

CHASING JUSTICE FOR SYRIA

// Roadblocks and detours on the path to accountability

On 7 August, she finally had enough. Carla del Ponte, former UN Prosecutor for the Former Yugoslavia and Rwanda, told reporters that she was stepping down as a member of the Independent International Commission of Inquiry on Syria. Since 2011, the UN panel has meticulously documented mass atrocities committed by all sides of the Syrian war. And yet, its investigations have not led to the creation of any tribunal or court, prompting Del Ponte to denounce it as an “alibi” for the international community. Why has criminal accountability – as a major element in the broader search for justice – remained so elusive in Syria? Which pathways, both well-trodden and novel, have been tried to circumvent political roadblocks? Where could the international community still do more?



Carla del Ponte, former member of the Independent Commission of Inquiry on the Syrian Arab Republic (Photo: picture alliance/AP Photo)

by **Caroline Fehl** and **Eliška Mocková**

In its sixth year, the Syrian civil war appears to be drawing toward a close. Bashar al-Assad and his allies are gaining ground, while the opposition’s external supporters are reconciling themselves to Assad remaining in power. A final settlement is still far off the horizon, but even when it comes, it is unlikely to ensure criminal accountability for the war’s atrocities. Not only Assad and other regime figures, but also opposition forces are deeply implicated in crimes and will have no appetite for **domestic trials**.

The **International Criminal Court** (ICC), as the most obvious international fallback option, has been blocked from taking action on Syria. Since Syria is not an

ICC member, the court could only gain jurisdiction through a referral by the UN Security Council. While more than 50 states petitioned the Council to take this step in 2013, a French-proposed referral resolution was vetoed by both Russia and China in 2014. Unlike in Libya or the Balkans, the external forces that have intervened in the war have no interest in imposing accountability. Russia and China have opposed ICC involvement since the beginning of the conflict as a slippery slope toward forcible regime change. While such a scenario is no longer realistic in Syria, Russia may now itself be guilty of war crimes, the same holds for Iran. On the other side of the conflict, the United States has been lukewarm about accountability. The Obama administration opposed an ICC referral for two years, fearing to complicate peace talks – and only came around to support it when the Russian veto was certain. The Trump administration appears decided to “leave Syria to the Russians”. In its fight against ISIS, it has authorized aggressive military tactics that have upped civilian casualties and that it would not like the ICC to look into.

Short of a referral, the ICC could still prosecute so-called **foreign terrorist fighters** (FTFs), linked to ISIS or other groups, who are citizens of ICC member states. Both states and activists have called on the court to investigate such cases, but ICC Prosecutor Fatou Bensouda has declined to open even a preliminary examination. She argues that FTFs are not usually in leading positions, while the ICC has been created to prosecute those most responsible. Even if some

among the several thousand FTFs from the EU, Tunisia, Jordan, and other ICC member states are “big fish” whose cases meet the threshold of gravity, Bensouda holds that the primary responsibility for prosecuting them lies with national courts in their home countries. Following the failed ICC referral, the idea of a **special tribunal** for Syria gained prominence, even Bensouda endorsed it. While the UN Security Council currently lacks the unity to set up a Syria tribunal (as it did in the 1990s for the former Yugoslavia and Rwanda), proponents present it as a long-term option that may materialize after a future Syrian power transition, with Syrian consent. In this – currently unrealistic – scenario, the tribunal could take the form of a hybrid court combining Syrian and international law and personnel, as proposed in 2013 by a group of former international prosecutors and legal experts in the *Chautauqua Blueprint*.

Back to the future: foreign courts as alternative?

With international trials remaining elusive for the time being, victims and civil society groups pin their hopes on **prosecutions in foreign national courts**. Investigations and trials are already under way across Europe, where many perpetrators have arrived along with Syrian refugees. In addition to prosecuting FTFs who are themselves European nationals (active nationality principle), some states allow their citizens who become *victims* of serious crimes abroad to prosecute foreign perpetrators domestically (passive personality principle). Prosecutions can also be based on universal jurisdiction, which means that no link between the prosecuting state and the crimes committed abroad is required.

Yet, neither of these legal avenues has produced a high number of convictions yet. The UK, for instance, reported in 2016 that only 54 out of 400 returning

British jihadists had been successfully prosecuted for any offence at all. The passive personality principle remains contested; only one case was filed in a Spanish court – and dropped due to lack of jurisdiction. Prosecutions based on universal jurisdiction have been launched in Austria, Finland, France, Germany, and Sweden since 2015. Particularly in Germany, which has taken in a high number of Syrian refugees, the police and prosecutors are working closely with Syrian victims to identify perpetrators. Still, trials remain rare. While German law permits crimes under international law to be tried even without the physical presence of the accused (*in absentia*), German prosecutors have thus far declined to take on such cases (unlike in France, where an investigation is pending since 2015). Such legal issues aside, national prosecutions have clear practical limitations. Because they focus on perpetrators present in the country, they predominantly deal with low-ranking opposition fighters who have fled Syria as the regime has gained ground. Furthermore, investigations far away from foreign crime sites are cumbersome, expensive, and politically delicate – one reason why states sought to delegate the task to the ICC in the first place back in 1998.

Investigations without trials: innovative tools of justice

The difficulty of taking Syrian perpetrators to court has produced a widespread sense of frustration – but also an unprecedented proliferation of **investigative bodies** collecting evidence for *future* trials. These include Del Ponte’s Commission of Inquiry, a standard UN format, but also some highly innovative tools. In 2015, the **Joint Investigative Mechanism** of the UN and the Organization for the Prohibition of Chemical Weapons (OPCW) was tasked by the Security Council with investigating not only whether chemical weapons were used in

Could Assad be prosecuted in Germany?

In November 2016, Berlin lawyer Mehmet Daimgagüler and his colleagues submitted a criminal complaint against Syrian President Bashar al-Assad with the German Federal Prosecutor General. To decrease the cost and length of investigations, crimes listed in this complaint cover only a short period of the conflict (April – November 2016) and are limited to about 40 well-documented incidents in Aleppo. The initiators themselves admit that their complaint is largely symbolic, as the Prosecutor is unlikely to proceed with such a politically explosive investigation. In legal terms, however, prosecutions *in absentia* are possible in Germany – and have already made progress in one other, less high-profile case. In 2017, Syrian torture survivors living in Germany submitted a criminal complaint against six high-level Syrian officials. In March, the Federal Prosecutor heard the testimonies of seven men and women about the torture they had to suffer in prisons run by the Syrian military intelligence. This case has more realistic prospects of going forward also because it does not have to deal with a common obstacle to foreign criminal prosecutions – diplomatic immunity, which Assad is entitled to as a sitting head of state.



A Syrian man collects samples from the site of a toxic gas attack in Khan Sheikhun, Syria, April 2017. The Independent International Commission of Inquiry confirmed on 6 September that Syrian government forces were behind the attack (Photo: picture alliance/newscom)

Syria – the usual task of OPCW fact-finding missions – but also *who* used them. Even more groundbreaking was the UN General Assembly’s (UNGA) creation of an “**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) in December 2016. The IIIM – also known as “the Mechanism” – is much more than a fact-finding mission, as it will compile individual criminal files that can be directly used in future trials. It will thus proceed much like the ICC Prosecutor – with the difference that it does not know the (national or international) judges who will eventually use the files. The IIIM’s sponsors insist that it is “quasi-prosecutorial”, as the creation of a tribunal would exceed the UNGA’s competences. And yet, the UNGA went as far as it could to establish a “Prosecutor without a tribunal”, as the Mechanism’s head, French judge Catherine Marchi-Uhel, has been dubbed. A critical limitation for the IIIM is that it relies on voluntary financial contributions from states. The slow pace of donations has severely delayed the setting-up process. Marchi-Uhel only took up her post on 8 August, and at the time of writing, the IIIM had yet to hire its staff and adopt its internal rules and working methods. For the challenging task of gathering evidence, the Mechanism will draw on an immense body of information that a network of more than 400 **private investigators** has collected and smuggled out of the country.

Most notable for its high standard of evidence is the Commission for International Justice and Accountability (CIJA). Unlike public investigations in foreign countries, which tend to focus on opposition fighters, local private investigators rely on cooperation with rebels and regime defectors, and are therefore biased toward uncovering regime crimes. Nevertheless, even ICC staffers judge that the benefits of the private groups’ work outweigh the disadvantages. Together with the IIIM, this points to a new sequential model of international criminal justice – public-private evidence collection *followed* by the creation of appropriate jurisdictions – that could become paradigmatic for future cases where politics is blocking the path to justice *in* conflict.

The hope that underpins this new approach is that the sheer weight of available evidence will make it difficult to ignore calls for accountability in the long run. Private activism and the extensive use of social media, combined with new statistical methods for identifying systematic crimes mean that the “the evidence collected for Syria could be nearly as strong as that used in the Nuremberg trials” (Kevin Jon Heller, law professor at the University of London, <http://nyti.ms/2ohjBMr>). The IIIM will further advance evidence collection and may even trigger a path-dependent political process: Once over a hundred states agreed that there is a need to investigate crimes, it is difficult to sweep away the findings. The investigative bodies will thus function as reminders of what needs to be done, sooner or later.

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European leadership is needed

European governments have been highly supportive of the new approach to justice. Britain, for instance, provided training and funding to CIJA's private investigators, while Liechtenstein and others initiated the IIIM's creation in the UNGA. Europe has also collectively contributed over 7 million EUR to the IIIM. These efforts contrast favorably with the meager support by other states that have voted for the "Mechanism" or spoken out for prosecuting Syrian crimes. The United States, in particular, withdrew its financial support for the CIJA's private investigations already under President Obama, and has failed to make any contribution to the IIIM. The Trump administration's disinterest in the matter is evidenced by its plans to dismantle the State Department's Office of Global Criminal Justice. In times like these, it is up to European governments to ensure, with both financial and political support, that private, national and UN investigators can carry on and intensify their valuable work. It is also important that these efforts become better coordinated, both through the IIIM and outside of it. As a start, European governments should increase their contributions to the IIIM for the current fiscal year, and push for its reliable funding out of the regular UN budget. The fact that a crowdfunding initiative has been trying to raise 2 million USD (!) which are missing in the IIIM's 2017 annual budget is an embarrassment for the international community – and a call to action.

The Commission for International Justice and Accountability (CIJA) in profile:

- a private nonprofit organization with a network of on-the-ground investigators in Syria
- founded in 2012 by Canadian lawyer Bill Wiley (previously ICC and International Tribunal for the Former Yugoslavia), at the invitation of the British government
- 150 employees, including about 50 Syrian investigators as well as international investigators, lawyers, trainers, and other experts based in two secret offices in Europe. This is nearly as many people as the ICC has for all of its situations.
- concentrates on collecting evidence against the Syrian leadership linking high-level political and military actors to offences committed by lower-level perpetrators
- produces criminal files ready for use in criminal prosecutions
- trains ground-investigators to conform with international standards of admissibility to ensure that the evidence can be used in court
- has collected 600,000 pages of regime documents
- widely acknowledged for high quality work
- financially supported by Britain, Denmark, Germany, Norway, and Switzerland

PRIF SPOTLIGHT

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