

Analysis: International Justice for War Crimes Committed in Syria

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Pro-democracy protests in March 2011 triggered the Syrian civil war. 7½ years later, the war continues at an incredible cost: 364,300 dead; 156,900 missing, presumed dead; 5 million refugees abroad; and 6 million internally displaced.[1]

All parties to the Syrian conflict have committed war crimes including murder, torture, rape, forced disappearances, use of indiscriminate weapons and use of civilian suffering as a weapon of war.[2] The Syrian government has even resorted to chemical weapons prohibited by international convention.[3] But, to date, justice for these war crimes has been limited.

This paper explores the different mechanisms available to hold war criminals accountable for their unlawful acts committed in Syria. It begins by explaining why the traditional mechanisms – the International Criminal Court or an ad-hoc International Tribunal – are not available for the Syrian conflict. Next, it explains the UN's novel creation of an investigative body to help investigate, but not prosecute, war crimes committed in Syria. Finally, it provides an overview of domestic efforts to bring perpetrators to justice. If successful, the international accountability for war crimes committed in Syria may bring about a new era in international criminal justice.

Political Bar to International Accountability

The International Criminal Court ("ICC") has jurisdiction to prosecute genocide, crimes against humanity, war crimes and now the crime of aggression.[4] While 123 states are parties to the *Rome Statute* that gives the ICC its jurisdiction, Syria is not one of them. State sovereignty is a fundamental principle of not only international relations, but also the international legal framework. Consequently, the ICC Prosecutor cannot, on his or her own initiative, commence proceedings for international crimes committed in Syria because Syria has not consented to the ICC's jurisdiction.

The UN Security Council could, acting under its Chapter VII power, initiate prosecutions for international crimes committed in Syria. In fact, the Security Council used this power in the wake of the 2011 Libyan crisis: on 26 February 2011, the Security Council unanimously adopted Resolution 1970 referring the international crimes committed in Libya to the ICC Prosecutor. Like Syria, Libya was not party to the *Rome Statute* but is a member of the UN, and Security Council Resolutions are binding on UN member states.

Unfortunately, it's unlikely that the UN Security Council will be able to obtain the necessary votes to pass a resolution giving the ICC jurisdiction over the international crimes committed in Syria. This is because the Security Council has five permanent members—the United States, Russia, the UK, France, and China —each with the ability to veto any Security Council resolution. The United States, the UK, France, and Germany have found themselves on the opposite side of Russia in the Syrian conflict, in a quasi-proxy-war that is reminiscent of the Cold War era. As of April 2018, Russia has vetoed 12 Security Council resolutions including, in May 2014, a French-backed resolution that would have referred international crimes committed in Syria to the ICC.5 All 13 other Security Council members were in favour of the resolution, but Russia and China's veto stopped the ICC Prosecutions.

For the same reason, it's unlikely the UN Security Council could authorize the creation of an ad-hoc criminal tribunal, like the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the Former Yugoslavia, without the consent from the Syrian government.

An International Investigatory Body

On 20 December 2016, United Nations General Assembly established 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 ("IIIM").[6]

The IIIM is an investigative body, not a court or a tribunal. It collects, consolidates, preserves, and analyzes evidence of international crimes committed in Syria pursuant to internationally accepted standards of evidence collection.[7] It also prepares files to facilitate and expedite fair, independent criminal proceedings in national, regional, or international courts.[8]The IIIM does not have jurisdiction to issue indictments, prosecute cases, or render judgments in the cases it investigates.[9]

The IIIM is a novel solution to the UN Security Council's political deadlock to international accountability in Syria. While the IIIM cannot carry out international criminal prosecutions, the United

Nations General Assembly gave the IIIM authority to carry out all the preparatory work historically conducted by the ICC Prosecutor or a special tribunal.[10] This is a significant development in international law. The 105 states that voted in favour of the IIIM's creation represent widespread political will to attain accountability for international crimes. The Independent International Commission of Inquiry on the Syrian Arab Republic (IICI), established in August 2011 by the Human Rights Council is further evidence of this political will.[11]When international politics catches up – when either a special tribunal for war crimes committed in Syria is created or the Security Council refers these crimes to the ICC – the IIIM will have collected and preserved all the evidence necessary for these prosecutions.

The IIIM mandate also specifically refers to the accountability efforts of domestic courts through universal jurisdiction.[12] In doing so, the IIIM insolates states who employ universal jurisdiction to investigate and prosecute international crimes from claims that these states have violated state sovereignty.[13]

The IIIM is expected to open two or more specific investigation files before the end of 2018.[14]

Domestic Prosecutions

Nine states – Germany, Sweden, France, Spain, Austria, Finland, Norway, the Netherlands and Switzerland – have commenced investigations and/or domestic prosecutions against their own or foreign nationals for international crimes committed in Syria. Typically, states can only assert jurisdiction over their own nationals or crimes that are committed on their territory. Universal jurisdiction, however, allows a state to take criminal jurisdiction over an accused person regardless of the accused's nationality or where the crime was committed.[15] Universal jurisdiction is not an exception to the traditional rule of state jurisdiction but rather, as former ICJ Judge Higgins wrote, universal jurisdiction is "a well-established norm, which stands alongside other norms of jurisdiction and is not to be seen as an exception from any one of them."[16] Crimes over which states can assert universal jurisdiction include genocide, crimes against humanity, war crimes, piracy, slavery, and torture.[17]

The sections below describe the each of these nine states' universal jurisdiction laws and their prosecution of international crimes committed in Syria to date.[18]

Germany

The German Code of Crimes against International Law gives German court universal jurisdiction over genocide, crimes against humanity, and war crimes, and domestic crimes of international concern (*e.g.*, offenses involving nuclear energy, explosives, or radiation, human trafficking, piracy, hijacking, and torture).[19] These crimes do not need to be offenses in the country where they occurred for Germany to prosecute.[20] Moreover, the suspect does not need to be in Germany during investigations but must be present for the trial.[21] German courts can issue an international arrest warrant for a person of interest.[22]

In 2012, Germany opened structural investigations to gather evidence of war crimes and crimes against humanity committed in Syria since 2011.[23] As of October 2018, Germany has opened eight investigations.[24] Three individuals have been convicted of war crimes and received prison sentences of between 2 and 8.5 years.[25] Most recently, on September 25, 2018, a German Court sentenced Ibrahim A – found guilty of torture and killing persons protected under international law as well as murder, extortion, kidnapping, and the commission of war crimes under this International Criminal Code – to life in prison.[26]

Sweden

The Sweden Criminal Code provides Swedish courts with universal jurisdiction over ordinary crimes (*e.g.*, murder, manslaughter, kidnapping, and rape), crimes of international concern (*e.g.*, piracy and human trafficking), and crimes under international law (*e.g.*, genocide and war crimes that correspond with crimes against international law in Swedish legislation).[27] Swedish courts cannot exercise jurisdiction over crimes against humanity, torture, or forced disappearance because these crimes are excluded from the Swedish Criminal Code.[28] Sweden's universal jurisdiction over ordinary crimes, however, captures these international crimes.[29]

Swedish law does not require the offender to be present in Sweden when an investigation is open, but the offender must be present when the indictment is issued.[30] If the offender is present in Sweden, the offense does not need to be an offense in the country it was committed for Swedish courts to take jurisdiction.[31] If, however, the crime involves a foreign public servant or non-resident and carries a minimum penalty of four years' imprisonment, the offense must be a crime in the country it was committed for Swedish courts to take jurisdiction.[32]

As of October 2018, Sweden has completed and sentenced two Syrian war criminals. Mohammad Abdullah was found guilty of war crimes and sentenced to eight months in prison. Haisam Omar Sakhanh was sentenced to life for mass killings caught on video.[33]

Finland

Finland's Criminal Code gives Finland universal jurisdiction over a number of crimes for which Finland has an international obligation to prosecute, including crimes against humanity, war crimes, genocide, torture, terrorism, piracy, and nuclear, chemical and biological warfare.[34] Finnish courts have jurisdiction over these crimes regardless of where they were committed, the offender's nationality, or the laws where the crime was committed.[35] The offender does not need to be presence in Finland for the courts to exercise universal jurisdiction.[36]

As of October 2018, Finland has not prosecuted any person of committing war crimes in Syria. It has however, prosecuted two Iraqi nationals for their role in the Camp Speicher massacre near Tikrit, Iraq, in June 2014.[37] It is therefore likely that Finland will also exercise jurisdiction over persons who are alleged to have committed crimes in Syria if such a case comes to the attention of the Finnish authorities.

France

France's Code of Criminal Procedure provides French courts with universal jurisdiction over crimes that France has an international duty to prosecute including torture, terrorism, piracy, hijacking, war crimes, crimes against humanity, and genocide[38] if the victim is French, the suspect resides in France, or the suspect is found in French territory.[39] For torture, French courts can exercise jurisdiction regardless of whether the offense is criminalized in the country it occurred.[40] But for all other crimes, the foreign state must have criminalized the offense or be a party to the ICC for a French court to exercise jurisdiction.[41]

As of October 2018, France has four open investigations of persons alleged to have committed war crimes in Syria and is conducting one ongoing trial: the LaFarge Corporate Accountability Case. The former chief executive and three former directors of Lafarge, along with two French directors of the subsidiary corporation, were formally indicted in December 2017 for financing terrorism and endangering lives in Syria.[42]

Spain

The Fundamental Law of the Judiciary gives Spanish courts universal jurisdiction if Spain has a binding international obligation to prosecute these crimes.[43] This provision allow Spanish courts to prosecute breaches of the 4th Geneva Convention and the Convention against Torture, as well as genocide and crimes against humanity if the offender is in Spain, the victims are Spanish nationals, or the case is otherwise linked to Spain.[44] The offense does not need to be criminalized in the state it occurred for Spanish courts to exercise universal jurisdiction.[45]

As of October 2018, Spain has attempted to prosecute one case, the Caesar Photos case. This was a criminal proceeding against high-level Syrian officials for allegations of forced disappearance, torture, and killings at a Syrian government detention centre. The case, however, was dismissed for lack of jurisdiction.[46]

Austria

Austria's Criminal Code gives Austria universal jurisdiction over certain offenses criminalized under Austrian law (*e.g.*, terrorism, human trafficking, production/distribution of weapons of mass destruction, extortion, sexual abuse of minors, and kidnapping); offenses Austria has an international obligation to prosecute (*e.g.*, breaches of the Geneva Conventions or the Convention against Torture); and offenses criminalized in the country where the offense was committed.[47] If the offense is criminalized under Austrian law, Austrian courts have jurisdiction regardless of where the offense was committed or whether the offense is criminalized in the country it was committed.[48] If the offense is criminalized in the country it was committed, Austrian courts have jurisdiction if the offender is an Austrian citizen or a non-extraditable foreign national.[49]

Generally, offenders need to be present in Austria for Austria to prosecute; however, if Austria has an international obligation to prosecution, the offender's presence is not required.[50]

As of October 2018, Austria has investigated, tried, and sentenced a former member of Farouq Brigade for killing twenty unarmed and injured Syrian governments soldiers. He was sentenced to life in prison.[51]

Norway

The New General Civil Penal Code of 2005 gives Norwegian courts universal jurisdiction over genocide, crimes against humanity, and war crimes.[52] The Norwegian General Civil Penal Code of 1902 gives Norwegian universal jurisdiction over other offenses including assault, hostage taking, and hijacking.[53] Norwegian courts can exercise jurisdiction over genocide, crimes against humanity, or war crimes committed abroad, but only if the suspect lives in Norway and the offense is criminalized in the country where it was committed.[54]

Investigations against persons alleged to have committed war crimes in Syria are ongoing in Norway but no charges have been laid to date.[55]

The Netherlands

The Dutch International Crimes Act gives Dutch courts universal jurisdiction over genocide, torture, war crimes, and crimes against humanity if the offender is a Dutch national, if the offender is present on Dutch territory, or if the offender commits the crime against a Dutch national.[56] Dutch courts also have universal jurisdiction over piracy, counterfeiting, and hijacking if the offender is present in the Netherlands.[57] Dutch courts can exercise their jurisdiction over all these crimes regardless of whether the offense is criminalized in the country it occurred.[58]

Investigations against persons alleged to have committed war crimes in Syria are ongoing in the Netherlands but no charges have been laid to date.[59]

Switzerland

The Swiss Criminal Code gives Swiss courts jurisdiction over crimes that Switzerland is obliged to investigate and prosecute, namely genocide, crimes against humanity, war crimes, torture, and forced disappearances.[60] Swiss courts can exercise jurisdiction over these crimes if the suspect is present on Swiss territory and not facing extradition.[61]

In December 2014, the Office of the Attorney General of Switzerland opened an investigation against Rifaat Al-Assad, the commander of an elite group of Syrian troops known as the Defence Brigades.[62] Under Rifaat Al-Assad command, the Defence Brigades are alleged to have participated in two infamous mass killings: the June 1980 attack against the Tadmor prison (1000 suspected of being killed); and the February 1982 attack against the city of Hama (10,000 to 40,000 civilians killed).[63] Investigations are ongoing.

Conclusion

The road to justice is neither straight-forward nor simple. It must evolve with the geopolitical framework in which it operates. And this is exactly what happened in the case of the Syrian conflict. International politics renders the traditional avenues to justice unusable. But states, appalled by the atrocities being committed in Syria, found another way forward. They have begun to use their own domestic legal systems to exercise jurisdiction over persons alleged to have committed war crimes in Syria and the United Nations General Assembly established the IIIM to assist with investigations and prosecutions. This movement might overcome the politics of the UN Security Council and, if successful, may be the beginning of a new era in international criminal justice.

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References

1. “Why is there War in Syria?”, *BBC News* (September 7, 2018), https://www.bbc.com/news/world-middle-east-35806229; “Syria: Events of 2017”, *Human Rights Watch* (2017), https://www.hrw.org/world-report/2018/country-chapters/Syria.
2. “Syria: The Story of the Conflict”, *BBC News* (March 11, 2016), https://www.bbc.com/news/world-middle-east-26116868.
3. Id.
4. *Rome Statute of the International Criminal Court*, 2187 UNTS 90, (17 July 2998) arts 5-8.
5. “Russia’s 12 UN Vetos on Syria”, *RTE* (11 April 2018), https://www.rte.ie/news/world/2018/0411/953637-russia-syria-un-veto/.

6. GA Res 71/248, UNGAOR, 71st Sess, UN Doc A/RES/71/248 (2017) (adopted with 105 votes in favour, 15 votes against, and 52 abstentions). See also Joseph Rikhof “Analysis: A History and Typology of International Criminal Institutions”, *Philippe Kirsch Institute* (November 24, 2017), http://www.kirschinstitute.ca/history-typology-international-criminal-institutions/.
7. United Nations General Assembly, 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, A/72/764 (28 February 2018) at paras 7-8 [IIIM Report].
8. IIIM Report at para 8.
9. Id. at para 7.
10. Wolfgang Kaleck & Patrick Kroker, “Syrian Torture Investigations in Germany and Beyond” (2018), *J Int’l Criminal Justice* 16, 160 at 170 [Kaleck & Kroker].
11. “Independent International Commission of Inquiry on the Syrian Arab Republic”, *United Nations Human Rights Council* (2018), www.ohchr.org/en/hrbodies/hrc/iicisyria/pages/independentinternationalcommission.aspx.
12. IIIM Report at para 7.
13. Kaleck & Kroker at 170.
14. “UN Syria War Crimes Body to Open Two Cases by Year’s End”, *Khaleej Times* (September 20, 2018), https://www.khaleejtimes.com/region/mena/un-syria-war-crimes-body-to-open-two-cases-by-years-end.
15. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1995) at 57-58 [Higgins]. James Crawford, *Brownlie’s Principles of Public International Law*, 8th ed (Oxford: Oxford University Press, 2012) at 467 [Brownlie]. See also “Prosecuting International Crimes Series: Defining Legal Concepts and Framework”, *Philippe Kirsch Institute* (May 31 2018), www.kirschinstitute.ca/prosecuting-international-crimes-series-defining-legal-concepts-frameworks/.
16. Higgins at 58.
17. Brownlie at 467; Higgins at 61.
18. Currency of these cases is October 2018.
19. Sections 6-12; FIDH & Redress, *Extraterritorial Jurisdiction in the European Union* at 137.
20. FIDH & Redress, *Extraterritorial Jurisdiction in the European Union* at 138.
21. Id. at 138.
22. Kaleck & Kroker at 180.
23. Trial International, *Make Way for Justice: Universal Jurisdictional Annual Review* (2015) at 22.
24. “Syrian Civil/Criminal Cases & Investigations of War Crimes”, *The Centre for Justice and Accountability* (2008), https://cja.org/wp-content/uploads/2018/06/Syria-Cases-Updated-March-2018.pdf. [CJA Syrian Cases & Investigations].
25. CJA Syrian Cases & Investigations.

26. Stephanie Halasz & Sarah El Sigany, “Germany Convicts Member of Western-Backed Syrian Opposition for ‘War Crimes’”, *CNN* (September 25, 2018), https://www.cnn.com/2018/09/25/middleeast/german-syrian-conviction-intl/index.html.
27. Sweden Criminal Code, c 2 (*Brottsbalken*); FIDH & Redress, *Extraterritorial Jurisdiction in the European Union* at 245.
28. FIDH & Redress, *Extraterritorial Jurisdiction in the European Union* at 245.
29. Id.at 245.
30. Id.at 246.
31. Id.at 246.
32. Id.at 245-246.
33. CJA Syrian Cases & Investigations.
34. Finish Criminal Code, section 7, chapter 1. FIDH & Redress, *Extraterritorial Jurisdiction in the European Union* at 244.
35. FIDH & Redress, *Extraterritorial Jurisdiction in the European Union* at 121.
36. Id.at 122.
37. Trial International. *Make Way for Justice: Universal Jurisdictional Annual Review* (2018) at 20.
38. FIDH & Redress, *Extraterritorial Jurisdiction in the European Union* at 130.
39. Trial International. *Make Way for Justice: Universal Jurisdictional Annual Review* (2016) at 28.
40. FIDH & Redress, *Extraterritorial Jurisdiction in the European Union* at 131.
41. Id.at 131.
42. CJA Syrian Cases & Investigations.
43. FIDH & Redress, *Extraterritorial Jurisdiction in the European Union* at 237.
44. Id.at 237.
45. FIDH & Redress, *Extraterritorial Jurisdiction in the European Union* at 238.
46. CJA Syrian Cases & Investigations.
47. Austrian Criminal Code, articles 64-65.
48. Id., article 64(1)(6); FIDH & Redress, *Extraterritorial Jurisdiction in the European Union* at 71.
49. Austrian Criminal Code, articles 65; FIDH & Redress, *Extraterritorial Jurisdiction in the European Union* at 71.
50. FIDH & Redress, *Extraterritorial Jurisdiction in the European Union* at 72.
51. CJA Syrian Cases & Investigations (defense is appealing this decision).
52. FIDH & Redress, *Extraterritorial Jurisdiction in the European Union* at 201.
53. Id.at 201.
54. Id.at 201-202.
55. Trial International. *Make Way for Justice: Universal Jurisdictional Annual Review* (2017) at 3.
56. FIDH & Redress, *Extraterritorial Jurisdiction in the European Union* at 193.

57. Id.at 193.
58. Id.at 193.
59. Trial International. *Make Way for Justice: Universal Jurisdictional Annual Review* (2017) at 3.
60. FIDH & Redress, *Extraterritorial Jurisdiction in the European Union* at 251.
61. Id.at 252.
62. "Rifaat Al-Assad Case", *Trial International* (March 10, 2017), https://trialinternational.org/latest-post/rifaat-al-assad-case/.
63. Id.