

CRIMINAL RESPONSIBILITY FOR THE COVID-19 PANDEMIC IN SYRIA

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ABSTRACT

Since the beginning of the Syrian conflict in 2011, the Syrian government has bombed healthcare facilities, attacked healthcare workers, and diverted humanitarian medical aid. These attacks not only decimated hospitals and led to numerous fatalities, but they also crippled Syrian healthcare capacity, leaving the country entirely unprepared to address the COVID-19 pandemic. Health experts now estimate that an unmitigated COVID-19 outbreak in Idlib, the last redoubt of the opposition, could result in the deaths of up to one hundred thousand persons—a situation that would not have arisen but for the Syrian government's campaign of violence against healthcare.

The Syrian government's attacks on health facilities are well-documented and were condemned in a series of reports issued by United Nations entities, journalists, and non-governmental

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organizations. But the death and suffering caused by these attacks is not fully encompassed by reference to direct casualties alone. Thousands of Syrians have been deprived of routine medical treatment for acute illnesses as well as communicable diseases as a result of a deliberate strategy of eradicating access to healthcare. This Article examines whether individuals may be held criminally liable for the Syrian government's campaign of violence against healthcare, which has led to the death and suffering of the Syrian people through injuries and illnesses, including COVID-19. By examining the concept of *dolus eventualis*, the Article concludes that the Syrian government's acts and omissions in furtherance of a policy to attack healthcare constitute numerous crimes against humanity and war crimes, including murder and extermination.

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INTRODUCTION

One of the Syrian government's most powerful and destructive weapons throughout its nine-year civil war has been its attacks on healthcare. The government has bombed hospitals, targeted medical personnel, stripped humanitarian convoys of medical assistance, and deliberately left outbreaks of measles, polio, and typhoid unchecked in opposition-controlled areas. In the midst of the current global COVID-19 pandemic, the Syrian government and its allies have punished dissidents through discriminatory restrictions, depriving certain groups of healthcare and medical aid.

Currently, there are limited prospects for the criminal prosecution of the Syrian government officials and military leaders most responsible for these violations.¹ Syria is not a state party to the Rome Statute,² and Russia vetoed a U.N. Security Council resolution to refer the situation in Syria to the International Criminal Court (ICC).³ While a limited number of criminal prosecutions are underway in Europe on the basis of universal jurisdiction, they are generally limited to perpetrators who fled Syria and are living in Europe. Because head-of-state immunity and functional immunity prevent prosecution of the most senior government leaders by another

1. See, e.g., Beth Van Schaack, *Option for Accountability in Syria*, JUST SECURITY (May 22, 2014), <https://www.justsecurity.org/10736/options-accountability-syria> [<https://perma.cc/N79J-8VXX>] (discussing alternative accountability measures for Syria in light of the U.N. Security Council's failure to refer the Syrian crisis to the International Criminal Court, including actions by the U.N. General Assembly, the U.N. Secretary General, or the International Court of Justice, domestic prosecution, hybrid tribunals, and empowering the U.N. Commission of Inquiry on Syria); Beth Van Schaack, *Accountability in the Time of COVID-19: Syria & Iraq*, JUST SECURITY (May 6, 2020), <https://www.justsecurity.org/69932/accountability-in-the-time-of-covid-19-syria-iraq> [<https://perma.cc/XB27-EUAJ>] (detailing several important accountability initiatives already underway to address conflict-related crimes in Syria: chemical weapons investigations and documentation; evidence collection, preservation, and analysis for future prosecutions; counter-terrorism trials of ISIS fighters; and universal jurisdiction trials in Germany and the United States).

2. *The States Parties to the Rome Statute*, ICC, https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [<https://perma.cc/CVQ5-J8QS>].

3. *Russia, China Block Security Council Referral of Syria to International Criminal Court*, U.N. NEWS (May 22, 2014), <https://news.un.org/en/story/2014/05/468962-russia-china-block-security-council-referral-syria-international-criminal-court> [<https://perma.cc/VYW7-6WX6>].

sovereign nation,⁴ the most likely venue for the prosecution of senior leaders of the Syrian government would be the ICC or a hybrid Syrian-international tribunal.⁵ When prosecution does occur, justice requires that the charges within an indictment fully represent the harm caused by the accused. This Article argues for the inclusion of charges related to the Syrian government's *sine qua non* attacks on healthcare in any future indictment.

Part I of this Article presents evidence of the Syrian government's weaponization of public health throughout the nine-year conflict, as illustrated by the destruction of healthcare facilities,

4. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, ¶¶ 70–71 (Feb. 14).

5. MARK LATTIMER ET AL., SYRIA JUST. & ACCOUNTABILITY CTR. & CEASEFIRE CTR. FOR CIVILIAN RTS., A STEP TOWARDS JUSTICE: CURRENT ACCOUNTABILITY OPTIONS FOR CRIMES UNDER INTERNATIONAL LAW COMMITTED IN SYRIA 4–5 (2015), available at <http://syriaaccountability.org/wp-content/uploads/A-Step-towards-Justice1.pdf> [<https://perma.cc/2SYJ-T6W8>]. An alternative venue for prosecuting senior Syrian government leaders would be a hybrid tribunal hosted in Syria and created by a bilateral agreement between the United Nations and a post-conflict government in Syria. See, e.g., Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, June 6, 2003, 2329 U.N.T.S. 117 [hereinafter ECCC Agreement] (establishing the Extraordinary Chambers in the Courts of Cambodia, a hybrid court comprised of Cambodian and foreign judges, to try senior Khmer Rouge officials for violations of international law committed during the Cambodian genocide). The law governing a Syrian hybrid tribunal would be dictated by its enabling statute and would encompass customary international law, international criminal law (including case law from various international and hybrid tribunals), and Syrian law. See Sarah M.H. Nouwen, *Hybrid Courts: The Hybrid Category of a New Type of International Crimes Courts*, 2 UTRECHT L. REV. 190, 206–09 (2006). The ICC's purpose is not to create new law. See Rome Statute of the International Criminal Court art. 21, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90, 104 (entered into force July 1, 2002) [hereinafter Rome Statute]. However, the principles animating the Rome Statute would likely have a significant impact upon the legal framework of a hybrid tribunal's statute, including by defining the international crimes within the court's jurisdiction. See ECCC Agreement art. 9, *supra*, at 122 (adopting the Rome Statute's definition of crimes against humanity in defining the ECCC's subject matter jurisdiction); INST. FOR SEC. POL'Y & LAW, THE CHAUTAUQUA BLUEPRINT FOR A STATUTE FOR A SYRIAN EXTRAORDINARY TRIBUNAL TO PROSECUTE ATROCITY CRIMES 13 n.30 (2013), available at <http://insct.syr.edu/wp-content/uploads/2013/09/Chautauqua-Blueprint1.pdf> [<https://perma.cc/6B3X-LRYP>] (presenting a draft statute to govern Syrian tribunals). Therefore, the Rome Statute provides a useful basis for analysis in this Article, irrespective of whether conflict-related crimes in Syria are ultimately prosecuted by a hybrid tribunal or the ICC.

the diversion of medical humanitarian aid away from opposition-held territories, and the deprivation of medical assistance for COVID-19. Part II provides a framework for analysis, setting out definitions and relevant international humanitarian law principles surrounding restrictions of humanitarian aid in general and medical aid in particular. Finally, Part III examines attacks on healthcare and public health from the perspective of international criminal law, assessing the extent to which individual criminal responsibility may apply to these acts, and in particular, whether senior leaders may be held responsible for deaths resulting from the eradication of healthcare. Thus, this Article presents the first in-depth analysis of the criminality of the Syrian government's response to COVID-19 while also placing such governmental policy within the wider context of the Syrian government's war on healthcare.⁶

I. PUBLIC HEALTH AS A WEAPON OF WAR

When viewed in the context of the nine-year Syrian conflict, the Syrian government's weaponization of its public health response to COVID-19 reflects an established governmental policy of using large-scale restrictions of medical care as a form of warfare and punishment.⁷ This policy, which has taken on various iterations

6. This Article is the first to assess the potential for criminal liability of Syrian officials arising from the COVID-19 crisis. However, for more information regarding inquiries into the potential impact of the virus on the conflict as a whole, see Muriel Asseburg et al., *The COVID-19 Pandemic and Conflict Dynamics in Syria: Neither a Turning Point nor an Overall Determinant*, STIFTUNG WISSENSCHAFT UND POLITIK (May 2020), <https://www.swp-berlin.org/en/publication/the-covid-19-pandemic-and-conflict-dynamics-in-syria> [<https://perma.cc/V4R8-8X4K>] (describing how conflict dynamics have stunted effective pandemic response and opining that COVID-19 is unlikely to prompt changes in military strategy among local, regional, and global actors); Galip Dalay, *Pandemic Politics: Will COVID-19 Exacerbate or Mitigate Conflicts in Libya and Syria?*, BROOKINGS (May 20, 2020), <https://www.brookings.edu/opinions/pandemic-politics-will-covid-19-exacerbate-or-mitigate-conflicts-in-libya-and-syria> [<https://perma.cc/H3LV-YXL9>] (concluding that COVID-19 is likely to exacerbate conflict dynamics); Maha Yahya, *Syria & Coronavirus*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Apr. 14, 2020), <https://carnegieendowment.org/2020/04/14/syria-and-coronavirus-pub-81547> [<https://perma.cc/QQ99-E5JM>] (describing the reciprocal effects of Syria's fragmentation on the pandemic response and, conversely, the pandemic on Syria's fragmentation).

7. Fouad M. Fouad et al., *Health Workers and the Weaponization of Health Care in Syria: A Preliminary Inquiry for The Lancet–American University of Beirut Commission on Syria*, 390 LANCET HEALTH POL'Y 2516, 2516 (2017)

throughout the conflict, has included (1) the destruction of healthcare facilities; (2) the diversion of humanitarian medical aid; and, most recently, (3) the deprivation of COVID-19-specific assistance in a discriminatory manner.⁸

A. The Destruction of Healthcare Facilities

First, the government and its allies have deliberately targeted and attacked medical personnel and facilities in areas outside the government's control, leaving millions to suffer without adequate medical care.⁹ Since the start of the conflict in March 2011, there

(describing the weaponization of healthcare in Syria as “a strategy of using people’s need for health care as a weapon against them by violently depriving them of it”).

8. *Public Health as a Weapon: Syria & COVID-19*, SYRIA JUST. & ACCOUNTABILITY CTR. (Mar. 18, 2020), <https://syriaaccountability.org/updates/2020/03/18/public-health-as-a-weapon-syria-and-the-covid-19-crisis> [<https://perma.cc/5EHF-STQT>] [hereinafter *Public Health as a Weapon*] (describing the Syrian government’s discriminatory polio vaccination policy as indicative of the discriminatory approach the Syrian government would take with respect to addressing the COVID-19 pandemic—the presence and extent of which the government attempted to cover up beginning in March 2020); *As COVID-19 Bears Down on Syria, Should Sanctions be Lifted?*, SYRIA JUST. & ACCOUNTABILITY CTR. (Apr. 9, 2020), <https://syriaaccountability.org/updates/2020/04/09/as-covid-19-bears-down-on-syria-should-sanctions-be-lifted> [<https://perma.cc/UU34-A9RL>] (explaining the Syrian government’s withholding of humanitarian and medical aid from opposition-held regions); *COVID-19 in Syria Could Lead to One of the Most Severe Outbreaks in the World, Warns IRC*, INT’L RESCUE COMM. (Mar. 23, 2020), <https://www.rescue.org/press-release/covid-19-syria-could-lead-one-most-severe-outbreaks-world-warns-irc> [<https://perma.cc/C943-V8GD>] [hereinafter *Warns IRC*] (explaining that nine years of conflict have left Syria’s health system “in ruins,” with only one in sixteen hospitals in northeast Syria fully functioning and only 28 beds available in the region’s Intensive Care Units).

9. Evan Hill & Christiaan Triebert, *12 Hours. 4 Syrian Hospitals Bombed. One Culprit: Russia.*, N.Y. TIMES (May 4, 2020), <https://www.nytimes.com/2019/10/13/world/middleeast/russia-bombing-syrian-hospitals.html> (on file with the *Columbia Human Rights Law Review*) (“Russia has long been accused of carrying out systematic attacks against hospitals and clinics in rebel-held areas as part of a strategy to help [President Bashar al-] Assad secure victory in the eight-year-old war.”); Rick Gladstone & Malachy Browne, *In Syria, Health Workers Risk Becoming ‘Enemies of the State’*, N.Y. TIMES (Dec. 4, 2019), <https://www.nytimes.com/2019/12/04/world/middleeast/syria-health-workers-persecution.html> (on file with the *Columbia Human Rights Law Review*) (explaining that President Bashar al-Assad successfully criminalized medical assistance to his enemies a crime over the course of the war).

have been 595 attacks on at least 350 separate medical facilities across Syria.¹⁰ Forty of these attacks occurred between April 2019 and February 2020 on medical facilities in northern Hama, Idlib, and western Aleppo.¹¹ The Syrian government and allied forces are primarily responsible for these attacks. Physicians for Human Rights (PHR), a U.S.-based non-profit, estimates that Syrian government forces committed at least 297 attacks and that either Syrian or Russian forces committed 239 more.¹² There is evidence that Russia has also participated in many attacks against hospitals and clinics in opposition areas.¹³

The attacks—827 of which the Syrian government and allied forces committed through shelling, bombing, and small-arms fire—killed hundreds of healthcare workers.¹⁴ This has led nearly 70% of healthcare workers to flee the country as migrants or refugees since the conflict began, leaving only a skeletal crew of medical workers to

10. *Physicians for Human Rights' Findings of Attacks on Health Care in Syria*, PHYSICIANS FOR HUM. RTS. (Feb. 2020), <http://syriamap.phr.org/#/en/findings> [<https://perma.cc/F35H-AMMR>] [hereinafter *Physicians for Human Rights*].

11. *Id.*

12. Although opposition groups have carried out similar attacks, this Article focuses on those committed by the Syrian government and its allies, which constitute the majority of attacks. *Id.*

13. Malachy Browne et al., *Hospitals and Schools Are Being Bombed in Syria*. A *U.N. Inquiry Is Limited. We Took a Deeper Look.*, N.Y. TIMES (Dec. 31, 2019), <https://www.nytimes.com/interactive/2019/12/31/world/middleeast/syria-united-nations-investigation.html> (on file with the *Columbia Human Rights Law Review*) (investigating seven attacks under U.N. review and determining that the “Syrian military was most likely responsible for at least four . . . the Russian Air Force for one and rebel groups for one or two”); Evan Hill, *U.N. Inquiry Into Syria Bombings Is Silent on Russia's Role*, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/world/middleeast/UN-Syria-Russia-hospital-bombings.html> (on file with the *Columbia Human Rights Law Review*) (describing the criticisms of human rights and advocacy groups to a U.N. report on six attacks on hospitals and schools, which fails to name Russia as a perpetrator); Hill & Triebert, *supra* note 9 (reporting that Russian warplanes twice bombed hospitals in northwestern Syria between May and November 2019); Christiaan Triebert et al., *We Proved Russian Pilots Bombed a Hospital. Then They Did It Again*, N.Y. TIMES (Nov. 14, 2019), <https://www.nytimes.com/video/world/middleeast/10000006815692/syria-hospitals-russia.html> (on file with the *Columbia Human Rights Law Review*) (reporting on the November 2019 hospital bombing by Russian pilots).

14. PHR documented the deaths of over 923 medical professionals. *Physicians for Human Rights, supra* note 10.

address any acute or chronic medical conditions.¹⁵ The available evidence strongly suggests that healthcare facilities and workers were intentional targets and not merely collateral damage of the government's attacks against armed groups.¹⁶ Journalists assembled video evidence and obtained cockpit radio communications showing that both Syrian and Russian air force control units gave orders to bomb hospitals.¹⁷ Further, a U.N. Board of Inquiry (BOI) found that information passed between warring parties through a deconfliction mechanism set up to ensure the protection of medical facilities was in fact used to target them.¹⁸ The attacks have decimated the healthcare infrastructure's capacity to respond to daily health needs, as well as health emergencies like the COVID-19 pandemic, in current and former opposition-held areas.

B. The Diversion of Humanitarian Medical Aid

In addition to the deliberate targeting of healthcare facilities, a number of NGOs have documented the Syrian government' co-opting humanitarian aid; the government routinely manipulates the

15. PAZENN GHARIBAH & ZAKI MEHCY, LONDON SCH. OF ECON. AND POL. SCI. CONFLICT RSCH. PROGRAMME, COVID-19 PANDEMIC: SYRIA'S RESPONSE AND HEALTHCARE CAPACITY 5 (2020), available at http://eprints.lse.ac.uk/103841/1/CRP_covid_19_in_Syria_policy_memo_published.pdf [<https://perma.cc/U443-UHLS>].

16. U.N. Secretary-General, Summary of the Rep. of the United Nations Headquarters Board of Inquiry into Certain Incidents in Northwest Syria Since 17 September 2018 Involving Facilities on the United Nations Deconfliction List and United Nations Supported Facilities 7–21 (Apr. 6, 2020), https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/NWS_BOI_Summary_06_April_2020.pdf [<https://perma.cc/J53K-FPZB>] (finding it highly probable that the Syrian government and its allies carried out attacks on the four healthcare facilities investigated in the report); Evan Hill & Whitney Hurst, *The U.N. Tried to Save Hospitals in Syria. It Didn't Work*, N.Y. TIMES (Dec. 29, 2019), <https://www.nytimes.com/2019/12/29/world/middleeast/united-nations-syria-russia.html> (on file with the *Columbia Human Rights Law Review*) (finding that Russian or Syrian forces attacked 27 hospitals between April and December 2019 alone—"only a small portion of the exempt sites struck during the Syrian war").

17. Browne et al., *supra* note 13.

18. *U.N. Fails to Acknowledge Own Failures in Hospital Attacks Inquiry*, SYRIA JUST. & ACCOUNTABILITY CTR. (Apr. 16, 2020), <https://syriaaccountability.org/updates/2020/04/16/un-fails-to-acknowledge-own-failures-in-hospital-attacks-inquiry> [<https://perma.cc/KCT2-ZYVR>] (criticizing the BOI's report for not adequately admitting the UN's role in enabling the attacks on the hospitals and schools through creation of the deconfliction mechanism).

flow of humanitarian aid, including medical aid, to punish opposition populations and benefit government loyalists.¹⁹ Specific Syrian government policies to that end include requiring humanitarian aid organizations to work with pre-approved local partners who are close allies of the government—particularly the Syrian intelligence branches, which are known human rights abusers²⁰—in order to undermine the aid organizations’ independence.²¹ Further, these polices require government approval for humanitarian projects, which results in selective approval on a discriminatory basis.²² Finally, these polices restrict the operational environment of aid organizations by distinguishing between “safe” areas for aid deliveries and “hot zones” where aid is to be restricted, effectively denying or delaying access based on political considerations.²³ The

19. See Haid Haid, CHATHAM HOUSE, PRINCIPLED AID IN SYRIA: A FRAMEWORK FOR INTERNATIONAL AGENCIES 5–6 (2019), available at <https://www.chathamhouse.org/sites/default/files/2019-07-04-PrincipledAidSyria.pdf> [<https://perma.cc/GNW4-58WR>] (indicating that the Syrian government has blocked humanitarian organizations from carrying out needs assessments and has utilized complex administrative procedures to control in what areas these organizations can distributed aid); HUM. RTS. WATCH, RIGGING THE SYSTEM: GOVERNMENT POLICIES CO-OPT AID AND RECONSTRUCTION FUNDING IN SYRIA 2 (2019), available at https://www.hrw.org/sites/default/files/report_pdf/syria0619_web4.pdf [<https://perma.cc/J2DY-ACTJ>] [hereinafter RIGGING THE SYSTEM] (noting that the Syrian government’s restrictions on “access of humanitarian organizations to communities in need or receipt of aid, selective approval of humanitarian projects and its requirement to partner with security-vetted local actors . . . ensure that the humanitarian response is siphoned centrally through and for the benefit of the abusive state apparatus”); *Documents Obtained by SJAC Show Role of Syrian Intelligence in Directing Humanitarian Aid*, SYRIA JUST. & ACCOUNTABILITY CTR. (Aug. 1, 2019), <https://syriaaccountability.org/updates/2019/08/01/documents-obtained-by-sjac-show-role-of-syrian-intelligence-in-directing-humanitarian-aid> [<https://perma.cc/734S-LE24>] [hereinafter *Documents*] (explaining that the Syrian government restricts aid to “hot zones” in the name of safety, though the identification of hot zones and corresponding restrictions are politically motivated rather than humanitarian in nature).

20. RIGGING THE SYSTEM, *supra* note 19, at 5.

21. Haid, *supra* note 19, at 7–8.

22. RIGGING THE SYSTEM, *supra* note 19, at 2–3.

23. *Documents*, *supra* note 19 (“the government punishes civilian populations perceived to be aligned with the opposition by diverting aid from opposition-held areas and nearby IDP camps, to areas perceived as loyal to the Syrian government”); Haid, *supra* note 19, at 9 (“By preventing direct evaluation, the government is able to cover up the extent to which it has been able to manipulate the distribution of aid.”); RIGGING THE SYSTEM, *supra* note 19, at 21 (calling the government’s aid approval processes and restrictions acts of “active

result is that aid is “siphoned through the abusive state apparatus, to punish civilian populations it perceives as opponents and reward those it perceives as loyal.”²⁴

The Syrian government has also repeatedly removed medical items from aid convoys travelling to opposition areas as part of its strategy to control the flow of aid and to ensure that wounded or sick opposition fighters, as well as civilians, do not receive care and treatment. For example, in February 2018, Syrian authorities removed 3,810 medical treatments from aid convoys heading to Ghouta.²⁵ In March 2018, forty-six trucks heading to eastern Ghouta were similarly stripped of medical supplies before being permitted to travel.²⁶ The Political Security Division of Syrian Intelligence, which monitors and supervises deliveries of humanitarian aid in “hot zones” (corresponding to opposition-controlled areas), was likely responsible for both instances of medical supplies seizure.²⁷

The Syrian government’s response to outbreaks of communicable diseases further exemplifies its weaponization of healthcare. For example, the reemergence of polio in Syria was a direct consequence of the Syrian government’s deliberate inaction. The government initially refused to acknowledge the existence of polio transmission and withheld routine immunizations in besieged and opposition-controlled areas such as Deir Ez-Zor , where the outbreak began in 2013.²⁸ The government also attacked vaccine

discrimination”); *Syrian Government Increases Restrictions on Medical Aid*, IRIN (Aug. 7, 2013), <https://www.refworld.org/docid/5204c8104.html> [<https://perma.cc/XQU2-7CL7>] [hereinafter IRIN] (quoting the WHO as reporting that “[c]ritical medical products, including as part of interagency convoys, have been prevented from reaching affected locations, undermining health care availability for trauma and disease control.”).

24. *Syria: Government Co-Opting Recovery Efforts*, HUM. RTS. WATCH (June 28, 2019), <https://www.hrw.org/news/2019/06/28/syria-government-co-opting-recovery-efforts> [<https://perma.cc/FG8K-E3H7>].

25. Menaka Wilhelm, *Syria Systematically Harasses Medical Aid Convoys*, NPR (Apr. 13, 2018), <https://www.npr.org/sections/goatsandsoda/2018/04/13/600834161/syria-systematically-harasses-medical-aid-convoys> [<https://perma.cc/92HP-SWLY>].

26. *Id.*

27. *Documents*, *supra* note 19; *see infra* note 32 and accompanying text (detailing memoranda collected by Syria Justice and Accountability Centre from the Political Security Division of Syrian Intelligence which illustrate officially-endorsed discriminatory policies on medical aid disbursement).

28. Annie Sparrow, *Syria’s Polio Epidemic: The Suppressed Truth* Annie Sparrow, N.Y. REV. (Feb. 20, 2014), <https://www.nybooks.com/articles/2014/>

storage facilities, leading to the destruction of 140,000 doses of vaccine.²⁹ By 2017, these attacks led to seventy-four confirmed cases of polio, a disease that had been on the verge of eradication.³⁰ As Dr. Annie Sparrow describes:

[T]he government stopped maintaining sanitation and safe-water services and began withholding routine immunizations for preventable childhood diseases. Once the war began, the government started ruthless attacks on civilians in opposition-held areas, forcing millions to seek refuge in filthy, crowded, and cold conditions. Compounding the problem are Assad's ongoing attacks on doctors and the health care system, his besieging of cities, his obstruction of humanitarian aid, and his channeling of vaccines and other relief to pro-regime territory . . . This politicizing of public health meant that many children born in 2010 or later could not commence or complete the routine course of polio vaccination required for effective protection. Of the roughly 1.8 million children born since the conflict began, more than half may be completely unvaccinated. WHO estimates that the vaccination rate has dropped from 83 percent of two-year-olds before the war to 52 percent in 2012. The Syrian Ministry of Health states that the vaccination rate has dropped from 99 percent pre-war to 68 percent in 2012. More than three million children across Syria may now be vulnerable.³¹

The government approached outbreaks of measles and typhoid in the same manner, weaponizing public health to make

02/20/syrias-polio-epidemic-suppressed-truth [<https://perma.cc/3F4R-2FWF>]; SAVE THE CHILD., A DEVASTATING TOLL: THE IMPACT OF THREE YEARS OF WAR ON THE HEALTH OF SYRIA'S CHILDREN 10 (2014), <https://www.savethechildren.org/content/dam/global/reports/emergency-humanitarian-response/devastating-toll-14.pdf> [<https://perma.cc/T3UY-K2PJ>].

29. *Public Health as a Weapon*, *supra* note 8.

30. *Id.* (indicating that polio reappeared in Deir Ez-Zor in October 2013—18 years after it was eradicated from the country); Diana Rayes, *COVID-19 in Syria: Short- and Long-Term Implications for a Country in Crisis*, TAHIR INST. FOR MIDDLE E. POL'Y (May 14, 2020), <https://timep.org/commentary/analysis/covid-19-in-syria-short-and-long-term-implications-for-a-country-in-crisis> [<https://perma.cc/H878-CRY3>] (stating that 74 polio cases emerged in northeast Syria between 2013 and 2017, when the reemergence ceased).

31. Sparrow, *supra* note 28.

outbreaks inevitable.³² Similarly, the spread of tuberculosis in Syrian prisons during the war, which killed hundreds of prisoners, resulted from deliberate government policies of starvation and the denial of medical care to prisoners.³³ These actions disproportionately affected Syrians living in opposition-controlled territory. As one report details:

32. *Polio Spreads as Targeting of Health Workers Continues*, SYRIA JUST. & ACCOUNTABILITY CTR. (Oct. 31, 2013), <https://syriaaccountability.org/updates/2013/10/31/polio-spreads-as-targeting-of-health-workers-continues> [<https://perma.cc/X8SA-RJDH>]. According to Dr. Sparrow, these outbreaks are best described as “man-made,” due to “the way that Syrian President Bashar al-Assad has chosen to fight the war.” Sparrow, *supra* note 28.

Vaccination efforts are “focused on children in government-controlled areas,” which consequently also enjoy working hospitals, food security, clean water, and fuel, “while neglecting the children in opposition-held areas where [communicable diseases like] polio ha[ve] actually broken out.” *Id.* Moreover, the Syrian government claimed to have established an effective early warning system to detect the outbreak of communicable diseases like measles, typhoid, and polio. *Id.* However, the warning system, according to Dr. Sparrow, “not only missed the first case [of polio], it missed the first two dozen” and continues to do so, as “official case” reports do not reflect the reality of such outbreaks on the ground. *Id.* The government’s policy towards polio thus foreshadowed its willfully blind underreporting of COVID-19 cases during the current pandemic.

33. Omar al-Shogre, *Covid-19 Will Massacre Prisoners on the Syrian Regime’s Behalf*, NEWSTATESMAN (Apr. 9, 2020), <https://www.newstatesman.com/world/middle-east/2020/04/covid-19-will-massacre-prisoners-syrian-regime-s-behalf> [<https://perma.cc/2RLH-FLHN>]. Omar al-Shogre, a former political detainee, spent three years within Syrian government prisons, where he saw “tuberculosis spread and kill thousands of fellow prisoners” and even contracted it himself, calling his survival a “miracle.” *Id.* He describes the conditions within such prisons, where there is little to no care given about “detainees’ health or well-being, or preventing the spread of diseases.” *Id.*; see also *Nine Years of Brutality: Assad’s Campaign Against the Syrian People: Hearing Before the S. Comm. on Foreign Relations, 116th Cong. 4* (2020) (testimony of Omar al-Shogre) (explaining how he was “afforded no medicine or medical attention” during his bouts of illness within Syrian prisons); TAYSEER ALKARIM ET AL., CTR. ON INT’L COOP., *DO OR DIE: COVID-19 AND IMPRISONMENT IN SYRIA 4–6* (2020), <https://cic.nyu.edu/sites/default/files/do-or-die-syria-covid19-imprisonment-web.pdf> [<https://perma.cc/9XXK-ZPED>] (describing the conditions of tens of thousands of arbitrarily and unlawfully detained political prisoners within Syrian prisons and detention centers). The latter report explains how the Syrian government has “deliberately punishe[d] detainees by keeping them in inhumanely overcrowded conditions, with little or no access to adequate food, clean drinking water, sanitation facilities, medical care, or medication.” *Id.* at 4. The report further describes that while there has been wide coverage of the “purposeful destruction of hospitals and clinics” by the Syrian government, the “deliberate withholding of medical care in detention centers is part and parcel of the same strategy.” *Id.* at 5. Even where doctors were allowed access to detainees,

Indeed, it is not a coincidence that responsibility for providing medical services to detainees lies with the Military Medical Services Directorate (Ministry of Defense) and not with a civilian authority such as the Ministry of Health. Nor is it an accident that most facilities lack any in-house medical personnel. When the prison administration determines someone needs urgent medical attention, they are given only basic medications like paracetamol, if they are given anything at all. Meanwhile, chronic conditions go untreated while infectious diseases are allowed to run rampant. Between April 2012 and October 2013, tuberculosis was reported to be among the leading causes of mortality in Aleppo Central Prison, accounting for more than 25% of 400 fatalities Detainees have described cellmates dying agonizing deaths, and recounted being held for hours or days in cells containing the bodies of deceased detainees.³⁴

such visits were under “strict control by security agents.” *Id.* at 6. Some detainees described receiving medical treatment “only to keep them alive during interrogations.” *Id.* Moreover, the report sheds light on the fact that the Early Warning Alert and Response System (EWARS) “doesn’t cover the detention centers,” such that outbreaks go unnoticed and unchecked. *Id.* at 9. For information on the tuberculosis outbreak, see Aula Abbara et al., *Populations Under Siege and in Prisons Require Investment from Syria’s National Tuberculosis Programme*, 6 LANCET 34, 34 (2018) (“Tuberculosis is . . . among the leading causes of mortality in Aleppo Central Prison [A]ntituberculosis therapy, often do[es] not reach prisoners . . . [whereas] intermittent or suboptimal dosing does reach prisoners, increasing the risk of drug-resistant tuberculosis.”); Hum. Rts. Council, *Out of Sight, Out of Mind: Deaths in Detention in Syrian Arab Republic*, U.N. Doc. A/HRC/31/CRP.1, at 1, 6 (2016) (reporting that the U.N. Commission of Inquiry on Syria found that “[t]he [Syrian] Government has committed the crimes against humanity of extermination, murder, rape and other forms of sexual violence, torture, imprisonment, enforced disappearance and other inhumane acts”). The Council cited the denial of medical care to detainees as a basis for its finding. *Id.* at 6. As the report details, a large number of deaths are caused by “squalid conditions,” including severely overcrowded cells, lack of sufficient food, lack of clean drinking water, sanitation, and other unhygienic conditions, such as minimal access to lavatories and cold temperatures, compounding to weaken detainees’ “resilience to illnesses.” *Id.* at 6. When illnesses surfaced, detainees were either ignored or tortured upon requests for medical assistance. *Id.* While some prisoners were transferred to military hospitals, they were tortured by the medical staff there as well. *Id.*

34. ALKARIM, *supra* note 33, at 5–6.

NGOs have uncovered strong evidence that policies discriminating in the provision of humanitarian medical aid were formed at the highest levels of government. For example, the Political Security Division of Syrian Intelligence issued a memorandum in February 2014 discussing a government policy of banning medical aid to opposition-held areas.³⁵ Moreover, in 2013, the Ministry of Health instructed that surgical items or any other medical items that could assist the opposition should not be part of any humanitarian aid to opposition-held territory.³⁶ The government has even adopted some of these policies publicly, such as the 2012 criminalization of medical treatment of armed opposition groups under Counter Terrorism Law 19, in which the government deemed the provision of healthcare in opposition-held areas to be material support for terrorism.³⁷ As a result, doctors began treating patients in opposition-held areas in secret for fear of being targeted themselves.³⁸

35. *Documents, supra* note 19. In one memorandum, for example, the Division delineated between “areas ‘safe’ for aid deliveries and ‘hot zones’ where aid is to be restricted.” The document, addressed to the Arab and Foreign Affairs Branch, lists a number of areas to which aid agencies requested access. The city of Jisr Ash-Shughur and the towns of al-Fu’ah and Kafriya were labeled ‘safe’ because “there are military bases there and the security situation is good.” Meanwhile, the towns of Atme and Qah are designated ‘hot zones’ because they contained “families of armed groups and camps for the displaced” (both are locations of large IDP camps). The explanations here show that access was being determined based on political considerations rather than humanitarian need. Through such restrictions, the government punishes civilian populations perceived to be aligned with the opposition by diverting aid from opposition-held areas and nearby IDP camps to areas perceived as loyal to the Syrian government. *Id.* Another communication that the Division addressed to the heads of its branches in all governorates orders the branches to “check the destination of the aid before dispatch, because the shipment to ‘hot zones’ requires a political decision and is monitored by the National Security office in coordination with the liaison officers from the Political Security Division.” *Id.* (translating a July 2014 telegram from the Division). The communication goes on to explain how “officers from the Political Security Divisions were assigned to monitor and supervise deliveries of humanitarian aid in ‘hot zones’ in coordination with local governors.” *Id.*

36. IRIN, *supra* note 23.

37. Mia Swart, *When Care Becomes Criminal: Syrian Health Workers Targeted*, AL JAZEERA (Dec. 4, 2019), <https://www.aljazeera.com/news/2019/12/care-criminal-syrian-healthcare-workers-targeted-191203132920758.html> [<https://perma.cc/V73Z-6NP8>].

38. Fouad et al., *supra* note 7, at 2517 (“Doctors practicing in areas which witnessed protests were forced to treat patients injured in such protests in secret for fear of being arrested.”); Rayan Koteiche et al., *“My Only Crime Was That I*

The Syrian government's policies directed at healthcare were even more stark during its siege of cities such as Eastern Ghouta.³⁹ Not only did the government shell local hospitals and target medical personnel, but also it restricted the delivery of medical assistance and aid to punish the population.⁴⁰ The increased prevalence of communicable disease, such as hepatitis A, tuberculosis, and myiasis, has been attributed to the lack of medicine during the siege.⁴¹

Was a Doctor? How the Syrian Government Targets Health Workers for Arrest, Detention, and Torture, PHYSICIANS FOR HUM. RTS. (Dec. 4, 2019), <https://phr.org/our-work/resources/my-only-crime-was-that-i-was-a-doctor/> [<https://perma.cc/752V-ZS6H>] (“In the security branch, I tried to provide some medical care—in secret, naturally. If I was caught providing consultations or care to anyone, the consequences would have been dire.”).

39. *Syria: Aid to Besieged Areas Being Blocked*, HUM. RTS. WATCH (Dec. 3, 2013), <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=52a5c4ba4&skip=0&query=restriction%20on%20humanitarian%20aid%20AND%20syria> [<https://perma.cc/W59M-BXST>].

40. AMNESTY INT’L, ‘LEFT TO DIE UNDER SIEGE’: WAR CRIMES AND HUMAN RIGHTS ABUSES IN EASTERN GHOUTA, SYRIA 8, 55–58 (2015), available at <https://www.amnesty.org/download/Documents/MDE2420792015ENGLISH.PDF> [<https://perma.cc/S8QC-X3JA>] [hereinafter LEFT TO DIE] (“Residents and aid workers in Eastern Ghouta told Amnesty International that the Syrian government had restricted access to humanitarian aid, food, medicine, gas, water, electricity and other basic necessities by arbitrary detention, sniper attacks and shelling.”); *Syria: The Siege of Eastern Ghouta*, AMNESTY INT’L (Mar. 13, 2020), <https://www.amnesty.org.uk/syria-siege-eastern-ghouta> [<https://perma.cc/SXH9-DJHZ>] (describing the closure of all smuggling tunnels for supplies in Eastern Ghouta in early 2017 and the subsequent closure of the last remaining entry point to nearby Douma in October 2017).

41. LEFT TO DIE, *supra* note 40, at 56. In documenting the deteriorating medical situation during the siege in Eastern Ghouta, Amnesty International conducted phone interviews with doctors in the area between May–June 2015:

[These doctors] expressed concern about the lack of medicine to treat communicable diseases that have become more prevalent during the siege, such as hepatitis A, tuberculosis, myiasis, scabies, and lice. According to doctors Adnan and Qassem, hepatitis A and myiasis infections first emerged in 2014 during the harshest months of the siege and doctors lacked sufficient medicines to treat them . . . Tuberculosis is a growing problem. Adnan, a former doctor in Eastern Ghouta, said that 104 cases of tuberculosis had been diagnosed in 2014 and that the Syrian Arab Red Crescent had managed at the end of 2014 to bring in some drugs to treat it, but Eastern Ghouta’s field hospitals remained desperately short of medicines and related supplies. In the absence of regular medical supply deliveries, since late 2014 some medical supplies have been brought in through

C. The Deprivation of COVID-19 Medical Assistance

After a long period of denying the presence of any COVID-19 cases in Syria, the Syrian Ministry of Health announced the first positive case of COVID-19 on March 22, 2020.⁴² The following week, the first fatality was reported with the second death reported the next day.⁴³ As of September 22, 2020, the Syrian Ministry of Health has confirmed 5,688 positive cases, with Damascus, the Damascus countryside, and Aleppo exhibiting the largest percentage of total reported cases.⁴⁴ While these official numbers represent an

underground tunnels built and controlled by armed groups, three doctors told Amnesty International. A doctor based in Kafr Batna told Amnesty International, “The Syrian government does not allow any surgical supplies to enter into Eastern Ghouta so we rely on the underground tunnels. If we are lucky enough, the Syrian government may once per year allow the Syrian Red Crescent to bring surgical and medical supplies in.

Id.

42. OCHA SYRIA & WHO SYRIA, SYRIAN ARAB REPUBLIC: COVID-19 HUMANITARIAN UPDATE NO. 11, at 1 (May 30, 2020) [hereinafter UPDATE NO. 11]. Since March 2, 2020, the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), in collaboration with the World Health Organization (WHO), has published several “COVID-19 Updates,” which highlight the current situation, including confirmed cases, fatalities, and government response. *See, e.g.*, OCHA SYRIA & WHO SYRIA, SYRIAN ARAB REPUBLIC: COVID-19 UPDATE NO. 01 (Mar. 2, 2020) (the first “COVID-19 Update”). However, WHO/OCHA reports rely on official government figures provided by the Syrian Ministry of Health and should therefore be viewed with reservation. Danny Makki, *Syria Is Facing a COVID-19 Catastrophe*, MIDDLE E. INST. (Aug. 6, 2020), <https://www.mei.edu/publications/syria-facing-covid-19-catastrophe> [<https://perma.cc/N8F7-AFX3>].

43. UPDATE NO. 11, *supra* note 42 and accompanying text (explaining how OCHA arrives at the case and fatality counts); Jack Dutton, *Syria Reports Second COVID-19 Death as Fears of Spread Rise*, THE NATIONAL (Mar. 31, 2020), <https://www.thenationalnews.com/world/mena/syria-reports-second-covid-19-death-as-fears-of-spread-rise-1.999469> [<https://perma.cc/GDN9-5HE4>] (indicating that Syria’s first two COVID-19 deaths occurred within less than 24 hours of one another).

44. *Weekly Briefing 37/2020*, SYRIA IN CONTEXT (Sept. 23, 2020), <https://tande.substack.com/p/syria-in-context-weekly-briefing-285> (on file with the *Columbia Human Rights Law Review*) [hereinafter *Weekly Brief 37*]; *Weekly Briefing 36/2020*, SYRIA IN CONTEXT (Sept. 16, 2020), <https://tande.substack.com/p/syria-in-context-weekly-briefing-6da> (on file with the *Columbia Human Rights Law Review*) [hereinafter *Weekly Brief 36*] (reporting the Syrian Ministry of Health confirmed 4,945 COVID-19 cases in Syria as of September 15, 2020, and that “[o]f these, 3,614 were recorded in government-controlled areas, including

exponential rise in cases seen between March and September 2020, with a twenty-fold increase in cases between May and July 2020 alone,⁴⁵ they represent only a tiny fraction of the true caseload. There are likely significantly more cases being hidden from the public as the Syrian government actively continues to conceal the real situation.⁴⁶

160 deaths and 871 recoveries, while 2,583 cases remain active”); Makki, *supra* note 42 (citing an estimate that there could be as many as 112,500 cases in Damascus and its countryside alone).

45. *Syria on Brink of Further Disaster as COVID-19 Cases Escalate*, WORLD VISION INT’L (July 30, 2020), <https://www.wvi.org/newsroom/coronavirus-health-crisis/syria-brink-further-disaster-covid-19-cases-escalate> [<https://perma.cc/6443-NSD8>].

46. *Public Health as a Weapon*, *supra* note 8 (expressing doubt regarding Syria’s claim, at the time, of zero confirmed cases, and suggesting that “the government is likely censoring information in large part to minimize criticism over its capacity to deal with the crisis”); *In Assad-Controlled Syria, the Official Narrative is ‘No COVID-19 Cases’*, GLOB. VOICES (July 16, 2020), <https://globalvoices.org/2020/07/16/in-assad-controlled-syria-the-official-narrative-is-no-covid-19-cases/> [<https://perma.cc/CU9K-7XJ9>] (presenting “narratives on the ground reveal[ing] the ways in which the state has denied and repressed the realities of COVID-19,” most strikingly through “deliberate termination operations” of suspected carriers at national hospitals); Ruth Sherlock & Nada Homsy, *Syria Is Overwhelmed by Coronavirus as Government Conceals Outbreak, Health Worker Says*, NPR (July 31, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/07/31/897664944/syria-is-overwhelmed-by-coronavirus-as-govt-conceals-outbreak-health-worker-says> [<https://perma.cc/SF8P-2MEQ>] (reporting on testimonies of medical workers that they fear speaking on the realities of COVID-19 because “there are continuous warnings against doctors speaking on this issue” and “intelligence officers watch the hospitals”); *Assad Regime Forced to Admit: Number Of COVID-19 Cases in Syria Higher Than Official Health Ministry Figures*, MIDDLE E. MEDIA RSCH. INST. (Aug. 31, 2020), <https://www.memri.org/reports/assad-regime-forced-admit-number-covid-19-cases-syria-higher-official-health-ministry> [<https://perma.cc/MZ68-HWES>] (relaying claims that the Syrian government is arresting healthcare professionals for disclosing accurate information and that there is insufficient testing, and observing that even pro-regime voices are calling for more accuracy); *U.N. Concern over ‘Widespread’ COVID-19 Transmission in Syria*, AL JAZEERA (Aug. 28, 2020), <https://www.aljazeera.com/news/2020/08/concern-widespread-covid-19-transmission-syria-200828065222962.html> [<https://perma.cc/ZY68-NWDY>] (quoting the U.N.’s deputy emergency relief coordinator’s findings that healthcare facilities are under pressure with rising patient numbers); Patrick Cockburn, *Inside Syria’s Coronavirus Crisis: Damascus Patient Describes Outbreak ‘10 Times Worse’ Than Regime Claims*, INDEPENDENT (Aug. 26, 2020), <https://www.independent.co.uk/news/world/middle-east/coronavirus-syria-cases-deaths-damascus-regime-a9687646.html> [<https://perma.cc/P8QR-7WGW>] (describing the realities of burials and poverty in relation to COVID-19); Mehmet Ozalp, *In War-Torn Syria, the Coronavirus Pandemic Has Brought Its People to*

For example, in one recent study, Imperial College COVID-19 response team researchers working with Syrian health experts assessed that only an estimated 1.25% of deaths resulting from COVID-19 in Damascus are reported.⁴⁷ In reality, there may be as many as 112,500 cases in Damascus and its countryside alone, based on assessments from burial offices.⁴⁸ Moreover, policy experts anticipate that at the true current rate of infection, Syria may be experiencing significantly more than two million cases of coronavirus as of early September 2020, resulting in over 119,000 deaths.⁴⁹ Syrian Minister of Health Nizar Yazji denied the pandemic's existence in the country and referred to Syrians in opposition-held territories as

the Brink of Starvation, THE CONVERSATION (Sept. 17, 2020), <https://theconversation.com/in-war-torn-syria-the-coronavirus-pandemic-has-brought-its-people-to-the-brink-of-starvation-144794> [https://perma.cc/EX9B-LU98] (remarking on low levels of testing and stating that “[i]t is almost certain the numbers of coronavirus cases are grossly under-reported”).

47. OLIVER WATSON ET AL., IMPERIAL COLL. COVID-19 RESPONSE TEAM, REPORT 31: ESTIMATING THE BURDEN OF COVID-19 IN DAMASCUS, SYRIA: AN ANALYSIS OF NOVEL DATA SOURCES TO INFER MORTALITY UNDER-ASCERTAINMENT 2 (Sept. 15, 2020), available at <https://www.imperial.ac.uk/media/imperial-college/medicine/mrc-gida/15-09-2020-COVID19-Report-31.pdf> [https://perma.cc/2S2E-Y8DS].

48. Makki, *supra* note 42 (explaining how Damascus burial offices are exhibiting over 100 deaths per day); see also Judi Dalati, *Syria Could Have 2 Million Cases of Coronavirus by Aug. 31*, AL-MONITOR (Aug. 20, 2020), <https://www.al-monitor.com/pulse/originals/2020/08/syria-health-sector-coronavirus-spike-scenarios.html#ixzz6W59GBd00> [https://perma.cc/2V6G-TXPL] (reporting that on July 29, 2020, the burial office in Damascus announced 133 people had died, compared to the average of 25–35 deaths in previous years). It is important to note that the numbers of COVID-19 cases reported throughout this Article are based on estimates compiled by journalists for the *New York Times*, *Washington Post*, *NPR*, and *Al-Monitor*; NGO reports by SJAC, Human Rights Watch, Amnesty International, Doctors without Borders, and Physicians for Human Rights; and reports from thinktanks like Brookings, CSIS, and Carnegie Endowment. The figures are corroborated by cross-checking these various sources against one another. However, these numbers are typically found by aggregating local, smaller samples of the population accessible to these groups. Therefore, without accurate information due to obstacles deliberately placed by the Syrian government, all numbers should be viewed with reservation.

49. Dalati, *supra* note 48; ZAKI MEHCY & RIM TURKMANI, FORECASTING THE SCENARIOS FOR COVID-19 IN SYRIA WITH AN SIR MODEL (TILL THE END OF AUGUST 2020) 2 (Aug. 4, 2020), available at http://eprints.lse.ac.uk/105869/2/COVID_19_Forcasing_Syr4.pdf [https://perma.cc/2NP7-JUJS]. Predictions made in this policy memo should be viewed with reservation, as the findings are based on estimates that the actual number of currently infected cases in Syria is only thirty-five thousand.

“germs’ to be eliminated” by the Syrian army.⁵⁰ This rhetoric set the tone for the government’s response to the medical crisis, which can best be described as an official policy of misinformation, intimidation, and discrimination against inhabitants in both current and former opposition-controlled areas—perpetrated through the use of gag orders, the imposition of media blackouts, and the prevention of journalists and medical personnel from discussing and even treating the disease.⁵¹

In all, the government has approached the COVID-19 pandemic in the same way as it has other health risks, namely by targeting political prisoners, refugees, and civilians in current and former opposition-controlled areas, depriving them of medical care, and exacerbating the illness to defeat the opposition.⁵² Thus, the government’s response to COVID-19 represents just another iteration of its weaponization of healthcare. This, when coupled with the continuation of the aforementioned wartime policies, ensures that sufficient response, testing, and medical care in current and former opposition-held territory is nearly impossible, making the spread of the virus and ultimate large-scale suffering and death of the Syrian people inevitable.

Out of 1,811 public health centers in all of Syria, only about 46% (833) are fully functioning, while 22% (389) are partially

50. Adham Sahloul, *Weaponized Humanitarianism & COVID-19*, CG POLICY (May 21, 2020), <https://cgpolicy.org/articles/weaponized-humanitarianism-and-covid-19/> [<https://perma.cc/42A5-V34T>].

51. Dale Gavlak, *Assad Exploiting COVID-19 Prevention Measures to Consolidate Grip on Syria, Observers Say*, VOA (May 18, 2020), <https://www.voanews.com/middle-east/assad-exploiting-covid-19-prevention-measures-consolidate-grip-syria-observers-say> [<https://perma.cc/RR5P-YEAG>] (reporting that the Syrian regime threatened hospitals and even deployed members of the secret police in hospitals across regime-controlled areas to “control and oversee the narratives of coronavirus discussions and cases across hospitals”); *Translation: The Syrian Minister of Health on Corona: “The Army Cleanser the Country of Germs”*, AL-MODON (Mar. 13, 2020), <https://www.almodon.com/media/2020/3/13/الجرائيم-من-البلاد-طهر-الجيش-كورونا-عن-السوري-الصحة-وزير/> [<https://perma.cc/E5V2-JJ7M>] (mentioning the media blackout about the virus throughout the country).

52. See Will Todman, *Assad Attempts to Weaponize COVID-19 in Syria*, THE HILL (May 27, 2020), <https://thehill.com/opinion/international/498943-assad-attempts-to-weaponize-covid-19-in-syria> [<https://perma.cc/MMH2-GT7H>] (demonstrating how the Assad regime has “tried to ensure that those in opposition-held areas are more vulnerable to the pandemic”).

functioning, and 32% (586) are non-functioning or fully destroyed.⁵³ The fully-functioning public health centers are clustered in the West, along the Mediterranean in Latakia, Tartus, western Hama, the northwest tip of Homs, and around the city of Damascus and western portion of As-Sweida region—all areas controlled by the government.⁵⁴

As noted by the World Health Organization (WHO), areas of heightened concern for the spread of COVID-19 include densely populated areas, notably urban centers; refugee and displacement camps, shelters, and informal settlements in northern Syria; and areas where hostilities may be ongoing.⁵⁵

1. Current-Opposition Held Areas Outside Government Control

The final rebel-held province of Idlib in northwest Syria has been besieged by government forces and victimized by a Russian-backed government offensive since December 2019, demolishing cities and forcing close to one million of its three million residents to flee from their homes and seek refuge in squalid, overcrowded settlements and camps.⁵⁶ These camps lack basic sanitation, water,

53. WHO, HERAMS ANNUAL REPORT (JANUARY – DECEMBER 2018): PUBLIC HEALTH CENTRES IN THE SYRIAN ARAB REPUBLIC 2 (2018), available at <https://www.who.int/health-cluster/countries/syria/HerAMS-Report-2018.pdf> [<https://perma.cc/L564-6555>].

54. WHO, *supra* note 53, at 6; see also Jesse Marks, *Syria's Civil War Will Make Fighting Coronavirus Particularly Difficult*, WASH. POST (Apr. 2, 2020), <https://www.washingtonpost.com/politics/2020/04/02/syrias-civil-war-will-make-fighting-coronavirus-particularly-difficult/> (on file with the *Columbia Human Rights Law Review*) (describing the difficulties for facilities in opposition-held areas such as Northeast Syria, which has much fewer hospitals, to deal with the cases).

55. OCHA SYRIA & WHO SYRIA, SYRIAN ARAB REPUBLIC: COVID-19 HUMANITARIAN UPDATE NO. 07, at 1 (Apr. 25, 2020) [hereinafter UPDATE NO. 7].

56. *Coronavirus: Aid Groups Move to Block Outbreak in Syria Rebel Pocket*, MIDDLE E. EYE (Mar. 8, 2020), <https://www.middleeasteye.net/news/aid-groups-move-block-coronavirus-outbreak-syria-rebel-pocket> [<https://perma.cc/EC4X-5WRD>] (“With close to one million displaced since December by a Russian-backed Syrian government offensive on the Idlib region, overcrowded settlements are teeming with fresh arrivals.”); Pinar Sevinclidir, *Coronavirus Could Kill 100,000 In Syria's Last Rebel Enclave, Officials Warn*, CBS NEWS (Apr. 16, 2020), <https://www.cbsnews.com/news/coronavirus-could-kill-100000-in-syria-last-rebel-enclave-idlib-officials-warn/> [<https://perma.cc/NLV9-XSXJ>] (“Thousands have been

food, access to medical resources, and any possibility of social distancing.⁵⁷ Since December, Syrian, Russian, and likely even Iranian forces have waged a deliberate campaign against medical facilities in the besieged area, destroying nearly eighty-four hospitals and medical facilities in Idlib.⁵⁸ Idlib health officials and humanitarian organizations estimate that only 127 to 148 intensive care beds and 47 to 153 ventilators remain in the surviving facilities.⁵⁹ As a result, only six hundred physicians remain in the region to serve a population of more than four million.⁶⁰ Such shortages in medical equipment and professionals have further weakened a health system already devastated by nine years of violent conflict, rendering Idlib among the areas likely to suffer the most from a coronavirus outbreak.⁶¹

forced to flee their homes and are now living in makeshift shelters and overcrowded camps, where self-isolation is an unattainable privilege.”)

57. *Warns IRC*, *supra* note 8 (describing the vulnerable conditions in these settlements “where sanitation is poor, social distancing is almost impossible and access to basic services is severely limited”).

58. *Public Health as a Weapon*, *supra* note 8; see also Betsy Joles, *Syria Has Confirmed Its First Cases of Coronavirus. An Outbreak There Would Be Hell*, VOX (Mar. 27, 2020), <https://www.vox.com/world/2020/3/27/21195860/coronavirus-syria-idlib-covid-19-cases-outbreak-middle-east> [https://perma.cc/2CZ3-Q8K9] (cautioning that “[h]ospitals and other health facilities have been destroyed by nine years of targeted attacks” and “[m]any hospitals in Idlib are no longer operational”); Maria Petkova, *Concern Mounts of “Catastrophic” Coronavirus Outbreak in Syria*, AL-JAZEERA (Mar. 16, 2020), <https://www.aljazeera.com/news/2020/03/concern-mounts-catastrophic-coronavirus-outbreak-syria-200316003354976.html> [https://perma.cc/D8ZM-X6XK] (mentioning the closure of 50 health facilities because of the advance of the Syrian government forces). See generally TAYSEER ALKARIM ET AL., NYU CTR. ON INT’L COOP., LAST REFUGE OR LAST HOUR? COVID-19 AND THE HUMANITARIAN CRISIS IN IDLIB (May 2020), <https://cic.nyu.edu/sites/default/files/idlib-covid-19-briefing-web-final.pdf> [https://perma.cc/3A7F-VADN] (discussing the development of the crisis in Idlib and assessing the risks that the pandemic poses to the region).

59. Sevinclidir, *supra* note 56 (estimating that there were only 127 intensive care beds and 47 ventilators in Idlib in April 2020); Jen Kirby, *Syria’s Idlib Was Already a Humanitarian Nightmare. Now the Coronavirus Has Arrived*, VOX (July 16, 2020), <https://www.vox.com/2020/7/16/21322665/syria-idlib-coronavirus-humanitarian-nightmare> [https://perma.cc/9L32-P337] (estimating that there were only 148 intensive care beds and 153 ventilators in Idlib in July 2020 for a population of more than three million).

60. ALKARIM ET AL., *supra* note 58, at 8.

61. Petkova, *supra* note 58; *Warns IRC*, *supra* note 8 (describing the conditions that contribute to Idlib’s vulnerability in the face of the spread of the coronavirus).

As of September 15, 2020, there were 116 registered cases in Idlib, but with very little testing capacity, the majority of cases remain unidentified.⁶² Health officials estimate that “[a]n outbreak in Idlib could kill 100,000 people in the region,”⁶³ as the virus would likely spread quickly among the population.⁶⁴ On April 17, 2020, the WHO claimed to have sent five thousand COVID-19 tests to the province, but only nine hundred tests were available, and healthcare workers continued to lack personal protective equipment, such as masks and gloves.⁶⁵ Thus, it appears that tests are being diverted to regime-controlled areas and away from opposition-controlled areas.⁶⁶

In an interview with Physicians for Human Rights, Dr. Munther al-Khalili, head of the Health Directorate of Idlib, described a sense of hopelessness among the population: “We’ve died a thousand times over. From chemical attacks, and barrel bombs, and rockets, and hunger, and torture, and freezing weather. The virus can’t do more than that.”⁶⁷ Moreover, there is growing concern that the Syrian government is “exploiting the chaos” of the COVID-19 pandemic to make military and political gains,⁶⁸ particularly

62. *Weekly Brief 36*, *supra* note 44.

63. Sevinclidir, *supra* note 56.

64. *Id.*

65. *Id.*

66. *See generally* Marks, *supra* note 54 (discussing that opposition-held areas are direly under-resourced to test for and treat COVID-19 as well as difficult for WHO officials to physically access due to political and logistical restrictions); *WHO Sends Medical Aid to Northern and Eastern Syria as Part of the Emergency Health Response to Tackle Coronavirus*, SYRIAN OBSERVATORY FOR HUM. RTS. (Apr. 14, 2020), www.syriahr.com/en/?p=160258 [<https://perma.cc/94UM-77R5>] (reporting that the WHO sent twenty tons of medical shipments, containing over eight thousand different medical supplies, to regime-controlled areas in Al-Qamishli to help confront the coronavirus outbreak in the northern and eastern regions).

67. Rayan Koteiche, *Voices from the COVID-19 Pandemic: “Within 20 Days of the First COVID-19 Case, Our Health System Will Collapse,”* PHYSICIANS FOR HUM. RTS. (Apr. 21, 2020), <https://phr.org/our-work/resources/voices-from-the-covid-19-pandemic-idlib-munther-al-khalil> [<https://perma.cc/6CTC-XTSX>].

68. Beth Van Schaack, *Accountability in the Time of COVID-19: Syria & Iraq*, JUST SECURITY (May 6, 2020), <https://www.justsecurity.org/69932/accountability-in-the-time-of-covid-19-syria-iraq> [<https://perma.cc/UM6X-7KAG>]; WILL TODMAN, CTR. FOR STRATEGIC & INT’L STUDS., CROSS-BORDER AID, COVID-19, AND U.S. DECISIONS IN SYRIA 3–4 (May 8, 2020) (discussing the Syrian government’s tendency to “restrict international humanitarian access to opposition-controlled areas of Syria as part of its efforts to regain control of the entire country”).

following Turkish President Tayyip Erdogan's accusation that the Syrian government was violating the ceasefire established on March 5 and 6, 2020 between Turkey and Russia in northwest Syria by "ramp[ing] up violence in Idlib."⁶⁹ Such an offensive may lead to the Syrian government retaking the M4 highway, which would result in the loss of cross-border access to Idlib and, consequently, of medical aid by U.N. agencies.⁷⁰

The situation in northeast Syria is similarly grave. The Syrian government's "discriminatory diversion of aid and essential services" is exacerbating an already dire humanitarian situation,⁷¹ where only one of the sixteen hospitals in the region is fully functional and other hospitals are underequipped.⁷² On April 17, 2020, authorities of the Autonomous Administration of North and East Syria reported the region's first death from COVID-19. Although the victim received a COVID-19 test, which was sent to Damascus on March 29 for processing, authorities did not receive the results until over two weeks later, by which time the victim had already passed

69. *Turkey's Erdogan Accuses Syrian Government of Violating Idlib Ceasefire*, REUTERS (Apr. 20, 2020), <https://www.reuters.com/article/us-syria-security-turkey-idUSKBN2222I7> [<https://perma.cc/GNF5-QG4L>].

70. TODMAN, *supra* note 68, at 5.

71. *Turkey/Syria: Weaponizing Water in Global Pandemic?*, HUM. RTS. WATCH (Mar. 31, 2020), <https://www.hrw.org/news/2020/03/31/turkey/syria-weaponizing-water-global-pandemic> [<https://perma.cc/FG4E-UVX7>] (referencing previous reporting on the various policies the Syrian government is using to restrict medical aid to areas outside government control). Additionally, Turkey has weaponized access to water, and thus basic sanitation, in northeast Syria during the pandemic through its control of the Allouk water station, which serves "460,000 people in al-Hasakeh governorate, including al-Hasakeh city and three displacement camps." *Id.* Specifically, Turkish authorities have failed to ensure adequate water supply to especially vulnerable communities in the area, making hand-washing and other sanitation and preventive measures nearly impossible. *Id.*; see also Marks, *supra* note 54 (describing hand-washing and other preventive actions as unavailable to most displaced Syrians living in camps and lacking access to water, among other basic needs).

72. Marks, *supra* note 54; see also Will Christou, 'A Ticking Time Bomb': COVID-19 Spike Catches Northeast Syria Unprepared, SYRIA DIRECT (Aug. 31, 2020), <https://syriadirect.org/news/%E2%80%98a-ticking-time-bomb%E2%80%99-covid-19-spike-catches-northeast-syria-unprepared> (on file with the *Columbia Human Rights Law Review*) ("After nine years of war, the area's capacity has only further degraded; there were only 22 Intensive Care Unit (ICU) beds available for four million people as of late March [2020] . . .").

away.⁷³ Kurdish health authorities pointed to the extraordinary delay in announcing the test results as an example of a coordinated attempt by the WHO and the Syrian government, which have been collaborating on pandemic response, to conceal the existence of the virus and of the WHO's abandonment of northeastern Syria.⁷⁴ Due to restrictions imposed by the Syrian government, the WHO can only operate out of the city of Qamishli and is not permitted to deliver PCR machines, which detect COVID-19, to the greater area.⁷⁵ Eighty-nine percent of the goods that the WHO has delivered to northeast Syria end up in Qamishli National Hospital, which, like the city itself, is controlled by the Syrian government, further illustrating the government's obstruction of impartial aid and funneling of resources to government loyalists.⁷⁶ Two aid agencies interviewed by Human Rights Watch explained that as of early April, the Syrian authorities had failed to send any of the twelve hundred COVID-19 testing kits then in their possession to areas not under government control in the northeast.⁷⁷ Additionally, according to the U.N., "the Syrian government has approved new testing laboratories in Lattakia,

73. Amberin Zaman, *Syria's Kurdish-led Region Decries Lack of International Support in COVID-19 Fight*, AL-MONITOR (Apr. 20, 2020), <https://www.al-monitor.com/pulse/originals/2020/04/syria-northeast-covid19-coronavirus-kurdish-who-un.html> (on file with the *Columbia Human Rights Law Review*); see also *Concerns Mount over COVID-19 Response in Northeast Syria*, MEDECINS SANS FRONTIERES (Apr. 22, 2020), <https://www.msf.org/concerns-mount-over-covid-19-response-preparedness-ne-syria> [https://perma.cc/4CQL-NY7K] (citing the region's reliance on one Damascus-based lab for its testing needs as a reason for delayed results).

74. Hisham Arafat, *Kurdish Administration Accuses WHO of Hiding First Coronavirus Case in Northeast Syria*, KURDISTAN 24 (Apr. 18, 2020), <https://www.kurdistan24.net/en/news/d59b9dad-69c4-4deb-8e1d-3827a806b57d> [https://perma.cc/M6G7-VPXZ].

75. TODMAN, *supra* note 68, at 5.

76. *Id.*; see also Todman, *supra* note 52 ("The WHO repeatedly has requested the Syrian government's permission to build its capacity in northeast Syria The government in Damascus has delayed and obstructed these efforts. When it finally authorized a WHO shipment in mid-April, it ensured that supplies were funneled toward government loyalists."); *Syria: Aid Restrictions Hinder COVID-19 Response*, HUM. RTS. WATCH (Apr. 28, 2020), <https://www.hrw.org/news/2020/04/28/syria-aid-restrictions-hinder-covid-19-response> [https://perma.cc/6MN9-L6YF] [hereinafter *Syria: Aid Restrictions*] (reporting on claims by aid workers and Kurdish officials that "despite some air shipments in March and April from Damascus to Qamishli . . . bureaucratic obstacles in Damascus are preventing aid agencies from transferring supplies to nongovernment-held parts of the region").

77. HUM. RTS. WATCH, *supra* note 76.

Homs, and Aleppo, but not in al-Hasakeh or Deir Ez-Zor.⁷⁸ Finally, northeast Syria does not have a border crossing accessible to the U.N.—the al-Yarubiyah crossing, previously used to provide aid to the region, has not been available since January 2020, when the U.N. Security Council resolution authorizing its use expired.⁷⁹

In light of these circumstances, as of September 23, 2020, there were 1,215 confirmed cases in the northeast.⁸⁰ As of late August, nearly a fifth of confirmed cases in the northeast were among healthcare workers,⁸¹ including three healthcare workers who tested positive in the infamous al-Hol refugee camp,⁸² where sixty-five thousand women and children affiliated with various ISIS members

78. *Id.*

79. Christou, *supra* note 72.

80. *Weekly Brief 37*, *supra* note 44.

81. *Spread of COVID-19 Has Devastating Consequence for People in Northeast Syria*, MEDECINS SANS FRONTIERES (Aug. 27, 2020), <https://www.doctorswithoutborders.org/what-we-do/news-stories/news/spread-covid-19-has-devastating-consequences-people-northeast-syria> [https://perma.cc/Y3PW-EMT3] [hereinafter *Spread of COVID-19*]. The high rate of infection among healthcare workers has been a devastating feature of COVID-19 in Syria. Not only does the disease impact infected medical personnel and their families, but it also leads to decreased healthcare capacity in an already fragile health system. Medical professionals with COVID-19 are unable to work, as are all other staffers who come into contact with them, often leading to the temporary shutdown of entire facilities. Moreover, a letter between U.N. Resident Coordinator and Humanitarian Coordinator in Syria Imran Riza and U.N. heads of agencies reported that more than two hundred U.N. staff members have been infected by COVID-19 in Syria. *Coronavirus: Leaked Letter Says Over 200 UN Staff in Syria Have Contracted Covid-19*, MIDDLE E. EYE (Sept. 6, 2020), <https://www.middleeasteye.net/news/coronavirus-leaked-letter-says-over-200-un-staff-syria-have-contracted-covid-19> [https://perma.cc/449Z-S9GW]; see also Sarah Dadouch, *Coronavirus Is Out of Control in Syria, No Matter What the Government Says*, WASH. POST (Sept. 25, 2020), https://www.washingtonpost.com/world/middle_east/syria-coronavirus-outbreak-doctors/2020/09/24/95d9323a-fcea-11ea-b0e4-350e4e60cc91_story.html (on file with the *Columbia Human Rights Law Review*) (confirming positive COVID-19 tests and symptoms among U.N. employees). Workers and medics say the real number is most likely higher, involving hundreds of staffers at NGOs that partner with U.N. agencies. *More Than 200 UN Staff in Syria Coronavirus Positive: Officials*, AL JAZEERA (Sept. 7, 2020), <https://www.aljazeera.com/news/2020/09/200-staff-syria-coronavirus-positive-officials-200907114152480.html> [https://perma.cc/S6CM-7D7L].

82. *First Coronavirus Cases Reported in Syria's Al-Hol Camp*, AL JAZEERA (Aug. 6, 2020), <https://www.aljazeera.com/news/2020/08/coronavirus-cases-reported-syria-al-hol-camp-200806162159182.html> [https://perma.cc/HCV7-7N6R].

reside.⁸³ These numbers also include a 145-case increase in the final week of August, such that COVID-19 cases had increased by 1,000% in the month of August alone with the largest increase in cases seen in Qasmili, al-Hassakah, and likely spreading to Raqqa.⁸⁴ However, Northeast Syria currently has the lowest testing rate in the country—404 tests per million people—as well as the highest rate of positive results relative to tests performed.⁸⁵ This data suggests that transmission rates are high and there is a rapid spread in the region such that much more testing is needed as the true caseload most likely outpaces official figures, with some estimating that in the coming month the numbers will be more similar to those in Damascus.⁸⁶

Finally, Syria's prisons currently hold tens of thousands of detainees, most of whom were arbitrarily detained for protesting the current Syrian government.⁸⁷ Prisoners confined in overcrowded

83. *Health Workers in Syrian Camp for ISIS Families Test Positive for COVID-19*, AL-MONITOR (Aug. 6, 2020), <https://www.al-monitor.com/pulse/originals/2020/08/al-hol-islamic-state-is-camp-syria-covid-19-coronavirus.html#ixzz6W5VTnK93> (on file with the *Columbia Human Rights Law Review*).

84. *Spread of COVID-19*, *supra* note 81 (indicating Qasmili and al-Hassakah as COVID-19 hotspots and Raqqa as the next likely hotspot); *COVID-19 Cases Increasingly (sic) Rapidly in Northeast Syria*, AL-MONITOR (Aug. 28, 2020), <https://www.al-monitor.com/pulse/originals/2020/08/covid-19-coronavirus-increase-northeast-syria-rojava.html> (on file with the *Columbia Human Rights Law Review*) (explaining that the 425 confirmed cases on August 28, 2020, in northeast Syria represented a 1,000% increase in August alone).

85. Christou, *supra* note 72 (“Around 30 percent of tests conducted thus far have been positive, as per an update by the NES COVID Forum on August 27. According to the WHO, a positive ratio greater than five percent indicates severe under-testing in a population.”).

86. *Coronavirus Update #20*, SYRIA IN CONTEXT (Aug. 26, 2020), <https://tande.substack.com/p/syria-in-context-coronavirus-update-5cd> (on file with the *Columbia Human Rights Law Review*) (“Reports of the uncontrolled and unrecorded spread of the virus are further corroborated by new satellite images of Najha cemetery outside Damascus.”); Christou, *supra* note 72 (indicating that northeast Syria has the lowest testing rate in the country, meaning that the spike in caseload still understates the true extent of the spread of COVID-19 in the area); *Spread of COVID-19*, *supra* note 81 (explaining that the near 50% positivity rate of the limited available COVID-19 tests indicates that transmission rates are high and far more testing is needed).

87. Sara Kayyali, *Syria's Detainees Left Even More Vulnerable to Coronavirus*, HUM. RTS. WATCH (Mar. 16, 2020), <https://www.hrw.org/news/2020/03/16/syrias-detainees-left-even-more-vulnerable-coronavirus#> [<https://perma.cc/XV4D-9AMA>] (indicating that many of Syria's tens of thousands of detainees have been “arbitrarily detained for their participation in peaceful

detention centers in regime-held areas of Syria are unable to socially distance from one another. Therefore, an outbreak of coronavirus would have catastrophic effects on these prisoners,⁸⁸ whose health has already been significantly compromised due to unhygienic prison conditions and abuse suffered in detention, such as torture, starvation, and withholding of medical care.⁸⁹ On March 22, 2020, President Assad announced an amnesty decree for the release of prisoners in the face of COVID-19. However, this has only applied to a few hundred people jailed for common crimes such as smuggling and forgery, rather than any political prisoners.⁹⁰

protests or for expressing dissenting political opinion”); *Syria: Vulnerable Prisoners Should Be Released to Prevent Spread of COVID-19*, AMNESTY INT’L (Mar. 31, 2020), <https://www.amnesty.org/en/latest/news/2020/03/syria-vulnerable-prisoners-should-be-released-to-prevent-spread-of-covid19/> [https://perma.cc/E8PX-HNMG] (estimating that one hundred thousand people were detained, abducted, or missing in Syria as of 2019); *Coronavirus: US Demands Syrian Government Release Civilian Detainees*, MIDDLE E. EYE (Mar. 25, 2020), <https://www.middleeasteye.net/news/coronavirus-us-demands-syrian-government-release-civilian-detainees> [https://perma.cc/TAV2-M8VX] (discussing the United States’ demand for the Syrian government to release civilians, including U.S. citizens, who have been “arbitrarily detained” in Syria).

88. ISIS detainees face similar overcrowded and unhygienic conditions within Syrian Democratic Forces (SDF) detention facilities, making mass infection from exposure to COVID-19 a severe risk such that measures must also be taken to ensure prisoner health and safety during this time for all detainees. See Christine Choi, *The SDF’s International Humanitarian Law Obligations to Islamic State Detainees During the Coronavirus Pandemic*, LAWFARE (Aug. 28, 2020), <https://www.lawfareblog.com/sdfs-international-humanitarian-law-obligations-islamic-state-detainees-during-coronavirus%C2%A0pandemic> [https://perma.cc/5L48-DAMP].

89. Al-Shogre, *supra* note 33 (“We were starved and kept in overcrowded cells where disease proliferated. We sat on top of one another, packed tightly like sardines. We hung on to life by a fine thread.”); ALKARIM ET AL., *supra* note 33 (“These facilities function as overcrowded torture chambers by design. Those who survive the daily brutalities endure inhuman conditions, with minimal food or water. Diseases are allowed to run rampant, emaciation is common, and medical assistance is purposefully withheld. Thousands have died in detention due to such circumstances.”).

90. Suleiman al-Khalidi, *Syria Slow to Free Prisoners Despite Coronavirus Risk in Crowded Jails: Rights Groups*, U.S. NEWS & WORLD REP. (Apr. 6, 2020), <https://www.reuters.com/article/us-health-coronavirus-syria-jails/syria-slow-to-free-prisoners-despite-coronavirus-risk-in-crowded-jails-rights-groups-idUSKBN21O1WO> [https://perma.cc/P2ML-DXBY].

2. Former Opposition Held Areas Currently Under Government Control

In recent months, as the virus has spread throughout government-held areas of Syria at an alarming rate,⁹¹ the effect of wartime attacks on healthcare in former opposition-held areas are still severely felt, even following the return of government control, thus compounding the overall impact of COVID-19 on the population. Following Damascus and the Damascus countryside, Aleppo is experiencing the next-highest rate of cases of COVID-19 in Syria.⁹² These high rates, including one hundred new cases recorded in mid-August 2020 in the neighborhoods of Salah al-Din, Al-Adhamiya, and Saif al-Dawla, coincide with a lack of health infrastructure in the city—particularly the eastern portion of the city—following its severe destruction at the hands of pro-Government forces in 2016.⁹³ Moreover, as of September 23, 2020, the largest outbreak was seen in Al-Bab.⁹⁴ However, the Aleppo province conducts fewer tests per day than even the rebel-held territory of Idlib, and early warning detection reporting has also dropped off.⁹⁵

At the start of the war, Aleppo was effectively divided into two with the eastern region a key opposition stronghold and the western region under Government control.⁹⁶ In February 2017, the U.N. Commission of Inquiry (CoI) documented the large-scale damage done to the city of Aleppo by pro-Government forces.⁹⁷ The CoI found that hospitals were demolished following the July 2016 siege and

91. *'Like a Horror Movie': Major COVID-19 Outbreak in Damascus and Failed Response*, SYRIA JUST. & ACCOUNTABILITY CTR. (Aug. 13, 2020), <https://syriaaccountability.org/updates/2020/08/13/like-a-horror-movie-stories-from-damascus-evidence-a-major-covid-19-outbreak-and-failed-response/> [<https://perma.cc/QV6B-6QVK>].

92. *Weekly Brief 36*, *supra* note 44.

93. *Coronavirus: 100 Confirmed Cases in Aleppo City, and Three People Died Including Medical Staff*, SYRIA OBSERVATORY FOR HUM. RTS. (Aug. 17, 2020), <https://www.syriahr.com/en/180081/> [hereinafter *100 Confirmed Cases*] (on file with the *Columbia Human Rights Law Review*) (indicating the high rates in the Aleppo neighborhoods); *Weekly Brief 36*, *supra* note 44 (explaining that these opposition-held areas are particularly vulnerable due to “a health system decimated by years of conflict”).

94. *Weekly Brief 37*, *supra* note 44.

95. *Id.*

96. Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/34/64, at 7, 14 (2017).

97. *Id.* at 4–5.

September 2016 Syrian and Russian aerial bombardment campaign over eastern Aleppo, leaving citizens without medical care and compounding an already dire humanitarian situation illustrated by a scarcity of food and medical aid.⁹⁸ The report goes on to conclude that by the time pro-Government forces recaptured the city in December 2016, no hospitals were left functioning.⁹⁹ This targeting of medical services was similar to the bombardments and siege of 2014, during which the government ceased to allow vaccine deliveries to opposition-held areas.¹⁰⁰ In Aleppo city, for example, “the reach of vaccination parallels the “Death Path”—the few hundred yards separating government—from opposition-held areas.”¹⁰¹

Similarly, Eastern Ghouta, retaken by the Syrian government in 2018, was a victim of the Syrian government’s weaponization of healthcare prior to the emergence of COVID-19. During the siege of Eastern Ghouta by the Syrian government, medical convoys were stripped of aid, medical access was heavily restricted, and government air strikes destroyed ten hospitals, medical facilities, equipment, and supplies, killing at least twenty doctors and medical personnel.¹⁰² In June 2018, the U.N. CoI described widespread and systematic bombardment of hospitals, medical facilities, ambulances, and personnel during the siege, concluding that “[t]he frequency of attacks on medical facilities in eastern Ghouta appears indicative of a policy on the part of pro-Government forces intended to erode the viability of health services in an opposition-held area.”¹⁰³ Even following the return of Eastern Ghouta to government control, the government continued to punish the people as aid sent to towns in Eastern Ghouta was syphoned away from former-opposition held areas and redirected toward government loyalist areas in the region.¹⁰⁴ According to Human Rights Watch, for example, such a discriminatory policy is exemplified by the provisions of aid given to two towns in Eastern Ghouta: Harasta and Douma. Harasta had 629 persons in need of assistance and Douma had ninety-four thousand

98. *Id.* at 8–9.

99. *Id.* at 8.

100. Sparrow, *supra* note 28.

101. *Id.*

102. AMNESTY INT’L, *supra* note 40, at 57–58 (detailing the impact of the siege of Eastern Ghouta on medical access to families there).

103. H.R. Council, *The Siege and Recapture of Eastern Ghouta*, U.N. Doc. A/HRC/38/CRP.3, at 13–14 (2018).

104. HUM. RTS. WATCH, *supra* note 19.

people in need of assistance.¹⁰⁵ Regardless, Douma received “only a fraction of the rehabilitation support that Harasta was receiving as Harasta’s population largely returned from pro-Government areas,” while in Douma, most residents had lived under opposition control.¹⁰⁶

3. Loyalist Areas: The Case of Damascus

While this Article primarily focuses on the effect of government policies in the context of the ongoing conflict for current and former opposition-held areas, it is important to note that Syrian citizens in government-controlled areas are also coping with a very bleak reality, which is reflected in the extremely high number of cases in Damascus, for example.¹⁰⁷ Journalists and NGOs have reported that hospitals in Damascus are chaotic, overcrowded, and unable to keep up with the rise of infections such that patients are succumbing to the virus due to a lack of medical attention.¹⁰⁸ Facing this reality, the government has encouraged terminating the lives of COVID-19 patients.¹⁰⁹ Moreover, government intelligence officers supervise doctors and journalists to force them into silence and perpetuate misinformation surrounding the public health crisis.¹¹⁰ The high virus rates in loyalist areas are even further corroborated by satellite imagery and photos as well as eyewitness reports of large scale burials of COVID-19 victims in cemeteries like Najha under

105. *Id.*

106. *Id.*

107. Anchal Vohra, *Inside Syria’s Secret Coronavirus Crisis*, FOREIGN POL’Y (Aug. 27, 2020), <https://foreignpolicy.com/2020/08/27/inside-syrias-secret-coronavirus-crisis/> [https://perma.cc/5RQT-USKV] (projecting that Damascus could see as many as one in four people infected within a span of weeks); ‘*Like a Horror Movie*,’ *supra* note 91 (reporting that, as of August 13, 2020, there had only been 12,416 COVID tests performed in Damascus, “one of the lowest per capita testing rates in the world.”).

108. ‘*Like a Horror Movie*,’ *supra* note 91.

109. GLOB. VOICES, *supra* note 46.

110. ‘*Like a Horror Movie*,’ *supra* note 91 (reporting that the government has continuously warned doctors to remain silent about the crisis and has barred journalists from reporting on hundreds of COVID-related deaths in the span of just one week); Ruth Sherlock & Nada Homsy, *supra* note 46 (reporting that intelligence officers watch the hospitals and intimidate medical staff to such an extent that the staff are wary to share COVID-related information even with one another).

cover of night by armed individuals in full personal protective equipment.¹¹¹

While the government originally implemented a series of strict preventive measures in government controlled areas—curfews, travel bans, and closures of public institutions, schools, parks, and transportation—¹¹² these measures were relaxed progressively and eventually lifted in April 2020 for economic reasons.¹¹³ Unable to continue to ignore the exponential rise of cases, the government has reintroduced some measures as of July and August 2020, such as banning Eid Al-Adha prayer services and funeral prayers, and shutting down funeral and wedding venues.¹¹⁴ However, the government has also implemented counteractive policies, such as prohibitive fees for testing and the creation of quarantine centers with “deplorable conditions ripe for internal spread.”¹¹⁵ People fear going to these quarantine centers, which some Syrians have likened to jails and detention centers.¹¹⁶ This fear has led to significant underreporting because people seek to avoid government attention.¹¹⁷

II. THE WEAPONIZATION OF HEALTH CARE THROUGH THE COVID-19 PANDEMIC

A. Introduction

This background raises the question of whether Syrian authorities and their Russian allies, including political and military leaders, may be held individually, criminally responsible for the discriminatory restriction and deprivation of health care and medical aid in the midst of the current COVID-19 global pandemic. While the academic and policy communities have spoken to the issue of

111. Vohra, *supra* note 107 (reporting on recent satellite imagery that shows that Najha, which is best known as the place where the regime allegedly buried thousands of the victims of its prison system, is now the burial site for COVID-19 victim burials); Cockburn, *supra* note 46 (reporting that one witness saw men in full personal protective equipment unloading anywhere from 45-60 bodies at a cemetery under cover of night).

112. WHO & OCHA, *supra* note 42.

113. Makki, *supra* note 48.

114. ‘*Like a Horror Movie*,’ *supra* note 91.

115. *Id.*

116. Vohra, *supra* note 107.

117. *Id.*

restrictions on humanitarian aid as a general matter,¹¹⁸ the following Part examines whether attacks on healthcare as a whole may qualify as the international crimes of genocide, war crimes, and/or crimes against humanity.¹¹⁹

118. See generally Rogier Bartels, *Denying Humanitarian Access as an International Crime in Times of Non-International Armed Conflict: The Challenges to Prosecute and Some Proposals for the Future*, 48 *ISR. L. REV.* 281 (2015) (noting that impeding humanitarian access and starving civilians is criminalized under the Rome Statute when committed during an international armed conflict, and proposing that it should also be a crime during non-international armed conflicts); Christa Rottensteiner, *The Denial of Humanitarian Assistance as a Crime Under International Law*, *INT'L REV. RED CROSS* (Sept. 30, 1999), <https://www.icrc.org/en/doc/resources/documents/article/other/57jq32.htm> [<https://perma.cc/DR5M-BYF5>] (clarifying the circumstances under which denying humanitarian assistance can constitute a crime under international law); Josh Scheinert, *Refusal to Save Lives: A Perspective from International Criminal Law*, 13 *INT'L CRIM. L. REV.* 627 (2013) (examining whether a state's refusal to accept life-saving humanitarian aid can qualify as a crime against humanity in international criminal law); Mominah Usmani, Note, *Restrictions on Humanitarian Aid in Darfur: The Role of the International Criminal Court*, 36 *GA. J. INT'L & COMP. L.* 257 (2007) (examining whether restrictions on humanitarian aid in Darfur constitutes a crime under the Rome Statute).

119. A recent self-referral pursuant to Article 14 of the Rome Statute requested that the ICC Prosecutor open an investigation into allegations that the ex-President of Bolivia is responsible for COVID-19 related deaths in the country by depriving opposition areas of medical equipment. See *Complaint for Systematic Attacks Against the Bolivian People*, *INT'L CRIM. CT.* (August 31, 2020), <https://www.icc-cpi.int/itemsDocuments/200909-Bolivia-referral-ICC-Eng.pdf> [<https://perma.cc/UV4T-RAQJ>]; Mike Corder, *Bolivia Calls on ICC to Investigate Morales over Blockades*, *ASSOCIATED PRESS* (Sept. 9, 2020), <https://apnews.com/b784849782e948c2d5153f6f7e0272c7> (on file with the *Columbia Human Rights Law Review*). However, there are counter-allegations that the self-referral is a political maneuver to side-line the ex-President's party prior to new elections. See Tom Phillips, *Bolivia Government Abusing Justice System Against Morales and Allies—Report*, *THE GUARDIAN* (Sept. 11, 2020), <https://www.theguardian.com/world/2020/sep/11/bolivia-justice-system-eva-morales-allies-human-rights-watch-report> [<https://perma.cc/J46E-U5D4>]. The ICC Prosecutor has acknowledged receipt of the communique but has not indicated when she may decide whether to open an investigation. See Statement of the Prosecutor of the International Criminal Court, Mrs. Fatou Bensouda, *On the Referral by Bolivia Regarding the Situation in Its Own Territory*, *ICC* (Sept. 9, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=200909-otp-statement-bolivia-referral> [<https://perma.cc/9KBF-8X2Z>]. There is some doubt that the referral will reach the requisite threshold of “seriousness” to open an investigation as it alleges that more than forty deaths were caused by the lack of availability of oxygen. See *Complaint for Systematic Attacks Against the Bolivian People* (Aug.

To be clear, deliberate attacks upon protected objects such as hospitals are themselves war crimes.¹²⁰ But the following analysis examines whether government and military leaders responsible for the diversion of humanitarian aid and deprivation of healthcare, in conjunction with attacks on medical facilities, may be held responsible for victim deaths and suffering that were the foreseeable result of their acts and omissions.

31, 2020), <https://www.icc-cpi.int/itemsDocuments/200909-Bolivia-referral-ICC-Eng.pdf> [<https://perma.cc/JX5C-NQAQ>].

120. Rome Statute art. 8, *supra* note 5, at 95. The U.S. Security Council condemned the act:

Expressing outrage at the unacceptable levels of violence escalating in several parts of [Syria], in particular in Idlib Governorate and Eastern Ghouta but also Damascus City, including shelling on diplomatic premises, and at attacks against civilians, civilian objects and medical facilities, further compounding suffering and displacing large numbers of people, recalling in this regard the legal obligations of all parties under international humanitarian law and international human rights law, as well as all relevant decisions of the Security Council, especially to cease all attacks against civilians and civilian objects, including those involving attacks on schools and medical facilities . . . [and further] . . . reiterates its demand, reminding in particular the Syrian authorities, that all parties immediately comply with their obligations under international law, including international human rights law, as applicable, and international humanitarian law, including the protection of civilians as well as to ensure the respect and protection of all medical personnel and humanitarian personnel exclusively engaged in medical duties, their means of transport and equipment, as well as hospitals and other medical facilities, and to fully and immediately implement all provisions of all relevant Security Council resolutions

U.N. SCOR, 77th Sess., 8188th mtg. at 1–3, U.N. Doc. S/RES/2401 (Feb. 24, 2018); *see also* Prosecutor v. Prlic, Case No. IT-04-74-T, Judgement, ¶ 126 (ICTY May 19, 2013) (“The Chamber considers, however, that the criterion that the destruction be extensive in scope must be evaluated in light of the facts of the case, and that a single incident, such as the destruction of a hospital, may suffice to constitute an offence under this count.”); Prosecutor v. Galic, Case No. IT-98-29-A, Judgement, ¶ 340–46 (ICTY Nov. 30, 2006) (holding that the intentional targeting of hospitals is a violation of the Geneva Conventions).

B. Definitions and the Legal Regime Surrounding Attacks on Medical Centers and Hospitals

The intentional targeting¹²¹ of medical units (establishments “organized for medical purposes,” including medical centers and hospitals),¹²² and personnel constitute violations of international humanitarian law under the First and Fourth Geneva Conventions as well as the Additional Protocols.¹²³ Article 18 of the Fourth Geneva Convention, for example, specifically prohibits deliberate attacks on civilian hospitals.¹²⁴ In its commentary, the ICRC explains that this provision requires military forces to “take special precautions to spare

121. See, e.g., Prosecutor v. Ntaganda, ICC-01/04-02/06-2359, Judgment, ¶ 1147 (July 8, 2019) (holding that the Sayo Health Centre qualified as a protected object).

122. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 19, 6 U.S.T. 3114, 3128, 75 U.N.T.S. 31, 44 (entered into force Oct. 21, 1950) [hereinafter First Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 18, 6 U.S.T. 3516, 3530, 75 U.N.T.S. 287, 300 (entered into force Oct. 21, 1950) (“Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.”) [hereinafter Fourth Geneva Convention]; see also *Customary IHL Rule 28: Medical Units*, INT’L COMM. RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule28 (on file with the *Columbia Human Rights Law Review*) [hereinafter *ICRC Rule 28*] (“This definition, which builds upon Article 19 of the First Geneva Convention and Article 18 of the Fourth Geneva Convention, is set out in Article 8(e) of Additional Protocol I.”); *Customary IHL Practice Relating to Rule 28: Medical Units*, INT’L COMM. RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule28 (on file with the *Columbia Human Rights Law Review*) (indicating that the protection of medical units is a feature not only of international law but also of national law in dozens of countries).

123. Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 12, 1125 U.N.T.S. 3, 12 [hereinafter Additional Protocol I]; Additional Protocol to the Geneva Conventions of 12 August 1939, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 11, 1125 U.N.T.S. 609, 615 [hereinafter Additional Protocol II]; see also *Documenting Attacks on Medical Facilities in Syria*, SYRIA JUST. & ACCOUNTABILITY CTR. (Feb. 23, 2016), <https://syriaaccountability.org/updates/2016/02/23/documenting-attacks-on-medical-facilities-in-syria/> [<https://perma.cc/4E9E-4P6A>] (urging future transitional justice mechanisms to address the issue of hospital destruction in Syria since 2011).

124. Fourth Geneva Convention art. 18, *supra* note 122, at 300.

hospitals so far as is humanly possible.”¹²⁵ Articles 9–12 of Additional Protocol II, pertaining to the protection of medical personnel, duties, units, and transport, further reiterates this principle while also prohibiting the punishment of such personnel in response to carrying out medical activities compatible with their humanitarian missions.¹²⁶ Such hospitals, medical units, and medical personnel are provided special protection under international humanitarian law due to their classifications as civilian objects and civilians.¹²⁷ Thus, targeted attacks on hospitals, medical units, and medical personnel functioning in a humanitarian capacity are never permissible.¹²⁸ This protection applies at all times when the medical unit is exclusively used for medical purposes and can only be lifted if the medical unit ceases to serve a medical purpose and instead commits acts outside its humanitarian duties that are harmful to the enemy and has received due warning.¹²⁹ Acts harmful to the enemy include the use of

125. INT’L COMM. RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, VOL. IV, GENEVA CONVENTION (IV) RELATIVE TO THE TREATMENT OF CIVILIANS IN TIME OF WAR, art. 18 (1958), <https://ihl-databases.icrc.org/ihl/COM/380-600022> (on file with the *Columbia Human Rights Law Review*); *Documenting Attacks on Medical Facilities in Syria*, *supra* note 123 (explaining that Article 18 requires military forces “to take special precautions to spare hospitals as far as humanly possible” when conducting military operations); *see also* Hague Convention [No. IV] Respecting the Laws and Customs of War on Land, *opened for signature* Oct. 18, 1907, art. 27, 36 Stat. 2277 [hereinafter *Fourth Hague Convention*] (obliging contracting powers to instruct their armed forces to refrain from targeting hospitals).

126. Additional Protocol II arts. 9–12, *supra* note 123, at 614–15.

127. U.N. SCOR, 71st Sess., 7685th mtg. at 2, U.N. Doc. S/RES/2286 (May 3, 2018).

128. *Customary IHL Rule 30: Persons and Objects Displaying the Distinctive Emblem*, INT’L COMM. RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule30 (on file with the *Columbia Human Rights Law Review*); *see also* Miguel Trelles et al., *Attacks on Civilians and Hospitals Must Stop*, 4 THE LANCET: GLOB. HEALTH 298, 298 (2016) (criticizing military attacks against sites where civilians and medical workers are known to be located).

129. *Prosecutor v. Galic*, Case No. IT-98-29-A, Judgment, ¶ 346 (ICTY Nov. 30, 2006); Trelles, *supra* note 128, at 298 (“This obligation applies at all times, even when the medical unit or hospital is not being used to accommodate wounded or sick patients, provided that the medical unit is used exclusively for medical purposes.”); *Fourth Geneva Convention* art. 19, *supra* note 122, at 300 (“The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given . . . and after such warning has remained unheeded.”); *ICRC Rule 28*, *supra* note 122

a hospital as a shelter for able-bodied combatants or fugitives, as an arms or ammunition dump, or as a military observation post, as well as the “deliberate siting of a medical unit in a position where it would impede an enemy attack.”¹³⁰ These rules arise from and illustrate the international humanitarian principle of distinction, which is the requirement that parties to armed conflict distinguish at all times between military objects or combatants and protected objects and personnel, such as medical units and healthcare workers.¹³¹

C. Definitions and the Legal Regime Surrounding Humanitarian Aid and International Law

It is also important to note the functional definition of humanitarian aid, and when humanitarian aid may be denied. For the purposes of this Article, humanitarian assistance is defined as “all emergency action to ensure the survival of those directly affected by armed conflict of an international or internal character.”¹³² Included in the definition is medical aid, which can be broadly

(asserting that state practice has established this protection and its exception under customary international law); *Customary IHL Rule 29: Medical Transports*, INT’L COMM. RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule29 (on file with the *Columbia Human Rights Law Review*) (explaining that state practice established the obligation to respect and protect medical transports as a norm of customary international law applicable in both international and non-international armed conflicts).

130. INT’L COMM. RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, VOL. I, GENEVA CONVENTION (I) FOR THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, art. 21 (1958), <https://ihl-databases.icrc.org/ihl/COM/365-570026?OpenDocument> (on file with the *Columbia Human Rights Law Review*); see also *Prosecutor v. Galic*, Case No. IT-98-29-A, Judgement, ¶ 346 (ICTY Nov. 30, 2006) (“The law is thus clear: a hospital becomes a legitimate target when used for hostile or harmful acts unrelated to its humanitarian function, but the opposing party must give warning before it attacks.”); Kevin J. Heller, *Don’t Blame IHL for Attacks on “Hospital Shields,”* OPINIO JURIS (Oct. 21, 2016), <http://opiniojuris.org/2016/10/21/dont-blame-ihl-for-attacks-on-hospitals/> [<https://perma.cc/Y3LZ-VLBF>] (arguing that international rules do not place medical workers and civilians at risk, but rather offer key protections from military strikes and attacks).

131. Heller, *supra* note 130; *Customary IHL Rule 1: The Principle of Distinction Between Civilians and Combatants*, INT’L COMM. RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1 (on file with the *Columbia Human Rights Law Review*).

132. Rottensteiner, *supra* note 118.

understood to encompass food, water, clothing, medicines, fuel, shelter, bedding, and hospital equipment.¹³³

Pursuant to international humanitarian law, the provision of humanitarian aid, including medical humanitarian aid, must be independent and impartial such that its sole purpose is to prevent and alleviate human suffering by “mitigat[ing] critical threats to the physical life” of individuals or groups of civilians, internees, and prisoners of war.¹³⁴ The denial or diversion of humanitarian assistance, including medical aid, arises where “as a result of the intentional behavior of certain persons, humanitarian assistance does not reach its intended beneficiaries” or necessary beneficiaries.¹³⁵ For example, the Independent International Commission of Inquiry on the Syrian Arab Republic, a body established by the United Nations Human Rights Council in August 2011 to investigate human rights violations occurring during the Syrian conflict, has determined that purposeful, targeted, and deliberate attacks on humanitarian aid relief personnel and objects constitute war crimes of denial of

133. *Id.*

134. Scheinert, *supra* note 118, at 630. For application of this general rule by the International Criminal Tribunal for the Former Yugoslavia, see Prosecutor v. Popovic, Case No. IT-05-88-A, Judgement, ¶ 615 (ICTY Jan. 30, 2015). For further discussion of international rules and norms protecting civilians, prisoners of war, and medical workers from threats to physical life, see Rottensteiner, *supra* note 118; Usmani, *supra* note 118, at 262; Fourth Geneva Convention, *supra* note 122; Additional Protocol I, *supra* note 123; Additional Protocol II, *supra* note 123.

135. Rottensteiner, *supra* note 118. Such denial may constitute the crime against humanity of persecution if committed in conjunction with other acts. See Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgement, ¶ 1807 (ICTY Apr. 19, 2011) (applying the rule against the intentional diversion of humanitarian assistance); see also S.C. Res. 2401, ¶¶ 7–8 (Feb. 24, 2018) (reiterating the Security Council’s demand that Syrian authorities respect the protection of civilian hospitals that international law demands and demanding that all parties “facilitate safe and unimpeded passage for medical personnel . . . their equipment, transport and supplies, including surgical items, to all people in need”); S.C. Res. 2504, ¶¶ 4, 7 (Jan. 10, 2020) (demanding that all parties allow safe, unimpeded access for UN and implementing partners’ humanitarian convoys, including medical convoys, and calling upon UN humanitarian agencies to improve monitoring of the delivery of humanitarian aid in Syria); S.C. Res. 2165, ¶¶ 2–3, 6–7 (July 14, 2014) (demanding that Syrian parties enable immediate and unhindered delivery of humanitarian assistance as required by international humanitarian law).

humanitarian aid due to their resulting diversion and hinderance of the successful delivery of humanitarian aid.¹³⁶

Moreover, it is important to establish that the Syrian civilian population has a right to receive medical aid under international humanitarian law and human rights law. The Geneva Conventions and Additional Protocols, including the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and the two Additional Protocols of 1977, guarantee the right to access humanitarian aid.¹³⁷ The Fourth Convention and Additional Protocol I apply to international armed conflict, and Common Article 3 of 1949 Geneva Conventions and Additional Protocol II apply to situations of non-international armed conflict.¹³⁸ As a party to the four Geneva Conventions, Syria has a duty to abide by the terms of these instruments, particularly with respect to facilitating humanitarian access to protect its civilians and ensuring their basic needs for survival in a non-discriminatory and impartial manner.¹³⁹ While

136. Hum. Rts. Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/34/64 (Feb. 2, 2017).

137. Usmani, *supra* note 118, at 261–62.

138. *Id.*

139. *Treaties, States Parties, and Commentaries: Syrian Arab Republic*, INT'L COMM. RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SY&nv=4 [<https://perma.cc/8R6B-93KB>] [hereinafter *Syrian Arab Republic*] (indicating that Syria is party to the four Geneva Conventions). Fourth Geneva Convention, *supra* note 122, at 303–04; Additional Protocol I, *supra* note 123, at 35–36 (“The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.”); Additional Protocol II, *supra* note 123, at 616 (describing the affirmative obligation that “relief actions . . . shall be undertaken subject to the consent of the High Contracting Party concerned”); see also JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *Rule 55*, in INT'L COMM. RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. 1: RULES, 193, 197–98 (2005) (ebook), available at <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> [<https://perma.cc/2VBD-GT2S>] [hereinafter ICRC RULES] (describing how, with respect to Rule 55, state practice has established a prohibition on the “use of starvation of the civilian population as a method of warfare” as customary international law); *id.* at 193–200 (describing as another rule of customary international law that “parties to [a] conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for citizens in need”). Moreover, through its Resolutions 2165 (2014), 2191 (2014), and 2258 (2015), the Security Council has authorized the unconditional delivery of humanitarian assistance including medical assistance throughout the Syrian Arab Republic to besieged

Syria has also acceded to Additional Protocol I, it is not a party to Additional Protocol II.¹⁴⁰ Specifically, Protocol II would require the consent of the Syrian government for relief operations to take place;¹⁴¹ however, ICRC analysis of the Protocols has established that the obligation to allow and facilitate passage of humanitarian relief for civilians in need applies in both international and non-international armed conflicts.¹⁴² Many of the terms of the Protocols, including those related to internal armed conflicts such as Common Article III and parts of Additional Protocol II, are now considered part of customary international law.¹⁴³ Thus, as noted in Commentary to Article 18 of Additional Protocol II,¹⁴⁴ a government's withholding of consent for relief operations can only be for valid and compelling reasons of military necessity, which denies the government unfettered discretion to restrict aid on "arbitrary and capricious' grounds."¹⁴⁵ Although

and hard-to-reach communities countrywide. S.C. Res. 2165, ¶¶ 1–8 (July 14, 2014); S.C. Res. 2191, ¶¶ 2–3 (Dec. 17, 2014); S.C. Res. 2258, ¶¶ 1–3 (Dec. 22, 2015). Additional Protocol I art. 54(1), *supra* note 123, at 27 ("Starvation of civilians as a method of warfare is prohibited."); Additional Protocol II art. 14, *supra* note 123, at 615 (elaborating on the prohibition against destroying "objects indispensable to the survival of the civilian population" during a conflict); Rome Statute art. 8(2)(b)(xxv), *supra* note 5, at 96 (defining war crimes to include, in the context of an international armed conflict, "[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions").

140. *Syrian Arab Republic*, *supra* note 139, at 24–25.

141. Additional Protocol II art. 18(2), *supra* note 123, at 616.

142. ICRC RULES, *supra* note 139, at 194–96 (describing the obligation to provide "access [for] humanitarian relief" as "a *conditio sine qua non* for [the] relief actions" required under Protocol II, as reinforced by state practice in both international and non-international armed conflicts); *see also* Bartels, *supra* note 118, at 282–83 (pointing to authority for the application of humanitarian relief provisions in Protocol II to non-international armed conflicts).

143. Usmani, *supra* note 118, at 267; Bartels, *supra* note 118, at 283 (discussing the evolution of laws of internal armed conflicts to globally-accepted norms of customary international law).

144. INT'L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS ¶ 4885, at 1479 (1987), https://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf (on file with the *Columbia Human Rights Law Review*).

145. Usmani, *supra* note 118, at 262–63 (citing Yoram Dinstein, *The Right to Humanitarian Assistance*, 53 NAVAL WAR COLL. REV. 77, 84 (2000) (internal citations omitted)); *see also* Bartels, *supra* note 118, at 288–89 ("[T]here is no unfettered discretion to refuse agreement, and it may not be declined for arbitrary or capricious reasons[,] . . . [but] it is far from clear what actually constitutes

arbitrariness is not well-defined, a government may not delay humanitarian assistance on the basis of pretextual excuses, such as the Syrian government's discriminatory creation of "hot zones" that it deems unsafe for humanitarian aid workers to travel to, which the government explicitly selected to coincide with current and former opposition-held areas.¹⁴⁶

When a state is unable to meet the needs of survival of its people, these instruments require the states party to a conflict to allow impartial, non-discriminatory relief organizations the ability to provide such aid, including where necessary, to permit and facilitate the free passage of relief supplies and personnel and to guarantee their protection.¹⁴⁷ A state may, however, check relief supplies to

arbitrary withholding of consent."); Rottensteiner, *supra* note 118 (noting that "[a]s a matter of present customary international law . . . [m]ilitary necessity cannot serve as a justification" for denial of humanitarian aid in some scenarios); Dapo Akande & Emanuela-Chiara Gillard, *Conflict-Induced Food Insecurity & the War Crime of Starvation of Civilians as a Method of Warfare*, 17 J. INT'L CRIM. JUST. 753, 770–71 (2019) (describing three circumstances in which "[c]onsent is withheld arbitrarily"); AMNESTY INT'L, DARFUR: THREATS TO HUMANITARIAN AID 3–5 (2006), available at <https://www.amnesty.org/download/Documents/68000/afr540312006en.pdf> [<https://perma.cc/2YAW-ZY68>] (describing Sudan's denial of humanitarian aid as unjustified under international law).

146. A leaked memo issued by the Political Security Branch of Idlib Governorate to the Arab and Foreign Affairs Branch in July 2014 shows "how the government *internally delineates*" between "hot zones" and "safe" areas using this explicit, political logic. *Documents*, *supra* note 19 (emphasis added). The case thus raises concern that the government's implementation of the "hot zone" scheme for granting permission to distribute humanitarian aid "constitutes arbitrary withholding of consent" in violation of international law. Bartels, *supra* note 118, at 288–89. For further discussion of the government's manipulation of consent, see *supra* notes 19–24 and accompanying text.

147. Article 3, common to the four Geneva Conventions, proscribes "minimum" humanitarian obligations for states involved in non-international conflicts and provides that an "impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services" to those parties. First Geneva Convention art. 3, *supra* note 122, at 32; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 3, 6 U.S.T. 3217, 3220, 3222, 75 U.N.T.S. 85, 86, 88 (entered into force Oct. 21, 1950) [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 3318, 3320, 75 U.N.T.S. 135, 136, 138 (entered into force Oct. 21, 1950) [hereinafter Third Geneva Convention]; Fourth Geneva Convention art. 3, *supra* note 122, at 288–90. Per Additional Protocol I and the interpretation of the Geneva Conventions under international customary law, the obligations of such states further encompass the affirmative duties

ensure they will “not be diverted or used advantageously by the opposition party and also to regulate the time and method of distribution.”¹⁴⁸ Still the “nature, extent, and impact” of such administrative monitoring procedures “must not prevent the ultimate rapid delivery of medical” humanitarian aid in a principled manner and their “imposition [and] effect” cannot be “arbitrary.”¹⁴⁹

Additionally, as a state party to the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social, and Cultural Rights (ICESCR),¹⁵⁰ Syria is bound to uphold and guarantee the right of its people to survival and development, which includes the rights to food, shelter, and medical treatment.¹⁵¹ This right to survival and development is also promised in the Universal Declaration of Human Rights, which is considered

related to passage and protection of humanitarian organizations, and governments may not evade these obligations where the aid is necessary for survival. Additional Protocol I, art. 70, *supra* note 123, at 35; Usmani, *supra* note 118, at 262–63 (articulating the duty of a state to ensure its civilians’ basic survival needs and to allow relief organizations to provide services to meet these needs where the state is unable to do so); Akande & Gillard, *supra* note 145, at 771–72 (“Once consent to conduct relief operations has been obtained, belligerents’ obligations are broader in scope than those that can be derived from the prohibition of starvation, and they must allow and facilitate the rapid passage of humanitarian relief consignments for persons in need.”).

148. Usmani, *supra* note 118, at 262.

149. DAPO AKANDE & EMANUELE-CHIARA GILLARD, OXFORD GUIDANCE ON THE LAW RELATING TO HUMANITARIAN RELIEF OPERATIONS IN SITUATIONS OF ARMED CONFLICT ¶ 91, at 35 (2016), <https://reliefweb.int/sites/reliefweb.int/files/resources/Oxford%20Guidance%20pdf.pdf> [<https://perma.cc/L4XE-XDK6>] [hereinafter OXFORD GUIDANCE].

150. U.N. Treaty Body Database, U.N. OFF. OF THE HIGH COMM’R OF HUM. RTS., https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=170&Lang=EN [<https://perma.cc/DR6X-PFFU>].

151. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25, 76 (Dec. 12, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 1, S. Exec. Doc. E, 95-2, at 23 (1978), 999 U.N.T.S. 171, 173 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 11, 993 U.N.T.S. 3, 4 (entered into force Jan. 3, 1976) [hereinafter ICESCR]; Usmani, *supra* note 118, at 261 (explaining that humanitarian assistance under international law arises from the right of the civilian population to receive aid—as protected by the ICCPR and ICESCR—and the right of humanitarian aid organizations to render aid without impediment—as guaranteed by the Geneva Conventions).

customary international law and thus binding on Syrian government practices.¹⁵²

Although the Syrian government's weaponization of healthcare runs afoul of its international obligations pursuant to international humanitarian and human rights law, not all such violations are international crimes. Therefore, the following section addresses the potential for individual criminal responsibility for the acts described in Part I of this Article.

III. ATTACKS ON HEALTH CARE AS INTERNATIONAL CRIMES

While Syria is not a state party to the ICC,¹⁵³ the provisions of the Rome Statute governing the description and elements of genocide, crimes against humanity, and war crimes represent the most widely accepted international standard of each crime based on relevant jurisprudence of the past half century.¹⁵⁴ There are some variations in the contextual elements of crimes against humanity applicable at various *ad hoc* or internationalized tribunals. Still, the crime base is largely the same.¹⁵⁵ Therefore, this Article adopts the ICC definitions and elements of crimes in the following analysis for determining the individual criminal responsibility of Syrian government authorities.

Finally, the following analysis refers to the three potential violations of destruction of medical units, diversion of humanitarian medical aid, and the denial of COVID-19-specific medical aid collectively under the umbrella term of attacks on healthcare.

A. War Crimes

War crimes include certain grave breaches of the Geneva Conventions and other serious and criminally punishable violations of international humanitarian law, committed within the context of an

152. UDHR, *supra* note 151, arts. 25, 76.

153. *The States Parties to the Rome Statute*, *supra* note 2.

154. Usmani, *supra* note 118, at 269, 273; Scheinert, *supra* note 118, at 630 (noting the “paramount status the ICC is attaining in setting uniform standards of [international criminal law]”).

155. Scheinert, *supra* note 118, at 632 (stating that “interpretation of these concepts [defining “crime against humanity” in the Rome Statute] is largely taken from *ad hoc* tribunals, which have provided the definitions adopted by the ICC Pre-Trial Chambers to date”).

armed conflict.¹⁵⁶ To constitute a war crime, a violation must first and foremost have taken place within the context of an armed conflict.¹⁵⁷ An armed conflict can be defined as one of an international nature (IAC) or one of a non-international, or internal, nature (NIAC).¹⁵⁸ An international armed conflict exists between two or more states, whereas a non-international conflict takes the form of protracted armed violence between a government and armed groups.¹⁵⁹ This distinction is critical for determining which legal framework is applicable.

It is largely accepted that the Syrian conflict is in fact a series of conflicts between different states and non-state actors with evolving interrelationships over the past nine years. Certain aspects of the conflict are non-international, such as fighting between the government and various non-state actors, whereas others may be considered international, such as U.S. coalition bombings in the fight against ISIS.¹⁶⁰ Still, there remains a healthy debate as to which aspects, if any, should be considered an IAC under international humanitarian law.¹⁶¹ The acts under consideration are predominately

156. See Rome Statute art. 8, *supra* note 5, at 95–98; Preparatory Comm’n for the Int’l Crim. Ct., Finalized Draft Text of the Elements of Crimes, U.N. Doc PCNICC/2000/1/Add.2, art. 8 (Nov. 2, 2000) [hereinafter Elements of Crimes]; Rottensteiner, *supra* note 118 (“In order for an act to become a war crime, the existence of an armed conflict is essential.”); Usmani, *supra* note 118, at 281 (“Certain grave breaches of the Geneva Conventions constitute war crimes without regard to the international or non-international nature of the conflict, whereas others are limited to international armed conflicts.”).

157. See Rottensteiner, *supra* note 118 (stating that “the existence of an armed conflict is essential”).

158. See Usmani, *supra* note 118, at 281.

159. Rome Statute art. 8, *supra* note 5, at 95–98.

160. See, e.g., Bartels, *supra* note 118 (characterizing the conflict at the time of publication as non-international in nature); Tom Gal, *Legal Classification of the Conflict(s) in Syria*, in THE SYRIAN WAR: BETWEEN JUSTICE AND POLITICAL REALITY 29, 35–36 (Hilly Moodrick-Even Khen et al. eds., 2020) (characterizing certain U.S. coalition bombings as international armed conflicts).

161. For examples of varying voices and opinions in such a debate, see generally Gal, *supra* note 160 (observing that there are multiple overlapping conflicts taking place in Syria, and analyzing how each conflict should be classified and regulated under respective legal frameworks); Terry D. Gill, *Classifying the Conflict in Syria*, 92 INT’L L. STUDS. 353, 362–73 (2016) (analyzing the applicable international humanitarian law based on classifications of various conflicts, and particularly examining the effect of a government’s consent to foreign military intervention on the conflict classification); Beth Van Schaack, *Mapping the Law that Applies to War Crimes in Syria*, JUST SECURITY (Feb. 1,

part of a NIAC because the Syrian government committed these acts against segments of its population living in opposition-held territory and requiring access to healthcare.¹⁶²

As part of a NIAC, attacks on healthcare may be examined within the context of serious violations of Common Article 3 to the Geneva Conventions.¹⁶³ The Syrian government's attacks on healthcare may be directed against one or more civilian persons or other protected persons (i.e., persons not taking part in the hostilities, such as the wounded, prisoners of war, and medical personnel)¹⁶⁴ or civilian objects,¹⁶⁵ and need not take place on a mass scale. The perpetrator must be aware of the factual circumstances that established the existence of an armed conflict, as well as the existence of the protected status of the person or object.¹⁶⁶

In Syria, the victims of attacks on healthcare include not just armed rebels, but also civilians, prisoners of war, medical personnel, and sick and wounded rebels, all have protected status.¹⁶⁷ Armed conflict has persisted in Syria for several years, so Syrian authorities are aware of the factual circumstances establishing the existence of such a conflict. Further, as a party to the Geneva Conventions, the

2016), <https://www.justsecurity.org/29083/mapping-law-applies-war-crimes-syria/> [<https://perma.cc/H7C5-A7UW>] (mapping the international humanitarian law provisions that may apply in the conflicts); Adil Ahmad Haque, *The United States is at War with Syria (According to the ICRC's New Geneva Convention Commentary)*, EJIL: TALK! (Apr. 8, 2016), <https://www.ejiltalk.org/the-united-states-is-at-war-with-syria-according-to-the-icrcs-new-geneva-convention-commentary/> [<https://perma.cc/3WSR-33H6>] (considering the complication of classifying the United States' armed conflict with ISIS in light of U.S. military operations in Syria); Deborah Pearlstein, *A Syrian IAC?*, OPINIO JURIS (Oct. 14, 2016), <http://opiniojuris.org/2016/10/14/a-syrian-iac/> [<https://perma.cc/T7QU-ZSCM>] (weighing in on the classification of U.S. armed conflict in Syria).

162. See Rome Statute art. 8(2)(c), *supra* note 5, at 97; Elements of Crimes art. 8(b)(2), *supra* note 156, at 23. Note that Russia is likely involved in certain aspects of the attacks on healthcare, such as bombings of hospitals, which could render the characterization an IAC. See generally Gal, *supra* note 160 (describing Russia's extensive involvement in the conflict in Syria and the likelihood that the law of IAC governs hostilities between Russia and other foreign intervenors in Syria). Given that IHL is more protective during an IAC, this nuance will not significantly affect the analysis here.

163. Rome Statute art. 8(2)(c), *supra* note 5, at 97.

164. *Id.*

165. *Id.* art. 8(2)(c)–(e); Elements of Crimes, art. 8, *supra* note 156, at 94–98.

166. Elements of Crimes art. 8, *supra* note 156, at 18.

167. See Rottensteiner, *supra* note 118.

Syrian authorities have actual knowledge of the protected status of civilians and relief workers, supplies, vehicles, and buildings. Thus, the contextual elements of war crimes are satisfied.¹⁶⁸

As to the elements of the underlying offenses, the following analysis shows that under Article 8 of the Rome Statute, attacks on healthcare in Syria constitute the following war crimes: “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture.”¹⁶⁹

1. Murder

In order to prove the *actus reus* of murder, the victims must be identified with sufficient precision. For example, victims of the government bombing of healthcare facilities are the healthcare providers and the patients killed as a direct result of the munitions. Under the ICC’s “Elements of Crimes” framework, however, killing is deemed synonymous with causing death.¹⁷⁰ Therefore, other victims would include those whose deaths resulted subsequent to the bombings.

The inaccessibility of healthcare in opposition-held territory is the direct result of the Syrian government’s intentional bombing of hospitals, attacks against healthcare workers, and diversion of medical aid. By decimating the entire health infrastructure in places like Idlib, the government has nullified the ability of these areas to provide care for injuries, chronic diseases (such as cancer), and communicable diseases.¹⁷¹ The Syrian government has denied the population access to proper medical facilities, further leading to conditions ripe for causing death.¹⁷² In the context of the inaccessibility of healthcare resulting from these attacks and the diversion of humanitarian aid, the number of victims whose death is

168. See Usmani, *supra* note 118, at 285 (explaining that it was sufficient to meet the “minimal” intent requirement that Sudan likely knew of the existence of an armed conflict that had persisted for several years, and that, as a party to the Geneva Conventions, it would likely be aware of the protected status of its victims).

169. *Id.* at 282; Rome Statute art. 8(2)(c)(i), *supra* note 5, at 97.

170. Elements of Crimes art. 8, *supra* note 156, at n.31.

171. GHARIBAH & MEHCHY, *supra* note 15, at 8.

172. Usmani, *supra* note 118, at 274 (suggesting that evidence of civilian deaths resulting from restricted humanitarian aid access may establish the *actus reus* element of “killing”).

attributable to healthcare inaccessibility may be determined by reference to the concept of “excess deaths,” defined as “the difference between the observed numbers of deaths in specific time periods and expected numbers of deaths in the same time periods.”¹⁷³ To take an example from another context, public health experts determined the number of Ebola virus deaths in West Africa that resulted from the inaccessibility of healthcare. Deaths of healthcare workers, mandatory curfews, and other factors prevented many victims from receiving treatment and consequently increased the number of Ebola-related casualties by thousands *vis-à-vis* the expected number of deaths without such factors.¹⁷⁴ The number of “excess deaths” was therefore attributable to these factors.

In Syria, the excess deaths are those *caused by* an inability to access treatment given the acts and omissions of the Syrian government.¹⁷⁵ Establishing the actual number of deaths attributable to the Syrian government may pose some evidentiary challenges.¹⁷⁶ For example, demographic experts will have to determine the expected numbers of deaths in a pre-war, pre-COVID-19 Syria, by reference to the most recent census numbers, while accounting for outflows of refugees and internally displaced persons. Investigators will then need to ascertain the factual circumstances on the ground, such as the number of patients who died as a result of conditions that

173. *Excess Deaths Associated with COVID-19: Provisional Death Counts for Coronavirus Disease (COVID-19)*, CTR. FOR DISEASE CONTROL, https://www.cdc.gov/nchs/nvss/vsrr/covid19/excess_deaths.htm [<https://perma.cc/E3JR-33YT>]; see also Jin Wu et al., *338,000 Missing Deaths: Tracking the True Toll of the Coronavirus Outbreak*, N.Y. TIMES (last updated Oct. 5, 2020), <https://www.nytimes.com/interactive/2020/04/21/world/coronavirus-missing-deaths.html> (on file with the *Columbia Human Rights Law Review*) (reviewing how “excess deaths” compare with COVID-19 deaths).

174. See generally Alyssa S. Parpia et al., *Effects of Response to 2014–2015 Ebola Outbreak on Deaths from Malaria, HIV/AIDS, and Tuberculosis, West Africa*, 22 EMERGING INFECTIOUS DISEASES 433 (2016) (describing a study that calculated that reduction in access to healthcare services during the Ebola outbreak led to excess death counts in the thousands).

175. Elements of Crimes art. 8(2)(c)(i)-1, *supra* note 156, at 18 n.31; Rome Statute art. 8(2)(c), *supra* note 5, at 97 (regarding war crimes in the context of a non-international armed conflict as is the case here).

176. See, e.g., Prosecutor v. Chea, Case No. 002/19-09/2007ECCC/TC, Trial Judgement, ¶ 297 (Nov. 16, 2018) (referencing estimates of excess death and finding that the “absence of relevant and reliable statistical data for the purposes of assessing a precise number of deaths attributable to the [Khmer Rouge] leads to inherent uncertainty surrounding the use of demographic evidence”).

were not treated, including COVID-19. The names and identifying information of the deceased should be recorded for the purposes of an indictment along with the respective causes of death.

However, there is also evidence from satellite imagery and local informants that bodies are being buried in specially-designated graves in Najha Cemetery.¹⁷⁷ Estimates of the number of casualties in these locations would also be valuable in determining the scale of deaths and would permit a determination of whether the crimes reached the threshold for a finding of extermination as a crime against humanity. The bodies of all of the victims need not be recovered, but the more detailed the evidence and identifying information, the more likely it is to satisfy the prosecution's burden of proof.¹⁷⁸

The death toll resulting from inaccessibility of healthcare over the course of the conflict is likely to be substantial as it includes mortality due to the inaccessibility of healthcare facilities, healthcare workers, and particular treatments that were unavailable due to the Syrian government's diversion of humanitarian medical aid as well as the destruction of healthcare facilities. It could also include deaths from COVID-19 where deaths were preventable but for the acts and omissions of the Syrian government destroying the possibility of treatment or diverting medical aid for COVID-19 testing and treatment.

Establishing the *mens rea* of murder poses some complexities and requires an examination of the extent to which the Syrian government officials intended that deaths result from its attacks on healthcare. There are three separate doctrines of *mens rea* that have been considered at international tribunals and may satisfy the elements of murder in this regard: (1) *dolus directus*, whereby an accused *foresees* and *desires* the death of a person; (2) *dolus indirectus*, whereby an accused *foresees* that death is a *certainty* even though the accused did not necessarily desire death; and (3) *dolus*

177. 'Like a Horror Movie,' *supra* note 91; Emma Beals et al., *Investigation: COVID-19 Spreads Out of Control in Damascus*, SYRIA IN CONTEXT (Aug. 6, 2020), <https://tande.substack.com/p/syria-in-context-investigation-covid> [<https://perma.cc/N9NU-3AR8>] (reporting that satellite imagery reveals that Najha has grown in size and density since January in order to accommodate COVID victims' bodies).

178. *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Appeal Judgement, ¶ 260 (ICTY Feb. 28, 2005).

eventualis, whereby an accused foresees the possibility that death would occur and nonetheless takes an action leading to death.¹⁷⁹ The latter may also include willful blindness.¹⁸⁰

The Syrian government must have foreseen a certain number of deaths from its attacks on healthcare as unavoidable or certain. For if all access to healthcare is denied, people will die. Thus, the *mens rea* could be satisfied by reference to the doctrine of *dolus indirectus*, which is more widely accepted as meeting the requirements of the principle of legality. However, a certain number of deaths may have been a mere possibility and not a certainty. In these cases, the more controversial doctrine of *dolus eventualis* would apply instead.

The jurisprudence of the *ad hoc* tribunals is settled with regard to the applicability of *dolus eventualis* to the crime of murder.¹⁸¹ However, the ICC has been inconsistent in its approach, with some Chambers finding that *dolus eventualis* satisfies the *mens*

179. Johan D. Van de Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 U. MIA. INT'L & COMP. L. REV. 57, 62–63 (2005).

180. *Id.* at 75.

181. *See, e.g.*, Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Appeal Judgement, ¶ 261 (ICTY Feb. 28, 2005) (explaining that *mens rea* of murder is satisfied if the perpetrator willfully caused serious bodily harm which the perpetrator should reasonably have known might lead to death); Prosecutor v. Stakić, Case No. IT-97-24-T, Judgement, ¶¶ 233, 236, 239 (ICTY July 31, 2006) (explaining that the *mens rea* of murder is satisfied where killing was foreseeable and the accused willingly accepted the risk that it would occur); Prosecutor v. Milošević, Case No. IT-98-29/1-A, Appeal Judgement, ¶ 108 (ICTY Nov. 12, 2009) (citing with approval Trial Chamber's finding that the *mens rea* of murder requires reasonable knowledge that an act or omission might lead to death); *see also* Prosecutor v. Chea, Case No. 002/19-09/2007ECCC/TC, Judgement, ¶¶ 650, 757 (Nov. 16, 2018) (noting the vast majority of domestic systems recognize that a standard of *mens rea* lower than direct intent may apply in relation to murder, the lowest being *dolus eventualis*). *Dolus eventualis* encompasses the case of an individual who willingly engages in conduct with the knowledge that his or her act or omission would likely lead to the death of the victim(s) and who, at a minimum, accepts or reconciles him or herself with the possibility of this fatal consequence. *Id.* *See also* Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgement, ¶¶ 415, n.1289, 533 (Sept. 26, 2013) (explaining that *dolus eventualis* or "awareness of the substantial likelihood" is an appropriate *mens rea* for aiding and abetting liability).

rea of murder and others finding the contrary.¹⁸² The ICC Appeals Chamber has yet to address the issue.

As to COVID-19, the critical legal question with regard to individual criminal responsibility will be whether and when the Syrian government foresaw that its attacks on healthcare, including bombing hospitals and the diversion of medical humanitarian aid, would result in deaths in the population with *virtual certainty* (*dolus indirectus*) or as a mere possibility (*dolus eventualis*).

While the Syrian government's motive may have been to terrorize the population into submission by attacking all potential havens of safety, there were numerous collateral impacts that were foreseeable. The government need not have foreseen the advent of a new pandemic disease such as COVID-19 to be held criminally responsible for deaths resulting from it. Though the government may not have known *how* each individual deprived of healthcare would die, it is sufficient that the government knew that significant excess deaths would be the natural result.¹⁸³ Even if virtual certainty of pandemic-related deaths were to be required, the Syrian government was put on notice of the potential ramifications of an unchecked

182. Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶¶ 351–52, 356 (Jan. 29, 2007) (accepting *dolus eventualis* as applied to any crime within the jurisdiction of the ICC, except where a special intent is so stated); Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Decision pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges, ¶¶ 358–60, 369 (June 15, 2009) (accepting *dolus indirectus*, wherein the perpetrator is aware of the elements of the crime will be the “almost inevitable outcome of his acts or omissions,” but rejecting *dolus eventualis* recklessness or any lower form of culpability); Prosecutor v. Ruto, ICC-01/09-01/11, Decision on the Confirmation of Charges pursuant to Art. 61(7)(a) and (b) of the Rome Statute, ¶¶ 335–36 (Jan. 23, 2012) (rejecting *dolus eventualis*); Prosecutor v. Katanga, ICC-01/04-01/07, Judgment pursuant to Art. 75 of the Statute, ¶¶ 775–76 (Mar. 7, 2014) (rejecting *dolus eventualis*); see also Prosecutor v. Ngudjolo Chui, ICC-01/04-02/12-4, Concurring Opinion of Judge Van den Wyngaert, ¶ 36 (Dec. 18, 2012) (noting split of authority as to the applicability of *dolus eventualis*); Prosecutor v. Katanga, ICC-01/04-01/07, Dissenting Opinion of Judge Van den Wyngaert, ¶ 292 (Mar. 7, 2014) (noting the majority opinion appears to have considered an argument based on *dolus eventualis* “dressed up under a different guise”).

183. See Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Decision on the Confirmation of Charges, ¶ 134 (June 15, 2009) (noting that it is not necessary for the prosecutor to specify the identity of each individual victim or each direct perpetrator, and nor is it necessary that the precise number of victims be known).

COVID-19 pandemic at least as early as January or early February 2020, when the WHO sounded the alarm.¹⁸⁴

The foreseeability of the spread of the disease should also be viewed in the context of the Syrian government's response to prior epidemics such as polio. With the start of the conflict in 2012, the government refused to allow a polio-eradication campaign access to opposition-controlled territories. Given the fact that polio has been known to exist for over one hundred years and the WHO has been engaged in a decades-long effort to eradicate the disease, a resurgence of the disease was all but expected in these areas.¹⁸⁵ Based on this experience of the reemergence of polio, the Syrian government knew that deaths from its acts and omissions related to the COVID-19 pandemic were all but certain (*dolus indirectus*). The government may therefore be held responsible for its diversion of COVID-19-specific medical aid and its omissions in failing to rebuild—or at least its refusal to facilitate the rebuilding—of healthcare infrastructure that it had previously destroyed in the face of the global pandemic.¹⁸⁶ Therefore, the Syrian government is responsible for murder as a war crime for deaths resulting from COVID-19. The scale of these crimes and the number of victims will depend on the severity of the pandemic in Syria which is still on-going.

2. Torture

Both torture and cruel treatment are also violations of Common Article 3.¹⁸⁷ In the case of torture and cruel treatment, the perpetrator must have “inflicted severe physical or mental pain or suffering upon one or more persons.”¹⁸⁸ Thus, attacks on healthcare can constitute torture only if they cause severe pain or suffering. This element may be met in Syria where a serious shortage of goods

184. WHO *Timeline—COVID-19*, WHO (Apr. 27, 2020), <https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19> [<https://perma.cc/8E65-ZKLP>].

185. See *supra* notes 28–31 and accompanying text.

186. See Scheinert, *supra* note 118.

187. Rome Statute art. 8(2)(c), *supra* note 5, at 97; Elements of Crimes art. 8(2)(c)(i)-3–4, *supra* note 156, at 38–39.

188. Elements of Crimes art. 8(2)(c)(i)-3, *supra* note 156, at 38; see also Rottensteiner, *supra* note 118 (“[T]he denial of humanitarian assistance can constitute torture only if it causes severe pain or suffering, for example as a result of a serious shortage of goods essential for the survival of the civilian population.”).

essential for the survival of the civilian population, such as medicine, medical equipment, and medical facilities, is causing death on the one hand and severe mental health problems on the other.¹⁸⁹

In the case of torture, the perpetrator's purpose must have been "obtaining information or a confession, punishment, intimidation, or coercion or for any reason based on discrimination of some kind."¹⁹⁰ This element is fulfilled in the case of the Syrian government's active war on health as illustrated by its deliberate, discriminatory restriction of medical aid carried out before and during COVID-19 and its destruction of medical units to punish dissident populations.¹⁹¹

Finally, the Syrian authorities must have intended to commit this deprivation of aid. The Syrian government's overall policy made this intention clear in deliberately targeting medical units and personnel, establishing bureaucratic obstacles to aid delivery, removing medical aid from convoys, besieging medicine, and instituting an official policy of restricting aid.¹⁹² Thus, the deprivation of medical humanitarian aid is an example of an act or omission constituting torture.¹⁹³

Similarly, the deprivation of healthcare may also constitute the war crime of cruel treatment, which requires that the perpetrator inflict severe physical or mental pain or suffering upon one or more persons, that the victims were civilians, *hors de combat*, or medical personnel, and the perpetrator was aware of their protected status.¹⁹⁴ The Syrian government knew where medical facilities were located, not only from their own intelligence, but also from the sharing of hospitals' coordinates through the UN deconfliction mechanism.¹⁹⁵

189. See Rottensteiner, *supra* note 118.

190. Elements of Crimes art. 8(2)(c)(i)-3, *supra* note 156, at 38; see also Usmani, *supra* note 118, at 282–83 (giving the same required purpose for torture).

191. See *supra* notes 40, 71 and accompanying text.

192. See *supra* note 51 and accompanying text.

193. *But see* Prosecutor v. Mrkšić, IT-95-13/1-T, Judgment, ¶¶ 517, 529 (ICTY Sept. 27, 2007) (holding acts of medical deprivation of medical care of those who had previously been injured, in and of themselves, were not of the nature to cause severe or serious pain or suffering to amount to torture or cruel treatment).

194. Rome Statute art. 8(2)(c), *supra* note 5, at 97; Elements of Crimes art. 8(2)(c)(i)-3, *supra* note 156, at 38; see also Usmani, *supra* note 118, at 282–83 (arguing that willful injury to civilian health from malnutrition and disease may have constituted torture in the context of Sudan).

195. See *supra* notes 16, 18 and accompanying text.

Attacks against healthcare facilities deprived protected persons, including civilians and medical personnel, of access to treatments thereby constituting cruel treatment.

The murder, torture, and cruel treatment of civilians through the denial of healthcare thus constitute war crimes.

3. Terror

Another way to conceive of the Syrian government's attacks on healthcare is as a campaign of terror. The motivations of the Syrian government in intentionally destroying hospitals and attacking healthcare workers are not entirely clear. But one motive may have been to terrorize the population into submission by showing that there will be no mercy or refuge—even in places that have been historically protected and are protected by international law, such as where healthcare is provided.

Although there is a strong grounding for the war crime of terror in international humanitarian law by its inclusion in the Geneva Conventions as violations in both international and non-international armed conflict, the offence does not form part of the Rome Statute. This is largely due to disagreements between delegates during the negotiation of the Rome Statute as to the potential for politicization of terrorism-related offenses.¹⁹⁶

Nonetheless, the crime of terror has been charged at the *ad hoc* tribunals and the Syrian government's attacks on healthcare with an intent to terrorize the populations could satisfy the requisite elements of the crime of terror.¹⁹⁷ However, this would not be an option at the ICC unless the Rome Statute were to be amended, or for that matter at any tribunal that adopts the ICC legal framework or elements of crimes.

B. Crimes Against Humanity

As outlined under Article 7 of the Rome Statute, a crime against humanity occurs when a perpetrator commits any of eleven

196. Cónan Kenny, *Prosecuting Crimes of International Concern: Islamic State at the ICC?*, 33 *UTRECHT J. INT'L & EUR. L.* 84, 94–95 (2017).

197. See *Prosecutor v. Galić*, IT-98-29-A, Appeals Judgment, ¶¶ 87–89 (ICTY Nov. 30, 2006) (outlining the bases for the prohibition of acts of terror in customary international law).

acts outlined in 7(1)(a)–(k) as part of a widespread or systematic attack directed against any civilian populations, with knowledge of the attack.¹⁹⁸

Before beginning the analysis of each of the five enumerated *actus rei* of crimes against humanity relevant for this analysis, four preconditions, referred to as *chapeau* elements, must be satisfied: (1) the act must be widespread or systematic; (2) the act must constitute an “attack”; (3) the attack must be “directed against any civilian population”; and (4) the act must take place “with knowledge of the attack”—the *mens rea* requirement.¹⁹⁹

For the denial of healthcare in Syria to constitute a crime against humanity, it must occur within the context of a widespread or systematic attack by the Syrian government against civilians and be based on a policy.²⁰⁰ For an attack to be considered widespread or systematic, the act must be of a large scale and directed against a “multiplicity of victims” involving a “multiple commission of acts,” rather than mere isolated inhumane acts.²⁰¹ Systematic also refers to “the organi[z]ed nature of the acts of violence,”²⁰² suggesting that this may occur in the context of a broader, organized plan or policy—

198. Rome Statute art. 7, *supra* note 5, at 93–94; Elements of Crimes art. 7, *supra* note 156, at 5; *see also* Scheinert, *supra* note 118, at 631–32 (outlining the eleven crimes against humanity set forth in Article 7 of the Rome Statute).

199. Rome Statute art. 7, *supra* note 5, at 93–94; Elements of Crimes art. 7, *supra* note 156, at 5; *see also* Scheinert, *supra* note 118, at 632–33 (describing the *actus reus* and *mens rea* requirements for crimes against humanity).

200. Rome Statute art. 7, *supra* note 5, at 93–94; Elements of Crimes art. 7, *supra* note 156, at 5; *see also* Rottensteiner, *supra* note 118 (echoing that, to constitute a crime against humanity, the relevant act must be “instigated or directed” by the government and must be widespread or systematic).

201. Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 82 (June 15, 2009); Rome Statute, art. 7, *supra* note 5, at 93–94; Elements of Crimes art. 7, *supra* note 156, at 5; *see also* Usmani, *supra* note 118, at 277 (“[A]n isolated act which did not occur in the context of a broader plan or policy to commit such attacks would not amount to a crime against humanity.”); Scheinert, *supra* note 118, at 633 (indicating that the definition of widespread excludes acts that are random or isolated and connotes the large-scale nature of both the attacks and the number of victims).

202. Prosecutor v. Katanga, ICC-01/04-01/07, Judgment Pursuant to Art. 74 of the Statute, ¶ 1098 (Mar. 7, 2014); *see also* Scheinert, *supra* note 118, at 633 (reiterating that “systematic” refers to acts of violence being organized and requiring an “improbability of . . . random occurrence”).

formalized or not²⁰³—which results in a continuous commission or pattern of crime.²⁰⁴ Additionally, an attack can encompass “any mistreatment of the civilian population.”²⁰⁵ The *actus reus* (discussed below) must be directed against any civilian population, implying crimes of a collective nature and thus excluding single, isolated acts.²⁰⁶

The Syrian government has constantly attacked and bombarded civilians as part of a deliberate, discriminatory policy not only to weaken the opposition but also to punish the civilians in opposition-held areas. These offensives have been large-scale and massive in scope, having affected millions of Syrians living in those areas.²⁰⁷ Moreover, there is a policy in place to attack, and thus punish, such civilians in furtherance of the Syrian government’s wartime and political goals.²⁰⁸

To satisfy the “with knowledge” requirement,²⁰⁹ the perpetrator must have not only intended to commit the underlying act but also knew that their conduct was part of (or intended the conduct to be part of) a widespread or systematic attack against a civilian population.²¹⁰ To meet this element, it is sufficient to find that Syrian authorities bombing of civilians was part of a deliberate and discriminatory governmental policy.

203. See Rottensteiner, *supra* note 118.

204. See Usmani, *supra* note 118, at 277, 279–80; Scheinert, *supra* note 118, at 634 (outlining similar characteristics of organized violence and quoting the ICC: “[t]he term ‘systematic’ has been understood as either an organized plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts”).

205. Prosecutor v. Katanga, ICC-01/04-01/07, Judgment Pursuant to Art. 74 of the Statute, ¶ 1101 (Mar. 7, 2014); see also Scheinert, *supra* note 118, at 646 (concluding that the term attack is best described not solely as a violent attack, but instead more generally as a course of conduct).

206. Rome Statute, art. 7, *supra* note 5, at 93–94; Elements of Crimes, *supra* note 156, art. 7; see Scheinert, *supra* note 118, at 635–36 (setting forth the same “against any civilian population” framework).

207. See Scheinert, *supra* note 118, at 645.

208. *Id.* at 646.

209. Rome Statute art. 7, *supra* note 5, at 93–94; Elements of Crimes art. 7, *supra* note 156, at 5.

210. Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 88 (June 15, 2009); see Scheinert, *supra* note 118, at 636–37 (setting forth the same criteria for the “with knowledge” requirement).

The Syrian government's actions since 2011 clearly constitute a widespread or systematic attack on a civilian population. This started with the organized repression of civilian protests, illegal arrests, and torture of thousands of individuals.²¹¹ It continued through the bombing and gassing of civilians, including women and children.²¹² Sieges of opposition-held territory and discriminatory treatment of all those who disagreed with the government further constituted attacks on civilians.²¹³

Five underlying acts of crime against humanity²¹⁴ are relevant for this investigation: murder, extermination, torture, prosecution, and other inhumane acts.

1. Murder

The analysis for murder²¹⁵ as a crime against humanity perfectly mirrors that for murder as a war crime in Section III.A.1., first establishing a causal nexus between denial of healthcare and death. There is precedent for *dolus eventualis* to apply to murder as a crime against humanity.²¹⁶ Still, *dolus indirectus*—in which the perpetrator of the act could foresee even undesired, secondary consequences as a certainty in addition to those consequences that the perpetrator desired²¹⁷—is sufficient on the facts before us to establish criminal liability.²¹⁸ It is virtually certain that deaths would

211. *Torture Archipelago: Arbitrary Arrests, Torture, and Enforced Disappearances in Syria's Underground Prisons Since March 2011*, HUM. RTS. WATCH (July 3, 2012), <https://www.hrw.org/report/2012/07/03/torture-archipelago/arbitrary-arrests-torture-and-enforced-disappearances-syrias> [<https://perma.cc/F8KU-7VHC>].

212. OPCW, First Report by the OPCW Investigation and Identification Team Pursuant to Paragraph 10 of Decision C-SS-4/DEC.3 “Addressing the Threat from Chemical Weapons Use” Ltamenah (Syrian Arab Republic) 24, 25, and 30 March 2017, S/1867/2020 (Apr. 8, 2020).

213. *See supra* notes 91–93.

214. OXFORD GUIDANCE, *supra* note 149, at 49–50.

215. Rome Statute art. 7(1)(a), *supra* note 5, at 93; Elements of Crimes art. 7(1)(a), *supra* note 156, at 5.

216. *See Prosecutor v. Chea*, Case No. 002/19-09-2007/ECCC/TC, Judgement, ¶ 650 (Nov. 16, 2018) (finding Nuon Chea and Khieu Samphan guilty of crimes against humanity in their genocide of the Vietnamese ethnic, national, and racial group at least partly due to malnutrition, overwork, and inadequate medical treatment in labor camps).

217. Van de Vyer, *supra* note 179, at 63.

218. *See supra* notes 183–86 and accompanying text.

result should healthcare be denied to a vulnerable population. Thus, murder as a crime against humanity may be established in the situation at hand.

2. Extermination

Extermination is defined in Article 7(2)(b) of the Rome Statute as including, “the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population” such that one or more persons are killed directly or indirectly.²¹⁹ The explicit mention of the deprivation of food and medicine in the Rome Statute shows the importance of the prohibition of such conduct under international law.²²⁰ Moreover, the extermination must have constituted or be part of a mass killing of members of the civilian population.²²¹ The perpetrators must have also killed such persons, including by inflicting conditions of life which could bring about such death.²²²

The *actus reus* of extermination requires the defendant to deny civilian populations in the opposition-held areas healthcare, resulting in deaths on a large scale.²²³ Since murder as a crime against humanity has been established above by *dolus eventualis* and *dolus indirectus*, the remaining legal question is whether the killings resulting from the Syrian government’s attacks on healthcare were sufficient in scale to constitute extermination.

The greater wartime policy of deprivation of healthcare through attacks on medical units, deprivation of medical aid, and the deprivation of COVID-19-specific aid has been a large-scale and brutally effective means of punishing opposition fighters and their civilian supporters. Moreover, Syrian authorities intended for these

219. Rome Statute art. 7(2)(b), *supra* note 5, at 94; Elements of Crimes art. 7(1)(b), *supra* note 156, at 6.

220. See Rottensteiner, *supra* note 118.

221. See Scheinert, *supra* note 118, at 640.

222. *Id.* at 652; Rottensteiner, *supra* note 118 (describing the necessity of finding conditions of life calculated to bring about death).

223. There is no minimum number of victims required to establish extermination. Prosecutor v. Stakić, Case No. IT-97-24-A, Appeal Judgement, ¶ 260 (ICTY July 31, 2003). Scale is assessed based on factors such as the time and place of the killings, the selection of the victims and the manner in which they were targeted, and whether the killings were aimed at the collective group rather than victims in their individual capacity. Prosecutor v. Lukic, Case No. IT-98-32/1-A, Judgement, ¶ 538 (ICTY Dec. 4, 2012).

acts to destroy these populations as punishment.²²⁴ Evidence must connect large-scale deaths with the destruction of hospitals and denial of medical aid in the past as well as in the present. In the case of COVID-19, evidence of further spread and deaths resulting from the virus in areas not receiving medical aid due to government restrictions is needed to establish large-scale deaths. This evidence can only be brought to light with time and accurate data on the spread of the virus. Thus, it remains too soon to determine if the denial of medical aid specific to COVID-19 constitutes extermination as a crime against humanity.

Additionally, there is strong evidence that the destruction of medical facilities and the systematic policy of denying medical humanitarian aid led to the deaths of numerous civilians, soldiers, and medical personnel in opposition-held territory.²²⁵ There may also be criminal responsibility for those who died (unrelated to COVID-19) as a result of no longer receiving the necessary medical care from injuries or sicknesses without such facilities and supplies.

3. Torture

Under the Rome Statute, torture is understood to mean the “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.”²²⁶ The “in the custody or under the control” element could apply where a victim is held in prison camps or a detention facility,²²⁷ such as those arbitrarily held in Syrian government prisons. Unlike the war crime of torture, the crime of torture as a CAH does not require the

224. See Scheinert, *supra* note 118, at 652–53 (discussing the *actus reus* of crimes against humanity and the necessity of proving intent).

225. See, e.g., PHYSICIANS FOR HUMAN RTS., MEDICAL PERSONNEL ARE TARGETED IN SYRIA (2020), <https://phr.org/our-work/resources/medical-personnel-are-targeted-in-syria/> [<https://perma.cc/D5QF-5EVD>] (documenting the death rates of medical personnel in Aleppo, Idlib, and Rif Dimashq governorates).

226. Rome Statute art. 7(2)(e), *supra* note 5, at 94; Elements of Crimes art. 7(1)(f), *supra* note 156, at 7.

227. Elements of Crimes art. 7(1)(f), *supra* note 156, at 7; see also Usmani, *supra* note 118, at 278–79 (noting that the “in the custody or under the control of the accused” element of torture could apply “where a person is being held in a prison camp or other detention facility”); Rottensteiner, *supra* note 118 (noting that “under the control” can be interpreted to apply to situations in prison camps).

additional element of a specific purpose (for example, to obtain information or for a discriminatory purpose).²²⁸ Syrian authorities may use COVID-19 against prisoners, as they have in the past with tuberculosis and general denial of healthcare. Where the government fails to release detainees knowing they are likely to suffer from illnesses such as COVID-19 due to poor conditions in jails—close proximity, poor hygiene, poor access to health treatment, and insufficient food and water—such deprivation constitutes torture. Additionally, continuing to keep detainees in prison knowing that illnesses such as tuberculosis and now COVID-19 are likely to infect them while denying precautionary measures might constitute psychological torture.²²⁹ Thus, where medical aid is restricted to punish the detainees and subsequently causes severe pain and suffering arising from contracting the illness and not receiving necessary care, the deprivation of medical aid may amount to torture under the category of crimes against humanity for those held in Syrian government prisons.²³⁰

4. Persecution

Under Article 7(2)(g), persecution is defined as the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”²³¹ Thus, three elements must be established as part of the *actus reus*: (1) the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights; (2) the perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such; and (3) such targeting was based on political, racial, national, ethnic,

228. Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 195 (June 15, 2009).

229. Cf. Soering v. United Kingdom, App. No. 14038/88, ¶ 111 (Eur. Ct. H.R. July 7, 1989) (finding the very long period of time spent on death row in extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty may constitute torture and inhumane or degrading treatment).

230. See Usmani, *supra* note 118, at 278–79.

231. Rome Statute art. 7(2)(g), *supra* note 5, at 94; Elements of Crimes art. 7(1)(h), *supra* note 156, at 10; see also Usmani, *supra* note 118, at 279 (quoting the definition of persecution and noting that the targeting of a group could be on political, racial, ethnic, cultural, religious, gender, or other grounds).

cultural, religious, or gender grounds.²³² The discriminatory intent requirement distinguishes persecution from all other crimes against humanity, requiring that a perpetrator purposefully target a group of individuals because of their membership in one of the aforementioned groups.²³³ Thus, the victims must belong to into one of the enumerated groups.²³⁴

The Syrian authorities' decision to deny healthcare implicates a number of fundamental human rights, including the rights to life and medical care, which are protected under various international legal instruments including the UDHR, ICCPR, and ICESCR.²³⁵

Additionally, the populations in opposition-held areas whose healthcare the Syrian government has denied constitute a protected political group. Syrian authorities' restriction of medical aid and targeted attacks on medical units were a means of targeting and punishing those outside government control as they opposed the government.²³⁶ Internal Syrian government documents—including communications regarding the targeting of opposition groups for surveillance, interrogation, and imprisonment—prove an intent to persecute those opposing the government.²³⁷ Likewise, government documents show that humanitarian aid was intentionally diverted to government-held areas and withheld from opposition-held areas.²³⁸ Thus, the discriminatory denial of healthcare constitutes the crime against humanity of persecution.²³⁹

232. Prosecutor v. Ntaganda, ICC-01/04-02/06-2359, Judgment, ¶¶ 991, 1009 (July 8, 2019); see also Scheinert, *supra* note 118, at 640 (listing the three factors that must be proven as part of the *actus reus* of persecution).

233. See Scheinert, *supra* note 118, at 640.

234. *Id.* at 640–41.

235. See UDHR art. 25, *supra* note 151, at 76; ICCPR art. 6, *supra* note 151, at 174; ICESCR art. 12, *supra* note 151, at 8; Scheinert, *supra* note 118, at 653 (noting that the rights to life, food, housing, and medical care are protected by the UDHR, ICCPR, and ICESCR).

236. See Prosecutor v. Chea, Case No. 002/19-09-2007/ECCC/TC, Judgment, ¶¶ 1178–79 (Nov. 16, 2018) (finding political persecution on the grounds that Khmer Rouge treated anyone who opposed them politically in a discriminatory fashion, including by imprisonment, deprivation of food, etc.).

237. SYRIA JUST. & ACCOUNTABILITY CTR., WALLS HAVE EARS 13–15 (2019), available at <https://syriaaccountability.org/library/walls-have-ears/> [<https://perma.cc/9THV-MHB7>] (analyzing five thousand government documents and noting clear coordination between government intelligence agencies to suppress political dissidents).

238. *Documents*, *supra* note 19.

239. See Rottensteiner, *supra* note 118.

5. Other Inhumane Acts

Finally, the residual category of crimes against humanity refers to “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”²⁴⁰ For a finding of “other inhumane act,” therefore, the act must inflict great suffering or serious mental or physical injury, the act must be similar in gravity to other inhumane acts, and the perpetrator must be aware of the factual circumstances that establish the character or gravity of the act.²⁴¹ Past precedents stemming from *ad hoc* tribunals, notably the International Criminal Tribunal for the Former Yugoslavia, support finding restrictions on humanitarian aid to be inhumane acts constituting crimes against humanity. Namely, in several cases, the ICTY Trial and Appeals Chambers found that blocking aid convoys was part of the “creation of a humanitarian crisis as a prelude to the forcible transfer of the Bosnian Muslim civilians.”²⁴² This conduct incurred individual

240. Rome Statute art. 7(1)(k), *supra* note 5, at 93; Elements of Crimes art. 7(1)(k), *supra* note 156, at 12; *see also* Scheinert, *supra* note 118, at 642 (quoting the Rome Statute’s definition of the residual category and elaborating that such inhumane acts are acts that are considered to be of a similar nature and gravity to the other acts referred to in the Rome Statute).

241. Rome Statute art. 7(1)(k), *supra* note 5, at 93; Elements of Crimes art. 7(1)(k), *supra* note 156, at 12; Prosecutor v. Katanga, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 454 (Sept. 30, 2008); *see also* Scheinert, *supra* note 118, at 656 (listing the three elements that must be proven to convict on other inhumane acts); Rottensteiner, *supra* note 118 (noting that other inhumane acts include only acts similar to the other crimes against humanity listed in the Rome Statute and that such acts must cause injury to human beings).

242. *See, e.g.*, Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Judgment, ¶¶ 806, 809, 1015, 1021 (ICTY Dec. 12, 2012) (finding restrictions on humanitarian aid convoys made living circumstances unbearable for the Bosnian Muslim population and contributed to their forced transfer); Prosecutor v. Vujadin Popovic et al., Case No. IT-05-88-T, Judgment, ¶ 766 (ICTY June 10, 2010) (finding a clear policy to restrict aid with the ultimate aim to force the Bosnian Muslims to leave, which constitutes the other inhumane act of forced transfer); Prosecutor v. Mladić, Case No. IT-09-92, Judgment, ¶ 4601 (ICTY Nov. 22, 2017) (finding that Mladić prevented the delivery of humanitarian aid and authorized deliberately obstructive inspections calculated to restrict humanitarian aid to the enclaves); *id.* at ¶ 4688 (conduct amounted to inhuman acts of forcible transfer); Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Judgment, ¶¶ 5624, 5641 (ICTY Mar. 24, 2016) (finding months of deprivation of basic necessities resulting from restrictions placed on humanitarian aid convoys led to a catastrophic humanitarian situation and forced the population to leave the area).

criminal responsibility for inhumane acts as crimes against humanity.

There is no doubt that the denial of healthcare has caused great suffering and injury to civilians in northern Syria and other opposition-held areas, including those who died from wounds, those who contracted illnesses such as polio and COVID-19 and were unable to access treatment, and those who watched loved ones suffer.²⁴³ Additionally, the act was similar in gravity and character to the other acts listed above.²⁴⁴ Finally, it must be proven that Syrian authorities had reasonable knowledge that the act or omission would likely inflict great suffering or serious injury to the body or mental or physical health.²⁴⁵

Government denials of the extent of the spread of illnesses such as polio and COVID-19 or the responsibility for targeting medical facilities preclude reliance on statistics published by the Syrian government to indicate awareness and knowledge. However, there is significant countervailing evidence published by monitoring, aid, and evidence-collection groups. For example, the 2013 Polio outbreak in Deir Ez-Zor was a direct consequence of Syrian government acts and omissions.²⁴⁶ As previously noted, COVID-19 numbers are vastly underestimated.²⁴⁷ Whether or not Syrian authorities believed they were under-reporting case numbers, they must have been aware of the factual circumstances advocated by these medical aid groups and NGOs surrounding COVID. At minimum, the Syrian government was willfully blind.²⁴⁸

Therefore, the restriction of medical aid could most likely be found to constitute a crime against humanity under “other inhumane acts.”²⁴⁹

C. Genocide

Article 6 of the Rome Statute defines genocide as any of five enumerated acts committed with intent to destroy, in whole or in

243. See Usmani, *supra* note 118, at 279.

244. See Scheinert, *supra* note 118, at 657.

245. *Id.* at 659–60.

246. See *supra* note 28 and accompanying text.

247. See *Coronavirus Update #20*, *supra* note 86.

248. See Scheinert, *supra* note 118, at 660.

249. *Id.* at 662.

part, a national, ethnical, racial, or religious group.²⁵⁰ Thus, for the Syrian government's discriminatory provision and restriction of healthcare to constitute genocide, the denial and restriction of medical aid and targeting of medical facilities must amount to one of the outlined enumerated acts: (1) the act in question must be directed against one of the protected groups, and (2) the perpetrator must have the specific intent to destroy the group in whole or in part.²⁵¹

In Syria, the evidence presented in Part I (regarding the practice and policies of Syrian authorities preventing humanitarian aid from reaching civilians in opposition-held areas in the Northeast and Northwest, alongside targeted attacks of health facilities in these areas) indicates the possibility of satisfying three of genocide's *actus rei*: killing, causing serious bodily or mental harm, and/or deliberately inflicting conditions of life likely to bring about physical destruction of a distinct group.²⁵²

1. Killing

Under the ICC's "Elements of Crimes" framework, "killed" is deemed synonymous with "caused death"²⁵³ such that to prove the *actus reus* of killing, evidence must show that Syrian government officials caused the death of civilians in opposition-held territories through the denial of healthcare. Moreover, unlike war crimes and crimes against humanity, *dolus eventualis* and *dolus indirectus* do not

250. Rome Statute art. 6, *supra* note 5, at 93; Elements of Crimes art. 6, *supra* note 156, at 2; *see also* Usmani, *supra* note 118, at 273 (delineating acts constituting genocide); Rottensteiner, *supra* note 118 (discussing the acts constituting genocide in the Genocide Convention).

251. Rome Statute art. 6, *supra* note 5, at 93; Elements of Crimes art. 6, *supra* note 156, at 2; *see also* Rottensteiner, *supra* note 118 (establishing the acts constituting genocide).

252. *See* Usmani, *supra* note 118, at 273 (delineating acts constituting genocide); Rottensteiner, *supra* note 118 (discussing the acts constituting genocide in the Genocide Convention); Manuel J. Ventura, *Prosecuting Starvation Under International Criminal Law: Exploring the Legal Possibilities*, 17 J. INT'L CRIM. JUST. 781, 810 (2019) (arguing that the intentional use of starvation could constitute genocide).

253. Elements of Crimes, *supra* note 156, at 5, n.7; Rome Statute art. 6(a), *supra* note 5, at 93.

suffice as specific intent for a conviction of genocide, where *dolus specialis* is a requisite element.²⁵⁴

2. Causing Serious Bodily or Mental Harm

Syrian authorities who engaged in the denial of healthcare may be held individually liable for “causing serious bodily or mental harm.”²⁵⁵ Examples of acts within this category include “harm that damages health or causes disfigurement or serious injury”²⁵⁶ as well as those “of such a serious nature as to tend to contribute to the destruction of all or part of the group . . . and inflict grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”²⁵⁷ When considering the debilitating effects of destroyed hospitals, lack of medical treatment, and the rampant spread of illnesses such as polio and COVID-19 on a person’s long-term and short-term physical and mental health, especially in the midst of government concealment and denial, the harm to the body and mind appears severe.²⁵⁸ Moreover, the long-term effects of having to face and suffer from potentially life-threatening diseases or injuries, while the government actively prevents assistance, can cause serious injury to one’s mental health.²⁵⁹ Watching family and friends die from such illnesses and injuries, without access to assistance, can also pose serious injury to one’s mental and physical health.²⁶⁰ The sentiments of Idlib residents shared in Part I.C.1 embody this argument perfectly.²⁶¹

254. Prosecutor v. Popovic et al, Case No. IT-05-88-T, Judgement and Sentence, ¶ 1184 (ICTY June 10, 2010); Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgement, ¶ 91 (May 21, 1999).

255. Rome Statute art. 6(b), *supra* note 5, at 93; Elements of Crimes art. 6(b), *supra* note 156, at 2.

256. Prosecutor v Brdjanin, IT-99-36-T, Judgement, ¶ 690 (ICTY Sept. 1, 2004).

257. Prosecutor v Karadzic, IT-95-5/18-T, Public Redacted Version of Judgement, ¶ 543 (ICTY Mar. 24, 2016); *see also* Ventura, *supra* note 252, at 810 (discussing the deliberate act of “inflicting conditions of life calculated to bring about physical destruction of a group”).

258. *See* Usmani, *supra* note 118, at 274.

259. *Id.*

260. *Id.*

261. *See supra* note 67 and accompanying text (describing Idlib residents as having “died a thousand times over”).

3. Deliberately Inflicting on The Group Conditions of Life Calculated To Bring About Its Physical Destruction in Whole or in Part

Finally, the denial of healthcare can also be characterized as deliberately inflicting harm on the group conditions of life calculated to bring about its physical destruction in whole or in part.²⁶² This *actus reus* criminalizes deliberate acts or omissions that do not immediately kill but ultimately seek the physical destruction of the protected group,²⁶³ sometimes referred to as “slow death” measures.²⁶⁴ The ICTY and ICTR define such measures to include subjecting the protected group to a subsistence diet, systematic expulsion from homes, and denying the right to medical services.²⁶⁵ Restriction of healthcare in Syria may meet this standard. Many in Syria face such gradual physical destruction due to the deliberately unchecked spread of the illnesses, including the current COVID-19 pandemic, and the inability to seek treatment in the face of sickness or injury.²⁶⁶ In fact, subjecting civilians in opposition-held areas to the restriction of healthcare and thereby creating circumstances ripe for the unchecked spread of health crises such as COVID-19 meets this category of crimes. Finally, in light of past Syrian government policy and evidence of a similar pattern of behavior in response to COVID-19 as seen in Northeast Syria, this restriction was the result of deliberate action, inferred from an official policy and pattern of behavior.²⁶⁷

262. Prosecutor v Karadzic, IT-95-5/18-T, Public Redacted Version of Judgement, ¶ 546 (ICTY Mar. 24, 2016).

263. Rome Statute art.6(c), *supra* note 5, at 93; Elements of Crimes, *supra* note 156, art. 6(c); *see also* Ventura, *supra* note 252, at 810 (“It does not require proof of result; unlike causing serious bodily or mental harm, actual bodily or mental harm or death need not be proven.”).

264. *See* Usmani, *supra* note 118, at 275.

265. Prosecutor v. Stakic, Case No. IT-97-24-T, Judgement, ¶ 517 (ICTY Oct. 29, 2003); Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgement, ¶ 116 (May 21, 1999).

266. *See generally supra* Section I.B (explaining the unchecked typhoid, measles, and polio epidemics during the war resulting from deprivation of humanitarian assistance); *see also supra* Section I.C (explaining how the continued blockage of humanitarian assistance, government cover-up, and targeting of healthcare facilities and professionals have allowed COVID-19 to ravage opposition-held areas).

267. Prosecutor v. Stakic, Case No. IT-97-24-T, Judgement, ¶ 517 (ICTY Oct. 29, 2003); Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgement, ¶ 116

4. Genocidal Intent

If the *actus reus* elements of genocide are met, as may be the case with causing serious bodily or mental harm and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, the element of genocidal intent for these two underlying acts must also be proven, alongside specific intent to destroy a group in whole or in part, to find that such restrictions on aid constituted a crime.²⁶⁸ Establishing a link between the denial of healthcare and the intent to annihilate a particular group presents a difficult hurdle. In the absence of a confession by Syrian authorities, however, intent may be inferred from certain factual circumstances.²⁶⁹ For example, the Syrian government may claim that its actions were primarily aimed at countering opposition groups in Northeast and Northwest Syria rather than destroying an entire protected group—composed of both armed rebels and civilians—in opposition-held areas.²⁷⁰ Moreover, several aid

(May 21, 1999) (reducing required medical services below a minimum is among measures that qualify as deliberately inflicting on the group conditions of life calculated to bring about its physical destruction); *see also* Prosecutor v. Karadzic, Case No. IT-95-5/18AR98bis.1, Judgement, ¶ 49 (ICTY July 11, 2013) (recognizing evidence of “severe overcrowding, deprivation of nourishment, and lack of access to medical care” against Bosnian Muslims and Croats as “demonstrating the *actus reus* of deliberately inflicting conditions of life calculated to destroy”); Prosecutor v. Stakic, Case No. IT-97-24-T, Judgement, ¶ 517, (ICTY Oct. 29, 2003) (including as proof of conditions calculated to bring about the “creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene”); Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 4(2)(c), Sept. 2009 (qualifying the deliberate infliction on a group of conditions of life calculated to bring about its physical destruction in whole or in part as genocide); Prosecutor v Tolimir, Case No. IT-05-88/2-A, Judgement, ¶ 225–26 (ICTY Apr. 8, 2015) (affirming the rationale used in *Stakic*). *But see* Prosecutor v Krajisnik, Case No. IT-00-39-T, Judgement, ¶ 863 (ICTY Sept. 27, 2006) (finding failure to provide adequate accommodation, shelter, food, water, medical care, or hygienic sanitation facilities will not ordinarily constitute the *actus reus* of genocide if the deprivation is not so severe as to contribute to the destruction of the group).

268. Rome Statute art. 6, *supra* note 5, at 93; Elements of Crimes art. 6, *supra* note 156, at 2.

269. Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Judgement, ¶ 524 (Nov. 28, 2007); Prosecutor v. Popovic, Case No. IT-05-88-A, Judgement, ¶ 553 (Jan. 30, 2015) (stating that agreement to commit genocide may be inferred from the conduct of the conspirators); *see also* Rottensteiner, *supra* note 118 (explaining that the ICTY found that specified intent may be inferred from a number of facts).

270. *See* Usmani, *supra* note 118, at 275.

organizations and NGOs have been granted limited access to parts of the country, undercutting the assertion that the government intends to destroy the population.²⁷¹ Genocidal intent can be inferred from the overall pattern and repetition of restriction of medical humanitarian aid that have characterized the past nine year conflict.²⁷² In Syria, the evidence points to a consistent pattern of violence against those living in opposition-held areas as denials of healthcare have been primarily directed against them, prior to and during the COVID-19 crisis.²⁷³

5. Protected Group

Ultimately, however, a finding of genocide requires the specific targeting of a national, ethnic, racial, or religious group.²⁷⁴ The civilians targeted in opposition-held areas do not fall under any of the distinct categories listed. In the case of the Syrian conflict, for example, it is difficult to separate political group, a category specifically excluded from the Genocide Convention,²⁷⁵ from any subjective religious or ethnic differences between the government and rebels in Idlib. Though political group was proposed and considered as a protected group at the Genocide Convention, concerns over the politicization of the term led the states parties to omit it from the treaty.²⁷⁶ Thus, the weaponization of healthcare in Syria likely does not constitute genocide.

CONCLUSION

The Syrian government's weaponization of COVID-19 represents the most recent iteration of its policy of denying

271. *Id.*

272. *Id.*; Rottensteiner, *supra* note 118 (explaining that intent could be inferred from acts not covered by Article 4(2) but which are covered by the same pattern of conduct).

273. *See* Usmani, *supra* note 118, at 275–76 (explaining that in Sudan, even if the Government were to deny improper motives, that genocidal intent could be inferred from the overall pattern of violence against the same group).

274. Rome Statute art. 6, *supra* note 5, at 93; Elements of Crimes art. 6, *supra* note 156, at 2; *see also* Usmani, *supra* note 118, at 276 (confirming that genocidal intent “requires the specific targeting of a national, ethnical, racial or religious group”).

275. *But see* Judge Ottara's Separate Opinion on Genocide (*Prolai Pouch-Sas*), ECCC Case No. 002/19-0-2007/ECCC/TC, ¶¶ 4468–517 (Nov. 16, 2018).

276. U.N. GAOR, 3d Sess., 128th mtg., UNGA Sixth Comm., at 663–64, U.N. Doc. A/C.6/SR.128 (Nov. 29, 1948).

healthcare to opposition-held areas as a means of punishment. To date, this policy includes, but is not limited to, the Syrian government's and Russian allies' targeted destruction of medical facilities including hospitals, as well as a bureaucratic policy of denying medical aid to such areas, creating conditions ripe for health crises. Any attempt at international justice for Syria must consider the Syrian government's weaponization of healthcare. As noted above, the International Criminal Court, or a hybrid Syrian-International Tribunal would be the most likely venue for the prosecution of senior leaders of the Syrian government because head of state immunity prevents the prosecution of cabinet level officials in a domestic prosecution.

This Article has shown how the policies of the Syrian government amount to war crimes as well as crimes against humanity under the ICC framework. Senior Syrian government officials should be held responsible not only for the direct victims of hospital bombings, but also for the foreseeable deaths and suffering resulting from its attacks on healthcare that have been the calling card of the Syrian government during this conflict. A narrow focus on direct casualties resulting from the Syrian government's bombing of healthcare facilities does not fully encompass the criminal wrongdoing of those responsible for campaigns that have terrorized the civilian population. The Syrian government's policy of attacking healthcare must be considered within the full context of its acts and omissions throughout the war, which have included direct attacks on facilities, intimidation and targeting of healthcare workers, and a diversion of humanitarian medical aid. Taken together, a policy of weaponizing healthcare becomes clear. The destruction of the means of obtaining healthcare and instillation of fear in seeking out medical treatment is a special kind of wrongdoing wherein the instruments of healing and protection have been transformed into instruments of death. Both indirect and direct victims of this type of harm deserve justice. The full extent of the harm should be estimated by reference to excess deaths, and any indictment should account for the weaponization of healthcare as a Syrian government policy.