PISM | POLSKI INSTYTUT SPRAW MIĘDZYNARODOWYCH
THE POLISH INSTITUTE OF INTERNATIONAL AFFAIRS

POLICY PAPER

No. 31 (79), November 2013 © PISM

Awaiting Justice: Prospects for Prosecuting War Crimes in Syria

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In light of the current situation in Syria, and calls to hold to account those responsible for the atrocities allegedly committed during the conflict, a group of members of the American Congress suggested that the Security Council should create an ad hoc tribunal for Syria. A Blue Ribbon Panel of international criminal law experts presented a draft Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes, while some of the Security Council members suggested referring the situation in Syria to the International Criminal Court. Issues pertaining to establishing justice and restoring the rule of law in Syria will certainly be on the agenda for future peace talks. The question of working out a transitional justice strategy for the country is inevitable. Whether such a strategy should include a judicial accountability mechanism will certainly be considered.

The use of chemical weapons in the Syrian conflict has again brought forward the question of bringing to account persons responsible for these attacks, and for other atrocities committed with the use of conventional weapons. A UNHCHR report of September 2011 argued that confidential information as to specific perpetrators of atrocities in Syria is available, and may be presented in the event of future investigations and possible indictments by a "competent prosecutor."[1] The Independent Commission of Inquiry on the Syrian Arab Republic reports that all parties to the conflict are responsible for violations against civilians and persons not directly participating in hostilities, or violations concerning the conduct of hostilities.[2] The most recent estimates point to more than 100,000 victims of the conflict. Security Council Resolution 2118 referred to the need to hold to account those responsible for the use of chemical weapons. Earlier drafts of the resolution included a referral of the situation in Syria to the International Criminal Court (ICC). It is very likely that the matter will be debated further in the near future.

The primary responsibility to investigate and prosecute war crimes and crimes against humanity lies with states that have the duty to prosecute their nationals or members of their armed forces accused of committing such acts. However, in the aftermath of conflicts or dictatorships, the question of holding perpetrators to account becomes particularly complex. Ongoing peace-building and reconciliation endeavours, political considerations, lack of judicial capacity or simply the need to achieve stability will often be in conflict with accountability processes. States are often more willing to introduce alternative measures such as amnesties or truth commissions—mechanisms aimed at fostering social reconciliation

[1] Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic, A/HRC/18/53, 15 September 2011.
[2] Report of the independent international commission of inquiry on the Syrian Arab Republic A/HRC/24/46, 16 August 2013.

rather than pursuing individual perpetrators. All in all, one must keep in mind that accountability brought through a formal justice mechanism is only one of many transitional justice elements that, together, should form a comprehensive transition process.

What is on the Table?

Today's international criminal tribunals can be categorised into three groups: *ad hoc* tribunals created by UN SC resolutions (the International Criminal Tribunal for the Former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994)), hybrid tribunals,[3] which blend national and international justice systems, and the permanent International Criminal Court established by the 1998 Rome Statute, which began operating on 1 July 2002.

There seem to be two major factors, among many, which need to be carefully considered in determining which of the above avenues could offer the most prompt and adequate accountability model for possible prosecutions of the atrocities committed in Syria. First is the question of jurisdiction, that is, who can be tried, and under which laws. Second is the issue of the international community's cooperation and Syria's future support for the tribunal. An overview of the difficulties faced in these areas by the tribunals may provide more clarity as to whether calls for subjecting the situation in Syria to the jurisdiction of the ICC or forming a special tribunal for Syria are viable.

Theoretically, the ICC has the institutional and legal framework to try individuals accused of "global" crimes. The ICC was established through an international agreement, the Rome Statute, as a tribunal independent from the UN, and vested with the authority to prosecute individuals accused of crimes of aggression, genocide, crimes against humanity and war crimes. The Court may prosecute acts which occurred only after the Statue entered into force, that is, after 1 July 2002, and when states are "unwilling or unable to genuinely carry out investigations or prosecution" (the principle of complementarity). However, the Court can deal with crimes which have either been committed by a state-party national or on a state-party territory. On an exceptional basis, the ICC may also gain authority to prosecute a case when a non-state party concerned agrees to such a course, or when the UN Security Council, having determined that the situation represents a threat to international peace and security, refers the situation to the ICC acting under Chapter VII of the UN Charter.

Currently, 122 states are parties to the Rome Statute, but Syria is not among them. Therefore, the Court would be able to carry out investigations into the crimes allegedly committed throughout the conflict in Syria only if the latter accepts ICC's jurisdiction, or in the case of a Security Council referral. So far, out of eight situations currently before the Court, two were referred by the Security Council. These are the situation in Darfur, Sudan[4] and the situation in Libya.[5] Interestingly, both referrals exclude the possibility for the ICC to pursue nationals of non-member states. A possible referral of the situation in Syria would most likely repeat this caveat and attempt to restrict the ICC prosecutions to Syrian nationals or residents, thus leaving many acts allegedly committed by perpetrators coming from foreign countries beyond the reach of justice.[6] To this end, it is worth noting that, for example, Saudi Arabia, Lebanon or Turkey, whose nationals have been actively involved in the conflict, are not parties to the Statute. Clearly such limited jurisdiction would provide further grounds for accusations of politicisation of international justice and the Court itself.

Instead of referring the situation in Syria to the ICC, the Security Council might establish an *ad hoc* international court, following the model of International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The ICTY and the ICTR were tasked with

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[3] The Serious Crimes Panels in the District Court of Dili, East Timor (2000); the Panels in the Courts of Kosovo (2001); The Special Court for Sierra Leone (2002); The War Crimes Chamber of the Court of Bosnia-Herzegovina (2005); The Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (2006), The Special Tribunal for Lebanon (2009), located in Leidschendam, the Netherlands.

[4] Resolution 1593 (2005).

[5] Resolution 1970 (2011).

[6] Whether such a limitation would be treated as binding for the prosecutor is a critical question. However, it has not so far been raised in practice by the OTP.

prosecuting individuals accused of acts of genocide, crimes against humanity, serious violations of law and customs of war, and grave breaches of the Geneva Conventions committed in the former Yugoslavia since 1991, or in the case of the ICTR, in Rwanda or its neighbouring states in relation to the 1994 civil war. ICTY and ICTR were established by the Security Council when the conflicts were still unsettled and when there was no will or national judicial capacity to conduct national trials. Contrary to the ICC, the *ad hocs*, enjoyed primacy over national courts. This prerogative turned out to be crucial when these newly established international courts faced difficulties in tracing and apprehending suspects due to lack of international support and state cooperation.

Although the ICTY and the ICTR were the first international initiatives after the Nuremberg and Tokyo trials to hold individuals accountable, and played a groundbreaking role in the development of other international tribunals, they are soon to be entirely replaced by the International Mechanism for International Criminal Tribunals. This is a small, temporary body established specifically to maintain the legacy of the two institutions and to carry out "jurisdiction, rights and obligations and essential functions" of the ICTY and the ICTR once all current trials before the tribunals are completed.[7] Given that the two *ad hoc* tribunals are now being phased out, it is questionable whether the Security Council would opt for establishing a new *ad hoc* tribunal for Syria.

The *ad hocs* have been criticised for being slow, costly and detached from the realities with which they were concerned. In fact, these are some of the factors which led the international community to look for an antidote in "hybrid" tribunals, which address specific situations and which are created through voluntary agreements concluded between the state in question and the UN.

Depending on the context, the jurisdiction of hybrid tribunals may be very narrow, as in the case of the Special Tribunal for Lebanon (STL), which pertains to one attack (the assassination of the Lebanese prime minister Rafiq Hariri in 2005). Alternatively, they may cover the time span of a conflict, as with the Special Court for Sierra Leone (SCSL), or they could stretch back decades, as is the case with the Extraordinary Chambers at the Courts of Cambodia (ECCC). However, their particular feature is that they combine international and national elements. These institutions were thought to deliver justice in a manner more responsive to the realities on the ground, through a process which is more proximate to victims' communities, thus increasing the level of local ownership of the process. Generally, hybrid tribunals apply both international and national law. They imply full participation of nationals of the state in question, along with a degree of international representation. Contrary to the ICC and the *ad hocs* which are based outside the territory of the state concerned (The Hague, and for ICTR, Arusha, Tanzania), hybrid tribunals tend to be based in the country with which they are concerned (the SCSL in Sierra Leone, ECCC in Cambodia). Of course, security issues sometimes make this impossible, i.e. the STL is located in Leidschendam in the Netherlands, whereas the SCSL trial of the former president of Liberia, Charles Taylor, took place first at the ICC and then at the STL premises in The Hague. As with the *ad hocs*, hybrid tribunals may request a national court defer to them at any stage of the procedure, which gives them supremacy over national courts when it comes to trying war crimes and crimes against humanity.

Funding is another crucial factor where effectiveness of international tribunals is concerned. Looking at the above examples, there seems to be no fully satisfactory solution in this regard. Hybrids are funded partly from voluntary contributions of the UN Member States and international organisations (the SCSL is funded entirely in this manner), and in part by governments of the states concerned (Lebanon covers 49% of the STL's budget, whereas Cambodia has covered about 4% of the ECCC's budget to date). The ICC and the *ad hocs*, on the other hand, are funded by the Assembly of State Parties or the UN respectively. Of course, this in no way translates as unlimited and secure operational capacity. In fact, previous Security Council referrals to the ICC put the entire financial burden of the investigations and prosecution on the Court, without providing any additional external source of funding. At this juncture, the ICC, which suffers from

[7] UNSC Resolution 1966.

continuous budgetary constraints, would simply lack the resources to conduct complex investigations in a country torn by a long lasting conflict with major security concerns.[8]

A Potential Tribunal for Syria—Key Challenges

This brief overview seems to suggest that the establishment of a special tribunal for Syria would offer an opportunity to create the mechanism best suited to the specificities of the situation. This links back to the issue of the authority with which such a special tribunal would be vested. Whom and for which acts should it prosecute? How, by whom and where should it be done? These are the basic questions that an agreement between future Syrian authorities and the UN, as well as the tribunal's statue, would have to specify.

In order to address atrocities committed in the conflict in Syria fairly and adequately, a tribunal charged with investigating them should have a clearly specified scope of activities. Preferably, it should have the power to prosecute individuals accused of bearing the greatest responsibility for the atrocities in question, including those who orchestrated atrocities from outside Syria. However, such a broad jurisdiction may be impossible due to internal political constrains and Syria's relations with its neighbours. In this context, should a tribunal address the crimes orchestrated by the Assad regime in general, or be limited to the events following March 2011? It is likely that investigating and prosecuting the atrocities from the entire period of the Assad regime, alongside those resulting from war crimes and crimes against humanity committed during the recent conflict, would affect the impartiality of the proceedings and cause procedural and technical difficulties.

Furthermore, taking into account the use of chemical weapons, a question arises as to the legal qualification of possible charges relating to these acts. A chemical attack could be prosecuted as a crime against humanity or as part of the war crime of intentionally directing attacks against a civilian population. Then however, the use of chemical weapons would not be a charge as such, but would be treated as the means by which the alleged crimes were committed. Given the international community's condemnation of the use of chemical weapons in Syria and the specific language of Security Council resolution 2118, to hold to account those responsible for the chemical attacks specifically, a charge to that effect would be desirable. The Rome Statute lists crimes of employing poison or poisoned weapons (article 8(2)(b)(xvii)) or of employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices (article 8(2)(b)(xviii)), but does not explicitly penalise the use of chemical weapons.[9] Arguably, one could however imply such a charge from its provisions pertaining to the employment of weapons of mass destruction. In the event that a Syrian special tribunal is created, its statute, retrospective in character, would probably refer to relevant international customary law, so as to address the atrocities that were specific to the conflict in a most accurate manner.[10]

Considering various options for trying war crimes at international courts, one must look at their political capacity and at the diplomatic constraints that these institutions face—in other words, the crucial issue of cooperation between the international courts/tribunals and the state in question. In post-conflict or post-dictatorship situations it is likely that attitudes towards internationally orchestrated justice mechanisms will change rapidly depending on shifts within local political leadership. This raises the question of state authority's will to cooperate with a tribunal, be it the ICC, an *ad hoc* or a hybrid tribunal. This problem can be well illustrated by the situation in Libya, where the National Transitional Council was initially willing to

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[8] Report of the International Criminal Court on its activities for 2012/13, to the UN General Assembly, 13 August 2013, A/68/314.

[9] The Rome Statute also lists war crimes of employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to the Statute (article 8(2)(b)(xx). However the annex mentioned still does not exist.

[10] It is noteworthy that, according to the ICTY Appeals Chamber in the *Tadić* case, international law prohibited the use of chemical weapons in internal armed conflicts and suggested that this prohibition was also present under international criminal law. See *Prosecutor v. Dusko Tadić* (IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1994, paras. 119–127.

cooperate with the ICC in relation to the arrest warrants issued by the ICC for Abdulah Al-Senussi and Saif al-Islam Gaddafi. Subsequently, the new government refused to surrender both of the accused and opted instead to try the two men before national courts. Similar moves are a common feature before international courts, the ICC in particular due to its complementary nature. Such challenges brought by governments reflect the lack of their consent for reckoning with the alleged crimes through international trials.

Establishment of a special tribunal for Syria might also face serious difficulties in this regard. At this point, it is even questionable whether it is possible that a political agreement allowing the tribunal to be set up and to operate is within reach. Even in case a transitional government were formed and the political will to create a special tribunal existed, given the multitude of political factions involved in the conflict, it would be very likely that internal and external power struggles would represent serious obstacles to expeditious and fair justice via such a tribunal. Although it is difficult to draw a parallel between the current situation in Syria and the situation in Lebanon after the Hariri assassination, one can point to the STL experience. The Court's investigations led eventually to the indictment of six Hezbollah supporters, a move which generated animosity in Lebanon and internationally. This experience, one of many similar incidents, shows that efforts to bring to account those responsible but who represent different political groups might cause major destabilisation and fuel security risks. In the case of Syria, where the atrocities were committed by all parties engaged in hostilities, and where the ethnic divisions are inherently embedded in the country's culture and history, there is high risk of attempts to abuse trials for political purposes, i.e. for eliminating political opposition. Particular care must be taken to avoid this, otherwise, such accountability processes could only hinder or even jeopardise the transition process.

Regarding the possibility to bring to account high ranking state officials, including former heads of states such as Bashar al-Assad, the possibility to try state officials is now widely recognised in respect of international trials.[11] Pursuing incumbent heads of states, however, has become a particular feature of the ICC. Apart from the Sudanese president al-Bashir, who remains at large, the ICC is currently prosecuting the sitting president of Kenya, Uhuru Kenyatta and his deputy, William Samoei Ruto. In the context of Syria this would be an issue if Assad remained in his position after the conflict ceased. Although the Kenya cases are not directly related to this analysis, these trials nevertheless expose important pressures pertaining to state cooperation and the general tension between the fight against impunity and the fight against terrorism, and may trigger novel solutions. Overall, the ICC's performance in these cases will certainly have a bearing on its legitimacy as an international judicial institution and, consequently, also on international criminal trials in general.

Finally, all international courts are largely dependent on state assistance in terms of arrests, surrender, collection and preservation of evidence, protection of witnesses and execution of sentences. Lack of consistent cooperation hinders the ability of a court to exercise its mandate as an international yet independent judicial body. This is aggravated by the fact that international tribunals have no independent enforcement services at their disposal. Investigators, and also others such as protection officers or court sections that communicate with victim communities, often need to conduct their tasks in remote areas in the immediate aftermath of the conflict. The arrest of Slobodan Milosevic, the pursuit of Ante Gotovina, Radovan Karadzic, and al-Bashir, the quest for access to certain evidence in possession of respective governments, and the refusal of Libyan authorities to comply with the ICC order to hand over Abdullah Al-Senussi and Saif al-Islam Gaddafi to the Court—these are only a few examples of how lack of cooperation frustrates the efforts of international courts and tribunals to fulfil their mandates in a timely and just manner.

[11] Jean Kambanda, former prime minister of Rwanda, was convicted of international crimes before the International Tribunal for Rwanda; Slobodan Milosevic was prosecuted before the International Criminal Tribunal for the Former Yugoslavia (ICTY), for war crimes and crimes against humanity; Charles Taylor, the former president of Liberia, was convicted by the SCSL for war crimes and crimes against humanity, committed during the conflict in Sierra Leone. See also, Rome Statute, Article 27.

Inevitably, international courts must engage in some form of diplomacy and bargaining with states and international organisations in order to fulfil their mandate justly and efficiently. This has and will lead to accusations of bias or a selective, politically motivated approach to justice. There is a delicate balance to be struck here. The capacity of international law to respond to the atrocities committed in Syria through judicial means is dependent on political will and state cooperation to that effect.

Future accountability process in Syria will require strong international and internal support. The latter should stem from the belief and understanding that the accountability process is an indispensable element for building peace, reconciliation and the rule of law. Such a judicial mechanism will function when peace and some level of stability are re-established and the country is governed by a functioning authority. The same is true for funding. The tribunal for Syria would be entirely dependent on the international community's good will. Even if future Syrian authorities are in a position to co-fund such a tribunal, it must in any case be part-financed by international donors in order to eliminate the possibility that the tribunal is fully dependent on the local authorities.

The support of the major players involved in the conflict, namely, Russia, the United States, Iran, Saudi Arabia, Lebanon and Turkey, and consistent backing of the Arab League, the EU and the Security Council, will be crucial for any tribunal instituted to deal with the atrocities committed in Syria in a fair and efficient manner.

Conclusions

At this point in time, while fostering efforts to convene the Geneva II peace talks, hopes of establishing an accountability mechanism for Syria might appear premature. However, as much as Syria needs a transition government, it also needs a carefully designed and consulted transitional justice strategy. Considering the gravity of some of the crimes committed throughout the conflict, it is very likely that there will be a demand to employ an accountability process as part of this strategy.

Security Council referral of the situation in Syria to the ICC would require either a yes or an abstention vote from Russia, China and the U.S., none of which are party to the Rome Statute. The lack of consensus within the SC on addressing the atrocities committed in Syria, chemical weapons being the only exception so far, demonstrates that this is rather unfeasible. Then, the Court's workload and its never-ending budgetary constraints are merely a minor factor against the question of the ICC's readiness to take up such a politically complex case.

The creation of a hybrid tribunal may contribute to further fragmentation of international justice and generate unnecessary costs. On the other hand, it would allow a mechanism responsive to the particularities of the Syrian conflict and political complexities to be shaped. Well managed, it may have the potential to guarantee greater local ownership of the future judicial process conducted under international supervision. Although the establishment of a special tribunal is probably the most feasible proposal, it will be prone to political hindrances. The tribunal, just as any other institution of the kind, will not function without adequate support and cooperation from international and national players.

Poland could take the opportunity to foster the dialogue on transitional policies by sharing its own experience in this regard, negotiating a transitional authority in particular. Moreover, it could advocate a prompt and thorough consultation process involving all parties to the conflict, regarding the future transitional justice strategy for Syria.