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BOFAXE

Syrian Extraordinary Tribunal to Prosecute Atrocities – A Deadlock for the International Criminal Court?

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Fokus

The Public International Law & Policy Group (PILPG) lobbies for a so-called "Syrian Extraordinary Tribunal". This Draft Statute points into the wrong direction for several reasons as explained in this BOFAX.

Sources:
The Chautauqua Blueprint, http://publicinternationallawandpolicygroup.org/wp-content/uploads/2013/09/Chautauqua-Blueprint1.pdf.

The atrocities committed on Syrian territory have been all over the media, especially the use of chemical weapons and the corresponding UN Security Council (SC) Resolution 2118 (2013). While the overarching aim of international activities towards Syria must be to bring an end to the conflict and to achieve peace and stability in the region, the call for justice grows. In early 2013, there were proposals that the UN SC refers the situation in Syria to the International Criminal Court (ICC). The Council did not follow this approach in Resolution 2118, but only expressed "its strong conviction that those individuals responsible for the use of chemical weapons in the Syrian Arab Republic should be held accountable" (para. 15). This may later-on lead to a referral to the ICC, but it also entails the possibility to establish a distinct mechanism for criminal prosecutions on Syria in the future. What are the options?

Syria is not a State Party to the Rome Statute. Thus, the ICC does not have jurisdiction, unless the Security Council specifically refers the matter to the ICC according to Article 13 (b) of the Rome Statute, which could be done on the basis of a resolution adopted under Chapter VII of the UN Charter. The Chief Prosecutor could then investigate and prosecute core crimes committed in Syria. This would be the most straightforward option for (international) prosecutions in Syria. The ICC would perform a function similar to the former *ad hoc* tribunals but still avoid the time- and resource-consuming establishment of a non-permanent tribunal. Recent practice of the Security Council in Darfur and Libya points into this direction.

The Public International Law & Policy Group (PILPG), a global, *pro bono* law firm providing legal assistance to governments involved in conflicts, currently lobbies for a so-called "Syrian Extraordinary Tribunal" on the basis of its "Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal". While PILPG obviously fears a political deadlock of the UN SC on a possible referral, from our point of view, a decision by the Security Council is yet unavoidable and politically necessary. Also, the proposal points into the wrong direction for the following reasons:

The idea of an Extraordinary Tribunal as such is a step backwards in the development of International Criminal Law. The establishment of the ICC aims at making *ad hoc* solutions obsolete. *Ad hoc* tribunals have been criticized for not being efficient in respect of duration, resources and location. While these problems have only partly been resolved by the ICC, a permanent Court still has the advantage of developing durable proceedings over time.

While the ICC's option (under Article 3 (3) of the Rome Statute) to conduct trials in a situation country, seems to also support the idea of a hybrid tribunal, the creation of an Extraordinary Tribunal would place the cart before the horse. The proposed tribunal is neither designed as an international tribunal nor as a chamber within the national system. The drafters' idea of the tribunal's extraordinary nature remains unclear, in particular its relationship to the ICC. While domestic chambers are a feasible option to complement ICC prosecutions, setting up a hybrid tribunal *instead* of ICC proceedings is not. Hybrid tribunals have the advantage of being "on the ground" and including a strong domestic linkage and ownership. They should be used for putting mid-level and minor perpetrators on trial. As the PILPG proposal aims at top-level perpetrators, it seems s to miss lessons learnt of former hybrid tribunals. Indeed, referring to the Extraordinary Chambers of Cambodia (ECCC) runs the risk to repeat mistakes that have led to serious problems before. The ECCC, ignoring the recommendations of a UN Expert group, was located in Phnom Penh and politico-legal controversies during the trials have led to a lack of confidence. The dangers of political influence and the risks of corruption outrun potential advantages of hybrid tribunals. They should therefore be used to complement international trials at the domestic level, but not replace them.

There is no ideal solution in sight for accountability mechanisms in Syria. As long as the conflict is on-going and the Security Council cannot find a common position, the follow-up question of trials cannot be settled. It is our view that a realistic approach towards the jurisdictionally limited ICC is necessary and that the creation of a new, hybrid tribunal is not the way ahead.

Verantwortung

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