ICC ASP15 Side Event on “Accountability Options for Syria”

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Convened by
No Peace Without Justice,
Human Rights Watch
and the Euro-Syrian Democratic Forum

Co-hosted by the Governments of Liechtenstein, Canada and the Netherlands
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1. **Overview**

Despite various initiatives, the situation in Syria continues to deteriorate, with few prospects of an end in sight. According to UN sources, up to 470,000 people have been killed since 2011; over half the population forced from their homes; some 4.6 million people eke out a minimal existence in places that few can leave and aid cannot reach; and a further 4.8 million people, including an estimated 2 million children, have left. The conflict has fractured Syria and threatens the peace and stability of the entire region.

The UN Independent International Commission of Inquiry (CoI) continues to report periodically well-documented patterns of serious violations of international humanitarian law and gross violations of human rights. These transgressions are massive in extent and scope; with each passing day, the goal of regaining ordinary life is exponentially more distant and harder to reach.

Syria’s people are looking for reprieve and for redress, while increasingly unable to believe this will ever happen. Continued impunity feeds the violence; the lack of credible signals that there is an expectation of accountability has created a situation where impunity is the norm, breeding extremism, terrorism and widespread violence. The people of Syria can no longer wait: they are seeking accountability options that can be exercised now.

Syrian and international civil society continue to call for accountability by making use of all available mechanisms and by preparing the ground for future accountability efforts in post-transition Syria. An important element of these calls is ensuring accountability is part of any political solution to the conflict.

At the national level, some States have started the process of investigating and prosecuting individuals alleged to have committed grave crimes such as torture, war crimes and crimes against humanity in Syria under the principle of universal jurisdiction. The individuals under investigations are low to mid-level perpetrators and few in numbers. Those most responsible for the crimes committed in Syria still enjoy impunity. At the international level, there has been little to no progress. The UN General Assembly annually adopts the resolution entitled “Situation of Human Rights in the Syrian Arab Republic” in the Third Committee with limited results. The Human Rights Council has adopted numerous resolutions on the situation in Syria and established the Commission of Inquiry in 2011.

The UN Security Council decided in 2013 that the Syrian government must destroy its chemical weapons arsenal. In 2016, the Joint Investigative Mechanism of the Organisation for the Prohibition of Chemical Weapons (OPCW) and the UN attributed three chemical weapon attacks to the Syrian government and one to Daesh. It is unclear if at all and how the Security Council will follow-up to holding those responsible for the use of chemical weapons to account.

In 2014, an attempt to have a UNSC referral of the situation in Syria to the International Criminal Court was vetoed by the Russian Federation and China. The initiative by Switzerland to call for Security Council referral of the situation in Syria to the ICC was supported by a total of 65 States at the time.

A UNSC resolution aimed at ending aerial bombardment of Aleppo and ensuring humanitarian access was vetoed by Russia on 8 October 2016. There has been no action by the Security Council to ensure accountability for the crimes committed in Syria. After the fifth veto in the Security Council on resolutions dealing with Syria, there have been increased calls for action by the General Assembly.

Against this backdrop, the side event looked how justice might be served in an environment where an ICC referral continues to be highly unlikely given the position of some Permanent Members of the United Nations Security Council. To what degree can universal jurisdiction provide at least some justice to Syrian victims? How could the General Assembly answer the increased calls for
action – could it create a mechanism for crimes committed in Syria to collect, preserve and prepare evidence to facilitate and expedite criminal proceedings nationally, regionally or internationally and to have the evidence ready for any future trials? At the same time, could States engage the International Court of Justice, for example through the mechanism provided in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment?

2. Side event summary

2.1 The participants
The meeting was opened by Sabine Nölke, Ambassador of Canada to The Netherlands and Permanent Representative to the OPCW, and moderated by Christian Wenaweser, Ambassador and Permanent Representative of Liechtenstein to the United Nations in New York. Speakers included Paul Wilke, Permanent Representative of the Netherlands to the ICC; Rami Nakhla, NPWJ Syria Project Coordinator; Ayman Ghojal, Syrian Human Rights Defender; and Richard Dicker, Human Rights Watch.

2.2. The panel discussion
As an introduction, Sabine Nölke gave an overview of the many initiatives Canada has taken to address the situation in Syria, such as calling upon the United Nations Security Council (UNSC) to take action. She said that despite violations of international humanitarian law, the Convention on chemical weapons and other international laws, a mechanism for accountability in Syria remains lacking. Nevertheless, she stressed that there cannot be peace without accountability. Therefore, she thought it time for New York, Geneva and The Hague to come together and strengthen their efforts.

In his welcoming remarks, Christian Wenaweser referred to the Commission of Inquiry and the attempt to refer the situation of Syria to the ICC. He said it was important to look at other options, since the chance of a referral is becoming increasingly smaller, as shown by the veto on the draft referral Resolution and the lack of action by the UNSC since then. He therefore encouraged participants to take the discussion outside the UNSC and look at the UN General Assembly (UNGA) to take action and establish a mechanism within the UN system to collect and gather evidence and prepare cases for any court that may have jurisdiction in the future. National investigations and prosecutions that have been taking place have only dealt with low level perpetrators and a handful of persons. An open and constructive discussion on this was welcomed, which would take place in the form of a panel discussion based on questions and interaction.

Replying to the question of what the accountability options are that Syrians are working and hoping for, Rami Nakhla said that when the conflict started in 2011, people were confident that the leaders would be held accountable. Now that there are few options left, however, Syrians feel that the international community has failed them and no longer have faith in it nor feel they can rely on international justice mechanisms. NPWJ is trying to help the Syrian people overcome this feeling and build the political will of States to join in the call for justice. Based on this answer, he was asked how the national procedures are received by the Syrians and whether they have an impact from their perspective. He answered that although this is a major step forward in terms of delivering justice for Syrian people, most Syrians do not even know it is taking place. A message should therefore be sent to Syrians inside the country that human rights violations and crimes are being monitored. Although he is impressed about cases from France, Germany and Sweden where national proceedings managed to bring justice, a documentary could be made in Arabic and sent to Syria, where perpetrators feel untouchable and protected. Perpetrators of all sides of the conflict should be prosecuted, regardless their affiliation.
Ayman Ghojal, was asked how he sees accountability options where there is no military solution and an uncomfortable relationship between politicians. As he is working on war crimes in Syria since 2012 and examined many videos from the conflict, he is horrified that this is still happening in this century. He referred to the Russian aircraft that destroyed every single hospital in Aleppo. He expressed doubts as to whether the peace process will work, since Syrians lost all hope, and warned that people losing hope become dangerous and there will be more violence. Thus, there is a need for justice to reach peace.

Paul Wilke stated how all boundaries seem to have been broken in Syria, where the use of chemical weapons shows a race to the bottom. Although the Netherlands has been a strong supporter of referral by the UNSC, they cannot wait for the UNSC to do its duty and the Netherlands has focused its efforts on supporting the collection of evidence of mass atrocities. He acknowledged that these activities might not be known in Syria or not known at all, which he believes should be worked on. He pointed out various efforts the Netherlands is undertaking, such as supporting the work of NGOs, making a documentary, interviewing victims and processing large amounts of documents valuable for future prosecutions, training for evidence collection by NGOs to ensure the evidentiary value of items collected. He welcomed input from the floor on different options.

Richard Dicker was asked how he sees a possible way forward and what the UNGA can do on this. Firstly, he stressed the paralysis at the UNSC and around the JIM report. He underscored that the report contained two findings of the use of chemical weapons, both by the Syrian Government and ISIS, yet the UNSC did not respond. Therefore, one should look at the UNGA and he recommended governments to think outside the box. The view of HRW has been to press for an emergency session to give the gravity of the situation in Syria its full weight and attention. He proposed that the UNGA could adopt a Resolution that refers to accountability and calls for the creation of a mechanism that would preserve and protect evidence. Since the time perspective we need in terms of accountability is 25 years, the kind of mechanism that is needed led by the UN is absolutely crucial.

On the issue of evidence collection and historical reference, Sabine Nölke added that numerous NGOs are collecting evidence now, which creates a need for coordination of these efforts. The history of the Yugoslavia conflict shows the position to act for the UN, which is not possible now, so that measures to protect evidence are necessary. Centralisation of evidence collection is needed to avoid it from getting lost or duplicated.

2.3 Discussion from the floor

Collecting and protecting evidence

The discussion was then opened to the floor and the issue of collecting evidence to fight impunity – and how to do it – was addressed. In particular, participants deemed it an absolute necessity to coordinate efforts and to focus on international criminal justice. The role of NGOs in this process was thus addressed. One important observation which came out of the discussion is that NGOs working on collecting evidence should coordinate their actions, not duplicate work and have synergy.

It was however underlined that the work of NGOs collecting information and documenting crimes needs more strict procedures and guidelines for the safety and security of the people involved, because disregard for the safety and security of witnesses, staff and interlocutors is unacceptable.

It was also noted that prosecutors face difficulties in developing national cases related to Syria, mainly in relation to the quality of evidence and the certainty of having jurisdiction. Therefore, Syrian and international initiatives should coordinate so that information is collected in a way to permit to be easily identified for judicial purposes and transformed into admissible evidence.
On the same matter, the idea was raised of a hybrid tribunal that could be created by an Arab country and the UN, so that evidence could already be transferred to this tribunal instead of being kept within NGOs. In fact, nothing is precluding a group of States to go forward and create a tribunal to take jurisdiction over crimes committed over Syria. Nevertheless, questions arose about credibility and legitimacy, since States in the region are often parties to the conflict and huge issues of impartiality would arise from that.

Also regarding how to collect evidence, it was repeated that specific data is necessary to identify missing persons, but a DNA process of identification requires enormous cooperation from countries hosting the refugees. It was recalled that a partnership has been developed on peer standards, protection of data and chain of custody. In this regard, some participants called for the use of new technology instead of old methods to collect evidence, which would be easier and cheaper.

Beyond cooperation between States and NGOs, another issue raised is the importance to work closely with Syrian refugees in Europe. Since many of them have dual nationality, countries of citizenship have jurisdiction and arrest warrants can be sent to Europe. Further, survivors can identify torturers hiding among refugees. Therefore, prosecutors need coordinated work and sources of information, which is challenging because Syrians feel let down by the international community. There is information within the community about high level individuals and a mechanism is needed to share this information. This stream of information is under-utilised and the growing distrust between Syrian refugee communities could further hinder the collection of evidence. Survivors and refugees need to be treated carefully so they do not turn against each other. The focus should not only be put on prosecuting and punishing criminals, but also on victims. When leaving Syria, they are victims of human trafficking, organs trafficking, sexual and gender based violence and other crimes. Thousands of children are without birth certificates and cannot go back to Syria without an identification document. It was argued that access to justice and information must be ensured for refugees in host countries, and that programs designed to help them and provide social and psychological support must be created.

This was deemed all the more important, since families of missing persons also possess vital information that should be collected and protected. The International Commission on Missing Persons (ICMP) faces great difficulties in assessing how many people are missing, including people in detention centres, kidnapped and killed by Daesh and people who have gone missing on their way to Europe. Cooperation with families of missing persons was thus identified as an essential point in the fight for accountability.

**Universal jurisdiction**

Another issue raised was that of universal jurisdiction, especially the need to expand the cases in national jurisdictions to more European countries where most Syrian refugees now stay. The need for coordination and cooperation between European prosecutors and strong support and adequate financial and human resources to move cases in national jurisdictions along, was particularly highlighted.

Despite the current lack of cooperation, it was noted that the criminal cases taking place under extra-territorial and universal jurisdiction are a positive development and begin to pierce and crack absolute impunity. For these kinds of cases, specialised units to investigate and prosecute appeared as an absolute necessity. Governments in the room were urged to create such specialised units and to support them with funding and personnel so they can move forward.

It was especially recalled that some leaders in foreign countries have faced justice in third countries for the crimes they committed. A proposal to focus on torture as an area where more can be achieved was welcomed, on the model of what was done in the *Habré* case. In this case, the
International Court of Justice interpreted the prohibition of torture as *ius cogens* and indicated an obligation to prosecute people who are suspected of having committed torture on the basis of universal jurisdiction. This was proposed as another avenue to open a door. It was indicated that more must be communicated to the Syrian people on this issue.

*The role of States and the United Nations*

In the view of many, States bear the primary responsibility to obtain accountability in Syria. States were called upon to replicate the movement and the spirit of 20 years ago when the Rome Statute was being negotiated and adopted. The issue of how political will could be found again and what the States Parties could do to overcome fatigue and vetoes was addressed. It was judged that collectively, governments are not in a position to operate and that Syria is the result and cause of difficulties in the international community.

During the discussion, Russia was pointed at for aiding and abetting crimes in Syria, if not committing them. For this reason, it was said that the UN General Assembly (UNGA) should address the issue and do something about the veto power, for the international community cannot continue to be powerless in dealing with a nation that forbids any resolution or action on such a conflict. In other words, Russia is engaged in the conflict in ways that require the UNGA to step in and re-evaluate the structure of the UN Security Council. On this matter, it was recalled that the governments of France and Mexico are putting pressure on permanent members of the UNSC not to use vetoes in situations of mass atrocities. At the same time, the Accountability Coherence and Transparency (ACT) group’s initiative on a Code of Conduct for the UNSC, spearheaded by Liechtenstein, was shared as an example for its ability to raise the political cost of blocking UNSC action to prevent or address serious crimes under international law.

The important role of NGOs and civil society in this process was also underlined. The fact that a lot of governments are willing to help and work together with NGOs was welcome. Participants noted that civil society has a large role to play to reach out to counterparts and partners in Africa and Latin America and make sure that the political will to crack the veto is generated.

All in all, many shared the view that the UNGA may be a way to overcome challenges. A web of accountability initiatives is needed and governments still have resources to enable this.

More broadly, States were said also to have a role to play in the fight for accountability *in fine.* The lack of justice was highlighted as becoming the drive for more crimes and as rewarding those who try to maintain power and legitimacy through violence against civilians. A sustainable solution, it was said, cannot happen without justice and accountability. For now, commanders who commit crimes are not only promoted by the regime but also honoured by Russia.

The UK Delegation thus mentioned that to reach justice and accountability, initiatives must also take place outside of the UNSC and countries should back up these initiatives. For instance, the UK justice system is taking action on foreign fighters and nationals who return to the UK.

Finally, it was said that discussions must not stop at side-events and need the support of all States. The need for a forum to follow-up efforts by States for justice on the ground was also stressed.

*2.4. Concluding remarks*

Moderator Christian Wenaweser welcomed that participants at the meeting put pressure on governments. NGOs are doing important work and now States should step up and do something. Accountability has been postponed and we must act now. The UNSC will never take action and although there might be humanitarian action, nothing will be done on accountability. We established the ICC to take on situations like this, which is not possible for Syria at this time. We are slowly working to change the political culture in the UNSC, but different venues are needed. The UNGA is the only universal body of the UN. This step is ambitious but realistic and pragmatic:
to establish a mechanism to collect evidence to make cases ready for the moment the Court will have jurisdiction.