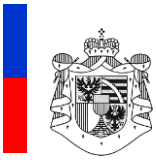

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Accountability in Syria

Meeting at Princeton University

17 November 2014

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Executive Summary

At the invitation of the Permanent Mission of Liechtenstein to the United Nations in cooperation with the Liechtenstein Institute on Self-Determination, some 25 diplomats and experts assembled at Princeton University to discuss accountability options for Syria. There was a clear sense that the International Criminal Court (ICC) remained the preferred option in principle, while there was no expectation that this option was viable in the near future and that national trials would be the best way to ensure accountability. There was a strong sense that there was a need to keep discussing accountability options and that several of the accountability options were complementary rather than mutually exclusive.

Even in the case of ICC involvement, however, complementary efforts would be required, given that the ICC could only ever try a very small number of perpetrators, ideally those most responsible. To that end, participants discussed the feasibility of starting to strengthen the national jurisdiction now, by training Syrian lawyers outside Syria. Another future option could be the creation of a hybrid court or chamber, which could involve international, Arab judges, prosecutors and lawyers alongside Syrians. Models for this include the State Court in Bosnia and Herzegovina.

Innovative approaches were suggested to advance the cause of accountability now. These included litigation against Syria before the International Court of Justice (ICJ) under the relevant provisions of the UN Convention Against Torture and/or possibly seeking an ICJ advisory opinion. The States of nationality of foreign terrorist fighters that are States Parties to the Rome Statute could also refer the situation in Syria to the ICC, while only for crimes committed by their nationals, to show their commitment to holding those fighters accountable and to fight impunity in general. States should also be mindful of perpetrators of crimes in Syria entering their countries, and try those suspected of having committed crimes under universal jurisdiction. Though this method was unlikely to ever put on trial those most responsible, it could have an important signal function.

Participants noted the myriad of evidence collection projects and efforts to improve the rule of law already ongoing in Syria and stressed the need for better coordination both by actors on the ground and, especially, the donor community.

Summary of Substantive Sessions

Session 1: International Criminal Court

Background: In May 2014, a French-drafted Security Council resolution on referral of the situation in Syria to the ICC was vetoed by China and Russia, despite having been cosponsored by a large number of States. The Commission of Inquiry has repeatedly recommended the Security Council refer the situation in Syria to an international justice mechanism. The ICC could already become active if nationals of States Parties commit Rome Statute crimes in Syria (possible because many foreign fighters are nationals of a number of European States that are States Parties, as well as Jordan and Tunisia).

In the introduction to this topic, it was recalled that the ICC could never be a panacea for Syria: the Court would be facing a challenging investigation in an ongoing armed conflict and capacity limitations. It could also never be the only accountability track, as it would only be able to put a small number of perpetrators of crimes in Syria on trial. Indeed, given the large number of perpetrators, an ICC referral would not negate the need to strengthen the domestic justice sector.

While an ICC referral would not be expected to end the conflict in Syria, it was noted that this point might not be clear to Syrians, who could be disappointed after an ICC referral. A clear communications strategy conveying what the Court can and cannot do was required.

It was pointed out that the ICC already has jurisdiction over nationals of States Parties in Syria, including "Foreign Terrorist Fighters" (FTFs). It was noted that many States of origin of FTFs would be quite willing to try them. However, it was also explained that States could try individuals for terrorism offenses, while they may find it hard to gather evidence to prosecute them for Rome Statute crimes. Seizing the ICC of the FTF issue, however, would thus not indicate States' unwillingness to prosecute, given the principle of complementarity, but rather emphasize their commitment to fight impunity.

While the ICC's Office of the Prosecutor has experience conducting investigations in far-away places, it would be facing a difficult and likely time-consuming investigation, due to lack of access and adverse security conditions. It would also be facing other constraints, including those of expertise and financial capacity. It was also noted that the ICC's record indicated that this would not be a quick process.

Under the principle of prosecutorial independence, the Prosecutor would likely investigate the conflict as a whole in order to establish patterns and policies. Its reach would become limited at the stage of the issuance of indictments as the Court's jurisdiction would be limited to a small number of individuals.

While an ICC referral by the Security Council was considered to be a "long shot", given present circumstances, it was still considered by many to be the preferred option. It was also pointed out that, while the draft resolution was vetoed, the text had nevertheless created a strong cross-regional dynamic around the initiative. Some options for a future referral include trying to find a compromise with the two permanent members that vetoed the first attempt, including through exploring the possibility of a prospective referral. The large number of co-sponsors could also be exploited more effectively in

pressuring reluctant permanent members, and the supporters of a referral should continue their joint efforts. It was also pointed out that the Syrian National Coalition could be engaged and asked to commit to ratifying the Rome Statute or making a declaration under article 12(3) of the Rome Statute. In this context, the possibility of challenging the credentials of the Syrian delegation at the United Nations was also discussed.

Session 2: Universal jurisdiction and other proceedings in foreign Courts

Background: Universal jurisdiction attaches to some of the most heinous crimes under international law, including some of those being committed in Syria (notably torture). States could, therefore, prosecute perpetrators even without a jurisdictional link. Germany has indicated that it was starting national prosecutions, though it is unclear whether this would be based on universal jurisdiction or based on another jurisdictional link. The US has also announced its ability to conduct trials if the victims held US (possibly dual) nationality. Most countries are able to exercise jurisdiction if their (dual) nationals commit crimes abroad.

In introducing the topic, it was noted that universal jurisdiction (UJ) is generally seen as providing a safety net, ensuring that no country can become a haven for those who have committed serious crimes abroad. The application of UJ required both appropriate domestic legislation and national institutions that are willing and able to apply national laws to crimes committed in Syria. National war crimes units could play an important role in ensuring that domestic legislation is actually applied in concrete cases. UJ would likely not lead to the prosecution of the most senior perpetrators, given the element of chance involved: most countries can only try those perpetrators that happen to be present on their territory. Nevertheless, any such trial would send an important signal.

Another option was prosecution under the passive personality principle, which could be done if, for example, the “Caesar pictures” also showed victims that are nationals of third states.

Prosecutors interested in opening a case under UJ could use documents created by evidence-gathering initiatives, which, through establishing linkages between crimes and high-level perpetrators, also identify mid and low level criminals. It was noted that Syrian defectors had migrated to Europe and North America, and that one could make use of the Syrian community in identifying potential perpetrators.

Session 3: National Syrian Courts

Background: Various groups speaking for Syrian victims have conveyed a strong desire for home-grown justice. Syrian criminal legislation is considered to be in fairly good shape, although it has been systematically bypassed throughout the years of the Assad family’s reign. Trials could take place either after the conflict or now, under the aegis of the opposition or defected judicial officials.

National courts and prosecutors should be the first stop, it was posited in the introduction to this topic, and participants generally agreed that national courts were always in principle the best option. However, at present Syria had a multitude of actors (the regime, opposition and ISIS) and a corrupt, bureaucratic, slow and arbitrary national judiciary that was unwilling to consider the crimes committed in the country. The legal system was based on the 1949 legal code, which was an adequate basis for prosecutions. Additionally, a Unified Arab Penal Code was applied, which defines some of the crimes being committed in Syria but has other lacunae. Sharia law was being applied in ISIS-held areas. While the underlying law was adequate, if antiquated, the real questions were who would be doing the prosecuting and the obvious lack of political will to prosecute those most responsible.

It was noted that the national laws had been bypassed by a series of extraordinary laws. The regime had been using counterterrorism courts for everything. One option would be to begin with low-level tribunals in the "liberated areas". Another option could be a Syrian tribunal operating outside Syria, as was the use of mobile courts, which had been pioneered in other parts of the world. The question was raised whether a domestic Iraqi court looking at ISIS crimes could also consider crimes committed by the Assad regime.

Speakers drew parallels to the situation in post-war Iraq, where erroneous assumptions about the state of the Iraqi criminal justice system had been made. Post-war initiatives such as the Baghdad Central Criminal Court were also mentioned as having achieved less than satisfactory results. On the other hand, inspiration could be drawn from positive examples, such as the State Court in Bosnia and Herzegovina. Here a national court had a positive spillover effect into the prosecutorial strategy of lower-level courts.

While Syrians now might have impulses to punish certain groups they associated with the crimes committed, participants emphasized the need to avoid victors' justice. There was also an important security aspect, as victims denied justice might in the end turn to vigilante justice.

Syrians could also avail themselves of other transitional justice mechanisms such as truth commissions or consultations. The latter could be useful in identifying expectations and having a conversation about standards and processes.

Session 4: Ad hoc, Hybrid or Regional Court

Background: Support for the creation of an *ad hoc* tribunal has waned noticeably in the last 18 months. While there are important legal differences, the option is also often taken to be interchangeable with a hybrid or regional Court. The creation of either a hybrid court, containing some Syrian and some international judges, or a regional Arab Court, possibly under the auspices of the League of Arab States has been mooted by a number of commentators and members of the US Congress.

In the introduction to this topic, it was noted that the international community now had the means and experience to step in and prosecute crimes, once a decision to do so had been made. One option would be an *ad hoc* court mandated by the UN Security Council under Chapter VII of the UN Charter. This

would be costly, however, and may not fulfil Syrian wishes for justice. It was unclear why this option would be easier to achieve than a referral to the ICC, given the necessary role of the Security Council. Another option would be a hybrid tribunal, with Syrian and regional players. Examples here include the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia, which has a very mixed record. The Special Court for Sierra Leone was also presented as the most successful international tribunal, and as a possible model for a hybrid court for Syria. The Chautauqua blueprint[1] could form the basis for such a tribunal, or for a tribunal created by a regional body.

Different bases of jurisdiction for a potential tribunal were explored, including authorization by the UN General Assembly, regional organizations or regional States. It was noted that one decisive factor would be the Government's willingness to cooperate with any such court; action by the General Assembly was not currently possible.

The question of the impartiality of a regional tribunal was raised, and it was noted that any Statute would have to be applied completely impartially. The establishment of such a tribunal would also likely lead to difficult discussions on the death penalty which was in place in most countries in the region (including Syria). At the same time, such an approach would find no support in many other parts of the world.

Some participants expressed reluctance for setting up additional *ad hoc* or mixed tribunals, given that the ICC was available as an option and created precisely for situations such as the one in Syria. In this view, a preferential option would be ICC trials complemented by national tribunals, with the possibility that those could have international participation.

[1] *See* http://publicinternationallawandpolicygroup.org/wp-content/uploads/2014/01/Chautauqua-Blueprint-2014.pdf.

Session 5: International Court of Justice

Background: Under article 30 of the UN Convention against Torture, disputes between States on the interpretation or application of the treaty can be referred to the ICJ after negotiation and arbitration. This Article has been relied upon at least once before in the Hissène Habré Case (Belgium v. Senegal, 2012).

While the International Court of Justice (ICJ) has no criminal jurisdiction, it could serve as a good forum for ascertaining the responsibilities of the Syrian regime through interstate litigation. While any such litigation would take a long time, it could serve as a basis for a future criminal justice mechanism and also have the advantage of a discussion of the situation in Syria in a highly respected international court. The Court could also indicate provisional measures, as early as three months after the application is filed. One potential basis for litigation would be the Convention against Torture (UNCAT), to which Syria acceded in 2004, which allows any State Party to bring a case involving a dispute under the Convention, provided that possibilities of negotiation and arbitration had previously been exhausted.[2] Such litigation would focus on the universal obligation to ensure that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. For reasons of perception, it might be beneficial if the State(s) bringing the suit had a direct link, e.g. if their nationals had been victims of torture in Syria.

In the following discussion, it was noted that States had historically been reluctant to bring cases against other States under human rights conventions – the relevant provisions of UNCAT had only been used as a basis for litigation once, in the *Hissène Habré* (Belgium v. Senegal) case.[3] Other inter-State procedures had also been used very rarely. Questions would be raised as to why action was being taken against Syria and not any of the other States Parties to the Convention where torture is widespread. An initiating State could also be accused of politicizing the convention.

Some questioned the relevance of a long trial leading only to a finding that Syria had violated UNCAT, noting also the irreparable damage a negative finding by the ICJ would cause. A practical problem would be linking the Syrian State to specific instances of torture. On the other hand, it was noted that having a State or a group of States seek to apply an important international legal instrument would add value unto itself, and would show that the international community was using all available options here, and to keep pressure on the Assad regime.

Participants noted the value of engaging in a conversation with Syria under article 30 of UNCAT, even without necessarily taking the step of referring the matter to the ICJ. This could be especially powerful if a group of States acted together.

Another option raised was the possibility of soliciting an Advisory Opinion from the ICJ, which could be requested by the General Assembly and would not have to be limited to the confines of UNCAT. The challenge here would be to devise the question in such a way as to elicit a response from the Court that

[2] States Parties can opt out of this procedure through a reservation pursuant to article 30(2) of UNCAT. Syria has made no such reservation.
[3] *See* http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=144.

adds value to the discussion on accountability in Syria. It was felt that further discussion of this topic was required.

Session 6: The Way Forward

Participants agreed on the importance of keeping the issue of accountability in Syria alive, and of continuing to consider all options to ensure accountability in a dynamic way.

Efforts of evidence collection in Syria were discussed, with participants noting the complementarity of various initiatives. Evidence was being collected in Syria by various organizations. This evidence was then analyzed abroad, either for advocacy purposes or to serve as the basis for future criminal proceedings. One organization was developing a crime-base matrix on the basis of evidence collected and was drafting sample indictments. The importance of coordinating the different approaches on the donor side was also noted, as the present parallel efforts might lead to crimes remaining undocumented and not make best use of the resources invested.

It was noted that any accountability effort would be shaped by a political deal yet to be negotiated. It would be important to orient the political process so as to ensure that accountability retains its proper place. Hopes were expressed that the new Special Envoy would be more open to the accountability dimension than his predecessor.

One step forward regarding the **ICC** option could be a re-activation of the group of States that co-sponsored the draft resolution or signed the letter coordinated by Switzerland which called for the situation in Syria to be referred to the International Criminal Court. There could be numerous steps taken to pave the way for future **domestic Syrian prosecutions,** including through identifying gaps in the existing legal framework, notably the 1949 criminal Court. Cases in third States, including under **universal jurisdiction,** were considered to be deserving of further consideration, as did litigation before the **ICJ.**

The importance of expectation management was also emphasized. It should be communicated to Syrians that justice would be a long-term projects. It was emphasized that accountability options should not be viewed as mutually exclusive, but rather complementary, and that several could be pursued at the same time.

In closing, the moral imperative of keeping faith with the victims was recalled. It was noted that the more groundwork is laid today, the better placed the international community will be to respond when opportunities present themselves.