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POLICY BRIEF

Accountability for International Crimes Committed in Syria

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Abstract: *Several war crimes, crimes against humanity, and even acts of genocide have been committed in Syria since 2011. While some States have undertaken unilateral military actions to deter the commission of further crimes, this Policy Brief proposes that States exercise pure universal jurisdiction over international crimes committed in Syria, and gather evidence that could be used for future trials in Syria, in a third State, or before an international court.*

Introduction

The conflict in Syria has been marked by atrocities committed systematically or on a large scale by all warring sides. In 2016, the Independent and International Commission of Inquiry on the Syrian Arab Republic (COI) found that thousands of persons have been subjected to war crimes, as well as to crimes against humanity.¹ The COI also found that the Islamic State in Iraq and the Levant (ISIL) has committed the crime of genocide against the Yazidi population.² Russia has however used its veto power to block most UN Security Council (UNSC) resolutions condemning widespread or systematic violations of human rights or calls for accountability for crimes committed by the Syrian forces and its allies. In this context of disagreement among the major powers, it is no surprise that the UNSC has also been unable to adopt a resolution authorizing the use of force in Syria for the restoration of international peace and security.

Nonetheless, the range of atrocity crimes committed in Syria has been accompanied by a proliferation of foreign interventions – some of which have violated international law. The use of chemical weapons against the civilian population, in particular, has prompted the US to conduct military strikes against Syrian forces in 2017 and 2018 - the latter operation was joined by France and the United Kingdom. While some of the justifications used for by-passing the UN Charter system in these cases were framed under the umbrella of humanitarian intervention, part of the public rationale also indicates that military force was employed for the specific purpose of deterring the Syrian regime from continuing its use of chemical weapons against the civilian population.³ In short, the declared purpose combined the protection of civilian populations and punishment for the use of prohibited weapons.⁴

States seeking to lawfully deter the commission of international crimes in Syria can and should continue to rely on international criminal justice.⁵ While a draft resolution tabled before the UNSC to refer the situation in Syria to the ICC was vetoed by Russia and China in May 2014,

¹ The Commission was established on 23 August 2011 by the Human Rights Council to investigate alleged violations of international human rights law since March 2011.

² UN Doc. A/HRC/32/CRP.2, 15 June 2016. The Yazidis are from the Sinjar region of Iraq close to the Syrian border. The COI found that ISIS forcibly transferred thousands of Yazidi women and children into Syria, where further genocidal acts were perpetrated.

³ See e.g. US Representative, Remarks at the UN Security Council emergency session, 14 April 2018 (“We acted to deter the future use of chemical weapons [...]”)

⁴ See also Charli Carpenter, Responsibility to Protect - Or to Punish, Foreign Affairs (29 August 2013).

⁵ Carsten Stahn, ‘Syria and the Semantics of Intervention, Aggression and Punishment’, 11 Journal of International Criminal Justice 955, 970 (2013).

the UN General Assembly (UNGA) entrusted States to combine their domestic universal criminal jurisdiction to prevent further atrocity crimes. Such a step would furthermore ensure that an appropriate measure of justice could eventually be provided for the international crimes committed in Syria.

1. The International, Impartial and Independent Mechanism

In light of the gridlock at the UNSC, the UNGA decided to create, in December 2016, ‘the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011’ (IIIM).⁶ The IIIM has been established mainly ‘to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses’.⁷ It cannot prosecute perpetrators of international crimes committed in Syria, but can facilitate such prosecutions ‘in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes’.⁸ With regards to the prospects of an international court or tribunal with jurisdiction over the situation in Syria, international legal scholar Alex Whiting observes that the IIIM ‘is a bridge to a future moment when the conditions and political will exist to provide for accountability in Syria’.⁹ For the moment, it is essential that all able and willing national domestic jurisdictions assist the IIIM in collecting information and evidences of crimes, and, most importantly, exercise their existing jurisdiction over genocide, crimes against humanity and war crimes.

2. Domestic investigations and prosecutions

By creating the IIIM, the UNGA sanctioned domestic forms of international criminal justice over the situation in Syria. As the UN Secretary General noted, ‘the primary burden rests with the Syrian Arab Republic and other States having jurisdiction to investigate, promptly, thoroughly, independently and impartially, any allegation’ of international crimes committed in Syria.¹⁰ The COI however notes that there is no evidence at the current stage that the Syrian judiciary is making a genuine and credible effort to investigate and prosecute the international crimes committed on its territory.¹¹

⁶ UN Doc. A/71/L.48, 21 December 2016.

⁷ GA RES. 71/248, par. 4.

⁸ Ibid.

⁹ Alex Whiting, ‘An Investigation Mechanism for Syria : The General Assembly Steps into the Breach’ 15 *Journal of International Criminal Justice* 231, 236 (2017).

¹⁰ Report of the Secretary-General, Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, UN Doc. A/71/755, 19 January 2017, par. 4 (‘Report of the SG’).

¹¹ UN Doc. A/HRC/28/69, par. 103.

Given that Syrian national courts are not currently an effective mechanism through which to pursue justice, the UNGA resolution calls upon other States to exercise universal jurisdiction over crimes under international law committed in Syria.¹² Genocide, crimes against humanity, and war crimes are largely recognized as subject to universal jurisdiction,¹³ that is, a basis on which States can exercise criminal jurisdiction over certain offences despite the lack of a territorial or nationality nexus with the offence.

To date, most prosecutions relating to the situation in Syria have not been carried out under the principle of universal jurisdiction. Instead, prosecutions relating to the situation in Syria have generally been undertaken when the alleged perpetrator was a national of the forum State (the 'active nationality principle') or when the victims were nationals of the forum State (the 'passive nationality principle').¹⁴ These extraterritorial jurisdictional bases can certainly reach Syrian territory. The active nationality principle, for instance, has been used for the prosecution of low-level foreign fighters returning to Europe from ISIL. The passive nationality principle has been invoked to capture the conduct of high-level perpetrators, as demonstrated by the recent arrest warrants issued by France against three Syrian High Commanders for the enforced disappearance of two dual Syrian-French nationals.¹⁵

Two forms of universal jurisdiction are currently asserted by States: conditional and pure universal jurisdiction. The distinction between them reflects two different roles States are ready to assume in the universal jurisdiction regime.¹⁶ Conditional universal jurisdiction has been qualified as a 'no-safe-haven' approach, whereby States resort to universal jurisdiction to impede perpetrators of international crimes of finding refuge in their territory.¹⁷ States asserting pure universal jurisdiction, by contrast, take a 'global enforcer approach', by assuming a role in preventing and punishing international crimes committed anywhere in the world.¹⁸ The legislation of States such as France, Spain, Sweden, and the United Kingdom allows for a conditional form of universal jurisdiction, thus requiring the presence of suspects in the forum State in order for the domestic courts to exercise universal jurisdiction. Germany and Norway, on the other hand, allow for pure universal jurisdiction, so that the suspect's presence in their territory is not required.¹⁹ States seeking to substantively contribute to the accountability process for the international crimes committed in Syria should take steps to enable their domestic courts to assert pure universal jurisdiction.

¹² Wolfgang Kaleck and Patrick Kroger, 'Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?' 16 *Journal of International Criminal Justice* 165, 170 (2018).

¹³ To the extent that their definition does not go beyond the customary definition, they are subject to universal jurisdiction.

¹⁴ By forum State, it is meant the State where the criminal proceedings are taking place.

¹⁵ Amnesty International, France: Arrest warrants for Syrian officials an important step towards justice, 5 November 2018, <https://www.amnesty.org/en/latest/news/2018/11/france-arrest-warrants-for-syrian-officials-an-important-step-towards-justice/>.

¹⁶ Maximo Langer, 'Universal Jurisdiction is Not Disappearing : The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction', 13 *Journal of International Criminal Justice* 245 (2015).

¹⁷ *Ibid.*, at 247.

¹⁸ *Ibid.*

¹⁹ In both States prosecutors are entitled to a broad discretion in deciding whether to investigate and prosecute a suspect not present in the territory.

It is worth noting that Germany - probably the State that currently best symbolizes the 'global enforcer approach' - allows the executive branch to intervene with respect to case selection. This strategy is highly significant, given that it asserts that international crimes occurring in the territory of a state are, by their very nature, a matter of international concern. Yet, some situations which feature systematic and widespread human rights violations are often accompanied by disagreement as to whether it warrants international intervention in the State's domestic jurisdiction. Therefore, in order to avoid generating a total destabilization of international relations, States should concentrate their use of universal jurisdiction over situations where there is broad agreement that the most serious international crimes have been committed.²⁰ The UNGA decision to establish the IIIM clearly reveals that there is such agreement over the situation in Syria.

The decision to adopt a 'global enforcer' instead of a 'no-safe-haven' approach can have an impact on whether the investigations will a priori focus on individuals or on crimes. In particular, if the use of universal jurisdiction is restricted to cases where the accused is a resident of the forum State, the investigations will most likely focus strictly on this individual. By contrast, States that have a law enabling them to exercise universal jurisdiction - without the need to establish links with the forum States - can more easily adopt a broader prosecutorial strategy.²¹ German prosecutors, for instance, have launched 'structural investigations', where the gathering of evidence is not targeted at specific suspects but at specific *structures*, within which international crimes have been allegedly committed.²² Such investigations are therefore not dependent on an actual trial but aimed at future criminal proceedings before German or other courts.

Obviously, no State has the capacity to investigate all situations where serious international crimes are committed. Structural investigations are informed (and triggered) by the availability of evidence in the forum State, particularly by witness testimonies and the increasing work of civil society organizations.²³ A State will thus focus its structural investigations according to evidences it is able to gather. With respect to the situation in Syria, the evidence collected can be shared with the IIIM, which also follows a 'structural investigation' approach.²⁴ The IIIM can, in turn, complement the forum State's case file with further information and evidence acquired through other sources. By proceeding this way, States are better placed to react swiftly if an individual suspected of international crimes in Syria enters their territory. By the same token, they contribute to ensuring that future proceedings in another jurisdiction, whether in Syria, in a third State or before an international court, can be promptly, thoroughly and efficiently undertaken. Such judicial measures, if undertaken by all actors of the international community,

²⁰ Maximo Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes', 105 *American Journal of International Law* 1, 49 (2011).

²¹ Kaleck and Krocker, *supra* note 12, 170-180.

²² *Ibid.*; To be sure, certain States with a 'no safe heaven approach', like France and Sweden, are also conducting 'structural investigations'.

²³ *Ibid.*, at 179.

²⁴ Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, 3 August 2018, UN Doc. A/73/295, par. 8.

will also have to be conceived and implemented in light of other measures that might facilitate the peace process.

3. Three Legal Frictions

While the exercise of universal jurisdiction does not infringe per se the sovereignty of the territorial and nationality State(s), the following three 'legal frictions' will need to be kept in mind.

First, if the domestic legislation of the forum State allows the trial to take place in absentia, the UN Secretary General has anticipated that the IIIM will 'generally' not share the (potential) information it has for such cases.²⁵ It is worth noting the IIIM's reservation towards trials in absentia does not entail that domestic *investigations* cannot be conducted while the accused is not present in the territory; it is the trial itself that should not take place without the presence of the accused. Structural investigation can thus take place. If sufficient evidence is found, arrest warrants can be issued (with an extradition request) but trials should not take place until the accused is present in court.

Second, not all crimes are subject to universal jurisdiction. Only crimes under customary international law fall into this category. The use of chemical weapons in international as well as in non-international armed conflict is a (war) crime under customary international law.²⁶ Treaties may require States to establish and exercise national jurisdiction in respect of particular crimes even absent any link between the State and the crime. But, such exercise of jurisdiction may be asserted only if the States with territorial and active nationality links to the crime are also party to the said treaty - otherwise, the latter States may rightly claim that the assertion of jurisdiction over their territory or nationals is in breach of their sovereignty. Furthermore, if the crime defined in the treaty is not applicable in the domestic law of the territorial and active nationality State(s), it may be validly claimed that finding the accused guilty of such crime is a violation of the principle of legality, as enshrined in Article 15 of the International Covenant on Civil and Political Rights. In this respect, it must be noted that the IIIM will only share its information with 'jurisdictions that respect international human rights law and standards'.²⁷

Third, Syrian State officials might be immune from the jurisdiction of the forum State's jurisdiction. The International Court of Justice in the *Arrest Warrant Case* notably found that the issuance and circulation of an arrest warrant against an official entitled to immunity is a violation of international law.²⁸ In particular, it is recognized that Heads of State, Heads of Government

²⁵ Report of the SG, par. 20.

²⁶ See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (2005), Rules 74 & 156; see also ICC, Assembly of States Parties, Review Conference, Amendments to Article 8 of the Rome Statute, 10 June 2010, Res. RC/Res.5, par. 8 (although not explicitly listing chemical weapons, these proscriptions include many and perhaps all uses of lethal chemical weapons).

²⁷ Report of the SG, par. 21.

²⁸ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, par. 70-71.

and Ministers for Foreign Affairs are entitled to a personal immunity from the jurisdiction of another State.²⁹ This immunity, also known as immunity *ratione personae*, also covers crimes under international law. Once the high-ranking official entitled to immunity *ratione personae* ceases to hold office, he/she loses this immunity to then enjoy an immunity *ratione materiae*. Immunity *ratione materiae* does not apply in respect of crimes under customary international law. It is therefore important to assess whether the charges are reflective of customary international law (or at least not going beyond it). If the charge goes beyond the customary definition of the international crime, the high-ranking official's State may object that the arrest warrant is breaching its sovereignty.

Conclusion

Bearing these legal frictions in mind, it is hoped that national prosecutions meeting international fair trial standards will be eventually undertaken in Syria. Indeed, the pursuit of accountability, if conducted in Syria, has the potential for a greater deterrent as well as greater impact within the local population - thereby facilitating reconciliation and redress for the victims. In the meantime, foreign domestic courts entitled to exercise universal jurisdiction under a 'global enforcer approach' have the opportunity to help ensure that the impunity gap for the crimes committed in Syria will, one day, be filled in accordance with the rule of law.

²⁹ It is still unclear whether such immunity is also applicable to other high-ranking officials when they are on a special mission, see International Law Commission, Immunity of State Officials from Foreign Criminal Jurisdiction, Statement of the Chairman of the Drafting Committee, Mr. Dire Tladi, 7 June 2013.