

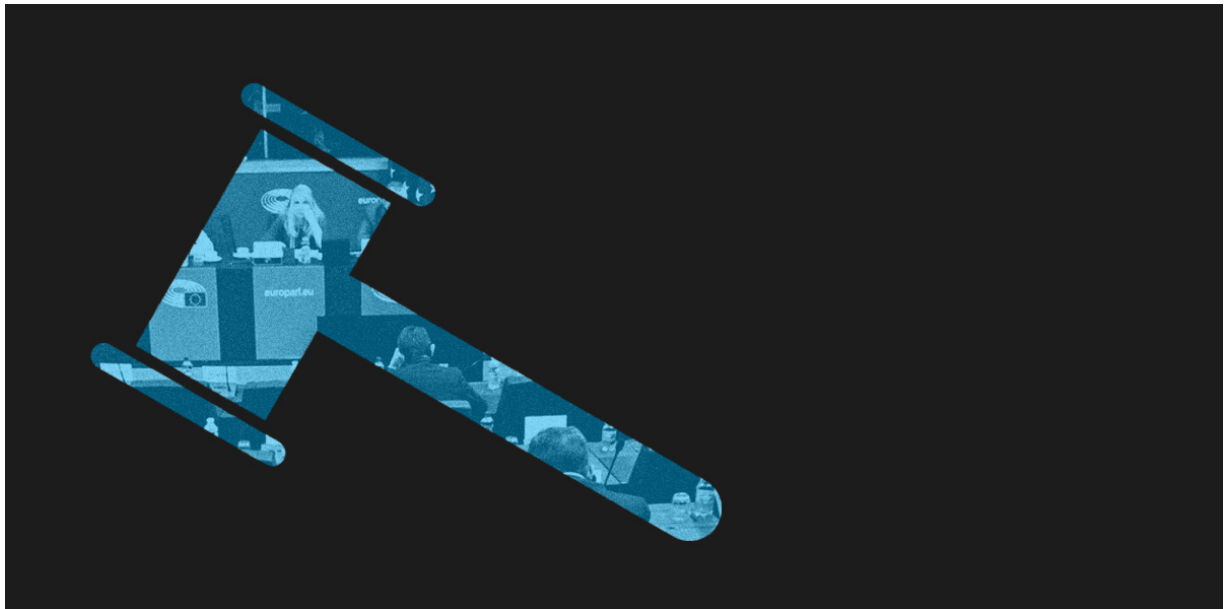


15-10-2020

Syrian civil society: “Strategic litigation” with no strategy

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Mohammad Al Abdallah



A new look at litigation against war criminals in Syria.

Ever since they dared to launch a revolution for freedom and dignity in 2011, the Syrian people have been subjected to a myriad of flagrant human rights violations and atrocities. From day one, live ammunition was used against

unarmed protestors, which foreshadowed the security crackdown undertaken by the regime in its attempt to quell the revolt—as well as instigate it, in some instances. Once again, the Syrian people had to endure tragedies not unlike those of the 1980s and 1990s, except on a more massive and violent scale that was fully visible to the world, in light of the abundance of smartphones and the ease of disseminating footage and news updates online.

However, the violence with which the regime met the 2011 revolution differed from that of the 1980s and 1990s in two critical ways. First was the widespread and sustained documentation of violations that were committed after 2011. Second were the ongoing attempts by Syrian civil society abroad to make use of the mass displacement of Syrians in order to bring certain regime officials to court outside Syria in states that afford Syrian survivors this opportunity.

Regarding documentation, there have been dozens of initiatives, both individual and organizational, by human rights activists and advocates, both individual and organized, to methodically document and archive violations and atrocities. Initially, the aim of this was to advocate for the cause of Syrians and expose the brutality inflicted upon them; only later would activists consider the possibility of using their records in legal prosecutions. That work ended up serving as a vital foundation in subsequent attempts to deliver justice for victims in several European countries.

It may be pertinent here to mention the Syrian government's non-ratification of the Rome Statute of 2003, which mandated the International Criminal Court (ICC). This has prevented the court from being able to investigate any

of the war crimes and crimes against humanity committed in Syria. An attempt at a special referral to the ICC by the United Nations Security Council was thwarted due to a double veto by Russia and China. It proved similarly impossible to reach a Security Council Resolution establishing a special tribunal for Syria, akin to those for the former Yugoslavia and Rwanda. As such, Syrians seeking justice were left with no other choice than to do so individually before national European courts, whether making use of local legislation (universal human rights jurisdiction) or the European nationalities of certain victims or their relatives, in order to hold violators accountable and attempt to achieve some justice for victims and survivors.

With virtually no UN involvement in international litigation, and as the establishment of an international tribunal for Syria proved impossible, Syrians were left with no option but to rely on themselves; thus, began the work of Syrian civil society and human rights organizations on this issue. Many organizations supported existing investigations by European prosecutors and shared evidence to this end, while others launched entire litigation efforts from start to finish against violators of Syrians' rights. It also bears mentioning that the vast majority of investigations in this regard were initially launched by local authorities, either directly, via the public prosecution, or by uncovering culprits in pertinent investigations, or during asylum claim interviews.

An unfair competition

Syrian human rights organizations, some recently established, have found themselves faced with the issue of courts and litigation without prior notice. They have begun

doing what they can with the modest means available to them, in competition with several older and more established international organizations. The relationship between Syrian civil society and international organizations is very particular, as Syrian organizations are unable to file cases without the assistance and support of their international counterparts. This is due to several factors, including their lack of international legal expertise; their lack of licensing to practice law or join bar associations in European countries; and their inadequate knowledge of local legal frameworks or even the local language. On the other hand, if left to their own devices, international organizations would be incapable of fully comprehending the Syrian context, or gathering evidence and witness testimonies, without the support of Syrian civil society organizations. On several occasions, this relationship has produced successful litigations with reasonably strong cases, but these have been marred by behind-the-scenes conflicts that are not immediately visible to the Syrian public. A recent example was the withdrawal by the Syrian Center for Media and Freedom of Expression from the **complaint filed** before the German Federal Court of Justice to make live Arabic interpretation available to all in attendance at the Koblenz court. The Center opted to file a different complaint than **that filed** by the European Center for Constitutional and Human Rights (ECCHR) to the same court on the same issue, despite the two organizations supposedly being “partners.”

Another important aspect is the nature of involvement in these lawsuits and their proceedings. While the technical elements of these litigation efforts are handled by European and international organizations, Syrian civil society plays a pivotal role in their initial conception and preliminary

evidence-gathering, as well as in convincing survivors to contribute to the proceedings. Yet Western and international organizations retain the exclusive prerogative to represent the complainants; access court records; file requests to judges; and interview witnesses, plaintiffs, and defendants. It is a delicate and complex relationship indeed, as these organizations issue joint statements about “joint complaints” filed before the court in one state or another, but the technical details remain all but obscure to Syrian observers (with the exception of those active in civil society and rights issues). Moreover, international organizations alone retain insight into the details of proceedings, while, sadly, their Syrian partner organizations conceal this information from the Syrian public. On many occasions, Syrian individuals and organizations who are “partners” in these litigations were privy to little more information than the public, receiving updates through the media and statements by their so-called partners. Seeing as these partnerships are informal, international organizations often cite the “confidentiality of court files” or their “inability to share documents with those other than the litigating attorneys” when pressed by their Syrian affiliates.

In an effort to bridge this gap between the various international “litigation organizations” and Syrian civil society, the Open Society Foundation’s Justice Initiative has gathered all parties active on this issue in periodic meetings in Berlin over the last four years. The aim of these meetings has been to produce some formula to cement existing partnerships and encourage all actors to work together, including the establishment of mechanisms for coordination, and the sharing of data and evidence. Unfortunately, these efforts ended in catastrophic failure, and a short email to the effect that it was best for Syrian

civil society to conduct these discussions with international organizations by themselves. Trust between these actors is scarce—if not nonexistent—which obstructs opportunities for sharing evidence or data, as international organizations refuse to share details after complaints are filed. Moreover, competition for funding and financial allocations remains one of the more ubiquitous and intractable issues governing the peculiar relationship between these various organizations.

Positive steps

Before delving into the details of the lawsuits ongoing in several European countries, it is perhaps useful to highlight the ways in which the Syrian context is unique. Demands for justice and accountability, and discussions of transitional justice mechanisms and programs have all taken place despite the fact that the Syrian conflict is ongoing and armed violence persists in the country, without any successful peace process. In the majority of previous revolutions, conflicts, and wars, such discussions and actions were undertaken only after a peaceful settlement—sometimes decades after—with the result being difficulty in gathering evidence or launching investigations into atrocities in the distant past. The Syrian context is unique in that it has an active civil society which has made great strides in documentation and advocacy, directly enabling discussions of justice mechanisms and processes, despite the Russia-led international obstruction of Security Council efforts.

Litigation is one of the most significant achievements of Syrian civil society and its active human rights organizations, which have made use of years of

documentation; the arrival of hundreds of thousands of Syrians to European countries; and the availability of political and financial support for this type of activity. As such, litigation in European courts is congruent with Syrians' demand that all perpetrators of violations and atrocities, on all sides, be held accountable. It also sends a clear message about the political support of European states for bringing to trial those responsible for violations in Syria.



Additionally, working closely with Syrian survivors, and the better understanding this has yielded of their lives and challenges since leaving Syria, will also assist in outlining any future international accountability measures for Syria; and building a national framework for Syria based first and foremost around the interests of victims. It has also increased the level of awareness among Syrian civil society organizations and activists of the demands of victims' families, in terms of possible reparatory compensation. For instance, many survivors refuse to be involved in court proceedings due to a shift in their approach towards justice, and wish to remain undisturbed by painful memories of the violence to which they were subjected.

In the long term, these litigation efforts take place in states with credible independent judiciaries that provide opportunities to victims and survivors to voice the truth of the crimes committed against them, and to obtain means of redress, all of which promotes and protects the victims' "narrative" in Syria. Since early on in the revolution, the Syrian government has attempted to cast protestors and activists as violent radicals and terrorists, promoting a

narrative that what unfolded in Syria was mere “counterterrorism.” However, the facts that are coming out from court proceedings in several European countries, and the arrest warrants being issued in absentia by these courts, promote the truth of the victims’ narrative and undermine the narrative of the Syrian government.

Strategic litigation or “public interest litigation”

In many cases of complex armed conflicts, given the absence of an international legal mechanism and the imbalance of political power to the advantage of one side, civil society often opts for what is known as strategic litigation, or “public interest litigation.” These terms refer to legal cases undertaken with aims beyond the mere court ruling and objectives that are not limited to winning the case per se. Public interest lawsuits are concerned with judicial proceedings as part of a larger strategy of promoting human rights, focusing on an individual case to achieve broader social change. Their objectives may include awareness-raising; introducing the issue at the core of the strategy; launching a discussion among the public and the media about the issue; or setting an important legal precedent. Among the most notable examples of this form of litigation is the case of the “apartheid wall” in Palestine. Many Palestinian and international organizations have worked intensively with the UN General Assembly in order to appeal to the International Court of Justice (ICJ) to look into the legality of the wall, ultimately obtaining an “advisory opinion” that the construction of the wall constitutes a violation of the rules and principles of international law. While not legally binding, the advisory opinion constitutes an important step in establishing the

rights of the Palestinian people in the long term and the grounds for future legal prosecutions that may be binding. For instance, several European companies involved in the construction of said wall have been subject to criminal prosecutions in European courts (most notable was **the case by the Palestinian organization Al-Haq against the Dutch company Riwal**, which was involved in the construction of the wall). Moreover, **blacklists** have been issued by the Office of the United Nations High Commissioner for Human Rights detailing enterprises involved in the construction of the separation wall, based on the ICJ's opinion that the wall constituted a violation of the principles of international law.

Justice through the court versus strategic litigation and advocacy

As many Syrian civil society organizations launch efforts to support ongoing lawsuits or investigations (initiated by European authorities) or undertake litigations of their own, an important question arises about the nature of these lawsuits. Are they strictly attempts to deliver justice to victims through the courts, or can they be cited as examples of strategic litigation and advocacy? Can they be both at once? In fact, this issue has **stirred considerable controversy** among civil society organizations; a controversy that has remained concealed from the average Syrian following their country's affairs and even from civil society organizations concerned with the victims or those founded by the victims themselves. This "elitist" debate has been confined to articles and back-and-forth discussions among a handful of organizations.

It is crucial to distinguish between the two methods of legal

activism. Technical legal prosecutions aimed exclusively at obtaining a court ruling are necessarily conducted strictly through the legal channels, effectively neutralizing any role for Syrian civil society in favor of a larger role for European or international organizations. Moreover, this method of legal action need not involve working directly with victims' organizations and their families; nor media statements and advocacy efforts. Its impact remains largely limited to the individual cases in question. If anything, any "over-enthusiasm" by "over-active" advocacy-oriented organizations would actually be detrimental to the cases and those making them. For instance, the director of one Syrian human rights organization attempted to capture footage of the proceedings of Anwar Raslan's trial, which constituted a flagrant violation of court rules, causing the suspension of the trial, and prompted the intervention of local law enforcement to delete the footage. This mishap was also among the reasons for the court's later refusal to allow spectators to listen to the Arabic interpretation available to witnesses and defendants, citing "prior violations of court rules." Under this approach to legal action, the primary criteria for the selection of cases to be prosecuted are the strength of the case and the availability of incriminating evidence, regardless of the moral value of the case; the rank or position of the accused; or the longer-term impact it may have for victims and the course of Syrian justice at large.

By contrast, the strategic litigation approach is based on selecting cases that are possible to prosecute, filing them, and making small but cumulative gains over a longer timeframe. Adopting this approach for Syria provides the opportunity to shed light on the crimes that have been committed and return the Syrian issue to the forefront in

the media and public discourse. It may also become more effective if numerous cases are litigated over an extended period of time. This strategy allows for more involvement from families of victims and their organizations, and grants Syrian civil society the space to play a larger role in applying political pressure, issuing statements, filing petitions, and communicating with the Syrian public at large; while still, of course, respecting and upholding the legal aspects of litigation in the narrowly technical sense.

Syrian civil society has long been torn between these two approaches. Lawsuits are often filed through Syrian initiatives and efforts by Syrian activists, who often adopt an explicit long-term advocacy strategy. These efforts then involve Western or international organizations with legal expertise or intimate knowledge of local law and procedures in the countries of litigation. However, the same Syrian organizations deny that these suits are part of a long-term advocacy campaign, or that the prospective legal gains are limited, or even symbolic. They have a tendency to overstate events or make declarations to the Syrian public to the effect that “justice has begun to be served;” that the course of accountability will not stop; or that these prosecutions “call into question” the place of the heads of intelligence agencies in Syria’s future. The last sentence appeared verbatim in a statement by the International Federation for Human Rights, in its [Q&A on the Dabbagh Case](#), after French and German courts issued international arrest warrants for high-ranking leaders within Syrian security agencies: Ali Mamlouk, Jamil Hassan, and Abdel Salam Mahmoud. Concerning developments in these cases, the organization added that the arrest warrants would “prevent the three suspects from traveling abroad freely.” However, the organizations working on this issue are fully

cognizant that international arrest warrants issued in absentia are nearly impossible to enforce, and that the persons in question already abstain from traveling to European Union countries, as they are already named on sanctions lists and European travel restrictions. In effect, no arrest of these individuals can take place without their extradition by the Syrian government itself, or by countries to which they do travel, such as Russia and Iran—assuming they do not turn themselves in to European authorities voluntarily. Yet these organizations opted nonetheless to overstate the significance of these arrest warrants to achieve symbolic—or illusory—victories. This practice not only ignores the facts, but it also raises expectations among the public. At the time of writing, two years have passed since the issuance of these arrest warrants, and they have yet to be enforced, nor have they served as deterrents against the practice of torture in Syrian prisons. In consequence, such developments and the rhetoric surrounding them may actually undermine the faith placed by Syrians in attaining justice, as the perpetrators retain their positions and their ability to commit violations. As a member of an organization working in human rights, I have sensed such attitudes in interviews with witnesses and survivors, who often ask, “What is the use in speaking to you? We have not seen any results.”

Major challenges

Syrian civil society faces considerable challenges in the realms of justice and litigation. Many of these do not concern civil society itself, such as the role of Russia, or the limited number of states that allow this form of litigation. However, a sizeable proportion of these challenges do result from shortfalls among the litigating organizations

themselves. These include:

~~Lack of transparency:~~ Inadequate transparency and a tendency to obfuscate details are unfortunate features of these litigation efforts. Many within Syrian organizations have a sense of embarrassment or unease at the fact they are not actually prosecuting anyone, nor do they possess the required expertise in local law, meaning that, in effect, the party representing the victims is typically in reality an international or European organization. Cognizance of this may be a factor that prevents many Syrian organizations from fully sharing the details of ongoing litigations. For instance, during the trial of Anwar Raslan and Eyad al-Gharib in Koblenz, Germany, at least four parties claim to have “filed” the suit or to be “partners” in the litigation effort. However, the court proceedings make evident that the party prosecuting the case consists only of attorneys who are members of the European Center for Constitutional and Human Rights; they are acting here in an individual capacity, as German law does not allow organizations to prosecute criminal cases. Of course, this is not to undermine the valuable contributions made by Syrian civil society partners in evidence collection or witness selection, yet the ambiguity in delineating the role of each party is nonetheless unjustified. This is especially true considering many of the aforementioned Syrian organizations often complain of the “domination” of Western organizations over the case proceedings and their withholding of information from Syrian civil society partners. In any case, most of the details and information relevant to the cases remains confined to the private correspondences of activists working in the human rights field, remaining unknown even to the survivors and victims’ families.

~~Overpromising, and raising the expectations of victims'~~ families: This is a distinctly negative feature of the litigation efforts in question. Examining the statements issued by organizations working on this issue, one finds instances of exaggeration that are willful in some cases, such as the claim that the Raslan trial in Koblenz could end the Syrian regime politically and internationally; and the aforementioned claim that international arrest warrants for certain intelligence chiefs in Syria would end their careers; and even examples of manipulating the perception of court cases among the public, by overstating them. For example, the phrase “we have filed a suit” has been seen in many statements by Syrian and international organizations after the mere filing of complaints to the judiciary of a European state; these would be more accurately described as criminal complaints pending follow-up or rejection by the public prosecutor. This latter detail could perhaps be overlooked, were it only circulated by journalists or activists; however, some of these statements have been issued by trained attorneys, who ought to know perfectly well that what they filed were not “suits” until they were examined and approved by a public prosecutor. This is, therefore, deliberate exaggeration.

Even the work of major international organizations is marred by similar mistakes. For instance, after the Guernica 37 International Justice Chambers organization sent a letter to the ICC in accordance with Article 15 of the ICC’s bylaws—which was merely a written request to accept a filed complaint—the BBC **reported** statements by a senior attorney at the organization referring to the letter as a “case” that has been “filed,” describing it as “a genuine breakthrough for the Syrian victims.” Almost a year and a half later, there has been no progress to speak of on this

request, which has not even been accepted by the ICC.

Even worse, organizations working in litigation have deliberately withheld certain technical—yet highly important—details from the victims and their families, and from other lay parties. These include the fact that, according to universal human rights jurisdiction, courts cannot prosecute heads of state, who enjoy immunity. This fact did not stop two international organizations, as well as a host of Syrian civil society organizations, contributing to a documentary titled Syria's Disappeared: The Case against Assad, which explored a case filed by the organizations in Spanish courts, on the basis that the sister of a victim of torture was a Spanish citizen. Despite the title, the complaint was actually filed against nine Syrian security officers, not Assad, nor even “Bashar al-Assad's government,” as was reported by media outlets. While people knowledgeable about the case would be aware the title was merely symbolic, this would not be self-evident to the average Syrian observer.

The alienation of the Syrian public in this regard is so severe as to almost seem deliberate. This is not to say that the ordinary Syrian citizen that follows these cases and lawsuits is completely uninformed about their developments, but merely that the organizations handling these cases are to a large extent in control of the information that gets disseminated or publicized about trials and court proceedings—not to mention the technical details that need to be thoroughly explained to observers and victims' groups and organizations. The Raslan trial may in fact be the only exception to this rule, due to the significant number of Syrian journalists and activists who follow the case closely. However, many so-called “partner”

organizations in this trial attempt to silence critical voices, or those demanding more information and greater transparency regarding what occurs in the courtroom. I will present some miscellaneous examples of this dynamic. For instance, not many Syrians realize that the case filed against Islam Alloush in France lacks sufficient evidence, and that Alloush can consequently be released at any time, or that the maximum term for provisional arrest in France is 12 months, after which Alloush will automatically be released, unless new evidence comes to light that justifies extending his detention. Another example is the fact that Spanish courts have refused to prosecute the torture case, and that the issue of accepting or rejecting the case is currently being considered by Spain's Constitutional Court. In fact, even if the case is accepted, Spanish law prohibits proceeding with cases in absentia, which renders the arrest of the nine defendants a necessary condition for any progress in these trials—a highly unlikely occurrence.

The raising of Syrians' expectations in this unrealistic and disingenuous manner has led to the concealment of vital details, which is not in the best long-term interest of Syrian civil society, as it undermines its credibility with survivors and victims' families. It may also result in the emergence of a hierarchy within Syria civil society circles, in which relevant international organizations are at the top, with Syrian organizations vying for positions lower down in the structure according to their levels of affiliation with survivors; their relevance to the cases being filed; or their ostensible status as "partners" in the litigation efforts. Consequently, Syrian partner organizations have opted for a supervisory or "gatekeeper" role for the suits and those involved in them, as well as with regard to the opinions of civil society activists; or even participated forms of

“populism” or “demagoguery” in fending off criticism or confronting those demanding more transparency. Perhaps one of the worst offenders in this regard has been the targeted Facebook campaign led by Syrian human rights activists who had participated in the witness selection process against other activists for the crime of merely **raising questions about one witness testimony**. In sum, then, this legal campaign is plagued by a lack of transparency on the part of the litigators; excessive overstatement and manipulation by deterring people from scrutinizing testimonies; and even the adoption of dangerous populist rhetoric that prohibits anyone from questioning the course of the trials.

Syrians are not alone

The reality is that Syrian civil society is not the first to experience such tumultuous challenges, and, if one is to be fair-minded, reference to similar practices is necessary. For example, Iraqi civil society found itself completely excluded from the trials of former Iraqi regime figures, as dozens of international organizations flooded Baghdad to “build cases;” work with the defense teams; or observe the court proceedings. The community of international donors was in no way concerned with supporting local Iraqi efforts, especially as Iraqi civil society was nascent, enjoying only modest resources. Early on, it became evident that preference went to Western organizations, with the result being a generally inadequate civil society for human rights in Iraq, and a sub-par level of documentation of later human rights violations in Iraq, whether by ISIS or Iran-backed militias.

This competition between local and international actors has

also affected trials in international courts. Few examples are clearer than the UN-established Extraordinary Chambers in the Courts of Cambodia (ECCC). Competition between local courts and the ECCC was publicized on numerous occasions. There were disputes regarding the “leaders responsible for the gravest violations,” whom the local community viewed through a lens that was completely different from international standards. These issues resulted in the suspension of some trials, with the **Supreme Court of Cambodia being sought** to resolve the disputes between various chambers. Moreover, miscellaneous issues exacerbated the tension between the two sides for the duration of the trials, including issues regarding pay, as the international staff working in Cambodia earned salaries two or three times higher than those of their local peers, including judges, public prosecutors, and administrative staff.

Furthermore, in the Palestinian context, the legal and the political have often been conflated among the Palestinian public by organizations working on legal issues, raising expectations to unrealistic levels and confusing the average observer. Perhaps the most telling example was the issue of the separation wall, where the US intervened by **applying political pressure** on the ICJ, while the Palestinian National Authority seized on this to cultivate political capital, raising the expectations of the Palestinian public who anticipated an ICJ ruling that would suspend the construction of the wall, and even demolish the parts already built. In reality, as mentioned earlier, the ICJ ruling has only a non-binding advisory status, and any later attempt to reach a binding Security Council resolution based on the Court’s “opinion” would face a US veto.

Prospects of the trials: Honesty with the Syrian people

Considerable efforts have been undertaken by Syrian civil society organizations, who have contributed to evidence-collection and case filing, which has required rigorous work with no small psychological impact on those involved. These efforts by organizations, activists, and Syrian observers at large are all highly commendable. However, they remain marred by certain imbalances, oversights, and blunders regarding the manner in which developments have been communicated to the Syrian public, stemming from a natural human impulse towards exaggerating achievements or overstating promises and expectations. All of this has had a profound impact on survivors and the families of victims.

What is urgently required of us today is to set a clear strategy for these litigation efforts, clearly delineating their short- and long-term objectives. Are these purely judicial proceedings to try individuals that can be charged? Are they strategic tools to promote the rights of Syrians, uphold the demand for fair trials and justice for victims, and highlight the war crimes and crimes against humanity that have been and continue to be committed in Syria? A discussion of the purpose of these trials and cases filed is paramount, and from it we can determine the nature of these cases, their scale, their timing, the method of their selection, and the parties and actors that can contribute or be involved. All of these crucial details are concealed today from the wider Syrian civil society, with discussion of them remaining confined to a narrow circle of organizations and individuals.

Even through an optimistic lens, the legal cases underway in European courts today will yield modest results. They are extremely unlikely to topple regimes or put an end to the mass violations of rights in Syria. However, they do constitute a clear departure from an era of impunity; introduce the clear and rightful demand for justice and accountability as a precursor for any political transition in Syria; and promote the narratives of victims and memorialize their suffering. The only options for Syrian civil society today are to adopt more openness, transparency, and sincerity with the Syrian public, and to manage expectations, such that we do not lose comrades, friends, or supporters of these commendable efforts.