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Accountability for Crimes in Syria: Lessons Learned from the Field of International Justice

by Jennifer Trahan

This document is an adaption of a speech delivered on May 12, 2015 at the launch of a report by the Syrian Justice and Accountability Center (SJAC) entitled "A Step Towards Justice: Current Accountability Options for Crimes under International Law Committed in Syria." The report discusses current accountability options for addressing crimes being perpetrated in Syria, examining the feasibility and potential impact of each option. The panel discussion that marked the launch of the report featured Mohammad Al Abdallah, Mark Lattimer, and Jennifer Trahan. The event was hosted by the American Bar Association (ABA) Center for Human Rights.

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You asked me to address lessons learned from the field of international justice for accountability for crimes being committed in Syria.

First: from a number of tribunals, we learn the importance of prosecuting all sides in a conflict.

The modern field of international justice began with the International Military Tribunal at Nuremberg—a tribunal spearheaded by the United States (which also took a leading role in the work of the International Military Tribunal for the Far East). We owe a tremendous debt to the Nuremberg Tribunal for starting the field of international justice, but we know the Nuremberg Tribunal was imperfect. Its founding London Charter only granted jurisdiction to prosecute Axis crimes. While, in the historical context, it is hard to imagine any other outcome, we hold our contemporary tribunals to a higher standard.

Tribunals must have jurisdiction to prosecute individuals from all sides in any conflict.[1] The Special Court for Sierra Leone did this when it prosecuted perpetrators from all three key warring factions in the Sierra Leone Civil War; it happened when the International Criminal Tribunal for the former Yugoslavia (ICTY) prosecuted those from all sides. It did not happen at the International Criminal Tribunal for Rwanda (ICTR).

Prosecutions on all sides will be important, if there is ever a freestanding tribunal to address crimes committed in Syria (whether ad hoc or a hybrid tribunal), or a special Syrian or special Iraq tribunal. Any such tribunal cannot have jurisdiction for instance only over "ISIS" or "Assad

[1] "All sides" here refers principally to crimes associated with the current Syrian regime and those of the so-called "Islamic State" (ISIS), but could include others, such as the al-Nusra front, Syrian rebels, or Iraqi regime or militia fighters. While US nationals should not be automatically exempted from the possibility of prosecution, this author does not mean to suggest they warrant prosecution, as long as US and coalition forces stay within the bounds of international humanitarian law (which does permit a certain level of collateral damage, and is an unfortunate, but almost inevitable, occurrence in any air campaign).

regime" crimes, but must have jurisdiction over the situation, or crimes committed in the territory of one or both countries.

An International Criminal Court (ICC) case would have the same approach, that is, if there were a UN Security Council referral, or Iraqi or, under a new regime, Syrian ratification of the Rome Statute; this would create jurisdiction over the "situation." Of course, if the ICC prosecutes today – as I discuss below – it currently cannot prosecute "all sides" but only the nationals of Rome Statute States Parties. So, here, I am looking to a time when there is a more fulsome prospect for justice than currently exists.

The SJAC report discusses the concern that if there are ad hoc European (or other country) prosecutions of "foreign fighters" implicated in atrocity crimes (for instance, when individuals return from Iraq or Syria), such prosecutions need to be coordinated. Otherwise, the SJAC report is concerned that prosecutions will be random or one-sided (e.g., prosecuting European nationals who join ISIS, but not those implicated in Syrian regime crimes).

The SJAC report also points out the risks of a hybrid tribunal conducting one-sided prosecutions. I do not think a hybrid is inherently susceptible to one-sided prosecutions, as we have seen hybrids that have not been one-sided (the Special Court for Sierra Leone), and non-hybrids that have been one-sided. Clearly, it will be the international community's responsibility to ensure that any hybrid, or other tribunal, that prosecutes crimes perpetrated in Syria (or Syria and Iraq) does not conduct one-sided prosecutions, but prosecutes all key perpetrators of the most serious atrocity crimes.

Second: from universal jurisdiction cases, particularly those commenced in Spain, which triggered national prosecutions in Chile, Argentina and Guatemala, we learn that you have to start somewhere.

In a perfect situation, there will be a tribunal to prosecute all sides for crimes committed in Syria (or Syria and Iraq), but I agree with the SJAC report that this may be years in coming. For now, there are pockets of jurisdiction, and meanwhile these need to be utilized.

The ICC already has jurisdiction over "foreign fighters" (those from Rome Statute States Parties, such as European countries, and Tunisia and Jordan). It certainly is not ideal in an atrocity situation, to single out individuals for prosecution by nationality, but absent Iraqi, or, under a new regime, Syrian, ratification of the Rome Statute or UN Security Council referral (so far blocked by the vetoes of Russia and China), the ICC only has limited jurisdiction—over foreign fighters from Rome Statute States Parties.

Yet, and here I disagree somewhat with the SJAC report, I think it would make a powerful statement for the Court to prosecute foreign fighters implicated in atrocity crimes. It would start to project that justice is coming.

Certainly, the Court will have to monitor if foreign fighters are implicated in serious atrocity situations (and NGOs working on data-collection should pay heed to this as well), but given an

estimated 20,000 foreign fighters having joined from Europe, and an estimated 1,500-3,000 Tunisians and 1,500 Jordanians,[2] I tend to think this will be likely, if it has not already occurred.

I also disagree with the SJAC report that the ICC needs "high-ranking individuals" to be implicated in crimes before proceeding. Low or mid-ranking individuals who are implicated in a mass atrocity crime could also trigger the court's gravity threshold. I do agree with the report that as to European nationals, the ICC likely would not need to prosecute, as their national courts no doubt would be "willing" and "able " to do so.

The SJAC report also expresses concern that such ICC foreign fighter prosecutions might only cover ISIS and not Assad regime crimes, and I agree that prosecution of ISIS crimes must not be at the cost of forgetting Assad regime crimes. Assad regime crimes could be prosecuted by the ICC currently only if individuals implicated in crimes hold dual nationality.

The SJAC report also discusses national criminal prosecutions of individuals *after* they commit atrocity crimes, but I will just add that ideally one apprehends individuals *before* they travel to Syria or Iraq. The US is using "preventative prosecutions" under a number of anti-terrorism related statutes; no doubt European countries are as well. These are extremely important.

The SJAC report also points out that if individuals return to the US or European (or other countries) after committing mass atrocity crimes in Iraq or Syria, there likely will be relevant war crimes, genocide, crimes against humanity, torture, terrorism, or other laws under which the individuals could be prosecuted, and a number of possible jurisdictional bases for prosecution. These are also currently feasible options.

Thus, I admit that ICC prosecutions of solely foreign fighters, or piecemeal foreign country domestic prosecutions of those returning to their home countries do not result in the kind of comprehensive prosecutions one would eventually want, but one has to start somewhere.

Third: from the absence of accountability mechanisms in Afghanistan, we learn that you do not wait for peace to be achieved before pursuing accountability.

The SJAC report touches upon this as well, stating "it is urgent to pursue some form of justice prior to the end of the conflict."

This is a much larger topic than I can cover briefly, but suffice it to say in broad overview that in the early years of the Karzai administration, the UN seemed to be persuaded that Afghanistan needed, first, peace, and only later, justice.

We now are much more convinced that these goals need to be pursued simultaneously.

In Afghanistan, of course, there is neither peace nor justice. Justice was given a back burner, and whenever initiatives seized momentum, they were thwarted, such as the work of the Afghan Human Rights Commission and an ambitious mapping project. Now, there is a domestic amnesty in Afghanistan as well.

[2] "Foreign Fighters in Iraq and Syria," Radio Free Europe Radio Liberty, updated on Jan. 29, 2015, available at: http://www.rferl.org/contentinfographics/foreign-fighters-syria-iraq-is-isis-isil-infographic/26584940.html.

Additionally, if one waits until all the crimes are over before attempting to pursue justice, then there is no possibility of deterrence. Starting accountability (and projecting that accountability is coming) are the only possibilities for deterring atrocity crimes.

Are ISIS fighters, or those in the Assad regime (who may already be implicated in significant crimes), rational actors who can be deterred (or deterred from committing further crimes)? I cannot answer this. It is indeed hard to prove that international justice causes deterrence (although there is some anecdotal evidence), but the international community can only use the tools that it has at its disposal.

Fourth: from the work of the Iraqi High Tribunal (and its missteps) - as well as the work of all the tribunals - we learn the importance of fair trials, and the corollary importance of the appearance of fairness.

The SJAC report also discusses the need for an impartial justice process.

There are many lessons to learn from the missteps (and some successes) of the Iraqi High Tribunal (IHT). That tribunal tried Iraqi nationals for crimes perpetrated during Saddam Hussein's regime. Saddam Hussein was executed after the verdict in the first trial (*Dujail*). The second trial (*Anfal*) covered crimes perpetrated during the 1988 genocide against the Kurds by the Iraqi military using chemical and conventional weapons during the 8-phased "Anfal campaign."

While the IHT had some accomplishments and achieved some level of justice in these trials: (i) there were shortcuts in due process; and (ii) the appeals were wholly political, with the appellate judgments entirely lacking in reasoning, yet affirming death penalties.

The appearance of fairness – also a critical component – was undermined: (i) when the Iraqi government had judges replaced during ongoing trials; (ii) when government officials made intemperate remarks about ongoing trials; and (iii) in the way the executions were conducted (and recorded). [3]

All of the work of the IHT took an initial downturn when the death penalty was incorporated into the IHT Statute. The death penalty existed under Iraq law, but when it became clear that the tribunal would be able to sentence to death, it caused (i) European forensic teams to stop their exhumation work; (ii) ICTY judges who were slated to train Iraq judges not to be sent; which (iii) meant that the only international assistance would come from the US (the Regime Crimes Liaison Office (RCLO)), and one Canadian national who assisted the defense teams. This was not the kind of internationalized approach one would like to see. It also gave the optics that the

[3] For further discussion of the Anfal trial, see, e.g., Jennifer Trahan, "A Critical Guide To The Iraqi High Tribunal's Anfal Judgment: Genocide Against The Kurds," 30 Mich. J. Int'l L. 305 (2009); Jennifer Trahan, "Remarks Regarding The Iraqi High Tribunal's 'Anfal' Trial: Speech Delivered at International Law Weekend," 15 ILSA J of Int'l & Comp. L 587 (2009); Jennifer Trahan, "Enemy of the State: The Trial & Execution of Saddam Hussein," book review, 18 Cornell J. of L & Pub. Policy 831 (2009).

US was in a position to control these trials; although I do not think that happened—if anything, at times, the RCLO seems to have been marginalized from the tribunal's work.

Thus, from the IHT, we can learn lessons about (i) the need for fair trials; (ii) the importance of the appearance of fair trials; and (iii) pragmatic difficulties that arose once the death penalty became an available punishment under the tribunal's statute. (One might also take issue with the death penalty on moral grounds.)

I will also add that, if there is to be a Syrian or Iraqi tribunal in the future, or a hybrid, one can anticipate Syrian and/or Iraqi interest in including the death penalty (which exists under both Syrian and Iraq law). That should be strenuously resisted. While it is important to have national ownership and buy-in for any justice process (after all, the victims are primarily Iraqi and Syrian), at least for any internationalized or semi-internationalized tribunal, one should draw a line at the death penalty, even if it represents national sentiment. The existence of the death penalty had a significant role (although not the only role) in undermining what the IHT tribunal otherwise could have accomplished.

Fifth: from the work of the Extraordinary Chambers in the Courts of Cambodia (ECCC), we can learn that "the perfect is the enemy of the good." That imperfect justice may be better than no justice.

Here, my remarks are again somewhat different from the conclusions in the SJAC report.

Again, this is a lengthier topic but I will note that negotiations for the ECCC were very lengthy and there was always concern that the resulting tribunal would be susceptible to manipulation by the Cambodian government.

To some extent this has come to pass, and the US's first War Crimes Ambassador, David Scheffer, has worked strenuously (with the ECCC international prosecutors) to try to keep cases 3 and 4 moving forward in the face of Cambodian opposition.

Yet, whatever justice the ECCC can bring to Khmer Rouge victims is significant. It may be imperfect (with only a few defendants in their 80s), and it is unclear if cases 3 and 4 will come to fruition, but the "perfect is the enemy of the good."

Had the international community insisted on a perfect ECCC, there likely would have been no accountability for the approximately 2 million victims of Khmer Rouge crimes.

Sixth: from the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), we can learn that in any situation of mass atrocity crimes, there will need to be a multi-tiered solution.

To adjudicate the crimes in both the former Yugoslavia and in Rwanda, multiple tiers of justice have been utilized.

To adjudicate crimes in the former Yugoslavia, the ICTY prosecuted primarily high-level perpetrators in The Hague, Netherlands. In Bosnia-Herzegovina, there was a second tier—a hybrid tribunal in Sarajevo. This was complemented by a third level of local "entity" level

prosecutions (in the Federation BiH, Republika Srpska, and the Brčko District). In Serbia, there is a specialized war crimes chamber in Belgrade. And, in Croatia, there are war crimes prosecutions in the district courts in the four largest cities.

In Rwanda as well, there have been three levels of justice to try the massive number of perpetrators of the genocide. The ICTR tried primarily high-level perpetrators in Arusha, Tanzania. Domestic courts in Rwanda tried mid-level perpetrators. And, "gacaca"—an existing domestic traditional "justice mechanism" that had previously only addressed much lower-level crimes—tried the remainder.

Thus, for any situation where atrocity crimes are as extensive as they are in Syria (and Iraq now as well), there will need to be a multi-tiered approach to accountability.

The ICC has limited capacity. In each situation country, the court issues only a handful of warrants. Even if there were a referral, or Iraqi or Syrian ratification, ICC prosecutions would not be sufficient to prosecute all the perpetrators.

Ideally there will be a hybrid or ad hoc tribunal as well. And, at the national level, Syrian and Iraqi courts will—when there is more stability in each country—need capacity building to eventually also be able to adjudicate war crimes. Even a hybrid or ad hoc tribunal cannot do all accountability.

Thus, one need not get too worried by competing proposals—and we need not waste time debating a hybrid or ICC approach. At the moment, we have neither, but ideally, there will need to be a multi-tiered solution. The solution, ultimately, as the SJAC report points out, also should eventually include other transitional justice tools, such as truth commissions, reparations, memorialization, vetting and security sector reforms.

I also want to point out that the contemporary tribunal with the greatest capacity to prosecute, to date, has been the ICTY. Unpopular as it is to mention ad hoc tribunals (primarily for reasons of cost), we should not always leap to discussion of hybrids, as it is the ICTY that issued 161 indictments. Other contemporary tribunal have achieved nothing like that volume of prosecutions. And, it is prosecutions on that volume that will be needed to address the crimes in Syria and Iraq.

Seventh: we can learn the importance of projecting that accountability is coming, if there is to be any deterrence.

Prior to a more recent round of elections in Kenya (subsequent to the ones at issue in the ICC's Kenya cases), the ICC Prosecutor visited Kenya. Her visit and statements while there may have helped ensure the country did not have another round of post-election violence.

Similarly, prior to 2013 elections in Guinea, the ICC Prosecutor traveled there and issued a statement that anyone who incites or commit violence could fall within the Court's jurisdiction and be prosecuted.

It is through these kinds of actions that one hopes that deterrence may be created.

It is important for: (i) the US (and other countries) to let it be known that "preventative prosecutions" are occurring; and (ii) if countries prosecute those who return from Iraq or Syria for mass atrocity crimes to project that as well.

I also wish the ICC had made clear that it was at least monitoring the situation of foreign fighters in Syria and Iraq. The Prosecutor, on April 8, 2015, stated that "the jurisdictional basis for opening a preliminary examination into this situation [foreign fighters as part of ISIS] is too narrow at this stage." I think she needed to at least put out a more robust message—that she was watching and continuing to assess the situation—if the ICC was to potentially create any deterrence.

Eighth: justice must not be bargained away at the negotiating table.

If there are eventual peace negotiations covering, as were attempted previously in Montreux, Switzerland, they must simply leave open the possibility for accountability to occur. Ideally, there would be a clear commitment to prosecutions. Second best, would be simply to ensure that future accountability is not foreclosed.

Ninth: finally, from the improbability of creating tribunals at all and the tremendous achievements made in this field, we need optimism to stay the course and aim high, for the best possible justice outcome.

When the UN Security Council first promulgated the ICTY Statute, it was unclear that there ever would be a working tribunal.

For years, it was unclear how Radovan Karadžić and Ratko Mladić (former President, and head of the military, respectively, of Republika Srpska) as well as other indictees would end up in The Hague. And yet they did.

Heading to Rome in the summer of 1998, states could easily have failed to resolve all the questions in their deeply bracketed text that would become the Rome Statute. Yet they did not fail.

When David Crane asked for an indictment of Charles Taylor—then President of Liberia—did he have any confidence Charles Taylor would be successfully apprehended and tried? Yet through sustained pressure, he was.

The SJAC report presents a number of reasons why hybrids or the ICC could not work—and here, while there are concerns—they also can be overcome. The SJAC report expresses concern that Syrian President Assad could remain at large; obviously, that is true for any indictee, but it is the responsibility of the international community to ensure that indictees are brought to justice. Yes, tribunals come at a high price, but doing nothing has a higher cost, in allowing cycles of violence to perpetuate, destroying whole populations, economies, and potentially requiring further rounds of peacekeeping operations.

When one has lofty goals such as creating a hybrid or ad hoc tribunal for crimes perpetrated in Syria (or Syria and Iraq), one must have optimism, figure out how to surmount impediments, and stay the course.

Conclusion

While prosecution is always second-best to preventing the crimes in the first place, the field of international justice has come too far for the horrific atrocity crimes being perpetrated in Syria and Iraq today not to warrant a robust response from the international community. Every state owes a responsibility to ensure this happens.