

The Long Road towards Justice in Syria: Challenges and Perspectives on War Crimes

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Introduction

This paper will attempt to analyze the prospects and pitfalls of bringing perpetrators to account in Syria. Considering the abundance of evidence that corroborates, beyond doubt, the culprit's atrocities, there seems a hope for prosecution either by employing the universal jurisdiction principles, or through the establishment of ad hoc tribunals. In addition, a referral to the ICC and domestic Syrian courts, albeit far-fetched, are possible avenues not only to render justice but also to restore victim's faith on international law and institutions. The pervasive climate of impunity and the grave nature of the abuse warrant such effort to bring the Assad regime to justice. Perhaps the paper acknowledges the limitations associated with the International Laws of War and other statutory (treaty based) conventions that will come to play.

With this goal in mind, the paper is divided into three parts. The first section examines the nature and various dimensions of the war. It is, in short, a concise introduction on the background of the conflict and a search for "taxonomy" under the International Law of Armed Conflict (hereafter LOAC), if there is any. In part two a discussion on the crisis and mayhem will be made in light of war crimes. By making reference to the fundamental elements under the Rome Statute, this section will investigate war crimes that are committed in Syria. The last section will put in perspective the promises and pitfalls associated with holding perpetrators accountable to their actions. Relevant issues of proof including but not limited to elements, instrumentalities and evidences of the offences, their veracity and accessibility is briefly appraised. Extensive discussion is also made on the prospects for accountability for the crimes, the potential mechanisms available, together with the challenges associated with this "higher road" approach to justice.

Background and the Nature of the Conflict

In 2010 a Tunisian university graduate, Mohammed Bouazizi, who had tried to make a living from a vegetable booth, set himself on fire out of a feeling of humiliation caused by the state authorities, frustration with mismanagement and corruption, and a sheer lack of prospects [1]. Since then, the fury of the people with their unbending regimes has been unleashed and has incited Arabs to challenge their autocratic regime in one country after the other.

Syria is not an exception to this massive movement which widely known as the "Arab Spring." Demonstrations started in the provincial town of Dara'a in March 2011 and have since spread to all parts of the country. Bashar al- Assad has responded with massive force by the police, the security forces and the army. In the early days of the conflict, army defectors had loosely organized the Free Syrian Army and many civilian Syrians took up arms to join the opposition [2]. Divisions between secular and religious fighters, and between ethnic groups, continue to complicate the politics of the conflict. So far, a little more than 11 million people are affected by the crisis. The casualties of this war have been massive. By now, about 450,000 Syrians were estimated to have been killed; 4.8 million fled Syria, 6.3 million were internally displaced within the country, and 13.5 million required humanitarian

assistance [3]. Even if the Assad regime (and its paramilitary allies such as the Shabiha) are the primary perpetrators, the rebel forces (such as the Free Syrian Army and the Kurdish Militants of Rojava), the Al Nusra and the Islamic State are equally responsible for the mass killings, rapes, disappearances and recruiting child soldiers [4].

Both from theoretical as well as practical standpoint, the war in Syria hardly fit into the major governing rules of the International Laws of War (LOAC). Albeit divergence of opinions, the conflict can generally be classified as non-international [5]. This is not without significant ramifications. Other than the Geneva Convention Common Article 3, the majority of the laws of Armed Conflict are inapplicable. Nonetheless, as far as the core principles goes, civilians must be spared and medical facilities protected, regardless of the nature of the conflict. As many of the customary rules of LOAC are applicable to non-international armed conflicts, warring parties must observe key principles of precaution and proportionality and distinguish between combatants and civilians, and between military and civilian infrastructure.

War Crime Probe in Syria

A comprehensive definition of War Crimes can be found in the Rome Statute. Even if the Statute's broad definition is designed in the context of international armed conflict, one of the major accomplishment of the Rome Statute is its inclusion of war crimes committed during non-international armed conflicts. Based on Common Article 3 and customary law, the statute includes a prohibition of acts such as violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture [6]. In its prohibited weapons section, the Statute unequivocally bans the use of poison or poisoned weapons, asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, and the use of certain types of bullets [7]. Such an express but otherwise limited provision on a selected group of weapons reflects greater reliance on customary law. Regrettably, the Statute opted for the non-inclusion of provisions on the use of prohibited weapons regarding non-international armed conflicts. For many commentators, this is in contravention with what has already been settled by the Appellate Chamber of the ICTY in the Tadic case that customary law rules prohibiting the use of specific weapons are equally applicable to non-international armed conflicts [8].

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Even if no war crimes prosecution has yet been brought against individuals, the death toll due to the siege and bombing in Aleppo and elsewhere in Syria constituted “crimes of historic proportions” that have caused heavy civilian casualties amounting to war crimes. So far as there is evidence of willful killing and targeting of civilian population in a greater scale, the threshold for initiating prosecution for war crimes is satisfied. In addition to civilian killings, abuses are being committed in detention centers and prisons in various parts of the country [9].

Evidence equivalent to Nuremberg?

A successful investigation and prosecution of perpetrators can only be possible with a complete record and storage of evidence. In this regard, international NGO’s and other investigators so far smuggled more than 600,000 pages of official documents out of Syria [10]. Foreign governments also trained moderate oppositions inside Syria to gather and document evidences. Among others, the evidences comprised the records of a secret committee of security chiefs, the documents of the Central Cell placed in charge of crushing the revolt signed and approved by Assad and his major military chairs. According to a recent report of the New York Times, a Syrian police photographer fled with pictures of more than 6,000 dead at the hands of the state, many of them tortured [11]. Stephen Rapp, the former chief prosecutor of the United Nations court handling the Rwandan genocide, told the New Yorker: “When the day of justice arrives, we’ll have much better evidence than we’ve had anywhere since Nuremberg [12].”

Accountability for war crimes: who should be prosecuted?

Central to the idea of war crimes is that an individual can be held criminally responsible for carrying out an unlawful act or, significantly, for ordering it. The charge would need to establish details such as what the target of an attack was, what information the commander had about any risk to civilians, what precautions were taken to prevent harm to civilians, and whether the risk of harm to civilians was disproportionate even if it was a legitimate military target and many other similar issues. Based on those parameters, the following individuals and groups would satisfy the threshold and be held responsible for war crimes in Syria.

a. The Assad regime and its officials: Assad and his high-ranking officials in Ba’ath party are carrying out systematic killings, torture and abuse in detention centers and elsewhere. Based on the various evidences smuggled out of Syria and official reports of the UN, atrocities including extra-judicial killings, mass arrests, torture, rape, forcible displacement, abductions, forced disappearances, pillaging and destruction of property, degrading or inhumane treatment are intensified [13]. By the order of the regime, government forces launched continual attacks using barrel bombs and other imprecise explosive weapons on civilian populated areas [14]. On August 21, 2013 that hundreds of people were killed in a chemical attack carried out in the East Ghouta district of Damascus by Assad forces [15]. The then UN Secretary-General, Ban Ki-moon, stated that 85 percent of the samples contained sarin, the use of which is a war crime [16]. More than 80 people were killed in a chemical attack on the rebel-held town of Khan Sheikhoun in north-western Syria on 4 April, 2017 [17]. The commission of inquiry formed by the UN is working on more than 20 reports accusing Assad and his government for war crime. Further the commission compiled a confidential list of suspects on all sides, which is kept in a safe [18].

b. The rebels: Groups who are engaged in armed struggle against the Syrian regime are obliged to obey humanitarian law. Anti-Government armed groups, who conducted sporadic shelling of pro-

government villages in *Idlib* and Damascus in particular, are guilty of war crimes.

c. **The Islamic state (DAISH):** DAISH is responsible for mass executions, sexual slavery, torture, rape and mutilation in Al-Hasakah, Deir Al-Zour, Al-Raqqa, Aleppo and Idlib, in northern Syria. DAISH has continued to commit war crimes on a “massive scale” in Syria.

The Road towards Accountability: Perspectives and Challenges

Other than a handful of war crime investigations and prosecutions in Europe, most of the perpetrators are at large. No cases have gone to the International Criminal Court either. Nonetheless, considering the abundance of evidence and alternative forums, there still is a hope to bring the culprits to justice. In the following, I will discuss these options, both their advantages and pitfalls.

The international criminal court in The Hague

Syria is not member to the Rome Statute, as a result the court’s chief prosecutor cannot initiate investigation on her own. The UN Security Council could refer a case to the court, but Russia has repeatedly used the veto option to shield Syria from international condemnation. And even if the Council were to act, President Bashar al-Assad and his top officials are battered down in Damascus, making their arrests difficult. Saddled with a fading legitimacy, political/ideological difference, and jurisdictional challenges, prosecution by the ICC is near to impossible.

Universal jurisdiction: forums in a “third” state

After the arrest of Pinochet by the British officials on behalf of a Spanish judge, there is a glimmer of hope in prosecuting perpetrators of heinous war crimes in a third country forum. This development is getting momentum following the success of some European prosecutors to open criminal charge against top Syrian officials on behalf of the refugee victims (so far, Germany, Spain, and France can be mentioned). In fact, universal jurisdiction is the best legal tool for doing ex-post facto justice with perpetrators in some countries such as Germany who has access to evidences and legal tools at their disposal to carry out investigations. Universal jurisdiction, either in its pure or mitigated form, provides an antidote to the impunity that accomplished despots are likely to enjoy in the countries that endured their crimes. Such optimism is partly based on the theory that if the Assad regime finally collapsed, perpetrators may flee Syria to countries who are parties to the Geneva Convention and the Convention against Torture.

Detractors, on the other hand, argue that such course ignore the processes of transitional justice aimed at rehabilitation and reconciliation within societies that have suffered from atrocities. Others also doubt the willingness and ability of most countries to engage in such an expensive endeavor. The international law principle of diplomatic immunity and states political considerations (not to meddle with Syria’s internal affairs) will added to the difficulties in pursuing prosecution in third country forums against high level officials such as Bashir Al Assad.

The national courts of Syria: imperfect option?

Despite the enthusiasm that justice will be done when the conflict is resolved and Syrian society reconstructs itself, history tells a different tale. Dictatorial regimes elsewhere are unwilling and unable to come to terms with the past because domestic justice is misled by the practice of amnesties or the state’s legal institutions are paralyzed and cannot be reliable. Syria is not an exception to this caveat. Post-

conflict Syria's willingness and ability to pursue criminal procedures against perpetrators is unlikely to succeed mainly because judicial independence and constitutionalism are not entrenched in the country's political history and the obvious challenges in states emerging from conflict, in which infrastructure and resources have been destroyed or are unavailable.

The case for "Syrian extraordinary tribunal"

Albeit controversies, Ad hoc International Tribunals are considered as alternative forums to deter future war crimes, to bring about justice, and to contribute to the restoration and maintenance of peace. Back in 2013, a panel of former international tribunal chief prosecutors and leading experts has prepared a "Draft Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes." The initiation, which looked like a defunct proposal, has now gathered renewed interest within the UN. A Commission of Inquiry is organized to lead investigation, analyzing information, and to build criminal cases before the trail goes cold. Even if there is no clear plan as to the nature of the Tribunal, the Commission is tasked in building a case for trial.

A hybrid court, that include a mix of domestic and international prosecutors and judges will cure the inherent defects of universal jurisdiction, the ICC and domestic courts. First, it is only through such "neutral" forum that trial of all actors is likely. And, its domestic cum international personality will help to galvanize legitimacy and support from the international community. In addition, an ad-hoc tribunal could also be based near the region, facilitating access of witnesses, documentation and so on. Iraq, Jordan and Turkey will be ideal places to host the Tribunal. With the help of the Independent International Commission of Inquiry on Syria, which has since 2011 been documenting crimes committed by the regime, the rebels, the Jihadist groups and international forces, there is a much higher rate for success. Among others, as we have seen from the ICTY and ICTR, cost is the main concern in going forward for ad-hoc tribunals.

Transitional justice: The longer view to reinstate trust in Syria

It is a misnomer to suggest that accountability refers solely to criminal justice. Instead, Transitional justice is part of vindicating rights that have been massively abused and restoring trust in institutions that have failed citizens. It is my opinion that institutions such as truth commissions, reparations, and reform measures should not be understood as alternatives to or replacements for criminal justice measures, but rather be part of the reconstruction process in post-war Syria.

Conclusion

This paper focuses on establishing the architecture for accountability and international justice in war-torn Syria. It is the opinion of this writer that despite the challenges, there is a hope to abolish the reign of criminal impunity in Syria. By applying either of the options (forums) discussed herewith, it is possible that the slow wheels of justice will finally be put in motion.

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