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"Establishing a Syrian War Crimes Tribunal?"

# Testimony to Subcommittee

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## **I. Introduction**

I am grateful to the Joint Subcommittee for inviting me to testify today, and thank both Chairman Chris Smith, Madame Chairman Ileana Ros-Lehtinen, and members of the subcommittees for holding this hearing to discuss the important issue of justice and accountability in Syria – a topic which does not often get enough time in the public domain but which is so critical.

My organization, Human Rights Watch, has issued eleven in-depth reports on horrific human rights crimes committed in Syria over the last two and half years. My colleagues have conducted over ten field missions interviewing hundreds of victims of and witnesses to these abuses. Most recently, we documented massacres by armed insurgents on a series of Alawite villages near the city of Latakia.

As you know, serious violations of international human rights and humanitarian law have been committed on a vast scale in Syria. Human Rights Watch has concluded that government forces have committed crimes against humanity and war crimes and has repeatedly called for an end to abuses. As you may know, the Syrian government continues to conduct indiscriminate air and artillery strikes on residential areas, and to arbitrarily detain, torture, and extra-judicially execute civilians and combatants. In August, hundreds of civilians, including many children, were killed in a chemical weapons attack on areas near Damascus. A United Nations investigation determined that the nerve agent Sarin was used. While the Syrian government denies responsibility, a Human Rights Watch report, based on independent analysis and documentation, found that available evidence strongly suggests that government forces were responsible for the attack.

Human Rights Watch has also documented and condemned serious abuses amounting to war crimes, including the indiscriminate use of car bombs, kidnapping, torture, and extrajudicial executions by some opposition groups. Foreign fighters and groups linked to Al Qaeda have been among the worst perpetrators of these abuses. In one operation documented by Human Rights Watch in the Latakia countryside of Syria in August, evidence strongly suggests that the abuses committed by some armed groups taking part in that particular military operation rise to the level of crimes against humanity. Some armed opposition groups fighting in Syria are also using children for combat and other military purposes.

One fundamental track toward accountability for these extensive and grave violations involves the credible investigation and prosecution of those individuals responsible in a court of law. Criminal justice can yield short and long-term benefits. Importantly, the fair prosecution of persons for serious crimes under international law may assist in restoring dignity to victims by acknowledging their suffering. It also acts an expression of condemnation and outrage at the commission of these violations and ensures that the perpetrators are duly punished. Moreover, by providing means of redress for victims, criminal justice may deter future violations and build respect for, and confidence in, the rule of law. The failure to hold those responsible for the most serious international crimes to account, on the other hand, can fuel future abuses.

Yet, criminal prosecutions of the crimes perpetrated during the Syrian conflict present challenges for any court system. It is therefore essential to be objective and clear-eyed about the difficulties in achieving the desired results in a situation as polarized as Syria is and will be.

Beyond the practical difficulties posed by the scale of the violations, including the collection and preservation of evidence, delivering meaningful justice in a manner that upholds the principles of impartiality and independence will also prove a daunting task. In most cases, it will also be difficult to ensure that investigations and prosecutions resonate with the concerns of victims and affected communities, be they in Aleppo or Latakia. In other locales, pursuing justice may turn out to be deeply unpopular, including among segments of the population who

believe that those who committed serious crimes were justified in doing so, or because those implicated in abuses retain positions of authority or are close to those in power. It is this complex landscape that frames the pursuit of criminal justice for grave abuses from the outset.

One must therefore think objectively and strategically in overcoming the obstacles that exist in addressing the crimes committed. This will require a comprehensive, long-term vision that makes use of a range of judicial and non-judicial tools at both the international and national level in a mutually re-enforcing fashion, and in a way which avoids pitting one measure against others.

With respect to achieving credible criminal justice for the crimes committed, Human Rights Watch believes that the most effective path to accountability should include prosecutions by Syrian courts, the contribution of a specialized ‘bridging’ mechanism embedded in the Syrian justice system, and the involvement of the International Criminal Court (ICC), acting as a critical reference point for the domestic system.

## **II. National Courts**

Normally the starting place would be with the national courts because these should be the first line of protection and justice for victims. Indeed, prosecutions by domestic courts are necessary to achieve fuller accountability. I submit that this is unlikely to happen in the short-term in Syria. Critically, the political will to permit the independent and impartial investigation and prosecution of the serious crimes committed in the past two and half years is absent. The domestic justice system lacks independence from political control and security forces are shielded by law from prosecution. This means that pursuing sensitive cases, which may implicate governmental policies or actors, is impossible in the current political landscape.

Moreover, beyond the acute hurdles that exist with respect to the political will to realize credible and effective justice, several steps will also need to be taken to develop the capacity of the domestic justice system to address these crimes. Cases involving grave crimes such as war crimes and crimes against humanity tend to be extremely complex to investigate, prove, defend

against, and adjudicate. Extensive evidence and scores of witnesses are usually involved. Prosecuting individuals who may have ordered the crime rather than personally having committed it or are responsible as a matter of command responsibility is also difficult – international experience shows that identifying these individuals and proving links between acts on the ground and orders or acquiescence from above requires extensive prosecutorial and judicial experience. Even the most sophisticated legal systems—which mainly deal with ordinary crimes—may lack the capacity to effectively address serious crimes committed on a large scale. At the same time, stark deficiencies will exist in the Syrian justice system which will aggravate these challenges, including a shortage of personnel, a lack of training in addressing serious criminal cases, concerns about the bias of national judges and prosecutors, limited court infrastructure, outdated rules of procedure, corruption, and limited case management.

So while the need for credible national justice is clear, the path to achieve it is by no means straightforward or within reach. Even where there is political will to see perpetrators from one side held to account, the local justice sector will be in disarray. As such, reforms and external assistance will be needed to equip the Syrian judicial system, over the long run, to carry out credible and independent domestic proceedings which are meaningful to the local population, including, for example, putting measures in place to ensure: (i) the independence of judges and prosecutors; (ii) the full protection of witnesses, lawyers, and judicial personnel; (iii) as well as the ability of investigators to gather evidence. Financial and diplomatic support for such future efforts could assist in bolstering national capacity to handle these violations, but this will all take a lot of time.

### **III. Specialized Mechanism Embedded in the National Justice System**

While this long-term judicial construction work is underway, the creation of a dedicated and specialized judicial mechanism embedded in the national justice system with the active participation of international investigators, prosecutors and judges could work to narrow the impunity gap. If appropriately structured, such a mechanism could, in time, strengthen the

capacity of the national justice system to handle grave international crimes. The War Crimes Chamber in Bosnia and Herzegovina's State Court and the Special Department for War Crimes in the Prosecutor's Office offer important lessons for policymakers and donors in this regard.

This will not be easy in Syria, but if done right, this would help to build "bridges" with the ordinary Syrian courts through sharing training, knowledge, and experience to bolster the capacity of the entire Syrian justice system.

The involvement of internationals with experience in trying complex cases carries a number of crucial benefits. Beyond enhancing the short and long-term capacity of professionals and institutions in Syria to conduct fair and effective war crimes trials, the presence of impartial international staff could also help insulate the mechanism from political interference and strengthen its perceived and actual independence. Lastly, presence of international staff may bolster victims and witnesses' willingness to give testimony, as well as witness protection. The internationals can be phased out over time, according to certain benchmarks, as the local judicial authorities gain experience, establish their legitimacy, and assert their independence.

It cannot be stressed enough though that without the necessary political commitment to fair and impartial trials at the outset, it will not be possible to legitimately pursue broader national prosecutions, let alone establish a meaningful "bridge building" mechanism.

#### **IV. The Role of the International Criminal Court (ICC)**

On this difficult terrain, we believe that the International Criminal Court (ICC) has a crucial role to play as a "reference point" for the national system. If possible, the court's involvement in the course of the *ongoing* conflict in Syria would send a clear message to all parties that grave crimes will not be tolerated and carry serious consequences. In the short-term, it would therefore put those in senior positions, no matter their political allegiance, on notice that they could be held responsible for crimes they order or commit, or for crimes they fail to prevent or punish – whatever the outcome of the conflict. This credible threat of prosecution may help stem further abuses. In addition, the record from other conflicts, such as those in the Balkans,

also confirms that criminal indictments of senior political, military, and rebel leaders while conflicts are ongoing can actually strengthen peace efforts by delegitimizing and marginalizing those who stand in the way of resolving the conflict.

Over a longer term, there are indications that it could have a potentially positive “spillover” or catalytic effect on future national proceedings. There is basis in practice for this trend. In particular, the *ad hoc* tribunals for the former Yugoslavia and Rwanda played a beneficial role in this regard. For example, the desire to have cases transferred from the international *ad hoc* tribunals propelled both Rwanda and the countries of the former Yugoslavia to engage in serious domestic legal reform in order to meet the tribunals' standards to have cases transferred to their national courts. This wish to try cases handled by the *ad hoc* tribunals also propelled some of these countries to create specialized judicial chambers and prosecutorial mechanisms to address atrocity crimes.

In many countries where the International Criminal Court is carrying out an investigation, steps have been taken—at least nominally—to start domestic proceedings. Even in countries where ICC investigations are being considered but have not been opened, efforts have been made to hold perpetrators to account that otherwise may not have occurred in order to keep the cases in national courts.

Yet, in spite of the positive impact the ICC could have in Syria, it is important to acknowledge that given its daunting mandate, the lack of sufficiently robust state support afforded the institution to date, and some performance failings over its first ten years, there have been shortcomings in the court's practice. With investigations in eight country situations, the court is overextended and Syria would pose the steepest challenge yet to the institution.

Meaningful justice delivered by the ICC will mean investigations regardless of the affiliation of the perpetrator and trials on charges reflecting the underlying patterns of ICC crimes committed in a situation. A robust approach will also mean, where possible, presence in the field and engagement with affected communities in order to inform ICC policy decisions, to

ensure that justice is not only done but seen to be done through public information and outreach activities, and to facilitate witness protection, fair trial rights, and the right to victim participation afforded under the Rome Statute. Practically speaking, the need for robust engagement means that an ICC intervention will be resource-intensive.

For the court to be able to implement its mandate, including by taking on important but politically unpopular cases, securing arrests, and guarding its independence, the ICC will need increased international political commitment—whether at meetings of its states parties, in strategic forums such as the UN Security Council and regional organizations, or in bilateral contacts—and the implementation of that political commitment in practice. Additional resources would likely be needed, including resources to support additional investigations and cases in Syria. Court officials and staff will also need to heighten their efforts to ensure that the ICC can meet its full potential. Indeed, the effective implementation of its mandate in practice will not be possible without the steadfast support and commitment on the part of a number of actors.

For now, the ICC cannot prosecute grave abuses committed in Syria since it is not a member state of the Rome Statute, the treaty that established the ICC. Unless the Syrian government ratifies the treaty or accepts the jurisdiction of the court through a declaration, the ICC could only obtain jurisdiction if the UN Security Council refers the situation there to the court. The Security Council, with what is called an “ICC referral,” could give the court jurisdiction stretching back to the day the Rome Statute entered into force, on July 1, 2002. The ICC would have jurisdiction to investigate war crimes, crimes against humanity, or genocide committed by *all* sides to this conflict, whether by government forces, opposition fighters, or other militias.

We have seen, as the situation on the ground shifts in Syria, changes in Russia’s position on chemical weapons and humanitarian access to populations in need inside Syria. It would be a mistake to preclude circumstances where Russia would not block a referral. This will require active US government support. Frankly, the administration could do a lot more to make its views

known. Such support will encourage its closest allies on the Council and raise pressure on the Russian Federation to change its obstructive stance. It will also underscore the administration's commitment to impartial justice.

## **V. Recommendations and Conclusion**

In sum, given the exigencies, we believe this three-pronged approach, sequenced in time between the prongs, offers the best possibilities for justice in an extremely difficult situation. After considering the situation on the ground and the most relevant experience from other country situations, I believe, with all respect, that the solution most likely to provide justice is not a stand-alone *ad hoc* tribunal for Syria. Establishing a separate, *ad hoc* entity to prosecute crimes in Syria comes with significant practical obstacles.

There are delays inherent in creating another highly complex institution from scratch, as was done with the International Criminal Tribunals for Rwanda and the Former Yugoslavia or the Special Court for Sierra Leone. Defining the legal framework, finding appropriate facilities, recruiting competent personnel and ensuring cooperation of states represent considerable challenges, require time and are likely to be more costly than if a permanent institution is tasked with investigation and prosecution. The delay involved in creating such an entity from the ground up would remove any potential deterrent effect that could be achieved by examining crimes in Syria now, as abuses persist. Another key concern relates to the current security situation in Syria, which precludes the presence of such an *ad hoc* entity. It is also unrealistic to assume that Syria would support the establishment of such an institution, let alone fully respect its independence.

Funding is also an issue of concern for mixed or hybrid judicial entities where financial contributions by states are not compulsory (as is the case for the Special Court for Sierra Leone and the Extraordinary Chamber of the Courts in Cambodia). Financial constraints drastically undermine the ability to effectively and independently provide justice for victims. The example of the Cambodian model also shows that internationalized structures which are integrated in the

national justice system can be exposed to a *considerable risk of undue influencing* which impedes the impartial delivery of justice.

It is noteworthy that the UN Commission of Inquiry on Syria, in its February 2013 report, concluded that the ICC is the most appropriate judicial institution for the fight against impunity in Syria and enumerated a series of reasons why an *ad hoc* entity would not present a viable option to adequately ensure accountability for crimes committed in Syria.

With the foregoing in mind, there are some concrete steps that could be taken to signal greater support for justice in Syria. Human Rights Watch would like to suggest:

First, the administration has already started supporting documentation efforts, including the preservation of potential evidence. This process will continue to be very important going forward and could be vital to future domestic and international accountability processes. Congress should support these efforts.

Second, the US government should make clear its position on the ICC instead of demurring behind concerns that Russia and/or China would veto any Security Council resolution which aimed to refer the situation in Syria to the ICC. While I recognize the ICC is often considered a lightning rod of sorts for many in this body, there is simply no reason to reject the idea out of pocket. There are now 64 countries supporting such a referral, including six Security Council members, so the administration would be smart to at least begin talking about how the court can play a constructive role. In this connection, the administration's overall justice strategy on Syria should take the ICC into account. Congress is well placed to press the administration on this point and I hope these subcommittees will consider doing so.

Thank you.