



## **International Justice and the Prevention of Atrocities**

**Case Study:** Dilemmas of Justice, Accountability and Peace in Syria

by Anthony Dworkin

ECFR background paper, November 2013<sup>1</sup>

---

Influenced by the example of other uprisings in the Arab world, protests in favour of the release of political prisoners and greater democratic freedom in Syria began in March 2011. In the face of a harsh response by Syrian authorities, the demonstrations began increasingly to mutate into an armed uprising and the country has become engulfed in civil war. It is now estimated that over 100,000 people have been killed. The conflict has been marked by repeated and well-substantiated allegations of war crimes and crimes against humanity, including the deliberate killing of unarmed civilians, torture of detainees, attacks on medical facilities and the use of chemical weapons. While most independent analysts believe that forces linked to the regime have committed the largest share of these crimes, as the conflict has continued there have also been credible reports of atrocities carried out by rebel groups.

The UN Human Rights Council responded quickly to developments in Syria, passing a resolution at the end of April 2011 that called for an investigation into human rights violations and international crimes “with a view to avoiding impunity and ensuring full accountability”.<sup>2</sup> A Commission of Inquiry on Syria was duly set up. At first its reports called for Syrian authorities to address the violations that were taking place and punish those responsible. But in its fourth

---

<sup>1</sup> This paper was prepared as part of a project of the European Council on Foreign Relations to compare the experience of different situations where international responses to crises involving mass atrocities have faced the dilemma of seeking accountability while trying to bring the crisis to an end. Please cite fully in the event of reference or quotation.

<sup>2</sup> ‘The current human rights situation in the Syrian Arab Republic in the context of recent events’, Human Rights Council, Resolution S-16/1, 29 April 2011.

report, issued in February 2013, the Commission for the first time said that it was “incumbent upon the Security Council, influential Member States and regional organisations to act urgently to ensure accountability”. The report recommended that the UN Security Council (UNSC) “take appropriate action... by means of referral to justice, possibly to the International Criminal Court.”

Already by this time, significant international support had coalesced behind the idea of the UNSC referring Syria to the ICC. As early as December 2011, the High Commissioner for Human Rights Navi Pillay recommended that the situation in Syria should be referred to the ICC based on the evidence that crimes against humanity had been committed. In June 2012, Switzerland called at a special session of the Human Rights Council for a referral, saying that the credibility of the United Nations was at stake. The government of Switzerland subsequently led an initiative to draft a letter to the UNSC requesting a referral; the letter was delivered on 14 January 2013, signed by Switzerland and 56 other countries. It argued that “without accountability... there will be no sustainable peace in Syria” and suggested that at least a threat to refer in the absence of any credible domestic accountability process “would have an important dissuasive effect”.

The letter was signed by all EU member states with the exception of Sweden, whose stance appeared to reflect the conviction at that time of Foreign Minister Carl Bildt that the involvement of an international tribunal would complicate efforts to achieve a negotiated settlement of the conflict. Bildt was quoted by a Swedish newspaper as saying that a referral “would put Assad in a headlock and make him less flexible, because we’d be telling him, ‘your only option is to fight to the death’”.<sup>3</sup> The United States also did not sign the letter, perhaps motivated in part by similar concerns. Secretary of State Hillary Clinton had earlier said that she was reluctant to label Assad as a war criminal because she thought “from long experience that can complicate a resolution of a difficult, complex situation because it limits options to persuade leaders perhaps to step down from power”.<sup>4</sup> Predictably Russia, Syria’s most prominent international ally, also opposed the initiative, describing it as “untimely and counterproductive”.<sup>5</sup>

At the same time as international pressure for a referral increased, opinions were also shifting toward an acceptance of the need for a negotiated settlement to the conflict. As President

---

<sup>3</sup> “Sweden rules out taking Syria’s Assad to the ICC”, *The Local*, 16 January 2013, available at <http://www.thelocal.se/45642/20130116>.

<sup>4</sup> Richard Spencer, “Syria: Bashar al-Assad could be regarded as a war criminal, says Hillary Clinton”, *The Telegraph*, 28 February 2012, available at <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9111848/Syria-Bashar-al-Assad-could-be-regarded-as-a-war-criminal-says-Hillary-Clinton.html>.

<sup>5</sup> ‘Russia slams plan to refer Syria crisis to ICC’, *Press TV*, 15 January 2013. URL: <http://www.presstv.com/detail/2013/01/15/283736/russia-opposes-referring-syria-to-icc/>

Assad's violent crackdown on protesters accelerated in 2011, Western leaders had been quick to declare that no solution to the conflict was possible unless he left office. Many Western leaders and officials continued to argue during the following year that the uprising had an inexorable force that would eventually drive the regime from power, and that some figures from the regime would ultimately be forced to seek peace terms from a position of weakness.

By early 2013 at the latest however these assessments were being revised. Momentum in the conflict appeared to be reversing, as regime forces with the strong support of Iran and Hezbollah began to recapture ground that had been held by the rebels. A US intelligence analysis concluded that "Assad's government was in no danger of collapsing, and that Syrian troops were gaining the upper hand in the civil war".<sup>6</sup> In Europe, conviction was growing that only a negotiated solution to the war was possible, along with concern about the growing influence of radical jihadist groups among rebel forces. When British and French officials mooted the idea of sending arms to insurgent factions in the spring of 2013, this was presented explicitly as a strategy to level the playing field so that both parties could enter talks on even terms, rather than as a route to a rebel victory.

The apparent large-scale use of chemical weapons by the regime in a suburb of Damascus on 21 August 2013 precipitated a dramatic increase in the international focus on the place of war crimes and accountability in the conflict. As the United States moved toward a military response, it used the language of accountability as at least an implicit justification – for example President Obama told Congressional leaders on 3 September that "Assad and Syria needs to be held accountable" as he rallied support for a limited armed response.<sup>7</sup> For his part, French president François Hollande spoke of the need to "punish those who took the despicable decision to gas innocent people".<sup>8</sup>

Following the Russian initiative for the dismantling of Syria's chemical weapons, France and the United Kingdom sought to include a referral of the situation in Syria to the ICC in the UNSC resolution that endorsed the Russian-US agreement. But beyond a general statement of "strong conviction that those responsible for the use of chemical weapons in the Syrian Arab Republic should be held accountable", the final resolution passed by the UNSC (Resolution 2118) contained no specific measures. Russia made clear that it would not support a referral, and the United States was also opposed (apparently the reluctance to give the ICC jurisdiction over the Israeli-occupied Golan Heights was the primary factor in US resistance to a referral).

---

<sup>6</sup> Mark Mazzetti, Robert F. Worth and Michael R. Gordon, "Obama's Uncertain Path Amid Syria Bloodshed", *New York Times*, 22 October 2013.

<sup>7</sup> "Obama: Assad must be held to account", AFP, 3 September 2013.

<sup>8</sup> "French parliament to debate Syria, right backs Hollande's 'punish Assad' call", RFI, 28 August 2013, available at <http://www.english.rfi.fr/france/20130828-french-parliament-debate-syria-right-backs-hollandes-punish-assad-call>.

Outside the UNSC, there was a strong civil society push to refer Syria to the ICC. But amid some argument about whether the involvement of the ICC could complicate prospective peace negotiations (“Geneva II”), a number of different permutations were proposed.<sup>9</sup> Former ICC Chief Prosecutor Luis Moreno Ocampo proposed a prospective referral, with the UNSC establishing a deadline “in the near future” that would trigger the jurisdiction of the Court.<sup>10</sup> Ocampo also suggested that the UNSC should make plans for the enforcement of arrest warrants, so that the threat of prosecutions had a meaningful deterrent effect. Another proposal suggested a contingent referral, whereby the UNSC would make clear that it was committed to refer the situation in Syria to the ICC if the parties to the conflict failed to reach a peace deal and political settlement within a specified period of time.<sup>11</sup>

In the absence of a concrete provision regarding the ICC in Resolution 2118, however, attention has shifted to other steps that might be taken to prepare for accountability in Syria following the conclusion of the conflict. A group of former prosecutors and others recently published a blueprint for a “Syrian Extraordinary Tribunal” that would be set up within the Syrian judicial system –perhaps with international involvement – “when the political system permits, presumably following a change in government”.<sup>12</sup> Another initiative, from the International Centre for Transitional Justice, looks ahead to the way that a transitional justice process could best be facilitated in Syria after the end of the conflict.<sup>13</sup> But amid the stuttering preparations for the Geneva II talks, a continued military stalemate, continued evidence of atrocities and divisions among the rebel groups, prospects for either peace or justice appear for the moment to remain far off.

The experience of the international community’s engagement with justice and accountability the Syrian conflict suggests a number of points for consideration:

1. The response of European countries to the Syrian crisis has evolved as the conflict has developed, but in recent months most EU member states have been committed

---

<sup>9</sup> For a comprehensive survey of different approaches to accountability for the chemical weapons attack, from a perspective sympathetic to an ICC referral, see Carsten Stahn, “Syria, Security Resolution 2118 (2013) and Peace versus Justice: Two Steps Forward, One Step Back?”, EJIL: Talk!, 3 October 2013, available at <http://www.ejiltalk.org/syria-security-resolution-2118-2013-and-peace-versus-justice-two-steps-forward-one-step-back/#more-9557>.

<sup>10</sup> Luis Moreno Ocampo, “Between Bombing and Doing Nothing”, Huffington Post, 4 September 2013, available at [http://www.huffingtonpost.com/luis-moreno-ocampo/between-bombing-or-doing-b\\_3869088.html?utm\\_hp\\_ref=tw](http://www.huffingtonpost.com/luis-moreno-ocampo/between-bombing-or-doing-b_3869088.html?utm_hp_ref=tw); see also Luis Moreno Ocampo, “The ICC as the Sword of Damocles”, Just Security, 23 September 2013, available at <http://justsecurity.org/2013/09/23/icc-sword-damocles/>.

<sup>11</sup> Kip Hale, “Mr. President, Here Is a Viable Non-Military Option for Syria”, Huffington Post, 3 September 2013, available at [http://www.huffingtonpost.com/kip-hale/mr-president-here-is-a-vi\\_b\\_3845565.html](http://www.huffingtonpost.com/kip-hale/mr-president-here-is-a-vi_b_3845565.html).

<sup>12</sup> “The Chautauqua Blueprint For A Statute For A Syrian Extraordinary Tribunal To Prosecute Atrocity Crimes”, 3 October 2013, available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2013/09/Chautauqua-Blueprint1.pdf>.

<sup>13</sup> Towards a Transitional Justice Strategy for Syria, ICTJ, September 2013, available at <http://ictj.org/sites/default/files/ICTJ-Syria-Analysis-2013.pdf>.

simultaneously to a referral to the ICC and to a negotiated end to the conflict. In this way, Syria differs from the recent case of Libya, where the ICC's involvement took place in a context where rebels were able to achieve a military victory. It is not clear whether the European position reflects a considered view that a referral to the ICC would not interfere with the prospects for a negotiated settlement, or a commitment to the idea that securing justice is an important goal that should be pursued even if it makes a peace deal harder to achieve. A third possibility is that European countries are continuing to improvise their responses to a complex foreign policy challenge involving a horrific civilian death toll, and have not found a fully resolved and consistent position. The potential tensions between European support for an ICC referral and for peace talks may simply reflect a wider lack of clarity about whether a negotiated settlement on terms acceptable to Western countries is really possible.

2. Despite the support for a referral from many supporters of international justice, it cannot be taken for granted that a referral would ultimately be in the best interests of the ICC. Certainly it is hard to envisage that any senior regime figures would surrender or be delivered by the current government to the Court without a dramatic change in the circumstances on the ground. If the conflict ends with a negotiated settlement, it can be expected that Assad and his leading officials will seek an outcome that gives them protection from prosecution, whether within Syria or in another country. Given that the leading Western powers are likely to embrace a negotiated settlement that ends the fighting, they may be willing to turn a blind eye to this arrangement, at the cost of ignoring the claims of the ICC and potentially weakening its credibility.
3. Schemes for a more sophisticated form of referral (prospective or conditional) appear to offer an attractive solution to the peace/justice dilemma, but they may also have downsides. First, they risk overstating the likely deterrent effect of potential prosecutions: given the complex dynamics of the Syrian conflict and the enormous stakes involved, is it likely that the threat of a referral would have a sufficiently strong influence to alter the calculations of the opposing parties? (Clearly a credible plan for enforcement of any arrest warrants might increase the deterrent effect – but it is not clear how such a plan would work and how it would relate to efforts to end the conflict). If the deadline were to expire without a peace agreement, the same dilemmas about peace and justice would be present – but the international community might have brought about the Court's involvement without fully facing the potential complications head-on.
4. Moreover, some people may be concerned that such an instrumental use of the UNSC's referral power undermines the independence and credibility of the Court – a question

that raises broader issues about how far it is appropriate for the UNSC to use referrals as a political tool, and how far it should instead seek as far as possible to refer situations based simply on the gravity of crimes involved.

5. In the absence of a UNSC referral, the main focus of efforts to secure accountability must shift to the prospective Geneva II peace talks, if and when they occur. There has been little discussion so far about the place that justice and accountability should have in these or future negotiations. A number of objectives can be imagined, at various levels of ambition. One goal might be simply to preserve the space for future justice mechanisms, for instance by avoiding any amnesty provisions. It is possible to envisage some more far-reaching measures, such as an attempt to exclude those against whom there was credible evidence of involvement in atrocities from political or military office. This might depend on a calculation about whether such a step was possible and necessary, or whether it should be deferred to a more complete transitional justice process to take place after national consultations. Ultimately the question of whether President Assad's departure from office is a precondition for an eventual agreement is at least in part an issue of accountability. In all these cases, what is achievable in the peace talks is likely to be determined by the balance of power between the parties and the pressure they are put under by their outside sponsors.

Thanks to Djeyhoun Ostowar for valuable research assistance with this paper.

*Anthony Dworkin is a senior policy fellow at the European Council on Foreign Relations, working on human rights, democracy and international justice.*