergsmo ed., 2013).

own methods. Those with the resources to do so have “professionalized” their fact-finding, with structures and processes in place for investigations, and specially-trained individuals on staff.<sup>175</sup> Others, in contrast, lack the expertise, time, and financial resources necessary to develop procedures for investigating and reporting.<sup>176</sup> This leads to the risk that materials may be contaminated by an organization lacking the resources and expertise required for collection and storage.<sup>177</sup> Inaccurate information may have ramifications beyond the individual report or allegation in question, if it calls into doubt fact-finding by NGOs more broadly.

Additionally, suppliers may produce information that is highly reliable and credible, but it may simply not be what demanders need. For example, institutions such as the COI focus on documenting incidents ordered by high-level perpetrators.<sup>178</sup> National prosecutors, however, often look to individuals, either perpetrators or victims, who happen to be within their specific jurisdiction.<sup>179</sup> The incidents in which these individuals were involved may simply not fall within the situations documented by the COI.

The challenges associated with an increase in suppliers in the marketplace reflect the reality that it is largely left to individual suppliers to determine their degree of professionalization, where and what they will investigate,

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<sup>175</sup> Molly Beutz Land, *Peer Producing Human Rights*, 46 ALBERTA L. REV. 1115, 1117–1118 (2009).

<sup>176</sup> Blitt, *supra* note 63 at 341.

<sup>177</sup> Kaleck and Terwindt, *supra* note 174 at 418.

<sup>178</sup> HUMAN RIGHTS WATCH, *supra* note 7 at 59.

<sup>179</sup> *Id.* at 59.

and the standards to which they will work.<sup>180</sup> There are many existing standards, protocols, and best practices on which organizations may draw.<sup>181</sup> CIJA, for example, has incorporated and improved upon best practices regarding

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<sup>180</sup> SNHR, for example, publishes a document outlining its methodology on its website: SNHR, *supra* note 69. Human Rights Watch also outlines its research approach on its website: About Our Research, HUMAN RIGHTS WATCH, <https://www.hrw.org/about-our-research> (last visited Jan 14, 2018). UN institutions like the COI and the IIMM develop their own methodologies in line with their mandates as articulated in the resolutions establishing them: see UNGA, *Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, Report of the Secretary-General*, U.N. Doc A/71/755 (2017) for the IIMM, and U.N. Doc. A/HRC/S-17/2, *supra* note 86 for the COI. And CIJA's founder has indicated that the organization has tailored its investigations in line with evidentiary standards in "international and western domestic criminal law jurisdiction[s]", drawing on its leadership's experience in international and hybrid tribunals as well as domestically: *Subcommittee on International Human Rights of The Standing Committee on Foreign Affairs and International Development: Number 033, 1st Session, 42nd Parliament: Evidence* (2016), <http://www.ourcommons.ca/DocumentViewer/en/42-1/SDIR/meeting-33/evidence>.

<sup>181</sup> See e.g. MANUAL ON HUMAN RIGHTS MONITORING: AN INTRODUCTION FOR HUMAN RIGHTS FIELD OFFICERS, (Siri Skåre, Ingvild Burkey, & Hege Mørk eds., 3rd ed. 2008); SIRACUSA GUIDELINES FOR INTERNATIONAL, REGIONAL AND NATIONAL FACT-FINDING BODIES, (M. Cherif Bassiouni & Christina Abraham eds., 2013). There are also standards tailored to specific crimes – see e.g. SARA FERRO RIBEIRO & DANAÉ VAN DER STRATEN PONTHOZ, INTERNATIONAL PROTOCOL ON THE DOCUMENTATION AND INVESTIGATION OF SEXUAL VIOLENCE IN CONFLICT (2017); UN OHCHR, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. HR/P/PT/8/Rev.1 (2004).

evidence collection, interviews, and chain of custody taken from the ICC and other *ad hoc* tribunals.<sup>182</sup> Its ability to do so stems in large part from the expertise of its founding members – investigators, prosecutors, and defence counsel from international and hybrid tribunals with firsthand experience of how these practices emerged and evolved, as well as an understanding of their inefficiencies.<sup>183</sup>

But not every organization will have the same experience upon which to draw. Additionally, the ability to look to best practices is constrained by available resources. Some of this is linked to funding – it may be expensive to implement certain standards, for instance IT systems to store and catalogue digital materials or appropriate storage facilities for documents, or it may require an increase in the number of staff. But it is also linked to time – understanding the available standards and choosing which to adopt takes time, as does the training of staff. NGOs may simply not have the time to fully engage in these activities.

### C. ACCESSIBILITY OF THE PRODUCT

A key challenge that accompanies an increase in the number of suppliers is the ease with which demanders are able to access the information it is that they need.

In some instances, prosecutors may be able to identify the information they need and the sources which possess it. Challenges may still emerge, however, in several areas. One such area is with respect to consent. In Sweden, prosecutors

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<sup>182</sup> Interview with Nerma Jelacic, *supra* note 73. CIJA does not make public its specific protocols and procedures.

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



have struggled to access COI information because sources interviewed did not provide their consent at the time of the interview for its contents to be shared with national prosecutors.<sup>184</sup> Prosecutors may also be unable to obtain materials from NGOs where sources divulged information in confidence.<sup>185</sup>

Other challenges emerge where suppliers lack the institutional capacity to effectively liaise with demanders. Swedish prosecutors have noted that the COI has a lack of staff dedicated to working with national jurisdictions, making cooperation with the institution difficult.<sup>186</sup>

A crucial challenge relates to the sheer volume of existing information. It was estimated in 2015 that there were over half a million media items depicting some form of violation of human rights in the context of the Syrian conflict.<sup>187</sup> The IIIM more recently characterized the volume of video and photographic materials linked to the Syrian conflict as “unprecedented in any other accountability process with respect to international crimes to date”.<sup>188</sup>

This presents significant challenges for national prosecutors seeking to assess the viability of prosecutions for crimes committed during the Syrian conflict. In the Netherlands, for example, prosecutors looking to take cases

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<sup>184</sup> HUMAN RIGHTS WATCH, *supra* note 7 at 59.

<sup>185</sup> Josh Macey et al., A WAR CRIMES “WIKI”: THE NEED FOR AN OPEN DATABASE TO ENSURE SYRIAN ACCOUNTABILITY YALE JOURNAL OF INTERNATIONAL LAW ONLINE (2017), <http://www.yjil.yale.edu/a-war-crimes-wiki-the-need-for-an-open-database-to-ensure-syrian-accountability/> (last visited Jan 13, 2018).

<sup>186</sup> HUMAN RIGHTS WATCH, *supra* note 7 at 58–59.

<sup>187</sup> Gregory, *supra* note 168 at 1380.

<sup>188</sup> U.N. Doc. A/72/764, *supra* note 123, at ¶ 72.

involving Syrian war crimes to trial look to open source intelligence.<sup>189</sup> Their efforts to sort through the pieces they collect require significant human and financial resources.<sup>190</sup> And there is no guarantee that, with the expenditure of these resources, prosecutors will be able to establish jurisdiction.<sup>191</sup> They may also be wasting resources, duplicating efforts already undertaken by other groups unbeknownst to them.<sup>192</sup> Accessibility concerns are therefore coupled with efficiency concerns as to the use of finite resources.

In other cases, demanders may know the information they need, but not know precisely where to look for it. It may be that one supplier has all of the materials in question, but it is more likely that demanders will need to look to a variety of actors. For instance, demand actors may need information on a variety of regions within Syria; however, individual suppliers may focus only on one particular region.<sup>193</sup> Moreover, depending on their mandates, suppliers may not naturally coordinate amongst themselves.<sup>194</sup> They may not share the same views on the methods to be used in conducting investigations.<sup>195</sup> They may also view new actors as threatening to their own interests and position in the market, and so may be disincentivized to work together.<sup>196</sup> This means that the burden shifts to demanders to coordinate with multiple suppliers, which takes time and resources. It also

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<sup>189</sup> Macey et al., *supra* note 185.

<sup>190</sup> *Id.*

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

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Kersten, *supra* note 5.

<sup>196</sup> *Id.*; Macey et al., *supra* note 185.

requires relationships, which demanders such as national prosecutors may not have with smaller or more newly established suppliers.<sup>197</sup>

Some of these accessibility problems may be attenuated by actors who attempt to create or share a “value-added” product. For example, instead of providing individual pieces of information, actors such as CIJA, SAP, and the IIIM put together prepared case briefs. In essence, they do a portion of the prosecution’s work for them, sifting through significant quantities of information in order to ascertain what is likely to assist in proving a criminal case beyond a reasonable doubt. The degree to which these products add value, however, is dependent upon the materials from which they are able to draw. If they are unable to access relevant information possessed by other suppliers, the case brief ultimately provided may leave out potentially valuable materials. The IIIM is looking to address this problem by establishing protocols of mutual action with 27 Syrian NGOs, as well as international NGOs.<sup>198</sup> Its success in this endeavor will greatly impact the overall quality of the prosecution briefs it is able to produce.

#### D. ETHICAL IMPLICATIONS OF CREATING THE PRODUCT

An increase in the number of suppliers in the marketplace may have ethical ramifications, even if the majority of these suppliers have entered the marketplace for

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<sup>197</sup> Macey et al., *supra* note 185.

<sup>198</sup> Marchi-Uhel, *supra* note 118.

altruistic, or at least not malicious, reasons.<sup>199</sup> This paper will primarily consider two ethical issues: the no-harm principle, and the principle of voluntary informed consent.

*i. The no-harm principle*

The no-harm principle reflects professionals' obligations to the individuals with whom they come into contact, regardless of the broader benefits anticipated to result from that interaction.<sup>200</sup> Contrary to its name, the no-harm principle does not demand that actors never cause harm; rather, it requires "minimizing harm and risk" to participants.<sup>201</sup>

In the marketplace, more suppliers may mean increased variety in methods used to collect and preserve materials. Where this leads to a decreased focus on interviews as a form of information, it may decrease the risks of harm to individual victims and witnesses. This is because participation in international criminal proceedings is often dangerous for victims and witnesses. It is not just testifying which may place an individual in danger; even participating in an interview can put a person at risk.<sup>202</sup> When suppliers

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<sup>199</sup> See George Ulrich, *Research ethics for human rights researchers*, in RESEARCH METHODS IN HUMAN RIGHTS: A HANDBOOK , 192 (Bård A. Andreassen, Hans-Otto Sano, & Siobhán McInerney-Lankford eds., 2017) where he notes the need for "ethical awareness and scrutiny" in the context of human rights research, despite its "pursuit of a good cause."

<sup>200</sup> *Id.* at 196.

<sup>201</sup> Théo Boutruche, *The Relationship between Fact-Finders and Witnesses in Human Rights Fact-Finding: What Place for the Victims?*, in THE TRANSFORMATION OF HUMAN RIGHTS FACT-FINDING , 145 (Philip Alston & Sarah Knuckey eds., 2015).

<sup>202</sup> Whiting, *supra* note 42 at 181.

such as CIJA are able to build cases based on documentation, and therefore conduct fewer interviews, they put fewer individuals at risk of harm. This is particularly important given the reality of the high cost of witness protection, both to the entity providing protection and to the witness, who often has to relocate along with his or her family.<sup>203</sup>

The other side of the coin, however, is that more suppliers may mean more interviews. This may place a greater number of individuals at risk, perhaps unnecessarily so. Professional investigators give significant thought to who they interview. For example, the OTP at the ICC takes steps to screen potential witnesses to ensure that it only interviews those who have relevant information.<sup>204</sup> Individuals or groups that are less sophisticated may not undertake the same analysis before conducting interviews.

More suppliers may also increase the amount of risk faced by particular individuals. Providing interviews to multiple sources increases the opportunities for a witness' identity to be discovered, which may place the witness in significant danger. Many suppliers will not have the ability to provide their interviewees with witness protection. Commissions of Inquiry, including the COI, do not have witness protection mechanisms.<sup>205</sup> Although the mandate of the IIIM establishes that the mechanism will have its own witness and victim protection unit, the IIIM head has indicated that it will not have a full-fledged protection

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<sup>203</sup> *Id.* at 180.

<sup>204</sup> *Id.* at 180.

<sup>205</sup> MILLER AND SCHICIANO, *supra* note 13 at 10.

regime.<sup>206</sup> Rather, it will use its leverage to work with states to ensure that states provide protection.<sup>207</sup>

Repeated interviewing may also have positive and negative psychological effects on the individual being interviewed. On the one hand, individuals who have suffered or witnessed a trauma may find it valuable and potentially even therapeutic to recount their stories.<sup>208</sup> On the other hand, the process of repeatedly recounting a traumatic event may be painful for the interviewee.<sup>209</sup> How the interview is conducted may cause harm, even if the interview is conducted respectfully and with thought given to minimizing harm. For example, where an interviewer is looking to assess credibility, she may ask the same questions in different ways or ask questions targeting specific details like times and dates.<sup>210</sup> The witness may take this to indicate the interviewer does not believe him.<sup>211</sup> If this same witness is interviewed in a similar style multiple times, he may feel angry, frustrated, or helpless as a result of his perception that he is not being believed.

*ii. Principle of voluntary informed consent*

The principle of voluntary informed consent requires the investigating actor to ensure that participants are aware

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<sup>206</sup> See U.N. Doc A/71/755, *supra* note 171 at ¶ 39; Marchi-Uhel, *supra* note 118.

<sup>207</sup> Marchi-Uhel, *supra* note 118.

<sup>208</sup> Soraya Seedat, Willem P. Pienaar & David Williams, *Ethics of Research on Survivors of Trauma*, 6 CURRENT PSYCHIATRY REPORTS 262, 262 (2004).

<sup>209</sup> *Id.* at 262–263.

<sup>210</sup> Boutruche, *supra* note 201 at 137–138.

<sup>211</sup> *Id.* at 137–138.

of the methods to be used and the goals of the investigation; and that they are able to choose the degree and type of involvement they have in the investigation.<sup>212</sup> For example, participants may consent to their information being used in a published report, may agree that it can be provided to criminal investigators or prosecutors, or may require that the information be kept entirely confidential.<sup>213</sup> They may also request anonymity, or agree to have their identities made public.<sup>214</sup> In all cases, participants must understand the potential consequences of their choices.<sup>215</sup>

A problem emerges as new suppliers and, in particular, intermediary actors enter the marketplace. Suppliers may wish to share the information they have with these actors. The IIIM, for instance, has concluded a Memorandum of Understanding with the COI.<sup>216</sup> Given the differences in mandates between the two institutions, however, the IIIM requires access to the COI's materials in order to determine precisely which information could be useful to it.<sup>217</sup> Where the information was gathered before December 2016, the IIIM did not exist and so the COI would not have been able to obtain consent to share information with it. As a result, the COI has to attempt to go back to its sources and seek consent.<sup>218</sup> Where it is unable to locate the source or otherwise obtain consent, it may not share the information

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<sup>212</sup> Ulrich, *supra* note 199 at 206.

<sup>213</sup> Boutruche, *supra* note 201 at 147.

<sup>214</sup> *Id.* at 147.

<sup>215</sup> *Id.* at 147.

<sup>216</sup> Marchi-Uhel, *supra* note 118.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

with the IIIM.<sup>219</sup> Additionally, the IIIM has clearly stated that it will not share information if the provider has indicated that such information is confidential.<sup>220</sup> This creates a tension between the principle of voluntary obtained consent and the efficacy of IIIM investigations. It also foreshadows the difficulties likely to emerge should a hybrid or international tribunal with jurisdiction over the Syrian conflict be established in the future.

#### E. ASSESSMENT OF CHALLENGES

The challenges resulting from the increased number of suppliers can be attributed to three key features of the marketplace. The first is that suppliers are in a relationship of competition rather than coordination. Because these actors do not necessarily work together, they may duplicate their efforts, inefficiently using resources and potentially placing witnesses in danger. They may also not want to share information with each other, or see no reason to do so. Their failures to coordinate also mean that demanders have to expend time and money navigating a complex web of suppliers in seeking the information they want.

The second feature is that suppliers themselves determine the standards applicable to the work they undertake. While some engage in a process of information collection and protection that is highly professionalized, others lack the time, financial resources, and staff necessary to identify and apply techniques that will increase the utility

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<sup>219</sup> *Id.*

<sup>220</sup> U.N. Doc. A/72/764, *supra* note 123, at ¶ 42.



of the information they gather to any future criminal proceedings.

The third characteristic is that the actors in the marketplace are not static. When new actors, such as the IIIM, enter the market after it has been up and running for some time, it creates the need for suppliers to go back to sources and obtain updated informed consent. As outlined above, this may be impossible. It also requires the expenditure of valuable time and resources.

Recognizing these features allows for the development of a targeted regulatory system which may improve the overall functioning of the market and the quality of its products.

## V. REGULATING THE MARKETPLACE

The introduction of one or more regulatory institutions offers an avenue through which the challenges summarized above may be, if not entirely surmounted, at least lessened in impact. This paper proposes one such regulatory framework, namely a model which strengthens the already existing IIIM using aspects of the regulatory system for private military companies as well as that of the humanitarian cluster approach. Such a framework would specifically target the shortcomings identified above, and look to improve the overall functioning of the marketplace.

### A. THE BUILDING BLOCKS

#### i. *The IIIM*

The IIIM was discussed in detail in Chapter 2.IV.D above; however, some additional information is necessary to

illustrate how it specifically addresses several of the challenges identified in this marketplace.

By serving as a “central receptacle for evidence from a variety of disparate sources”,<sup>221</sup> the IIIM endeavors to “play a role in promoting a more comprehensive and integrated accountability strategy for the Syrian Arab Republic.”<sup>222</sup> The mechanism is already looking to work with a wide variety of suppliers to compile materials and ultimately create casefiles. It met twice with Syrian NGOs in 2017, ultimately establishing a platform for biannual meetings going forward and creating a protocol governing cooperation between the NGOs and the IIIM.<sup>223</sup>

The IIIM and CIJA have also established close ties, with CIJA providing cooperation and assistance to the mechanism that it expects will increase as the IIIM further develops its infrastructure.<sup>224</sup> The IIIM has been working with U.N. bodies including the COI, with which it is seeking to establish a cooperation agreement; and the United Nations Secretariat, from which it is looking to access information previously obtained by the Organisation for the Prohibition

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<sup>221</sup> Hohler and Pederson, *supra* note 100.

<sup>222</sup> U.N. Doc. A/72/764, *supra* note 123, at ¶ 5.

<sup>223</sup> *Id.* at ¶ 54; *Protocol of Cooperation between the International, Independent and Impartial Mechanism and Syrian Civil Society Organisations participating in the Lausanne Platform* (3 April 2018), <https://iiim.un.org/engagement-with-stakeholders/> (last visited 3 September 2018). The protocol specifies that “operational details or working procedures” may be addressed in individual memoranda of understanding as required: *Protocol of Cooperation*, at 1.

<sup>224</sup> Interview with Nerma Jelacic, *supra* note 73.

of Chemical Weapons-United Nations Joint Investigative Mechanism.<sup>225</sup>

The IIIM has the potential to move from solely cooperation to coordination as well, and is already taking certain steps in that direction. It has stated that it will work alongside national jurisdictions to determine “areas where it can add most value to existing work while avoiding duplication”<sup>226</sup> and that it is “working on strategies aimed at promoting greater coordination with civil society actors to enhance the overall effectiveness of the collective work being done.”<sup>227</sup> In November 2018, the IIIM issued its first information bulletin, which included a section entitled “What kind of documentation gathered by Syrian NGOs is of particular high value for the IIIM?”, providing a measure of direction to NGOs looking to collect information to assist with future prosecutions.<sup>228</sup>

To facilitate the collection and storage of materials, the IIIM is currently setting up an IT system which will organize the information such that it is searchable; establish metadata to improve the ease of analysis of the material; identify duplicate information; and ensure confidentiality.<sup>229</sup>

ii. *The regulatory framework for private military companies*

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<sup>225</sup> U.N. Doc. A/72/764, *supra* note 123, at ¶ 57-58. As the Joint Investigative Mechanism’s mandate was not renewed as of November 2017, the IIIM is not able to liaise with it directly.

<sup>226</sup> *Id.* at ¶ 40.

<sup>227</sup> *Id.* at ¶ 21.

<sup>228</sup> BULLETIN NO. 1 - NOVEMBER 2018, (2018), <https://iiim.un.org/wp-content/uploads/2019/01/MESASA1.pdf> (last visited Feb 10, 2019).

<sup>229</sup> U.N. Doc. A/72/764, *supra* note 123, at ¶ 35.

The regulatory framework for private military companies (PMCs) is comprised of two key components: the International Code of Conduct for Private Security Service Providers (ICoC),<sup>230</sup> and the International Code of Conduct for Private Security Service Providers Association (ICoCA).<sup>231</sup> This paper will focus on the ICoC.<sup>232</sup>

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<sup>230</sup> THE INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS, (2010),

[https://icoca.ch/sites/all/themes/icoca/assets/icoc\\_english3.pdf](https://icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf).

<sup>231</sup> See The ICoC Association, INTERNATIONAL CODE OF CONDUCT ASSOCIATION, <https://icoca.ch/en/icoc-association>.

<sup>232</sup> The ICoCA model could, however, be looked to as an example of a framework that would move beyond simply promulgating standards to certifying organizations and monitoring compliance. A key challenge associated with this framework, however, is the reality that not all actors would be able to comply, nor would all actors necessarily be targeted.

Smaller NGOs, for example, may not have the capacity to undertake training or provide documentation outlining how they apply standards in their activities. As a result, they could be pushed out of the marketplace. If one subscribes to the view that pure competition breeds quality, this might not be seen as an issue (i.e. by forcing weaker suppliers out of the marketplace, the overall quality of information provided will improve). This view, however, is not necessarily reflective of the reality of atrocity crime investigations. If, for example, these NGOs were providing documentation in an under-served region or on individuals/groups less commonly focused on, concerns arise with respect to whether they will be replaced.

Additionally, individual suppliers are unlikely to be targeted by any standard-setting regime, given their numbers, but are likely to continue to provide evidence and information. Encouraging their compliance with established standards would likely need to be based in improving their ability to access standards through centralization. As a result, this paper focuses on centralization rather than certification.

The ICoC establishes “a commonly-agreed upon set of principles for [PMCs]” as well as “a foundation to translate those principles into related standards as well as governance and oversight mechanisms.”<sup>233</sup> It outlines principles regarding the conduct of personnel, including rules on the use of force and rules prohibiting torture; as well as principles addressing management and governance, including commitments concerning personnel selection and training.<sup>234</sup> The text of the ICoC was developed through multi-stakeholder consultations, using as a foundation the Montreux Document<sup>235</sup> and the “protect, respect, remedy” framework outlined by the UN Secretary General’s Special Representative on Business and Human Rights.<sup>236</sup>

The ICoC is voluntary, which raises the danger that PMCs simply will not comply with the standards articulated.<sup>237</sup> Consequently, some form of incentive is

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<sup>233</sup> THE INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS, *supra* note 230 at 5.

<sup>234</sup> *Id.* at 28–69.

<sup>235</sup> THE MONTREUX DOCUMENT ON PERTINENT LEGAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICT, (2008), [https://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0996.pdf](https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf) (last visited Jan 14, 2018).

<sup>236</sup> See THE INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS, *supra* note 230 at 2–3; ANNE-MARIE BUZATU, TOWARDS AN INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY PROVIDERS: A VIEW FROM INSIDE A MULTISTAKEHOLDER PROCESS 39 (2015).

<sup>237</sup> Sarah Percy, *Regulating the private security industry: a story of regulating the last war*, 94 IRRC 941, 955 (2012).

required for compliance.<sup>238</sup> One such incentive comes from what Anne-Marie Buzatu terms as “co-regulatory approaches” undertaken by national governments and international institutions.<sup>239</sup> These demand actors have taken steps, under national law or in outlining procurement policies, to make it obligatory for a PMC to be compliant with the ICoC and be a member of the ICoCA before the actor will contract with the PMC.<sup>240</sup> In doing so, the demand actors give the voluntary framework some teeth, incentivizing suppliers to join and to comply.<sup>241</sup>

iii. *The humanitarian cluster approach*

At its core, the humanitarian cluster approach looks to ensure groups of actors working within the same context towards the same goal coordinate in their operations so as to act more effectively overall. It also provides a framework through which key actors can engage and promulgate standards and best practices.

In order to understand the workings of the cluster approach, it is necessary to get a sense of its key components. These are summarized by J. Benton Heath as follows:

The Office for the Coordination of Humanitarian Affairs (OCHA), an office of the UN Secretariat, manages the coordination of humanitarian affairs, overseeing humanitarian operations as well as the coordination of

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<sup>238</sup> Stephanie M. Hurst, “Trade in Force”: *The Need for Effective Regulation of Private Military and Security Companies*, 84 SOUTHERN CAL. L. REV. 447, 481 (2011).

<sup>239</sup> BUZATU, *supra* note 236 at 60.

<sup>240</sup> *Id.* at 60.

<sup>241</sup> *Id.* at 60.

humanitarian policy and advocacy. Policy setting and best practices are developed by the [Inter-Agency Standing Committee (IASC)], which includes all the UN operational agencies, such as the High Commissioner for Refugees (UNHCR) and the World Health Organization (WHO), and which extends standing invitations to a range of nongovernmental organizations (NGOs), the Red Cross, and the International Organization for Migration (IOM). Country-level efforts are overseen by an in-country humanitarian coordinator, who is named by the head of OCHA and remains directly accountable to her. The head of OCHA is an appointee of the UN secretary-general.<sup>242</sup>

Global cluster leads are responsible for putting together clusters of organizations which articulate and disseminate standards and best practices, as well as provide training and operational support.<sup>243</sup> At the country level, the humanitarian coordinator designates clusters of organizations and leaders to act within the country as needed.<sup>244</sup> Cluster leaders within the country then focus on ensuring actors within their particular sector provide humanitarian responses in a manner that is coordinated and effective.<sup>245</sup>

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<sup>242</sup> J. Benton Heath, *Managing the 'Republic of NGOs': Accountability and Legitimation Problems Facing the UN Cluster System*, 47 JOURNAL OF TRANSNATIONAL LAW 239, 246–247 (2014).

<sup>243</sup> *Id.* at 247–248.; IASC, GUIDANCE NOTE ON USING THE CLUSTER APPROACH TO STRENGTHEN HUMANITARIAN RESPONSE 4 (2006), [http://www.who.int/hac/network/interagency/news/iastc\\_guidance\\_note.pdf](http://www.who.int/hac/network/interagency/news/iastc_guidance_note.pdf) (last visited Jan 14, 2018).

<sup>244</sup> IASC, *supra* note 243 at 5.

<sup>245</sup> *Id.* at 7.

## B. THE HYBRID MODEL

None of the above models on their own are sufficient to ameliorate all three of the primary challenges to the marketplace identified above. As a result, this paper proposes a hybrid model combining elements of all three frameworks, with an overall structure similar to that of the humanitarian cluster approach.

As a preliminary point, it should be noted that this hybrid model could be situated within the U.N. framework, as are the IIIM as well as the cluster approach, or take the form of a multi-stakeholder initiative, similar to the regulatory framework for PMCs. This paper does not comment on the merits or shortcomings of one approach as opposed to the other, but rather looks to outline what the model itself would look like and how it would address the particular challenges facing the marketplace for the investigation of atrocities. In order to do so, it examines the two key components of the hybrid model: one permanent body, the “Office of Coordination and Standard-Setting” (OCSS); and temporary bodies, known as “Situation-Specific Mechanisms”, established by the OCSS as needed.

### i. *The Office of Coordination and Standard-Setting*

At the top of the institutional structure of the hybrid model would be an institution similar to the OCHA, which this paper will refer to as the “Office of Coordination and Standard-Setting” (OCSS). The OCSS would be a permanent body which, as its name suggests, would have two primary functions: coordination and standard-setting.

Turning first to coordination, the OCSS would look to monitor and assess ongoing conflict situations to determine



whether it would be necessary to establish SSMs to improve the overall functioning of the marketplace. Considerations in this decision-making process would need to be laid out, but could include length of the conflict, ability of investigative authorities to access the territory and conduct investigations, volume of information being produced, and number of actors active in the situation.

In making these determinations, the OCSS would maintain strong working relationships with actors both supplying and demanding information concerning human rights abuses and international crimes. This would require it to have the personnel and technical capacity necessary to liaise with these actors and monitor conflict situations, but allow it to be a leaner organization than the IIIM, for example, as it would not require the same degree of staff, IT resources, and storage facilities. As a permanent body, however, the OCSS would have on-going relationships with supply and demand actors, retain the institutional memory necessary to set up situation-specific mechanisms, and provide at least one static actor in the marketplace to whom individual victims and witnesses could provide their informed consent.

Shifting focus to standard-setting, the OCSS would look to articulate market standards for investigative practices, providing a central location to which supply actors could turn in order to locate best practices. As mentioned above, documents outlining standards and best practices for human rights work and investigative methods do exist. These could provide a starting point for the type of multi-stakeholder process that led to the creation of the ICoC, but one geared towards articulating standards for investigating atrocity crimes. Both supply and demand actors could be involved in the process, so as to ensure that standards reflected both the capacities of suppliers as well as the needs of demanders.

Although an SSM such as the IIIM could in theory serve the same purpose,<sup>246</sup> allocating management of standards-setting to a separate permanent body allows for a greater degree of specialization and promotes the development of permanent institutional memory.

As is the case with the PMC model, the crucial issue would be how to incentivize suppliers to adopt and implement standards. Demand actors may be positioned to provide the necessary incentives. For example, they may indicate that they will, at least for the most part, only accept information from those suppliers who meet the standards. This may happen as a result of a deliberate choice to encourage the adoption of the standards. Or it may occur more naturally if suppliers using the best practices consistently produce credible and reliable information, or if a court provides a favorable evidentiary ruling taking into account the supplier's application of recognized standards.

An additional challenge to articulating best practices would relate to the nature of the standards to be articulated and applied. There are different standards for admissibility of evidence based on where a given prosecution is taking place. National jurisdictions have different rules of evidence from each other, and from international fora. In the Syrian context, it is possible that cases may be heard at an international or hybrid tribunal which does not yet exist. Consequently, its

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<sup>246</sup> And indeed, the IIIM has noted that it "sees obvious scope, when possible and subject to operational constraints, for providing some feedback to civil society actors about the utility of information that they have given the Mechanism, as well as for making constructive suggestions about increasing the utility of information collected in the future": U.N. Doc. A/72/764, *supra* note 123, at ¶ 21. This is also reflected in the *Protocol of Cooperation*, *supra* note 221, at 4.

rules on admissibility do not yet exist, although it may be possible to draw on the rules of existing bodies for guidance. This is where multi-stakeholderism has a significant role to play – engaging demand actors from a variety of jurisdictions and with varied needs would help to ensure that the standards ultimately developed are sensitive to different contexts.

ii. *Situation-Specific Mechanisms*

Should the OCSS determine it is necessary, it would then establish an SSM similar in nature to the IIIM. One of the key strengths of the IIIM framework is its ability to facilitate interactions between supply and demand actors.<sup>247</sup> Provided that the SSM is able to cooperate with the wide variety of supply actors active in a given context, the benefits to actors on the demand side, in particular national prosecutors, would be readily apparent. Most importantly, demand actors would be able to liaise primarily with one sole actor as opposed to many. As regards documentary or electronic materials, this would limit the amount of time required to acquire the necessary information, and also address the concern that

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<sup>247</sup> It is important to keep in mind, however, that there may be issues associated with national prosecutors' use of or reliance on evidence collected by outside sources. Kaleck and Kroker, *supra* note 153, raise the concern of how much of the investigative stage of prosecutions, particularly in inquisitorial systems, can be left to or helped by the IIIM. Additionally, Hohler and Pederson, *supra* note 100, note that it is unlikely any prosecutor ethically could rely on an intermediary actor such as the IIIM's analysis without conducting his/her own due diligence and review. These limitations are important to bear in mind when assessing the potential impact of the IIIM on national prosecutions.

demand actors might simply have no access to or no institutional relationships with certain suppliers.

Another key benefit of adopting the IIIM framework is its potential to more effectively sort through and categorize information and materials received, while ensuring that it is stored in adherence with criminal law standards. By effectively using IT tools, the SSM could improve how information is received, searched, transferred, and managed.<sup>248</sup> It would also allow those actors with fewer resources, but which still wished to contribute to the end goal of criminal accountability, to provide useful information without needing to establish expensive and extensive IT systems. Moreover, linking each individual SSM to a permanent body also would avoid the need to reinvent the wheel with each new conflict situation. Instead, existing IT systems could be improved and, as necessary, adapted to new situations.

The SSM need not be limited, however, to coordinating between the demand and supply side. It could also take on a role similar to that of the humanitarian coordinator at the country level in the cluster approach.<sup>249</sup> In addition to being a repository for information, the SSM could work alongside the various actors to improve overall coordination, perhaps encouraging the formation of clusters based on region, types of offences investigated, types of information produced, or some combination thereof. Those clusters could then look to

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<sup>248</sup> For a detailed overview of the use of IT in each of these areas, see Iliia Utmelidze, *Information Technology and Quality Control in Non-Criminal Justice Fact-Work*, in *QUALITY CONTROL IN FACT-FINDING* 447–460 (Morten Bergsmo ed., 2013).

<sup>249</sup> An approach already suggested for the IIIM by Kersten, *supra* note 4.

coordinate amongst themselves to avoid overlap and promote the effective use of resources. This would, ideally, provide a form of overhead assistance and coordination without sacrificing the knowledge and experience of actors involved in day-to-day investigations.

As a conflict situation ends and investigations and prosecutions come to a close, the SSM could then scale back its operations, eventually winding down entirely. Thought could be given as to the ability of the OCSS to serve as an archive system for the information obtained, or whether a separate archive would need to be established.

## VI. CONCLUSION

The hybrid model outlined above provides an initial flavor for how the marketplace for investigating atrocities could be regulated in order to improve the quality of the product produced, as well as the efficiency and ethics of interactions between its participants, and between these participants and their sources. Alternative models could be imagined, and may be better-suited to the features of this particular marketplace. Regardless of what course is adopted, the reality appears to be that multiple suppliers will continue to play an active and important role in creating and gathering information concerning human rights violations and international crimes. Strengthening these actors' abilities to do so is crucial to increasing the opportunities for justice available to victims of atrocities.