

New Paths to Accountability for Crimes in Syria and Iraq (Including ICC Jurisdiction Over Foreign Fighters)

By Jennifer Trahan

Wednesday, November 12, 2014 at 8:59 AM

Horrible crimes in Syria during the Syrian Civil War and more recent ones in Iraq have led to widespread frustration at the present lack of a clear accountability mechanism. While the launch of airstrikes by U.S. and Arab allies against the Islamic State of Iraq and Syria (ISIS/ISIL) appears to be somewhat quieting calls to action, the level of mass atrocity crimes occurring highlights the even greater need for accountability. And, with foreign fighters flocking to join ISIS/ISIL's ranks, there is actually an increased potential for accountability in some venues.

There are a number of potential avenues to address the large-scale war crimes and crimes against humanity that are occurring at the hands of Syrian governmental forces, ISIS/ISIL, and other groups. In some instances, *jurisdiction over current crimes already exists*, and in other instances, the ability to exercise jurisdiction can be created. What is dismaying is that few actors in Syria or Iraq (or those joining from outside countries) appear to be calibrating their actions and taking their criminal exposure into account. The fact that deterrence is not having the effect we would want no doubt stems from the fact that the international community continues to waffle on its commitment to accountability.

When Russia and China, for political reasons (and despite an outpouring of support by 64 UN members states and over 100 NGOs) vetoed the referral of the situation in Syria to the International Criminal Court (ICC) on May 22, 2014, they did exactly the opposite of what is needed – which is to send a clear message that the world is watching. Although full ICC jurisdiction is not an option at the moment, and other accountability efforts have stalled, there are still some short- and long-term efforts that can help re-prioritize accountability.

Short term

No level of criminal justice can make the victims of mass atrocity crimes whole again. But, in the short term, important steps can be taken to advance eventual accountability efforts.

These include: documentation initiatives to preserve “evidence,” as is being done by a number of NGOs (such as the Syria Justice and Accountability Centre, and the Commission for International Justice & Accountability (CIJA); (2) justice-related training of Syrian jurists and other future personnel; (3) building shared political will around the position that there *must* be fair and impartial justice; and (4) the corollary that no eventual peace agreement in Syria should bargain away the possibility of justice

through the imposition of an amnesty. Given the importance of these efforts, the recent news that US funding to CIJA has ended is dismaying. What is now needed is added work to document ISIS crimes, but no reduction in funding to document the Assad regime's horrific atrocities.

While the U.N.'s Independent International Commission of Inquiry on Syria has the mandate to "investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic," it (or another commission) could also be mandated to consider options for accountability. (Panels of experts for Sri Lanka, Cambodia and East Timor have been given such forward-looking mandates.)

Although there has been a lot of attention to the issue of foreign fighters in the region, more can be done to impose accountability on this group of actors. States need to ensure that they have fully criminalized under their domestic laws all the crimes related to assisting terrorist groups as required by U.N. Security Council resolutions 1373 and 2178, and international terrorism conventions to which they are a party. In addition, states may have domestic statutes aimed at criminalizing the joining of such groups.

Longer term

In the longer term, of course, what is possible in terms of criminal justice will depend on outcomes: how the situation in Iraq resolves, who is in power in Syria, and to what extent those in power are implicated in crimes. Obviously, the more that individuals implicated in crimes share a role in government (such as remnants of the Assad regime), or are in close political alignment with those in government, the more difficult it will be to ensure broad-based accountability. That said, many different routes remain available, some of which have been discussed in prior posts on Just Security ([#1](#), [#2](#), [#3](#), [#4](#)).

International Criminal Court

The ICC prosecutes genocide, war crimes and crimes against humanity. While it is deplorable that China and Russia blocked the Security Council's referral of the situation in Syria to the ICC (meaning that there is no ICC jurisdiction over the crimes in Syria as a whole), ICC jurisdiction in both Syria and Iraq could be triggered in the future. Even if a referral is not forthcoming, it should not be overlooked that *ICC jurisdiction over nationals of Rome Statute States Parties (i.e., many of the foreign fighters), already exists.*

In terms of the ICC's jurisdiction over the entire conflict, barring an unlikely shift in political alignment, Russia and China will not reverse course, so there will not be a Security Council referral of the situation. Syria under an Assad government also would never accede to the Rome Statute (as it would create jurisdiction over government crimes).

Iraqi accession to the ICC's Rome Statute (or executing a declaration under article 12(3) of the Rome Statute) is feasible, however, and would be significant. This would enable the ICC to assert jurisdiction over crimes in Iraq, including those at the hands of ISIS/ISIL. Such a 12(3) declaration could be retroactive, so the usual rule that law is forward looking would not apply.

Furthermore, a new Syrian government might emerge, and could similarly accept jurisdiction backwards in time through an article 12(3) declaration. There also could come a point in time at which the Syrian opposition looks sufficiently "state-like" (i.e., is recognized by more countries as the legitimate government, and/or possesses more of the criteria of statehood) so as to accede to the ICC's Rome Statute or execute an article 12(3) declaration. (Palestinian efforts to invoke ICC jurisdiction are here relevant – while the Palestinians were initially unsuccessful in invoking jurisdiction, the more "state-like" they appear increases the possibility that they could do so).

Meanwhile, significant ICC jurisdiction already exists – over foreign fighters who come from the ICC's 122 States Parties (e.g. those from Europe, as well as many other countries). Estimates suggest there are "more than 13,000 foreign terrorist fighters from more than 80 [U.N.] Member States" that have joined ISIS/ISIL and the Al-Nusra Front. (UN press release, 24 September 2014).

Thus, the International Criminal Court – which has shown itself ready and willing to prosecute even heads of state when implicated in mass atrocity crimes – may well be able to assert extensive jurisdiction over crimes in Iraq and/or Syria, *and already has jurisdiction* over substantial numbers of foreign fighters who may be, or become, implicated in mass atrocity crimes.

A hybrid tribunal

In a number of situations, a hybrid tribunal (having features of international and national systems) has been created, such as those that have adjudicated or are adjudicating crimes in Sierra Leone, East Timor, Kosovo, Bosnia, Cambodia, and Lebanon. These may be formed by agreement between the national government and the U.N. (e.g., Sierra Leone and Cambodia), or by the Security Council (e.g., Lebanon). Such tribunals typically prosecute genocide, war crimes and crimes against humanity, although the Lebanon tribunal has jurisdiction to prosecute terrorism as defined by national law.

While it is entirely unlikely that the current Syrian government would agree to the formation of such a tribunal, the current Iraqi government or a future Syrian government might. It is also possible that new, creative ways to form a hybrid tribunal might be explored, for instance, through a regional organization. Here, the EU's work to establish a tribunal for crimes in Kosovo, and the AU's work to establish an "extraordinary African

Chambers” within Senegal’s judiciary, may serve as helpful precedent. One model statute for a hybrid tribunal for Syria already exists: “The Chautauqua Blueprint For A Statute For A Syrian Extraordinary Tribunal To Prosecute Atrocity Crimes.” (For earlier discussion of the merits of a hybrid tribunal, see Van Schaack’s posts at Just Security.)

Regional or European hybrid tribunal for foreign fighters. One might even envision the creation of a hybrid regional or European hybrid tribunal for the prosecution of foreign fighters. It could be created by, and composed of nationals of, states of which the fighters are nationals.

Domestic courts

Finally, domestic courts within Iraq and Syria *already have jurisdiction* over the crimes that are occurring in those countries. While they may not be able to exercise it currently in Syria, or against ISIS at the moment in Iraq, at some point in the future they will be able to do so, although vetting mechanisms targeted at regime jurists may need to be implemented particularly as to courts in Syria. Thus, national courts in both countries will be able to prosecute both their own nationals as well as foreign nationals who commit crimes on their territories. To this end, a specialized war crimes chamber could be created, such as Iraq did by creating the Iraqi High Tribunal (although certain aspects of that model should not be followed).

As Beth Van Schaack points out in her post on Just Security, neighboring countries such as Turkey and Jordan might also have grounds for exercising jurisdiction in their courts, as would other countries under universal jurisdiction laws.

Domestic and universal jurisdiction over foreign fighters. To the extent that foreign fighters travelling to Iraq and Syria are implicated in crimes, they could be prosecuted in their home countries after their return (or, in some instances, before their departure, if apprehended, as we have discussed elsewhere). Crimes at issue would include not only war crimes and crimes against humanity, but terrorism-related offenses. U.N. Security Council resolutions 2178 and 1373 mandate that all states “ensure that their legal systems provide for the prosecution, as serious criminal offences, of travel for terrorism or related training, as well as the financing or facilitation of such activities.” (UN press release, 24 September 2014).

It will be key for domestic prosecutions particularly in Iraq or Syria, but also elsewhere (and at the international level), to ensure independent, credible prosecutions that meet minimum international standards of justice. For this reason, it may be difficult to use local domestic courts, but there is certainly potential for their use, particularly as to lower level perpetrators.

Syrian and Iraqi views

Preliminary indications are that Syrians want trials for crimes in Syria, but favor Syrian domestic trials. (See, e.g., Syrian Justice and Accountability Centre, “*He who did wrong should be accountable: Syrian Perspectives on Transitional Justice*,” at 38.) While such views are significant, and Syrians and Iraqis will need to play a significant role in any justice process for crimes committed in their countries, it is too soon to exclude any of the above approaches. Experience also shows that in order to create meaningful accountability for mass atrocity crimes, justice must occur at multiple levels.

Harness Deterrence By Signaling that Accountability Will be Forthcoming

Thus, there are many possible routes to achieving justice for the crimes occurring in Iraq and Syria. While one cannot know which combination of these will be politically possible, some criminal jurisdiction already exists, and other venues for prosecution will likely emerge.

The perpetrators of crimes in Syria and Iraq (or foreign fighters joining them) may be oblivious to the multiple possibilities for their prosecution, or choose to act despite them. But they do so at their peril.

What is now needed is to broadcast information so that would-be perpetrators know these avenues to accountability exist. The goal is to deter them from committing gruesome acts or never joining ISIS/ISIL in the first place.

Tags: [Bashar al-Assad](#), [Foreign Fighters](#), [Guest Post](#), [ISIL](#)

ABOUT THE AUTHOR

Jennifer Trahan is an Associate Clinical Professor at NYU’s Center for Global Affairs. She is also Chair of the American Branch of the International Law Association’s International Criminal Court Committee.



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