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# Assembling Atrocity Archives for Syria

Assessing the Work of the CIJA and the IIM

Michelle Burgis-Kasthala\*

## Abstract

*This article provides an ethnographically informed comparative case study of the atrocity archiving work being undertaken by two entities: the not-for-profit, civil society organization, the Commission for International Justice and Accountability (CIJA), and the United Nations' International, Impartial, and Independent Mechanism for Syria (IIM). Insights from data collected are read alongside debates within the fields of international criminal law, transitional justice, and archival studies. The article argues that this archival work is of significance in exploring how international lawyers respond to the Syrian tragedy, how they understand the possibilities and limitations of criminal trials, as well as their ethical responsibilities in possessing so much sensitive material. The example of the Syrian atrocity archive, and the innovative technological approaches it requires, provides new ways of thinking through the relationship between evidence, custodianship, and the legitimacy of (possible future) criminal trials.*

## 1. Introduction

How can international criminal lawyers respond to the scale of suffering that engulfs Syria? Can current or future legal institutions provide some form of redress and, if so, with what material, what artefacts, what memories? Such questions are important both practically and theoretically, and are implicated

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in the work of a number of actors currently engaged in and on the Syrian conflict. Since the uprising began in 2011, a variety of groups have invested in a range of humanitarian governance practices, including emergency relief work, human rights advocacy and reporting, along with criminal investigations, and the assembling of a number of material and/or digital archives both by local and international organizations.<sup>1</sup> This article uses a comparative case study of two such organizations — the Commission of International Justice and Accountability (CIJA) and the International, Impartial and Independent Mechanism (IIIM) — and their partially interdependent archives to reflect on the limits and possibilities of redress through artefacts of atrocity. Such a focus seeks to establish a conversation across the fields of international criminal justice, transitional justice and archival studies about how to study international criminal law (ICL) archives, and what the ethical ramifications are of such targeted archival practices. In particular, the article explores the tension between the pursuit of evidence preservation and its inevitable transformation whether as stored within the confines of the archive or as produced for a criminal trial.

Methodologically, this article offers an ethnographic lens onto the particular challenges I confronted as a scholar seeking to understand these practices of instrumental archival creation, as well as the challenges faced by those

- 1 This article only considers the archiving practices of two key international criminal evidence organizations relating to Syria, but notes the important efforts of a number of other organizations, especially: the Violations Documentation Centre, which was established by Syrians in June 2011 to document human rights violations by all actors in the conflict with the goal of assisting future accountability efforts: Violations Documentation Center in Syria, <http://vdc-sy.net/en/> (visited 9 March 2021); and similarly, the Syrian Network for Human Rights, <http://sn4hr.org/about-us/> (visited 9 March 2021); Bellingcat, which conducts investigations about Syria and other cases through online materials: Bellingcat, <https://www.bellingcat.com/> (visited 9 March 2021); the Berkeley Human Rights Centre, which enables students to investigate alleged violations through open source material: Human Rights Center, at <https://humanrights.berkeley.edu/home> (visited 9 March 2021); Forensic Architecture, which employs innovative methodologies to investigate alleged war crimes in Syria and beyond: Forensic Architecture, available online at <https://forensic-architecture.org/location/syria> (visited 9 March 2021); Syrian Archive, which focuses on the preservation of video evidence: Syrian Archive, available online at <https://syrianarchive.org/en> (visited 9 March 2021); the UN Commission for Syria, available online at <https://www.ohchr.org/en/hrbodies/hrc/iicisyrria/pages/independentinternationalcommission.aspx> (visited 9 March 2021); and the Syria Justice and Accountability Centre, whose mandate is to document alleged violations of human rights, international humanitarian and international criminal laws. They have developed a sophisticated set of protocols to inform their work and that of other similar entities: Syria Justice and Accountability Center, 'Documentation Training', available online at <https://syriaaccountability.org/documentation-practices/> (visited 9 March 2021); the Syrian Accountability Project, available online at <http://syrianaccountabilityproject.syr.edu/> (visited 9 March 2021). On the Syrian Archive, especially see S. Ristovska, 'Human Rights Collectives as Visual Experts: The Case of Syrian Archive', 18 *Visual Communication* (2019) 333; The Syrian Observatory For Human Rights, available online at <http://www.syriahr.com/en/> (visited 9 March 2021); and the Violation Documentation Center in Syria, available online at <https://vdc-sy.net/en/> (visited 9 March 2021). Also see N. Aboueldahab, *Writing Atrocities: Syrian Civil Society and Transitional Justice*, Brookings Doha Centre Analysis Paper, Number 21, May 2018, available online at [https://www.brookings.edu/wp-content/uploads/2018/04/transitional-justice-english\\_web.pdf](https://www.brookings.edu/wp-content/uploads/2018/04/transitional-justice-english_web.pdf) (visited 13 July 2021).

archiving themselves. While acknowledging the rich lineage of scholarship emerging from the ‘archival turn’ which seeks to problematize understandings of ‘the archive’ per se, this article is grounded in a narrower focus suggested by Ketelaar. He argues that the ‘important question is not “what is an archive”, but how does . . . [a] particular individual or group perceive and understand an archive?’<sup>2</sup> Here, then, is a call to organizational ethnography as a way to make sense of particular archival practices.<sup>3</sup> Understanding ‘the organizational setting and the ways in which documents are used must be taken into account, because documents on their own terms often reveal little about the diverse functions that documents play in organizations’.<sup>4</sup> Although the security protocols of both the CIJA and the IIM prevent any pretense at full-blown ethnography, I recognize the need for such sensibilities in informing a study of their archival practices. Such a focus on particular actors themselves provides an opportunity to understand how general notions about criminal accountability, redress, and legitimacy are given meaning within the dynamics of organizational culture.<sup>5</sup> Thus, while speaking from and speaking to lawyers and their ‘universalized’ concerns about criminal accountability, this article explores how actors contribute to the building of such universalized edifices through their construction of archives. In particular, I focus on the motivations informing this type of work and explore its possible practical and ethical implications for the legitimacy of the fields of ICL and transitional justice (TJ).

Data for this article draws from 40 in-depth interviews with CIJA and IIM personnel and associates. I visited the CIJA’s European headquarters in June 2017 and October 2021 as well as an annual training workshop of its Syrian personnel in late 2018. I also conducted interviews through Skype with former and current staff and advisors based in several locations. I visited and

- 2 E. Ketelaar, ‘Archival turns and returns: Studies of the archive’, in A.J. Gilliland et al. (eds), *Research in the Archival Multiverse* (Monash University, 2017), available online at <https://research.monash.edu/en/publications/archival-turns-and-returns-studies-of-the-archive> (visited 8 March 2021).
- 3 Zeitlyn’s notion of archiveology is related to such an endeavour when he argues that ‘we must consider archives as complex social organizations, studying them anthropologically to produce ethnographies of archives, works of archiveology’. D. Zeitlyn, ‘Anthropology in and of the Archives: Futures and Contingent Pasts. Archives as Anthropological Surrogates’, 41 *Annual Review of Anthropology* (2012) 461, 466. Here, I acknowledge the rich body of work on organizational ethnography that has informed my fieldwork, such as T. Watson, ‘Ethnography, Reality, and Truth: The Vital Need for Studies of ‘How Things Work’ in Organizations and Management’, 48 *Journal of Management Studies* (2011) 202; and T. Zilber, ‘Beyond A Single Organization: Challenges and Opportunities in doing Field Level Ethnography’, 3 *Journal of Organizational Ethnography* (2014) 96. Similarly, Stoler points out that to understand an archive, ‘one needs to understand the institutions that it served. A. Stoler, ‘Colonial Archives and the Arts of Governance: On the Content of the Form’, in C. Hamilton et al. (eds), *Refiguring the Archive* (Springer, 2002), 83–102.
- 4 A. Langhof, ‘Off the Record: Understanding the (Latent) Functions of Documents in Organizations’, 7 *Organizational Ethnography* (2018) 59, 59.
- 5 Especially, see G. Sarfaty, ‘Why Culture Matters in International Organizations: The Marginality of Human Rights at the World Bank’, 103 *American Journal of International Law (AJIL)* (2009) 647.

conducted interviews with key members of the IIM in Geneva in June 2019. Most of these interviews were transcribed with identities suppressed in the interests of safety, and as required by the organizations themselves.<sup>6</sup> In the case of the IIM, I provide direct quotations only from interviews conducted with its Head and Deputy Head as they act as the organization's official spokespersons. For those interviews with other IIM staff, I have either paraphrased their ideas or have included excerpts from the Mechanism's official reports where they closely reflect interviewee perspectives.

This article comprises three substantive sections. First, I introduce the two organizations by overviews their establishment, mandates, and personnel. Secondly, I explore a variety of the practical challenges these entities face in their archival work. Thirdly, I reflect on the ethical dimensions of this archival work as it relates to questions over access, how such archives could inform criminal trials, and how else might we imagine the future existence of these now alienated archives, which were once securely held by the Syrian state. In particular, I ground such concerns in a conversation with key scholars of the 'archival turn' to demonstrate how the fields of ICL and TJ can benefit from such interdisciplinary engagement.

## 2. Comparative Case Study of the CIJA and the IIM: Understanding Competing and Converging Mandates and Motivations

### A. The CIJA

*Bill [Wiley, CIJA's founder and executive director], so to speak, was the right man, at the right place, at the right time. He understood the value of the documents, right away. He sees this opportunity to get a hold of half a million pages of [Syrian] regime generated documents, when nobody thought they were of any use or value, and he rescued them, he safeguarded them for the Syrian people.*

CIJA Interview #3, 7 June 2017

*In 2012 [in Syria], no one thought about documenting, and in June in 2012, who would think about documenting? Immediately CIJA was involved and formed a team, and documented things . . . they wanted to document during the events.*

Syrian field staff member, CIJA Interview #22, 2 November 2018<sup>7</sup>

Even before both Russia and China vetoed a United Nations Security Council (UNSC) referral of Syrian atrocities to the International Criminal Court (ICC) in May 2014,<sup>8</sup> it was clear that existing public international institutions had

6 Some of these themes of secrecy and academic transparency regarding CIJA research are explored in M. Burgis-Kasthala, 'Researching Secret Spaces: A Reflexive Account on Negotiating Risk and Academic Integrity', 33 *Leiden Journal of International Law (LJIL)* (2020) 269.

7 Emphasis added.

8 Unusually, China and Russia resorted to the double veto to block UNSC referral to the ICC under Chapter VII: UNSC, Security Council Draft Resolution, S/2014/348, 22 May 2014,

failed to respond adequately to the scale of Syria's civil war. Although it might be tempting for international lawyers to blame politics for this inaction,<sup>9</sup> law is in fact a vital element in this catastrophe of governance relating to the Syrian conflict. First, in terms of the ICC, the conflict has fallen through the cracks of a piecemeal jurisdictional system reliant on UNSC referral, state consent through ratification of the Rome Statute or the creation of a specialized tribunal. Second, although fact-finding efforts can go some way to documenting these abuses, their legally endorsed mandates are circumscribed by particular terms of reference.

While these frustrations played themselves out in public registers, a variety of actors very quickly began to develop a range of governance responses in Syria as it fell apart. Most prominent was the daring<sup>10</sup> mobile phone footage gathered early on in the conflict and uploaded onto social media sites that seemed to cry out for a response.<sup>11</sup> Notwithstanding the affective qualities of this material, it was soon clear that other more sophisticated approaches would be needed. The CIJA was one of these responses as its experienced founders were ideally placed with access to high-level UK diplomats early on in the Syrian conflict. Funded initially through UK government contributions along with some private capital from its Director and founder, William Wiley,<sup>12</sup> it emerged with the idea of securing evidence 'during armed conflict' that could be used for future criminal trials.<sup>13</sup> Thus according to one CIJA lawyer, the CIJA did not want to 'be in a situation like Rwanda, where all the documentation the government produced was gone by the time the investigator came...[so]...there is a need for CIJA to go in while the evidence is still available and secure it and organize it so that it could be used one day.'<sup>14</sup>

Although non-Syrian CIJA staff do enter the country from time to time, the bulk of the work *in situ* is carried out by Syrians themselves. The first few years of CIJA's work centered on training and mentoring Syrian lawyers in the skills of criminal investigations, particularly in relation to identifying types of documentation and the gathering of supporting witness statements. Although the Syrian conflict has involved a range of alleged perpetrators, the CIJA has confined its remit to regime crimes and opposition crimes committed by ISIS.

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available online at [https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2014\\_348.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_348.pdf). (visited 13 July 2021).

- 9 On the various iterations on the relationship between law and politics at play within ICL in particular, see G. Simpson, *Law, War & Crime: War Crimes Trials and the Reinvention of International Law* (Polity Press, 2007).
- 10 K. Hiatt, 'Open Source Evidence on Trial', 125 *Yale Law Journal Forum* (2016) 323, 324.
- 11 C. Tenove, 'Networking Justice: Digitally-Enabled Engagement in Transitional Justice by the Syrian Diaspora', 42 *Ethnic & Racial Studies* (2019) 1950.
- 12 Wiley's background and how he came to set up CIJA is discussed in M. Burgis-Kasthala, 'Entrepreneurial Justice: Syria, the Commission for International Justice and Accountability and the Renewal of International Criminal Justice', 30 *European Journal of International Law (EJIL)* (2019) 1165, 1178–1179.
- 13 CIJA anonymized interview #1, 5 May 2017.
- 14 CIJA anonymized interview #4, 20 June 2017.

To assist with the securing of supporting documentation for these groups, early on in the conflict, the CIJA entered into an agreement with one of the main opposition groups at the time, the Free Syria Army, which then handed over all materials it encountered during its operations to the CIJA. This, along with a steadily growing network of expertise and informants, has enabled the CIJA to amass a staggering 1.15 million pages generated by the regime,<sup>15</sup> along with developing a sophisticated internet-based crimes database and connected witness statements. Since 2015, the CIJA has extended its work into Iraq and secured a similar agreement with the Kurdish authorities in the North to receive documentation. Such scale in documentation is impressive and is probably the largest instance of evidence preservation on the part of a civil society actor in Syria. The CIJA also regards the nature of its work as unprecedented for its strict commitment to international criminal trial standards in preparing pre-trial briefs from its archival arsenal.<sup>16</sup> While some CIJA staff looked to the Documentation Centre of Cambodia (DC-Cam)<sup>17</sup> as an early example of similar civil society work,<sup>18</sup> this evidence gathering occurred years after the Cambodian atrocities, whereas CIJA's innovation has been to step in and secure evidence contemporaneously. Standing before these documents in 2017 with only a vague sense of their content during my fleeting visit to CIJA's headquarters, I found it hard not to be impressed and even overwhelmed by their hidden possibilities. I was also troubled as to how these materials might

15 In addition, there are around 200 000 pages prevented from transfer due to Covid-19: Personal communication with Bill Wiley, 16 October 2020. For a glimpse of these files in the hands of CIJA's director, see the CIJA Annual Report 2019-2020: available online at <https://static1.squarespace.com/static/56706cbb841aba81145cadea/t/5f5baf02a871f324968f4daa/1599844159116/CIJA+Annual+Report+2019-2020.pdf>, page 14 (visited 13 July 2021).

16 This ethos is captured well by a CIJA legal analyst in her account of the Commission's sexual and gender biased violence work: S. Barbour, 'Supporting Accountability for Sexual Violence in the Syria and Iraq Conflicts: Innovations, Good Practices, and Lessons Learned through Private Criminal Investigations', 18 *Journal of International Criminal Justice (JICJ)* (2020) 397.

17 DC-Cam was established by Yale University in 1995 after the U.S. government passed the Cambodia Genocide Justice Act in 1994. The Centre has worked on securing material relating to the genocide which occurred between 1975–1979. These materials were used by the Extraordinary Chambers in the Courts of Cambodia. The Centre is not simply a documentation gathering entity, however, but is also an active civil society organization in support of education, advocacy and development: Documentation Center of Cambodia, at <http://dccam.org/home> (visited 9 March, 2021).

18 As noted in interview with Beth van Schaak, CIJA Advisory Board member, 22 November 2017 and CIJA anonymized interview #5, 21 June 2017. On the nature of DC-Cam's archives, especially see M. Caswell, 'Khmer Rouge Archives: Accountability, Truth, and Memory in Cambodia', 10 *Archival Science* (2010) 25; V. Frings-Hessami, 'Khmer Rouge Archives: Appropriation, Reconstruction, Neo-Colonial Exploitation and their Implications for the Reuse of Records', 19 *Archival Science* (2019) 255; and M. Klinkner, 'Forensic Science for Cambodian Justice', 2 *International Journal of Transitional Justice* (2008) 227. It is interesting to note how none of my interviewees discussed the more recent and geographically proximate case of the removal of the Iraqi state archive by U.S. troops during the invasion in 2003. For an overview of the archival practices surrounding this episode, see M. Caswell, "'Thank You Very Much, Now Give Them Back': Cultural Property and the Fight over the Iraqi Baath Party Records', 74 *American Archivist* (2011) 211.

be used or not used whether to inform criminal trials or other social justice projects.

## B. The IIIM

*The limitations of the Mechanism's mandate are, at the same time, sources of opportunity to forge new approaches to international criminal justice.*<sup>19</sup>

While groups such as the CIJA were partly created to offset public body inaction, existing international fora tried to address the many crimes unfolding in Syria with the UN serving as the focal point of such activity.<sup>20</sup> In the face of diplomatic frustration over the limited means for criminal investigation and prosecution, a group of state and non-state actors successfully lobbied the United Nations General Assembly (UNGA) to create the IIIM in December 2016.<sup>21</sup>

In contrast to the CIJA, the IIIM is tasked with considering crimes committed by all parties to the conflict. The Mechanism is innovative for several reasons. First, the IIIM's inception shifts the focus on accountability from the UNSC to the UNGA. Operating under its Chapter VII 'enforcement powers' of the Charter, the UNSC had served as the preeminent creator of international criminal justice bodies, such as the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR) in the 1990s. This power was consolidated through the establishment of the ICC in 1999 under the Rome Statute, which affirms UNSC powers to confer jurisdiction even without state consent, as was the case in relation to Libya in 2011.<sup>22</sup> While such UNSC action demonstrates a willingness to respond to some key contemporary human rights challenges, the impetus still remains framed within the remit of 'peace and security', rather than the pursuit of victims' rights. The UNGA has tended to play a secondary role in investigating criminal accountability, through assisting UNSC mandates, such as in the creation of fact-finding missions. In the Syrian case, however, frustration with UNSC paralysis in the face

19 IIIM, *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*, A/72/764, 28 February 2018, § 12.

20 In particular, the Independent International Commission of Inquiry on the Syrian Arab Republic, established by the United Nations Human Rights Council in August 2011: UN Human Rights Council, Res. S-17/1 on the Situation of Human Rights in the Syrian Arab Republic, 23 August 2011.

21 UN General Assembly, Resolution on the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, GA Res. 71/248, 19 December 2016. Also see I. Elliott, 'A Meaningful Step Towards Accountability? A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria', 15 *JICJ* (2017) 239; and C. Wenaweser and J. Cockayne, 'Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice', 15 *JICJ* (2017) 211.

22 SC Res. 1970, 26 February 2011. As per Art. 13 ICCSt.



of widespread alleged atrocities encouraged the UNGA to take a more central role to support international criminal justice initiatives.

Second, while the UNGA and subsidiary bodies have created a number of human rights-oriented fact-finding bodies,<sup>23</sup> the mandate of the Mechanism is more explicitly tied to the collection and analysis of materials in support of proving individual criminal responsibility in future criminal trials.<sup>24</sup>

Third, and in contrast to the human rights ethos of the Commission of Inquiry for Syria ‘to report publicly on all aspects of its work’,<sup>25</sup> discretion is crucial at this stage of its operations which focus on consolidation of its documentation and case building for domestic authorities. While the Mechanism produces two publicly available reports a year on its work to the UNGA, it has thus far divulged no details about the particular cases or individuals it is pursuing or which domestic partners it is assisting. This is to ensure the safety of its staff and partners as well as the integrity of current and future criminal trials.

Fourth, the degree to which civil society actors are recognized as important collaborators with the Mechanism is unprecedented for (public) international criminal justice institutions.<sup>26</sup>

The IIMM’s mandate is set out in its founding documents and reports. As was the case for the CIJA, acting to preserve evidence before it is too late, is a vital goal:

The preservation of evidence at risk of destruction continues to be a significant priority and serves as an important illustration of the value that the Mechanism can add for future accountability processes. Operating within the United Nations framework and with the benefit of digital and other preservation and storage capabilities, the Mechanism has worked on several large-scale preservation activities to safeguard high-value material at risk of being lost ... such operations have included both field missions and remote collections. The work often entails risk, and the Mechanism has prioritized the adoption of security procedures to safeguard its team and the courageous individuals involved in assisting the Mechanism in preserving crucial evidence.<sup>27</sup>

23 In general, see P. Alston and S. Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford University Press, 2016) and specifically in relation to international criminal law, see C. Schwöbel-Patel, ‘Commissions of Inquiry: Courting International Criminal Courts and Tribunals’, in C. Henderson (ed.), *Commissions of Inquiry: Problems and Prospects* (Hart Publishing, 2017), 145–169.

24 T. Meron, ‘Closing the Accountability Gap: Concrete Steps Toward Ending Impunity for Atrocity Crimes’, 112 *AJIL* (2018) 433, 443. See also N. Combs, ‘Grave Crimes and Weak Evidence: A Fact-Finding Evolution in International Criminal Law’, 58 *Harvard International Law Journal (HILJ)* (2016) 47.

25 *Ibid.*, Meron. The Independent International Commission on Inquiry on the Syrian Arab Republic was created by the United Nations Human Rights Council in August 2011 with a mandate to investigate human rights violations and possible criminal responsibility, see *supra* note 20.

26 The role of civil society actors is noted in the UNGA resolution establishing the Mechanism, *supra* note 21.

27 IIMM, *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*

According to its Head, Catherine Marchi-Uhel, the original UNGA resolution along with the title of the Mechanism itself — international, impartial, independent — establish the IIIM's remit as encompassing 'the collection, preservation, analysis, building of cases, what this does not say ... is an important part of our role, which is ... the importance of sharing, not just fully-fledged files, but also evidence and analytical products'.<sup>28</sup> Thus, rather than see the Mechanism as being about creating an international tribunal such as the ICTY, Marchi-Uhel instead suggests a more modest purpose of being a 'central repository'<sup>29</sup> for all of the materials amassed on the Syrian conflict as a 'service to prosecutors and courts' for current and future trials as well as a wider repository for survivors.<sup>30</sup> While at present this assistance has taken place at the domestic level in a number of European jurisdictions,<sup>31</sup> the IIIM could serve as the key resource for any future international criminal tribunal — as was the case for the Extraordinary Chambers of the Courts of Cambodia's (ECCC) reliance on DC-Cam archives in Cambodia.

Although the IIIM rests on the imprimatur of the UNGA, it is still prevented from accessing Syrian territory in the absence of regime<sup>32</sup> or UN Charter Chapter VII authorization. It is thus reliant upon open-source, internet-based materials as well as the efforts of actors located inside and outside Syria to populate its ever-growing archive and related case work. This work includes cooperation with states, various UN bodies (especially the Commission of Inquiry) as well as civil society organizations.<sup>33</sup> Some of the challenges of obtaining evidence were anticipated even before the Mechanism's creation and this accounts for its close reliance on civil society actors. Thus, according to its Head, 'the mandate really recognizes properly the role of civil society as

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*Committed in the Syrian Arab Republic since March 2011, A/74/313, §. 17 (2019); and anonymized interview #6, Geneva.*

28 Catherine Marchi-Uhel interview, 13 June 2019.

29 *Ibid.*

30 *Ibid.*

31 One of the most important cases is the recent conviction in Koblenz Germany of Eyad al-Gharib, a former arrest warrant officer of the intelligence service, for aiding and abetting crimes against humanity. Along with witness testimony, the case relied on the Caesar photos. For some background on the case from one of the key civil society advocacy groups, the European Centre for Constitutional and Human Rights (ECCHR): available online at <https://www.ecchr.eu/en/press-release/syria-trial-in-koblenz-german-court-convicts-eyad-a-of-crimes-against-humanity/> (visited 11 March, 2021). Also noteworthy is the *Colvin Case: Colvin v. Syrian Arab Republic*, which found the Syrian regime liable for the killing of American journalist, Marie Colvin in Homs, 363 F. Supp. 3d 141 (D.D.C. 2019). This case drew on CIJA-generated material and the expert report of CIJA lawyer, Ewan Brown: available online at [https://cja.org/wp-content/uploads/2018/04/17-Expert-Report-of-Ewan-Brown-dated-March-2-2018\\_Redacted.pdf](https://cja.org/wp-content/uploads/2018/04/17-Expert-Report-of-Ewan-Brown-dated-March-2-2018_Redacted.pdf) (visited 11 March 2021).

32 As noted in its August 2020 report: IIIM, *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, A/75/311* (2020).

33 Especially see the Mechanism's August 2020 report where it calls on the UN, other international organizations, states (including the Syrian Arab Republic) and civil society to cooperate with it, for example in providing full access to any relevant materials, *supra* note 32, §§ 53–55.

documenters, and we've tried to develop the relationship as a really two way relationship with them, recognizing that they can contribute by many other ways than just providing evidence or information'.<sup>34</sup> For Marchi-Uhel, civil society actors are vital interlocutors who provide a window onto the perspective of survivors and a much greater appreciation of the Syrian context.<sup>35</sup> As of August 2020, the Mechanism has worked with over 220 individuals and entities, only one of which is the CIJA.<sup>36</sup> The IIM and the CIJA have now entered into a MOU facilitating the online transfer of the CIJA's archive to Geneva. The long-term location of the original hard copy documentation remains a point of discussion between CIJA and the Mechanism and thus raises questions about custodianship as explored in Section 4.

### 3. Working in and for the Archive: Understanding the Daily Challenges of Building Atrocity Archives

*... there is a difference between information and evidence ... [I]nformation becomes (no matter how exciting it is) ... evidence only after it's been analyzed in the context of the legal requirements of the offences and modes of liability.*

Bill Wiley interview, 10 November 2017

*The challenge for the Mechanism will not be a paucity of available material, but rather effectively handling the overwhelming volume of material produced on the Syrian situation. In particular, the volume of videos and other images — as well as the role played by social media — is unprecedented in any other accountability process with respect to international crimes to date. The standard tasks of classifying relevant material, demonstrating authenticity, presenting the complexity of collected material in innovative visual ways and managing the association of evidence with other corroborating material become amplified by volume and by the diversity of the collection methods and organizations involved. This means that the Mechanism must devise creative new strategies for handling that reality, which makes its IT systems and expertise crucial, as reflected by the heavy early focus on this aspect of its operations.<sup>37</sup>*

Appreciating how the CIJA and the IIM understand and perceive the building of their particular atrocity archives is the focus of this article as inspired by the insights of Ketelaar in the introduction. One way of gaining such an understanding is to explore the quotidian challenges particular actors have faced in their endeavours before reflecting on their ethical dimensions on the final section. Here I note the challenges of access, fragmentation and coordination, volume, and secrecy as well as the time required for evidence collection and collation.

While accountability for the most serious crimes of the Syrian conflict remains unaddressed, this has not deterred a variety of actors from trying to gather as much high-quality evidence as possible for future trials. Yet accessing the requisite materials is a challenge that has regularly confronted especially

34 Catherine Marchi-Uhel interview, 13 June 2019.

35 Follow-up interview with Marchi-Uhel, 14 February 2020.

36 IIM August 2020 report, *supra* note 32, § 11.

37 IIM February 2018 report, *supra* note 19, § 72.

public actors seeking to build a criminal case in the absence of a UNSC mandate. For example and in general, the ICC has faced difficulties in procuring trial documentation in the face of 'unwilling or unable' states and non-state parties.<sup>38</sup> The same goes for the IIM which is highly constrained in how it operates in relation to Syrian territory. This helps explain why the work of private actors such as the CIJA able to extract material more discretely fills a crucial evidentiary gap. Thus, according to a senior CIJA lawyer,

It is clear that the biggest problem with the ICC is not in fact the arrest issue, it is even more basic than that, it is getting access to the documentary evidence and getting access to inside premises, and getting access to the kind of quality of evidence that the ICTY ... [Furthermore, the ICC feels] obliged to seek state party consent before getting on the ground and getting evidence ... *that* is just a crazy play to try and investigate crimes committed by that specific government.<sup>39</sup>

As a number of CIJA staff bring extensive ICC experience to the organization, it is clear that part of the reason for its private and covert style of evidence gathering arises as a way to counter perceived ICC weaknesses.

The complexity, intensity and protracted nature of the conflict itself has also produced a highly fragmented and even competitive field of documentary responses by a range of actors<sup>40</sup>:

The gathering of evidence is so episodic and so opportunistic, it's just not being done in any sort of an organized way ... I mean of course we know stuff is being carried out in backpacks right, so it's not...perfect, but at least you can sort of identify where you got it, how you got it back to CIJA and how it gets organized.<sup>41</sup>

Thus, another challenge that arises in thinking about potential criminal trial archives is to coordinate such efforts by sharing information and material and countering duplication.<sup>42</sup> According to the Mechanism's Deputy Head,

Our ability to produce and transfer persuasive evidence is much greater when you simply have a broader range of sources you can use for corroboration. So, it is very much about explaining to individual collectors, that it is great that you have this piece of it, but if we can add your piece with this piece and that piece, we start to have a very different picture, and it is important because a lot of the evidence had not been collected according to traditional methodologies of criminal justice, and that is not necessarily a problem if you can corroborate and prove the proper value in other ways, and that's I think what we can really do.<sup>43</sup>

This extends to the collection of witness statements. In some instances there has already been over-documentation where witnesses have been interviewed

38 C.M. de Vos, 'Investigating from Afar: The ICC's Evidence Problem', 26 *LJIL* (2013) 1009.

39 CIJA anonymized interview #5, 21 June 2017.

40 According to the CIJA's director, Bill Wiley, early in the conflict, the Dutch tried to coordinate civil society actors in the field through a series of meetings in The Hague and New York. These efforts did not result in any coordinated civil society activity. Personal communication, Bill Wiley, December 2019.

41 Interview with Beth van Schaack, CIJA Advisory Board member, 22 November 2017.

42 *Ibid.*; and Interview with Catherine Marchi-Uhel, 13 June 2019.

43 Interview with Michelle Jarvis, IIM, 13 June 2019.

by multiple actors, potentially generating inconsistencies and unnecessary trauma for the witness along with the interviewer, translator and analyst.<sup>44</sup> It is for this reason that the IIM has tried to position itself as a 'bridge'<sup>45</sup> between various actors and serve as a central repository for the material collected: 'The Mechanism has provided preservation and evidence-processing services to organizations that, in some cases, lack the resources, technology or capacity to preserve evidence to the required legal standards. These activities complement, rather than replace, the efforts of civil society and other stakeholders.'<sup>46</sup>

The potential coordinating role of the IIM partly flows from its impressive resources, particularly in relation to its sophisticated technological capacities. Indeed, the technological aspects of evidence collection during the Syrian conflict mean that in many ways new approaches to archiving practices are needed.<sup>47</sup> Most simply this arises from the amount of material that has been generated and often collected within and outside Syria since 2011: '[the] sheer volume... is unprecedented [and]... really extraordinary'.<sup>48</sup> 'By most accounts, the Syrian conflict has been the most documented war in history'.<sup>49</sup> Such a plethora of archival documents presents an unusual problem as typically the very reverse is the case: researchers tend to worry that there is not enough evidence available to sustain an argument.<sup>50</sup> Thus, rather than trawl through these 'digital troves',<sup>51</sup> instead, lawyers need to think anew about how they approach and analyse evidence being generated:

We are getting tremors of the pending earthquake that is going to break everything open and we are not ready for that in any tribunal, certainly not the ICC, lawyers are still rooted in the kind of old systems and old way of thinking, so it is out there, you know, people know of it, they know it is coming but, we kind of deal with the changes and the environment precipitates changes in policy, in practice and the environment has not changed yet to force us to change the practice.<sup>52</sup>

44 CIJA anonymized interview #16, 19 September 2017; and CIJA anonymized interview #10, 20 June 2017. The IIM in fact prides itself on being one of the first international organizations to adopt policies to minimize 'secondary trauma' for its staff. As noted in, many of the IIM's biannual reports, such as its February 2018 report, *supra* note 19, at § 26.

45 Anonymized IIM Interview #2, 13 June 2019.

46 IIM, *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*, A/73/741, § 19 (2019); and Anonymized IIM Interview #6, 13 June 2019.

47 Anonymized IIM Interview #6, 13 June 2019.

48 Interview with Michelle Jarvis, IIM, 13 June 2019; and IIM Interview #6, Geneva.

49 R. Abdulrahim, 'AI Emerges as Crucial Tool for Groups Seeking Justice for Syria War Crimes', *Wall Street Journal*, 13 February 2012, available online at <https://www.wsj.com/articles/ai-emerges-as-crucial-tool-for-groups-seeking-justice-for-syria-war-crimes-11613228401> (visited 1 October 2021).

50 Many thanks to Galina Oustinova-Stjepanovic for this insight.

51 J. Aronson, 'Preserving Human Rights Media Justice, Accountability, and Historical Clarification', 11 *Genocide Studies and Prevention* (2017) 82, 85.

52 CIJA anonymized interview #4, 20 June 2017.

Perhaps as it was created so recently, the IIM has tried to confront such challenges by devising a kind of ‘digital native’ approach that integrates technology and legal evidence.<sup>53</sup> This is demonstrated by the creation of a dedicated team populated by professionals trained jointly in the fields of law and IT, who possess a number of different skills.<sup>54</sup> These individuals ‘have figured out a way to adapt’<sup>55</sup> in the new conditions of criminal investigations. In addition, the Mechanism is developing a range of technological innovations that will enable it to categorize and search through its extensive archive by ‘algorithmic tests’.<sup>56</sup> In the words of its latest report, this ‘represents one of the first uses of technology assisted review within international criminal law’.<sup>57</sup>

Given the sheer volume of materials amassed, the work is slow, not without risk, and requires considerable attention, particularly when making a case for command responsibility of regime crimes through linkage evidence:

When you are working on a political or military case, what you need is every possible document as close as you can get to the top of the pyramid of power and once you get those documents then the next most important level, is the level down from that, and then you need to go a level down from that. And so on until you get to crime-base and then you must build up enough documentation combined with other forms of evidence.<sup>58</sup>

While crime-base testimony and video evidence is relatively easy to gather, painstaking reconstructive linkage work is slower and best done to the steady pace of discrete investigations. In the words of one long-serving CIJA political analyst,

We have provided them [the lawyers] if you want with the architects of the perpetrating organizations, this is what the documents give you, it gives you architects, linkage evidence, this what was always lacking in the beginning in the ICTY, we had a lot of perpetrators, a lot of really low-level shooters and nobody...knew how to link it up to Milošević or anybody else, Karadžić, you name them, Croatian accused, so here in the CIJA, we started with linkage evidence.<sup>59</sup>

As elaborated on below, human rights advocacy and attendant funding cycles tend to rely on constant publicity to remind wider audiences about the continuing importance of the case at hand. Conversely, for my informants, they tended to see the legitimacy of criminal investigations as sustained by the promise of future trials and convictions as a result of carefully constructed

53 Anonymized IIM Interview #6, 13 June 2019.

54 Such an approach builds on the efforts of the OTP of the ICC. For an overview of the ICC’s approach to evidence gathering and informational communication technology, see P. Amann et al., ‘Challenges to Advanced Electronic Evidence Lifecycle Management in an International Court Environment’, in B. Papasratorn et al. (eds), *Advances in Information Technology* (Springer, 2012) 31–45.

55 *Ibid.*

56 IIM, *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*, A/75/311, 13 August 2020, § 38.

57 *Ibid.* Also see Abdulrahim, *supra* note 49.

58 CIJA anonymized interview #5, 21 June 2017.

59 CIJA anonymized interview #3, 7 June 2017.

and evidence-based cases. While the promise of pending justice serves as justification for an archive sequestered from sight, it is unlikely that such aspirations will assuage many of those Syrians seeking access to the materials as a way to recover a traumatic past and construct a new one.

#### 4. Why Build an Atrocity Archive? Exploring the Impetus to Build Atrocity Archives and their Ethical Consequences

Ongoing efforts of the CIJA, the IIM and many other actors helping to populate Syrian atrocity archives demonstrate a keen commitment to the project of documentation and its future possibilities. Faith in the idea of justice and accountability partly captures this impetus that at times runs the risk of death.<sup>60</sup> Why are these individuals dedicating their lives to documenting this conflict in such highly legalized parameters? Why do they see their work as important and who are the intended beneficiaries of such endeavors? Here in this penultimate section, I engage with these questions first through the distinct literatures of archival studies and the legal fields of TJ and ICL, before turning to a substantive evaluation of the public and private dimensions of these archives and their ethical implications.

While the fields of archival studies and TJ/ICL rarely converse with each,<sup>61</sup> the central epistemic role of evidence in the criminal trial brings these disciplines into conversation both practically and theoretically. Practically, international criminal trials rely on the expertise of archivists to amass and catalogue an arsenal of material that can inform a trial. Any lawyer will readily admit that such material must be transformed before it is legally legible in court such as to be both convincing and thus productive of a conviction. International criminal tribunals are not simply sites of legal judgment; most crucially, they are 'epistemic engines'<sup>62</sup> 'that systematically and inevitably produce knowledge or find truths about the conflicts that come before them'.<sup>63</sup>

60 Some of CIJA's staff place themselves in great danger to extract evidence for hoped-for future trials as discussed in Burgis-Kasthala, *supra* note 6. Generally, see D. Koller, 'The Faith of the International Criminal Lawyer', 40 *New York University Journal of International Law and Politics* (2008) 1019.

61 But see the 'Beyond Evidence: The Use of Archives in Transitional Justice' special issue: 25 *International Journal of Human Rights (IJHR)* (2021).

62 J. v. H. Holtermann, 'International Criminal Tribunals as Epistemic Engines, or Why Legal Truth is Not Sui Generis', *Humanity* (2017), available online at <http://humanityjournal.org/wp-content/uploads/2017/07/04.-Holtermann-International-Criminal-Tribunals.pdf> (visited 9 March 2021). Similarly, for Houge, international criminal justice institutions are 'sites in which knowledge is produced and for which knowledge is constructed'. Emphasis in original. A. Houge, 'Narrative Expressivism: A Criminological Approach to the Expressive Function of International Criminal Justice', 19 *Criminology and Criminal Justice* (2019) 277, 285.

63 A. Zammit Borda, 'History in International Criminal Trials: The "Crime-Driven Lens" and its Blind Spots', 18 *JICJ* (2020) 543, 544.

This 'declarative'<sup>64</sup> impulse of the international criminal trial advancing its finding of (a single, fixed)<sup>65</sup> 'truth' is particularly compelling in the face of shocking crimes.<sup>66</sup> This not only speaks to a legalist sensibility of law redeeming social collapse through individual criminal responsibility,<sup>67</sup> but also to the idea that historical understanding and recognition of victims are vital therapeutic and reparative dimensions of the trial.<sup>68</sup>

Yet it is not simply a matter of the lawyer sculpting already formed facts and objects to impress upon the court to render its verdict.<sup>69</sup> The practice of archiving itself is also an epistemic process that includes and excludes what is knowable and what is contestable within the confines of (projected, future) trials. In fact, it is somewhat erroneous to separate the archival and the trial phases so distinctly as instead, they are often iterative. For Campbell, both the legal archive and the projected trial (re)shape memories of atrocity.<sup>70</sup> According to the Mechanism's Deputy Head, 'the evidence collection is the main [aim and] ... then [there is] the structural investigation [which] is sort of the analytical layer over the evidence collection, so that, not only do you have your own material, but you really have the mapping and the big factual issues that will be needed for your case files'.<sup>71</sup> Thus, if the archive being generated is intended for a criminal trial, rather than, for example, human rights advocacy,<sup>72</sup> a different

64 S. Stolk, 'The Victim, The International Criminal Court and the Search for Truth: On the Interdependence and Incompatibility of Truths about Mass Atrocity', 13 *JICJ* (2015) 973, 979.

65 Zammit Borda, *supra* note 63, 546.

66 N. Jain, 'Radical Dissents in International Criminal Trials', 28 *EJIL* (2017) 1163, 1182; and M. Koskeniemi, *Between Impunity and Show Trials* 6 *Max Planck Yearbook of United Nations Law* (2002) 1.

67 M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007).

68 For example on this historical dimension see B. Sander, 'The Method is the Message: Law, Narrative Authority and Historical Contestation in International Criminal Courts', 19 *Melbourne Journal of International Law* (2018) 299. Kendall notes how suffering must be shaped to fit within the criminal trial: S. Kendall, 'Archiving Victimhood: Practices of Inscription in International Criminal Law', in S. Motha and H. v. Rijswijk (eds), *Law, Memory, Archive: Uncovering the Counter-Archive* (Routledge, 2016) 156–176. Cf. Viebach who demonstrates how 'the witness is de-subjectified and ... the traumatic experience is not heard because it is silenced in the legal structure of the trial procedure'. J. Viebach, 'The Evidence of What Cannot be Heard: Reading Trauma into and Testimony against the Witness Stand at the International Criminal Tribunal for Rwanda', 6 *International Journal of Crime, Justice & Social Democracy* (2017) 51.

69 This process of 'transformation' of evidence at trial is discussed by Stolk, *supra* note 64, 989.

70 K. Campbell, 'The Laws of Memory: The ICTY, the Archive, and Transitional Justice', 22 *Social & Legal Studies* (2014) 247, 248. Also see N. Eltringham, 'The judgement is not made now; the judgement will be made in the future': 'politically motivated' defence lawyers and the International Criminal Tribunal for Rwanda's 'historical record', *Humanity Journal* (2014), available online at <http://humanityjournal.org/author/nigel-eltringham/> (visited 11 March 2021).

71 Michelle Jarvis interview, 13 June 2019.

72 According to ICL scholar and CIJA advisory board member, Alex Whiting, 'Typically, human rights organizations, have a different approach to gathering information and investigating because they are in the business of advocacy, and naming and shaming and drawing attention and so forth, and building political support, and all of that can be done based on a different ... quality of information and investigation. So often times NGO reports will essentially gather allegations and



type of knowledge will be produced both during the practice of archiving and at the trial itself.

While questions of the archive had been of concern for social theorists such as Benjamin<sup>73</sup> and Foucault,<sup>74</sup> it was not until the end of the twentieth century that the ‘archival turn’ really took off. Part of the inspiration for this stemmed from the 1996 publication in English of Derrida’s *Archive Fever*, a speculative and expansive reflection on the role of archives. In this work, Derrida begins by tracing the etymology of the word archive, *arkhe*, to capture its sense of both commencement and commandment, reminding us that archives were stored in the house of the *archon*.<sup>75</sup> He noted the function of consignment in transforming this domestic, private space into a center of public ‘legitimate, hermeneutic authority’.<sup>76</sup> He defined consignment as aiming to ‘coordinate a single corpus, in a system or a synchrony in which all the elements articulate the unity of an ideal configuration’.<sup>77</sup> The act of consignment relies on a degree of exteriority so that there can be no ‘archive without outside’.<sup>78</sup> Thus, the act of archiving and then authorizing access is one of privilege and power which tends to be associated with elites and, especially, the state.<sup>79</sup> While a state-centric bias continues to inform the fields of both archival studies as well as ICL and TJ, the nature of the Syrian atrocity archive radically challenges many of these assumptions as I explore further below.

At the end of the twentieth century, general speculation about the archive shifted to scholarly reflection about methodology, particularly through the notion of approaching archives *ethnographically*. Ketelaar pinpoints Dirks’ intervention in 1997 as perhaps the first step in this critical wave when this historian of colonialism argued that archives should be understood as *processes* rather than things.<sup>80</sup> Anthropologist Ann Stoler elaborated on these intuitions by stressing the contingency of archives, suggesting that we see them as

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just repeat them . . . just sort of publish them.’ Alex Whiting interview, 28 June 2017. This is not to say that human rights practices result in more flexible approaches to knowledge production. Especially see K. Hastrup, ‘Violence, Suffering and Human Rights: Anthropological Reflections’, 3 *Anthropological Theory* (2003) 309.

73 Such as W. Benjamin, ‘Theses on the Philosophy of History’, in H. Arendt (ed.), *Illuminations: Walter Benjamin, Essays and Reflections* (Schocken Books, 1968), 253–264.

74 Especially see M. Foucault, *The Archaeology of Knowledge and the Discourse of Language* (Routledge Classics, 2002).

75 In classical Greece, *archons* performed a variety of public leadership functions. The word derives from the verb *arkh*, meaning to rule or be first, hence Derrida’s double meaning of archives. J. Derrida, *Archive Fever: A Freudian Impression* (University of Chicago Press, 1996), 1–3.

76 *Ibid.*, 3.

77 *Ibid.*

78 *Ibid.* 11. Also see S. Brown and G. Lightfoot, ‘Presence, Absence, and Accountability: E-mail and the Mediation of Organizational Memory’, in S. Woolgar (ed.), *Virtual Society? Technology, Cyberspace, Reality* (Oxford University Press, 2009) 209–229, 227.

79 Aronson, *supra* note 51.

80 E. Ketelaar, ‘Archival Temples, Archival Prisons: Modes of Power and Protection’, 2 *Archival Science* (2002) 221, 232; and N. Dirks, ‘Annals of the Archives: Ethnographic Notes on the Sources of History’, in B.K. Axel (ed.), *From the Margins: Historical Anthropology and its Future* (Duke University Press, 2002) 47–65.

epistemological experiments because ‘we are no longer studying things, but the making of them.’<sup>81</sup> Here in this new contextualized site of meaning-making, rather than seeking ‘a truth’, she called on researchers to ‘track the production and consumption of . . . “facts” themselves.’<sup>82</sup> On this account, the archive is ‘a site of epistemic and political struggle’<sup>83</sup> that is dynamic and incomplete and thus unable to support indisputable knowledge claims.<sup>84</sup> Instead, archives necessarily ‘exclude other realities’<sup>85</sup> by prescribing ‘what kinds of knowledge projects are possible’.<sup>86</sup> Mbembe argues that this exclusion is the result of a judgment, where certain artefacts are deemed to be ‘archivable’ and others ‘unarchivable’.<sup>87</sup> Similarly, within the confines of a criminal trial, only certain ‘truths’ can be spoken.<sup>88</sup>

Such ‘symbolic annihilation’ from the archive can have profound effects in the constitution of status, identity, and political possibility.<sup>89</sup> This is brilliantly captured by Azoulay in her discussion about the photograph of a Palestinian man refusing his expulsion in 1948. She highlights how his stance of trying to stay in his homeland came to be transformed in the Israeli state archive to being characterized as (simply a criminal) ‘infiltrator’ bereft of political and national claims. Azoulay calls on us to see the Israeli archive not as a collection of neutral artefacts whose meanings are to be uncovered, but instead as an epistemic institution able to determine history’s winners and losers,<sup>90</sup> which is inseparable from the founding violence of the state:

The archive lures scholars to comply with the imperative to look for infiltrators in photographs and documents, where their images, manners, habits, and modes of infiltration can be viewed and studied carefully. In the archive, the legibility of the category of the ‘infiltrator’ is acknowledged and confirmed as an object of knowledge belonging to citizens.<sup>91</sup>

This example reminds us about the inescapably epistemological, political and ethical implications of dwelling in any archive.

81 Stoler, *supra* note 3, 87, 89.

82 *Ibid.*, 91.

83 R. Mawani, ‘Law’s Archive’, 8 *Annual Review of Law and Social Science* (2012) 337, 340.

84 *Ibid.*, 339.

85 Ketelaar, *supra* note 80, 222.

86 Aronson, *supra* note 51, 85.

87 A. Mbembe, ‘The Power of the Archive and its Limits’, in C. Hamilton et al. (eds), *Refiguring the Archive* (Springer, 2002) 19–27, 20. Similarly, Motha and Van Rijswijk ask, ‘Which forms of violence resist being archived, and what is their political significance?’. S. Motha and H. v. Risjswijk, ‘Introduction: A Counter-Archival Sense’, in Motha and H. v. Risjswijk (eds), *Law, Memory, Violence: Uncovering the Counter-Archive* (Routledge, 2016) 1–15, 2.

88 B. Thorne, ‘Remembering Atrocities: Legal Archives and the Discursive Conditions of Witnessing’, 25 *IJHR* (2021) 467, 485.

89 M. Caswell et al., ‘“To Be Able to Imagine Otherwise”: Community Archives and the Importance of Representation’, 38 *Journal of Archives and Records Association* (2017) 5, 8.

90 J. Schwartz and T. Cook, ‘Archives, Records, and Power: The Making of Modern Memory’, 2 *Archival Science* (2002) 1, 4.

91 A. Azoulay, ‘The Imperial Condition of Photography in Palestine: Archives, Looting, and the Figure of the Infiltrator’, 33 *Visual Anthropology Review* (2017) 5, 11.

This critical work on the general nature of archival practices has forced archivists themselves to reevaluate their role and responsibility in relation to archival preservation and the political possibilities within it. As the bulk of 'archival science' literature in English comes from archivists working in liberal democratic states, there had been a tendency to regard archivists as builders of public memory. Such an impulse was alluded to by Azoulay in her disruptive reading of the Israeli state archive as set in opposition to a recalcitrant indigenous presence.<sup>92</sup> Once the 'public' is circumscribed in its statist dimensions, a traditional account of archival work strives towards open access. Such a goal is captured well in the amended 2005 statement of values by the Society of American Archivists: 'Archivists promote and provide the widest possible accessibility of materials, consistent with any mandatory access restrictions, such as public statute, donor contract, business/institutional privacy, or personal privacy. Although access may be limited in some instances, archivists seek to promote open access and use when possible.'<sup>93</sup> Such open access sentiments are also practiced by the ICC: 'transparency of its archives is put forward as a means to bringing truth to the general public and to victims in particular, and is implemented, for example, by public access to trials (physically or through web-streaming) and online publication of transcripts.'<sup>94</sup> Perhaps, then, some misgivings about the early phases of international criminal investigation — such as the Syria situation — can be offset by later efforts at full (trial) transparency.

The vital public function that is served by archives through their 'constitutive and relational capabilities' means that for Moore and Pell, 'archives act as spaces for public formations'.<sup>95</sup> But they also point out that 'the Public' does not necessarily only speak to a singular mode as linked to the state. Instead, the multiple uses of archives also points to the possibility of counter-archives for 'counter-publics'<sup>96</sup> that can generate political change even during widespread atrocities and social collapse.<sup>97</sup> This is precisely what is stake in the case of Syria's state-generated archives of atrocity which can simultaneously demonstrate the regime's undeniable capacity as a state entity, but as one that has failed in its duties to protect its citizens through endemic criminality.<sup>98</sup> The

92 G. Stinnett, 'Archival Landscape: Archives and Human Rights', 32 *Progressive Librarian* (2008) 10, 17.

93 Quoted in Aronson, *supra* note 51, 94. Society of American Archivists, SAA Core Values Statement and Code of Ethics, available online at <https://www2.archivists.org/statements/saa-core-values-statement-and-code-of-ethics> (visited 9 March 2021).

94 Stolk, *supra* note 64, 980.

95 S. Moore and S. Pell, 'Autonomous Archives', 16 *International Journal of Heritage Studies* (2010) 255, 255.

96 *Ibid.*, 256.

97 Closely related is the notion of archives being used for 'counter-insurgent' purposes. See K. Weld, *Paper Cadavers: The Archive of Dictatorship in Guatemala* (Duke University Press, 2014), 15.

98 For both international humanitarian law and international criminal law, one of the most fundamental considerations is that of state capacity both to protect the population and in instances of war crimes, to prosecute them. Especially see Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), August 12, 1949, 75 U.N.T.S. 287, art. 147 as translated into the notion of 'unwilling and unable' under Art. 17 ICCSt., *supra* note 22.

Syrian regime had painstakingly assembled detailed accounts of its state-sanctioned torture and death. Although such material was never created within the ethos of the democratic state archive readily accessible to all and thus protected by archival principles of inalienability, the chaos of war and insider defections have provided the CIJA, the IIIM and other actors with large portions of this state archive of atrocity. The CIJA and its network as well as other actors building atrocity archives have acted to preserve these materials in the midst of conflict. Often then the methods used were based on spirited out state-based documents by whichever means possible while all the while trying to preserve chain of custody. The CIJA maintains a policy too of gathering 'both inculpatory and exculpatory evidence, keenly aware that failure to do so could leave the legitimacy of its practices open to challenge'.<sup>99</sup> Assembling and speaking to such an alienated archive of alleged atrocity enables these actors to undermine any notion of the Syrian state as enforcer of 'public' order, but instead as violator of Syrian society in need of a new or 'counter-public' reliant on these 'counter-archives', whether as arsenals of evidence for future trials, or as supporting a variety of other transitional justice endeavors.

Archivists have increasingly come to recognize their work as implicated in power/knowledge networks, particularly in relation to human rights archives (in contrast to the criminally focused archives being generated by the IIIM and the CIJA). There is a growing body of work being undertaken by archival studies scholars to explore how human rights activists have built and used archives that tend to document widespread state abuse. While such work can often complement the work of prosecutors in building an international criminal trial case, it is important to note that typically the human rights archival telos is broader than a criminal trial and thus any evidence gathered will not necessarily be (re)framed for criminalized legibility. Instead, human rights archives can inform a range of practices such as awareness raising, advocacy and various reparative transitional justice efforts such as truth and reconciliation commissions. Geraci and Caswell identify four key themes in the human rights archive literature: (i) the role that archivists can play in realizing legal redress, justice, and reconciliation; (ii) the complicity of archivists in human rights abuses and forms of structural violence; (iii) the political nature of archival work; and (iv) the ethical responsibility of archivists' work.<sup>100</sup>

Such a turn to political ethics on the part of archivists potentially disrupts some core tenets of the profession such as inalienability, which 'posits that records generated by the state or governmental institutions rightfully belong in the custody of state-operated governmental archives'.<sup>101</sup> In questioning the state's legitimacy, the principle of 'inalienability' in particular becomes suspect, as it is 'based on outdated nationalist notions that no longer provide adequate

99 Barbour, *supra* note 16, 416.

100 N. Geraci and M. Caswell, 'Developing a Typology of Human Rights Records', 3 *Journal of Contemporary Archival Studies* (2016) 1, 2.

101 M. Caswell, 'Rethinking Inalienability: Trusting Nongovernmental Archives in Transitional Societies', 76 *American Archivist* (2013) 113, 114.

guidance in our globalized world'.<sup>102</sup> Whether as human rights archiving or as criminal justice archiving, this turn away from inalienability<sup>103</sup> — one of archivists' core principles — is captured by a CIJA senior lawyer working on Syria who had spent a number of years at the ICTY:

Now, the big million-dollar question is, well what about the sovereignty of the state involved? And my argument would be that where a government has so thoroughly and egregiously failed to fulfill its duty to its own citizens, i.e. where it committed crimes against humanity against its own citizens, then that government's claim to some kind of state sovereignty argument preventing those documents from being taken outside that country, in order to uncover the truth and accountability, that should be taken into account, that State sovereignty cannot act as some kind of trump... the governments of those states have lost the legitimacy to argue the state sovereignty argument.<sup>104</sup>

Such a stance can be understood as 'R2R' or, the responsibility to record as building on from and related to R2P, or the Responsibility to Protect.<sup>105</sup> This suggests that once a state's legitimacy is questioned in general, then specific questions soon emerge about *how* to document state abuses. For Ciorciari, if 'a state is unable or unwilling to carry out its duty to record, do other actors have the right, or even the responsibility to step into the breach?'<sup>106</sup> Human rights as well as criminal accountability archiving provides an affirmative answer.

More important, however, are considerations of *how* to treat extant state archives themselves that document violent and systematic abuses of power as is the case in Syria itself. While archives arising, for example, from Syrian prison detainee photos and death certificates depicting state oppression, their placing in counter-archives, such as those generated by the CIJA and the IIM, provides ways to challenge the legitimacy of state rule. Will it be important in a future criminal trial that these documents were procured without the consent of the Syrian state? While a traditional archival approach would answer in the affirmative, here, I am suggesting that new understandings about atrocity archives are undermining such norms.

102 *Ibid.*, 126.

103 Especially see J. Lowry, 'Radical Empathy, the Imaginary and Affect in (Post)colonial Records: How to Break out of International Stalemates on Displaced Archives', 19 *Archival Science* (2019) 185.

104 CIJA anonymized interview #5, 21 June 2017.

105 This notion was coined by Rotem Giladi-Sobel. On R2P, see GA Res. 60/1, 24 October 2005. For a closely related notion, see Aronson's discussion on a 'duty to preserve': 'For those who believe in the inherent value of human rights documentation, there is a pressing duty to preserve this content for use in humanitarian, justice and accountability, and historical investigations. This duty is shared by individuals and institutions whose missions are explicitly human rights-oriented and who are capable of doing so in a safe and secure way, as well as the privately operated platforms that serve as de facto public forums for media that clearly depict human rights violations and war crimes.' Aronson, *supra* note 51, 83.

106 J. Ciorciari, *Archiving Memory after Atrocity*, Rapoport Human Rights Working Paper Series 4/2012, 10, available online at [https://www.academia.edu/18527553/Archiving\\_Memory\\_after\\_Mass\\_Atrocities](https://www.academia.edu/18527553/Archiving_Memory_after_Mass_Atrocities) (visited 9 March 2021).

Typically, a human rights approach to documentation emphasizes the importance of the right to know and a duty to record<sup>107</sup> to further the interests of a transitional society. *Public access* to such archives is an invaluable tool in learning about the fate of lost loved ones: where were they, how did they suffer, how did they die, where are their remains?<sup>108</sup> This type of approach captures traditional transitional justice motivations that seek to repair and redress societal wrongs during extraordinary times.<sup>109</sup> Yet, such an approach to archival access potentially jars with criminal justice orientations that rely on secrecy until their transformation into legally legible materials for criminal trials. This then raises important questions about *who* should be able to gather and control these alienated archives. CIJA's director concedes that

The source of data that we hold . . . and the amount of personal information we hold is, if I put on my civil libertarian hat, then yes, it is fucking shocking and you know what are the checks, on CIJA, not in terms of the quality of its case building . . . but I mean the broader checks, and what are the prior checks on this organization holding these kind of files . . . these are questions that I think need to be discussed and debated, definitely, because I think they are really important . . .<sup>110</sup>

Such concerns are echoed by the Mechanism's Deputy Head, when she points out that there are 'unresolved issues' in relation to the control of atrocity archives: 'where you have got something like government documents, which CIJA has extracted, who manages those? Is it legitimate for . . . an international NGO to claim ownership of those documents?'<sup>111</sup>

Instead of providing *public* access to these counter-archives, the legitimacy of criminal justice archiving needs to be grounded in appeals to an alternative non-state constituency (such as the Syrian people or the international community), whose frustrations over denied access can be assuaged through the opening of the archive for a future — even if utopian — criminal trial. It was for this reason that, in discussing the work both of the CIJA and the IIM, I asked all of my interviewees as to whom they saw as their (and their organization's) constituency. Responses were varied. While CIJA staff were acutely aware of their funding base of a select group of states,<sup>112</sup> they also spoke in

107 *Ibid.*, 2.

108 The International Commission on Missing Persons estimates that there are around 100,000 missing persons from the Syria conflict: International Commission on Missing Persons, available online at <https://www.icmp.int/the-missing/where-are-the-missing/syria/> (visited 9 March 2021). Searching has been made more difficult as a result of the Covid-19 pandemic (personal communication, Bill Wiley, 16 October 2020). For example, these specific organizations help families trace loved ones from the Caesar photo archive or beyond: Syrian Association for Missing and Conscience Detainees, <https://safmcd.com/> (visited 9 March 2021) and Caesar Families Association, <https://www.caesarfamilies.org/> (visited 9 March 2021). The ICRC also carries out its own service to assist families of the disappeared: ICRC, *Syria: Tens of Thousands of Families with no News of Loved Ones* (28 August 2020), <https://www.icrc.org/en/document/syria-tens-thousands-families-no-news-loved-ones>.

109 For example, see R. Teitel, *Transitional Justice* (Oxford University Press, 2000).

110 Bill Wiley interview, 10 November 2017.

111 Michelle Jarvis interview, 13 June 2019.

112 These include a number of European states along with Canada and the United States.

expansive terms of ‘the Syrian people’ or the international community.<sup>113</sup> Those at the IIIM also invoked the Syrian people framed as ‘survivor communities’. Given the nature of their mandate and work, however, there was also a much greater recognition of the UN itself as a constituency as well as the important role of certain national jurisdictions pursuing criminal cases against alleged perpetrators. Perhaps conscious of its remoteness from Syria, the IIIM has tried to remain connected to its broader Syrian constituency by engaging with a variety of Syrian civil society organizations (CSOs). It first hosted a face to face meeting in Lausanne in 2018 which resulted in a ‘Protocol of Cooperation’ between 28 CSOs and the IIIM.<sup>114</sup> Most recently, a virtual meeting was held as a way to provide a forum for information sharing about the Mechanism’s work.<sup>115</sup> While such efforts are to be supported, it is not clear how ordinary Syrians can be part of this dialogue about the IIIM’s accountability work and archival practices. It is also unlikely to foster sustained transitional justice efforts.

While it was easy enough for my interlocutors to make connections between their work and broader constituencies such as ‘the Syrian people’ or ‘the international community’, the subterfuge and discreet dimensions of their work was also troubling. CIJA is currently debating how best to preserve its Syrian archive, as its Director is all too aware of the responsibility that such a repository entails even if ‘we don’t like being the guardians’.<sup>116</sup> This burden of custodianship without a specific (international) trial to work towards is hard to shoulder and points to the difficulties of speaking to and speaking for different constituencies.<sup>117</sup> One of CIJA’s longest serving staff members was at pains to point out that

113 I use quotation marks here deliberately to capture the indeterminate status of the ‘international community’ as expressed by Redwood, who points out that ‘the international community is not . . . ontologically stable, but is constantly reformulated as it encounters new problems and subjects . . . . Under the auspices of defending the norms of the international community, the internal workings of states, and the relationship between a state and its citizens, have regularly become the concern of ‘external’ actors — whether large international organizations, such as the UN, other national states, (I)NGOs or private corporations.’ H. Redwood, ‘Archiving (In)justice: Building Archives and Imagining Community’, 48 *Millennium* (2020) 27.

114 Protocol of Cooperation between the International, Impartial and Independent Mechanism and Syrian Civil Society Organisations participating in the Lausanne Platform, 3 April 2018, available online at [https://iiim.un.org/wp-content/uploads/2018/04/Protocol\\_IIIM\\_-\\_Syrian\\_NGOs\\_English.pdf](https://iiim.un.org/wp-content/uploads/2018/04/Protocol_IIIM_-_Syrian_NGOs_English.pdf) (visited 13 July 2021).

115 Bulletin No. 5, February 2021, available online at <https://iiim.un.org/wp-content/uploads/2021/03/IIIM-Syria-Bulletin-5-ENG-Feb-2021.pdf> (visited 13 July 2021).

116 Personal communication with Bill Wiley, December 2019. Redwood notes that ‘the archive . . . produces particular understandings of both responsibility for violence and responsibility to the victims of violence’. Redwood, *supra* note 113, 17.

117 When an archive is alienated, it is vital that questions around its custodianship are addressed. The example of Iraqi Ba’athist regime documents being taken out of the country and stored at the Hoover Institute saw the Society of American Archivists and the Association of Canadian Archivists stridently protest at these actions: Caswell (2011), *supra* note 18.

We did not steal these documents,<sup>118</sup> they were given to us by Syrians, we are the custodians, we safeguard them until such time that they can be handed back to a free and democratic Syria and it is important to spread that word as well, because you know we are not just your common spies and thieves, these are what Syrians have given to us, in the hope that they can be used in prosecution and not to blackmail other people or extort other people.<sup>119</sup>

This illustrates how the CIJA asserts its legitimacy through its role as archival custodian, holding these documents ‘in trust for the Syrian people’ into an unknown future.<sup>120</sup> Here it seems then that those Syrians helping the CIJA to create its own counter-archive have displaced any possible concern raised by the Syrian state and its claim to legitimate custody of records of atrocity. This resonates with Caswell’s argument that in human rights archiving former notions of (state) inalienability have increasingly given way to ‘trust’ in certain NGOs and other actors as a better way of gauging the ethics of archival practices.<sup>121</sup> Yet, while human rights workers seek to *publicize* the contents of such archives, those working toward a criminal trial must instead reassure sometimes impatient publics that a future, public trial will be worth the wait. In sequestering these archives, Bill Wiley concedes that there is a ‘danger’ here: like the United Nations War Crimes Commission archive which ‘got buried for years’, he worries that the Syrian atrocity archives may also get ‘buried’ and consign possibilities of redress to oblivion.<sup>122</sup>

While some of the CIJA’s and the IIM’s evidentiary arsenal emerges from a traditional state-based atrocity archive, there is also another archive at play here: publicly available videos and photos captured by a variety of local actors. These actors who continue to operate are often motivated to bring to light hidden atrocities as a form of political and ethical advocacy. Yet, as in the case of the alienated state archive, these materials do not speak for themselves even though their visual immediacy might suggest some sort of ‘universal legibility’.<sup>123</sup> While on the one hand such material is globally circulating and often publicly available, overwhelmingly, it is private companies which exercise control over these repositories. The acts captured in these materials then are like public secrets:<sup>124</sup> everyone knows that atrocities occurred in Syria, but how this is (re)presented, archived and controlled is potentially in the hands of private, for-profit actors, such as Facebook and YouTube. These actors hold immense influence in determining which — usually digital — material is

118 Cf. J.B. Rhoads, ‘Alienation and Thievery: Archival Problems’, 29 *American Archivist* (1966) 197–208.

119 CIJA anonymized interview #3, 7 June 2017.

120 Interview with Beth van Schaack, CIJA Advisory Board member, 22 November 2017.

121 Caswell (2013), *supra* note 101, 115.

122 Interview with Bill Wiley, 30 September 2019.

123 M. McLagan, ‘Introduction: Making Human Rights Claims Public’, 108 *American Anthropologist* (2006) 191, 192.

124 Many thanks to Lotte Hoek for this idea.



preserved or removed from their servers.<sup>125</sup> In relation to Syria in particular, Banchik notes how

Many [practitioners] did not initially anticipate the disappearance of human rights-related content on sites like YouTube and Facebook, only learning to distrust such platforms as reliable repositories after repeatedly losing access to valuable media and posts. Practitioners sought alternative means to safeguard content, but the safe storage of backups, particularly for videos, required time, expertise, and resources that human rights practitioners unevenly possessed.<sup>126</sup>

For one IIIM interviewee, relying on this type of ‘archive of humanity’ in the hands of private corporations for accountability was deeply troubling and may result in the very opposite of accountability. A growing literature devoted to questions of ‘platform governance’ has started to address some of these concerns, particularly as a result of the Syrian conflict. Della Ratta points out that for the ‘evidence-image, to the production of which many Syrians have sacrificed their lives, is at risk of disappearing not as a result of an openly coercive act of censorship from an authoritarian regime, but in the most neoliberal fashion of all, silently and sophisticatedly choked by market and state regulations’.<sup>127</sup> Practically, these challenges highlight the pressing need for securing and preserving Syria’s archives of accountability. Technical and financial constraints have limited the capacities of most of those performing documentation work on Syria<sup>128</sup> and so staff at the IIIM were acutely aware of their privileged role in serving as custodians of such civil society efforts.<sup>129</sup>

Whether as carefully stored away or quickly uploaded onto YouTube, the volume and intensity of suffering seem to necessitate outrage followed by some sort of response,<sup>130</sup> but to date, most Syrians are still waiting for any sign of redress. While scholarship exploring affect and the archive points to ‘new

125 In the case of the Syrian conflict, this became particularly challenging once Microsoft, Facebook, YouTube and Twitter had formed the Global Internet Forum to Counter Terrorism on 26 June 2017, which facilitated the removal of a large number of images of violent footage from Syria, often through machine algorithms. H. Al Khatib, ‘Corporations Erasing History: The Case of the Syrian Archive’, in D. Della Ratta et al. (eds), *The Arab Archive: Mediated Memories and Digital Flows* (Institute of Network Cultures, 2020) 91–100, 92.

126 A.V. Banchik, ‘Disappearing Acts: Content Moderation and Emergent Practices to Preserve At-Risk Human Rights-Related Content’, 23 *New Media & Society* (2020) 1527, 1528, available online at <https://doi.org/10.1177/1461444820912724> (visited 1 October 2021).

127 D. Della Ratta, ‘Why the Syrian Archive is No Longer (Only) About Syria’, in D. Della Ratta et al. (eds), *The Arab Archive: Mediated Memories and Digital Flows* (Institute of Network Cultures, 2020) 101, 105.

128 According to one of her Syrian interviewees speaking on the storage of war-time video-footage, ‘There’s no way you can archive those . . . you almost need a platform as big as Google. We’re a non-profit organization.’ Quoted in Banchik, *supra* note 120, 10, but see the work of Syrian Archive in particular, *supra* note 1.

129 IIIM anonymized interview #6, 13 June 2019.

130 S. Gregory, ‘Transnational Storytelling: Human Rights, Witness, and Video Advocacy’, 108 *American Anthropologist* (2006) 195, 203.

forms of attachment to others,<sup>131</sup> perhaps the most powerful affective result from viewing so much suffering is one of numbness. In the case of 'overexposure'<sup>132</sup> to an avalanche of agony of (usually, visual) Syrian suffering, Jabbour points out that such a voyeuristic 'spectacle' of violence and indignity does not necessarily lead to action.<sup>133</sup> Instead, the proliferation of such images constitutes 'an obstacle to visibility' within a globalized political economy of suffering where the vast majority of Syrian victims/survivors (from the 'seen' Global South) are re-presented (to the 'seeing' Global North)<sup>134</sup> without their consent and for a variety of indeterminate ends<sup>135</sup> that seems to strip them (quite literally) of their individuality, if not, of their humanity. Whether or not a Western savior complex informs the production of these images,<sup>136</sup> its mere suggestion in the context of a former colonized society, is deeply perplexing.

This is best captured in thinking through the ethics of viewing the Caesar photos, a huge trove of intensely violent images smuggled out of Syria.<sup>137</sup> What is the purpose of displaying the emaciated, naked and torture-ridden corpses of thousands of Syrian detainees? Can the act of viewing restore a

- 131 M. Cifor, 'Affecting Relations: Introducing Affect Theory to Archival Discourse', 16 *Archival Science* (2016) 7, 8. Also see T. Luker, 'Animating the Archive: Artefacts of Law', in S. Motha and H. v. Rijswijk (eds), *Law, Memory, Violence: Uncovering the Counter-Archive* (Routledge, 2016) 70–96, 72. Here, I am also gesturing towards the important work on the materiality of archives, which demands attention to the object itself as 'architecture, paper and markings', rather than its purported meaning. K. Biber, 'The Archival Turn in Law: The Papers of Lindy Chamberlain in the National Library of Australia', 39 *Sydney Law Review* (2017) 277, 280. Also see M. Hull, 'Documents and Bureaucracy', 41 *Annual Review of Anthropology* (2012) 251, 252; and A. Riles, 'Models and Documents: Artefacts of International Legal Knowledge', 48 *International and Comparative Law Quarterly* (1999) 805, 815–816.
- 132 On overexposure of Syrian suffering, see E. De Angelis, 'The Controversial Archive: Negotiating Horror Images in Syria', in D. Della Ratta et al. (eds), *The Arab Archive: Mediated Memories and Digital Flows* (Institute of Network Cultures, 2020) 71–90, 76–78. More generally, see J. Slosower, 'Capturing Suffering: Ethical Considerations of Bearing Witness and the Use of Photography', 3 *International Journal of the Image* (2013) 11.
- 133 S. Jabbour et al., 'Rehumanising the Syrian Conflict: Photographs of War, Health and Life in Syria', 391 *The Lancet* (2018) 1140.
- 134 On this binary between seeing and seen, and the visual construction of the victim in international criminal law, see C. Schwöbel-Patel, 'Spectacle in International Criminal Law: The Fundraising Image of Victimhood', 4 *London Review of International Law* (2016) 247, 269–270.
- 135 Jabbour, *supra* note 133. Also see T. Macías, 'Between Violence and Its Representation: Ethics, Archival Research and Politics of Knowledge Production in the Telling of Torture Stories', 5 *Intersectionalities* (2016) 20, 25.
- 136 Thanks to Kath Weston for raising this important point. On this phenomenon more generally, see M. Mutua, 'Savages, Victims, Saviors: The Metaphor of Human Rights', 42 *HILJ* (2001) 201.
- 137 The 'Caesar photos' are a trove of over 11,000 images, smuggled out of the country in 2013 by a regime defector and former military photographer. Outrage at the gruesome content of the photographs depicting torture and execution has propelled calls for international criminal trials. G. le Caisne, "'They Were Torturing to Kill': Inside Syria's Death Machine', *The Guardian*, 1 October 2015, available online at <https://www.theguardian.com/world/2015/oct/01/they-were-torturing-to-kill-inside-syrias-death-machine-caesar> (1 October 2021); Human Rights Watch, *If the Dead Could Speak: Mass Deaths and Torture in Syria's Detention Facilities*, 16 December 2015, available online at <https://www.hrw.org/report/2015/12/16/if-dead-could-speak/mass-deaths-and-torture-syrias-detention-facilities> (visited 1 October 2021)

degree of humanity to the barbarity on display or instead is this simple voyeurism? To what extent need we also think of the right to silence and the right to be forgotten instead?<sup>138</sup> While recognizing the problems of saturation and numbness, Sontag stresses the ethical imperative of preservation and of on-going viewing:

Let the atrocious images haunt us. Even if they are only tokens, and cannot possibly encompass most of the reality to which they refer, they still perform a vital function. The images say: This is what human beings are capable of doing — may volunteer to do, enthusiastically, self-righteously. Don't forget.<sup>139</sup>

Speaking specifically in relation to Syria, De Angelis, is less sanguine:

The images circulating on social media do so without references, as bare documents of what happened: a chemical attack against civilians. Who were those children and the other photographed persons? Who was the photographer? Why were they there and what was the relationship with the photographed subjects? Under which conditions did they shoot those images and with what kind of equipment? All of this is forgotten as a means of producing only an image symbol of a war crime, in this case so strong as to trigger a foreign intervention.

However, not all anti-regime activists share the pictures on their Facebook profiles and some of them criticize the exposure of the victims for ethical and strategic reasons. Some of them invite those involved to stop publishing them, pointing out that they deprive the victims of their dignity and do not provoke any form of international solidarity.<sup>140</sup>

Individuals working at both the CIJA and the IIIM are firmly committed to the preservation of these (otherwise possibly lost) images to furnish future criminal trials. While some were clearly uncomfortable with certain aspect of their custodianship of such material, none questioned its value or its transformation into an archive for a future trial that is far from guaranteed. The promise of international criminal justice — even if quite distant — seemed to be worth the effort as well as the ethical discomfort.

## 5. Conclusion: Towards a Future Archive?

To exhume a paper cadaver or rescue a document is to stave off oblivion, to look backward, to prevent stories and lives and traumas from being forgotten, and to accord dignity to the dead, disappeared and displaced. But while to delve deeply into dark pasts is an act of remembering, it is also a constructive act, one of imagination.<sup>141</sup>

138 Aronson, *supra* note 51, 97. Cf. an IIIM lawyer, who saw part of her role as being to ensure that Syria's crimes are not forgotten. Anonymized IIIM interview #2, 13 June 2019. On the relationship between archives, transitional justice and silence, especially see J. Viebach, 'Transitional Archives: Towards a Conceptualisation of Archives in Transitional Justice', 25 *IJHR* (2021) 403, 423–426.

139 S. Sontag, *Regarding the Pain of Others* (Penguin, 2003), section 8.

140 De Angelis, *supra* note 132, 72.

141 Weld, *supra* note 97, 256.

For international lawyers, it is almost impossible not to respond to the tragedy of Syria without invoking ICL, whether as mere rhetorical condemnation of criminality or as full-blown support for international criminal trials. Evidence is the *sine qua non* for such endeavors and it is for this reason that lawyers at both the CIJA and the IIM see their work of instrumental archival creation as vital. The impetus for such work plays out within a wider field of local and international civil society actors seeking to create atrocity archives for Syria not simply for future trials, but for a range of reform projects. Mohammed Al Abdallah of the Syria Justice and Accountability Center makes this point clearly: ‘To do effective institutional reform, you need good quality documentation.’<sup>142</sup>

Through a comparative organizational ethnography which explores particularized understandings of archive-building, I have tried to problematize the archival impulses of the CIJA and the IIM to suggest that such work paradoxically enables as well as constrains ways of understanding the Syrian conflict. This preservation work of so much material in its public and private registers is to be lauded, and it speaks to how an archive opens up new vistas in linking the past, the present, and the future. Yet, constant ‘ethical reflection’<sup>143</sup> on the part of these lawyers, as well as ourselves, is also needed in thinking through law’s relationship with such archives.<sup>144</sup> Neither archival practices per se nor the gathering and presentation of evidence for criminal trials is neutral<sup>145</sup> or generative of stabilized meaning.<sup>146</sup> Thus in these archives as epistemic engines, potentialities are both produced and destroyed.<sup>147</sup> Such a plurality of future possibilities is suggestive of the idea of multiple archives ‘or *multiple archival moments*’<sup>148</sup> that can speak to counter-publics within the liminal zone that is transitional justice and the pursuit of redress.<sup>149</sup> As this archival work is of such social significance and works with radically evolving technological innovation, the cases studied here suggest that new forms of coordination are required globally to develop common standards and ethics in relation to the gathering, storing and later use of such material. This will be vital in ensuring not only the admissibility of evidence into trial, but trust in the possibility of social repair through the creation of such atrocity archives per se. For scholars studying such

142 As quoted in Aboueldahab, *supra* note 1, 12.

143 Macías, *supra* note 135, 21.

144 Especially see Mawani, *supra* note 83.

145 A. Sekula, ‘Reading an Archive: Photography between Labour and Capital’, in L. Wells (ed.), *The Photography Reader* (Routledge, 2003) 443–452, 446.

146 K. Biber and T. Luker, ‘Introduction: Evidence and the Archive: Ethics, Aesthetics and Emotion’, in K. Biber and T. Luker (eds), *Evidence and the Archive: Ethics, Aesthetics and Emotion* (Routledge, 2017) 1, 3.

147 For Sekula, in ‘an archive, the possibility of meaning is liberated from the actual contingencies of use. But this liberation is also a loss, an *abstraction* from the complexity and richness of use, a loss of context.’ Sekula, *supra* note 145, 444.

148 H. Redwood, ‘Archives of Knowledge: Power and Ownership of the ICTR’s Archive’, *Humanity*, 5 July 2017, available online at <http://humanityjournal.org/blog/archives-of-knowledge/> (visited 11 March 2021).

149 Campbell, *supra* note 70, 252. Aboueldahab reminds us that there can be very different ‘justice priorities’ operating for different actors: Aboueldahab, *supra* note 1. Also see Viebach’s related idea of ‘transitional archives’: Viebach, *supra* note 138.

archival practices, this article has highlighted how an interdisciplinary sensibility should inform future research as well as the development of best practice standards.

Given that the nature of this material could inform so many projects of social repair, lawyers at both entities recognize how difficult it is to argue in favour of continued archival alienation and secrecy. Should a select group of international criminal lawyers serve as the custodians not only of evidence for future trials but material that could inform a whole array of other reparative functions? In speaking of their work as ‘archival’ rather than simply ‘evidentiary’ is this a universalizing gesture seeking to both legitimize their work but also crowd out the efforts of others less prominently placed and resourced? Ultimately, the legitimacy of this work rests not only in persuading (not-necessarily-specified) beneficiaries that a denial of access will be worth the wait once criminal trials eventuate and not just of low-level subordinates, but individuals of significant stature. More significantly, it requires conviction in the idea that the international criminal trial itself — through its archive — can carry the burden of redressing so many expectations and so much suffering.