

ADDRESSING THE ISSUE OF MASS GRAVES IN SYRIA

I. INTRODUCTION AND BACKGROUND

1. Over the past decades, hundreds of illicit mass graves have been created in Syria¹, which to date have not been excavated in a professional manner that allows for the identification of the victims and the handing over of their remains to their families. Nor have perpetrators been investigated and prosecuted. There have been some inexperienced efforts to exhume bodies, as well as attempts to collect forensic evidence that may have compromised the integrity of such evidence. This may negatively affect families' rights to effective investigations including determining the fate of their living loved ones and the circumstances of their deaths². These illicit graves include the remains of tens of thousands of people who died in various areas of Syria at the hands of multiple state and non-state actors, including security services and militias affiliated with the Syrian authorities³, militias affiliated with Iran and Turkey, and jihadist groups such as "the Islamic State of Iraq and Syria" (ISIS), in addition to the victims of aerial bombardments by international forces including Russia and the "Global Coalition"⁴.
2. Mass graves in Syria are a result of large-scale extra-judicial executions based on martial law or other proceedings that lack due process, as well as a general culture of impunity. Mass killings often occur in detention centers as a consequence of torture, ill-treatment and inhumane conditions⁵. Furthermore, authoritarianism and the absence of the rule of law have aggravated sectarian and ethnic conflicts, creating fertile ground for the rise of extremist groups.

¹ For more information about mass graves in northeast Syria, see the report of the International Commission on Missing Persons (ICMP), "The Missing in North East Syria: a Stocktaking", 25 March 2020, pp. 9 et seq, available at: <https://www.icmp.int/wp-content/uploads/2020/05/icmp-gr-mena-065-6-w-doc-stocktaking-missing-persons-in-north-east-syria.pdf> See also, Abd al-Razzaq al-Husayn, Mass Graves and the Missing in Raqqa, *Jumhuriya*, 5 September 2019, available at: <https://www.aljumhuriya.net/ar/content/22258778> In addition, there are reported graves tied to the Hama massacres of the 1980s. For more information, see Trial International, Syria: Justice for the Hama Massacre, 2 February 2021, available at: <https://trialinternational.org/latest-post/syria-justice-for-the-hama-massacre/>

² See the Charter of Truth and Justice: A Common View on the Issue of Enforced Disappearances and Arbitrary Detention in Syria from Organizations of Syrian Victims and Their Families, February 2021, p. 6, available at: https://drive.google.com/file/d/1JlwS6X_x8a4VR7ueYE-rwOvrwFn5j013 See also, Report of the Special Rapporteur, op. cit. p. 14.

³ On the role of the Syrian authorities in creating mass graves, see Ben Hubbard and Marlise Simons, Mass Graves Identified in Syria Could Hold Evidence of War Crimes, *The New York Times*, 16 March 2022, available at: <https://www.nytimes.com/2022/03/16/world/middleeast/mass-graves-syria-war-crimes.html>

⁴ Abdul Razak Hussein, op. cit.

⁵ Principle II of the Principles on the Effective Prevention and Investigation of Extrajudicial, Arbitrary and Summary Executions adopted by the Economic and Social Council provides that "In order to prevent extrajudicial, arbitrary and summary executions, Governments shall ensure strict control, with clear chain of command, of all officials responsible for the arrest, arrest, detention, imprisonment and imprisonment of persons and of officials authorized by law to use force and firearms." Principle VI adds that "Governments shall ensure that persons deprived of liberty are placed in officially recognized places of detention and that their relatives, lawyers or other trusted persons are promptly provided with accurate information on their detention and whereabouts, including transfers." Resolution 65/1989 of 24 May 1989, available on the website of the Office of the High Commissioner for Human Rights: <https://www.ohchr.org>. In this context, any Syrian legal reform should include the abolition of all Syrian decrees and laws that promote a culture of impunity and those that violate human rights. For more information, see PCG, Towards Addressing the Issue of the Missing, Report to the United Nations on the Universal Periodic Review of the Syrian Arab Republic, Fortieth Session - July 2021, p. 8 et seq, available at: <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=9605&file=ArabicTranslation>

International and regional military interventions have further contributed to a large number of civilian deaths and the proliferation of mass graves.

3. This paper proposes the adoption of a national legal framework to address the issue of mass graves in Syria. In particular, it proposes provisions to ensure the professional handling of mass graves to establish the conditions and circumstances of the victims' deaths, revealing their identities, and collecting evidence for criminal prosecutions. The proposed legislation also seeks the involvement and representation of victims' families and it highlights the need to ensure non-repetition of violations. It is important to note that in order to ensure that procedures dealing with mass graves are followed, a legitimate political system must exist in which the executive body and the judicial system are fair, independent and impartial. In this context, and moving forward, the Policy Coordination Group (PCG) urges all concerned parties to contribute towards establishing an international working group that would seek to advance addressing the issue of mass graves, including preparing and qualifying cadres of Syrian individuals to strengthen their capacities in dealing with mass graves so that they can make a contribution as soon as circumstances allow.
4. Ultimately, the PCG urges adherence to professional and responsible practices and standards in dealing with mass graves. This includes preserving mass graves and other illicit burial sites and ensuring that such sites are not tampered with before adequate legal and operational frameworks are in place, including the technical capacity to excavate and engage in recovery operations at a professional level. This requires all parties, including the de facto authorities and non-state armed actors, to protect these sites and ensure respect for human rights and international humanitarian law, including the rights of the families of missing⁶. All mass grave excavations should be seen as part of criminal investigations, including the collection of evidence and DNA sampling for comparison with genetic reference samples provided by victims' families. In addition, the involvement of specialized international organizations is essential, as explained below.

II. INTERNATIONAL FRAMEWORK ON MASS GRAVES

5. The term "mass grave" is often applied to burial sites that include more than one person⁷. Many forensic and human rights experts require that the site be linked to mass human rights violations, such as executions, arbitrary killings, torture, and enforced disappearances and/or that it triggers an obligation to conduct effective investigations that are capable of establishing the circumstances of death⁸. The Bournemouth Protocol defines "mass grave" as "a site or defined area containing a multitude (more than one) of buried, submerged or surface scattered human remains (including skeletonized, commingled and fragmented remains), where the circumstances surrounding the death and/or the body-disposal method warrant an investigation

⁶ For general points on duties of armed groups to ensure respect of international humanitarian law and sanction war crimes, see René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents*, Oxford University Press, 2021, pp150-180.

⁷ For more information, see Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *Mass graves highlighting the multiple sites of mass killings and unlawful deaths throughout history and the world*, 12 October 2020, A/75/384, pp. 6 and 7.

⁸ *Ibid*, same pages. The Bournemouth Protocol on Mass Grave Protection and Investigation, Bournemouth University, Melanie Klinkner and Ellie Smith, 2020, p. 4, available at: https://issuu.com/bournemouthuniversity/docs/the_bournemouth_protocol_on_mass_grave_protection_fr=sMjc3OTIOMjAyNzM

as to their lawfulness"⁹. Illicit mass graves are often associated with the commission of war crimes, crimes against humanity, and/or genocide. Thus, the responsibility of addressing these crimes lies not only with the national authorities, but may also involve various international organizations and justice mechanisms¹⁰.

6. International law emphasizes the importance of protecting mass graves and respecting the remains of deceased persons. Article 34 of the 1977 Protocol Additional to the Geneva Conventions prohibits "the non-respect of the remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities, and to protect and maintain such gravesites". International law also emphasizes the need for an effective, independent and appropriate investigation of such burial sites to collect information and other necessary evidence for the purposes of identification and prosecution of those responsible¹¹.
7. Addressing the issue of mass graves is essential for victims' families. It is also indispensable for the implementation of transitional justice pillars, including the disclosure of the fate of missing persons, holding perpetrators accountable, honoring and providing reparations for victims and/or their families, contributing to guarantees of non-repetition in the future and laying the foundation for sustainable peace. However, ensuring the appropriate handling of mass grave sites, implementing transitional justice measures and conducting judicial proceedings should not impede fulfillment of the State's obligation to provide the families with any available and accurate information about the fate of the missing and when applicable the circumstances of their deaths¹².

III. ASPECTS OF A NATIONAL LEGAL FRAMEWORK ON MASS GRAVES

8. Dealing with mass graves in Syria requires the adoption of fair and appropriate legislation that may be included in a special chapter of the proposed Law on Missing Persons¹³, as is the case in Lebanon¹⁴, or in a separate law dedicated to it, as is the case in Iraq¹⁵. At a minimum, the following items/provisions should be included:
 - It is the duty of the state to oversee all matters related to mass graves, including the excavation of sites, the exhumation of mortal remains, and the investigation and prosecution of those responsible¹⁶. The state should search for mass graves and document

⁹ The Bournemouth Protocol on Mass Grave Protection and Investigation, Bournemouth University, Melanie Klinkner and Ellie Smith, 2020, p. 4, available at: https://issuu.com/bournemouthuniversity/docs/the_bournemouth_protocol_on_mass_grave_protection_?fr=sMjc3OTIOMjAyNzM

¹⁰ See below.

¹¹ The Bournemouth Protocol, op. cit, pp. 9-10.

¹² The report of the independent expert on fulfilling the set of principles to combat impunity stated that "victims and their families, regardless of any judicial proceedings, have an imprescriptible right to know the truth about the circumstances in which the violations were committed and about the fate of the victim in the event of death or disappearance". United Nations Economic and Social Council, Report of the Commission on Human Rights, Promotion and Protection of Human Rights: Impunity, E/CN.4/2005/102/Add.1, February 2005, p. 7. See also article 18 of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), adopted by the General Assembly of the United Nations in 2006.

¹³ See also the PCG paper on the Missing Persons Law, available at: <https://www.icmp.int/wp-content/uploads/2022/03/pcg-005-3-W-doc-paper-of-syrian-legislation-concerning-the-missing-persons.pdf>

¹⁴ See Law No. 105 of 3 November 2018.

¹⁵ See Mass Graves Affairs Law No. 5 of 2006 as amended by Law No. 13 of 2015.

¹⁶ As for the responsibility of non-state actors, see p. 1.

and protect their locations¹⁷. It should also provide protection to those searching for mass graves and to those who report on their existence by ensuring secure and guaranteed methods for reporting on them¹⁸. Relevant legal provisions should extensively define the duties of the various state institutions in dealing with mass graves. These institutions should provide the necessary information and adequate human, technical and material resources to facilitate all relevant processes and procedures;

- All necessary measures should be taken to protect gravesites from premature excavation, tampering, destruction, and looting¹⁹. They should only be opened according to internationally-agreed standards and best practice for investigating burial places, exhuming human remains and identifying mortal remains²⁰. This, in turn, will allow for the return of the mortal remains and belongings to their families. This must be accompanied by the collection and preservation of evidence to open the necessary investigations into the circumstances of the violations and the identity of the victims, allowing for the prosecution of perpetrators. It is also the responsibility of the state to take measures to memorialize victims and ensure that violations are not repeated, including by supporting civil society initiatives and family associations working on issues related to mass graves such as documentation of violations, and memorialization efforts;
- There are various types of bodies or investigation teams that can be established to open and investigate mass graves. A Commission for Missing Persons, as proposed by the PCG²¹, may have a primary role in this, and/or smaller committees can be formed to oversee each individual gravesite. Otherwise, a special department can be established to excavate mass graves in cooperation with various state agencies, including the prosecutor's office, the Ministry of Health, and the national Human Rights Commission²², supported by relevant international bodies. In all cases, the investigation team for this purpose should include specialists in various fields, including at least a judge²³, a forensic doctor, a forensic archaeologist, and a forensic anthropologist, as well as a representative of the aforementioned Human Rights Commission, and a representative of the victims' families²⁴. Indeed, the participation and representation of families of victims must be taken into account at all stages of the process, as explained below. Standard practice also requires that the team includes crime-scene technician(s) and a crime-scene photographer in order to document and photograph the overall context of the grave (to aid in the reconstruction of the event), the position of the bodies and associated evidence, and the excavation process;

¹⁷ On the obligation of states to search and investigate, see The Bournemouth Protocol, op. cit, p. 5.

¹⁸ On the issue of safe reporting, see the Bournemouth Protocol, op. cit, p. 8.

¹⁹ For more information on protecting mass graves, see: Melanie Klinkner, Towards mass-grave protection guidelines, Bournemouth University, <https://www.icmp.int/wp-content/uploads/2019/05/Towards-massgrave-protection-guidelines1-1.pdf>

²⁰ Minnesota Protocol to Inquire into Unlawful Deaths (2016), United Nations-OHCHR, New York and Geneva 2017, pp. 17 ff. See also the Bournemouth Protocol, op. cit, pp. 9-10.

²¹ See the PCG document on the Missing Persons Law, op. cit.

²² For more information on this Commission, see PCG Paper, Proposed Constitutional Principles Related to Syria's Missing, 2022, available at: <https://www.icmp.int/?resources=proposed-constitutional-principles-related-to-syrias-missing>

²³ Appointed as a president of the concerned body, and who has expertise in criminal cases.

²⁴ It is also possible for this team to contract with experts in other fields. In this context, the Bournemouth Protocol provides that relevant investigative and forensic expertise may include various actors or specialist disciplines such as digital data experts, forensic archaeology, forensic ballistics/firearms and tool marks specialists, forensic entomology, forensic odontology, and forensic toxicology. For more information on each specialist, see the Bournemouth Protocol, op. cit, p. 18.

- All excavation and exhumation investigation teams must receive training that equips them with the comprehensive skill-set necessary to process, document, and preserve forensic evidence and exhume human remains to an acceptable standard. Moreover, the members of the investigation teams should have situational awareness and take into account the cultural, political and religious sensitivities surrounding mass graves;
- Legal standards should be established to ensure that the rights of the families are respected, and their participation is guaranteed in all relevant processes and procedures. They have the right to be informed of the progress and results of investigations²⁵. Families' participation takes different forms, including representation in the team or body formed to open any gravesite and exhume the bodies from it, as indicated above. Families or their representatives should also participate in deciding and preparing for the construction of commemorations. They should be consulted in the management and protection of the gravesites as well as in any follow-up in regard to the state's relevant obligations towards them²⁶. Finally, the victims' families must be given the opportunity to object before a competent court against decisions of the designated authority or authorities overseeing the issue of mass graves, mainly against decisions to identify exhumed remains²⁷. All parties designated to deal with mass graves should respect the religious, cultural and material rights of victims' families, including handing over mortal remains in accordance with appropriate ceremonies, securing an appropriate resting place for them and helping them to bury their relatives respectfully²⁸, and providing them with adequate financial and moral compensation and reparation²⁹;
- The authority overseeing the excavation and investigation of graves, and other cooperating and intervening parties should follow ethical standards and codes of conduct as described in the Ethical Charter issued by the PCG³⁰, and principles and best practice contained in other accepted international documents such as the International Code of Medical Ethics, the Bournemouth Protocol³¹, and the Minnesota Protocol³². This includes at a minimum adopting a rights-based approach, embracing transparency while maintaining confidentiality when necessary, and maintaining impartiality and non-discrimination on the basis of any protected status, including national, religious or ethnic affiliation;
- The designated authorities should also rely on technologies and scientific methods when locating and excavating mass graves. This can include tools to determine their precise location and date; excavations employing crime-scene management and archaeological techniques; and documentation of all stages of the excavation using forms, logs, video,

²⁵ Minnesota Protocol, op. cit, p. 15.

²⁶ *Ibid.*, p. 30. For more information on forms of family participation and potential difficulties, see *ibid.*, pp. 16-17.

²⁷ Such an appeal is submitted before the Personal Status Court in which the cemetery is located in Iraq (according to Article 7 of the Law on Mass Graves Affairs mentioned above), and before the competent administrative court in Lebanon (according to Article 27 of Law No. 105 mentioned above).

²⁸ The state must also secure burials for unidentified persons and treat their remains with respect.

²⁹ Principle 20 of the Principles on the Effective Prevention and Investigation of Extrajudicial, Arbitrary and Extrajudicial Executions adopted by the Economic and Social Council states that "the families of victims of extrajudicial, arbitrary or extrajudicial executions, and their dependents, shall have the right, during the period of reasonable and fair compensation", op. cit. See also the PCG paper on the Missing Persons Law, op. cit. See also Article 24 of the ICPPED.

³⁰ Published on 30 August 2021, available at: <https://www.icmp.int/wp-content/uploads/2021/07/ethical-charter-data-collection-and-documentation-of-syrias-missing-15-july-2021-arab.pdf>

³¹ Op. cit. See p. 6 et seq.

³² See Minnesota Protocol, op. cit, p. 15.

photography, and even measuring instruments such as a total station that captures highly precise data on the positioning of human remains and associated evidence. Adoption of a comprehensive documentation system, including a comprehensive photographic record, ensures that the standard and quality of evidence recovery is sufficient for autopsy or examination, and later identification efforts, as well as for criminal proceedings. Within this scientific and technical framework, the designated authorities should ensure sampling for DNA analysis of mortal remains³³, as well as collection of DNA reference samples from surviving family members, and the preparation of medical and supporting reports, including matching reports of ante-mortem and post-mortem DNA samples³⁴;

- In this context, the legislation related to mass graves should provide for the involvement of international bodies with expertise and knowledge in the handling of mass graves and mortal remains. Within this framework, local authorities should commit to cooperating with these bodies and facilitating their work. The PCG reiterates the necessity of compatibility between Syrian legislation and international human rights instruments. The Syrian courts should apply those instruments to any relevant matter in cases where the Syrian laws fail to address them;
- It is necessary to adopt legal provisions that include penal consequences for those who obstruct the work of competent authorities during the search for mass graves, or those who prevent persons from providing information on them or authorized persons from opening and conducting investigations in or around them. In addition, there should be penal consequences against those who tamper with mass graves, exhume mortal remains or steal their contents. Stiffer penalties should be imposed on those with the intention to destroy evidence of the victims' or perpetrators' identities. An offender who contributes to revealing the location of a secret gravesite and helps determine the identity of the victims or perpetrators, the cause of death, the date of burial or any other information that can contribute to revealing the truth, can mitigate his or her penalties. A financial reward should also be granted to any person who provides such relevant information. The state has the responsibility to prosecute those responsible for violations related to mass graves, with the support of other parties referred to in this paper, in addition to international courts specialized in prosecuting gross human rights violations. Universal jurisdiction can also be relied upon in national courts of other countries to prosecute perpetrators of international crimes.

IV. SUMMARY OF RECOMMENDATIONS

- ❖ Establish an international working group that would seek to advance addressing the issue of mass graves in Syria.
- ❖ Adopt a Syrian national legal and political framework consistent with the provisions of international conventions and treaties to ensure the effective protection of human rights, and to address the issue of mass graves and the issue of families' right to seek justice, honor the victims and hold perpetrators accountable.

³³ Samples taken from mass graves differ. They include human samples, such as soft tissue, bones, teeth, blood, urine, saliva, sperm, and vitreous humor in the eye, hair and nails. Non-biological samples are chemical substances, such as drugs, toxic substances, explosive materials, firearms; profound traces, such as vehicle tires and shoes at crime scenes; and finally soil/environment samples. Patterns, including scattered blood and burns, must also be analyzed, as well as fractures, tool marks and any documents that may be found.

³⁴ For more information on technological tools, see the report of the Special Rapporteur, *op. cit.*, p. 23.

- ❖ Elaborate as much as possible within the legal framework on the duties of the different state institutions in dealing with mass graves.
- ❖ Take all necessary measures to protect mass graves from premature excavation, tampering, and destruction. Mass graves must not be compromised before there is a suitable legal and political framework in place and technical capacity at hand to excavate and exhume the bodies in a proper manner. Non-state actors that govern areas which might contain mass graves must bear responsibility for ensuring the integrity of these sites, and for observing all applicable international law.
- ❖ Adhere to internationally-agreed standards and best practice and follow codes of conduct and ethical principles during the investigation of burial places, the collection of evidence, the exhumation of human remains, the identification of mortal remains, and any other related matters.
- ❖ Take into account the diversity of competencies in forming the investigation teams or related bodies to open and investigate mass graves, and to ensure that members of such teams receive the necessary training, and are aware of the social, political, religious and cultural context in which they operate.
- ❖ Respect the rights of families, and ensure their participation and continuing knowledge of all relevant processes and procedures, transferring the mortal remains to families in accordance with their cultural and religious beliefs and providing them with support and financial and moral compensation.
- ❖ Rely upon all available technological and scientific tools when locating and excavating mass graves, and request assistance from international bodies with expertise and knowledge in the handling of mass graves and mortal remains.
- ❖ Ensure that those responsible for violations related to mass graves are held accountable, and impose penal consequences on those who tamper with mass graves, exhume mortal remains or steal their contents, as well as on those who obstruct the search for mass graves or investigations in or around them.