

Testimony on H. Con. Res. 51

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I thank the committee for inviting me to testify on this important initiative to address the humanitarian crisis in Syria. I am sympathetic to the underlying aim of H. Con. Res. 51. I would like to suggest grounds for caution, however, before we urge the UN to establish a formal tribunal to judge war crimes in Syria. Instead, I urge the committee to consider a somewhat modified approach, one that might better adapted to the current situation and more feasible to establish, as an interim measure.

Before expressing my concerns about the proposed tribunal, however, I want to express appreciation for two basic aspects of the concurrent resolution proposed by Rep. Smith and others. First, the resolution rightly calls attention to the whole range of atrocities inflicted on civilians in Syria. The United States government has so far focused almost all its diplomatic efforts on removing chemical weapons from Syria. That is a worthy aim. Still, more than 100,000 people have already been killed in Syria – all but a small proportion of them by conventional weapons. We should not minimize the suffering of victims or the gross indifference to international standards that has generated such massive civilian casualties. We risk doing exactly that by focusing almost all our attention on chemical weapons.

Secondly, I commend the resolution seeking a new forum to address the Syrian situation, instead of simply urging a Security Council resolution to confer jurisdiction on the International Criminal Court. The ICC is an experiment in which the United States has declined to participate. There are sound reasons for U.S. caution about the ICC. Down the road, the Court may prove a threat to American military flexibility, by threatening to second-guess our commanders and inhibiting potential allies. So we should always be wary of helping to build up the ICC's authority.

But there are more immediate objections to calling in the ICC here. The Court has so far devoted all its efforts to prosecutions in Africa. It has achieved so little in these efforts that African countries, even signatories to the ICC Statute, have openly challenged its authority and declined to assist it in even the most basic ways. The least one can say is that the ICC has no proven capacity to persuade people in

conflict zones that it is seeking real justice. It makes sense to tailor our response to the Syrian civil war to the particular circumstances of that conflict.

We should not, however, be naïve about the difficulties that even a new, special tribunal for Syria would face. The first thing to remember is that cooperation from local authorities cannot be taken for granted. Even in Rwanda, the new government was so angry at the priorities of the UN tribunal that it declined after a while to allow UN officials to enter Rwandan territory. And that was a Tutsi government, which had already secured its control over Rwanda and was very eager to see Hutu officials of the deposed government punished for the genocide they had implanted against the Tutsi population.

In Syria, things will be much more difficult. If the conflict is still continuing, when the special court starts to operate, it may have great difficulty persuading witnesses to give public testimony. Even if some sort of peace returns to Syria within the next few years, we cannot assume the government in place will want to cooperate. If the post-war government is headed by Assad or a Baathist or Alawite successor, it will not want to allow close scrutiny of atrocities committed by their own, victorious forces. If the new government is drawn from rebels, they will not want to publicize atrocities committed by their forces during the civil war.

Even in the most hopeful scenario, in which Assad is succeeded by a coalition drawn from a range of Syrian factions, we cannot assume that they will all be equally inclined to cooperate with an international tribunal. It is much more likely that a new government will give priority to accommodating the various factions and so allow particular groups to resist prosecutions that seem most threatening to their own leaders. If there is a broad coalition in charge of Syria in the next few years, we should expect that many of the participants at the top level will have blood on their hands – or owe their success to the ruthlessness of local commanders or supporters with very bloody hands.

The preamble to the current resolution asserts that “any lasting, peaceful solution to civil war in Syria must be based upon justice for all” That may be true, but Syria’s immediate future will probably be a search for some attainable halt to all-out war, even if that “resolution” is not, in itself, assured of being “lasting” or entirely “peaceful.” Most countries that made a transition to democracy in the 1990s accepted a general amnesty. That was true in South Africa, in most countries in Latin America and almost all countries in Eastern Europe. They preferred to sacrifice justice in order to strengthen prospects for peace. I do not at all mean to recommend that approach in Syria. I simply want to emphasize that what outsiders regard as the best hope for peace may not be what locals regard as the best hope.

Then we need to acknowledge that international jurists are bound to have different priorities from locals. I don’t think that is simply because “western” or “advanced” countries have developed a different legal culture. International tribunals have developed their own legal culture. So, for example, Rwandan Tutsis

were bitter that the International Tribunal for Rwanda was barred by its charter from imposing the death penalty. When Europeans sentenced fellow Europeans for comparable crimes after World War II, they were quite prepared to impose capital sentences. The United States still allows capital punishment for aggravated murder. In unstable countries, a long prison term may be an invitation to the supporters of the convicted mass murderer to break into the prison or extort a pardon through terror threats. Iraqis preferred to forfeit most international cooperation in the trial of Saddam Hussein, rather than forego a capital sentence (as Europeans demanded).

The “justice” delivered by international tribunals in the last twenty years has been excruciatingly slow because international jurists have given priority to procedural fairness. I don’t think that is a matter of western values, per se. The International Military Tribunal at Nuremberg lasted only one year, from the opening gavel to the execution of capital sentences on the worst offenders. In post-war France, Pierre Laval was dispatched to the guillotine with comparable speed. But the Rwanda Tribunal did not achieve a single conviction in its first five years; after ten years, it had reached convictions on only twenty perpetrators, promising to reach verdicts on another twenty-five defendants before the end of fifteen years. The government of Rwanda, with one tenth the funding of the international tribunals, reached verdicts in 5,000 cases within five years of starting its own justice program. If the point is to reassure local people that justice is being done, making them wait for a decade will not be reassuring – nor helpful to a new government.

To cite another example of differing priorities: the International Criminal Tribunal for Yugoslavia decided it was important to allow Slobodan Milosevic all the time he wanted to speak in his own defense – and denounce NATO for what he depicted as its own war crimes against Serbia. The ICTY thought it was important to have these speeches televised and broadcast into Serbia. The result was that Milosevic, who had been overthrown by his own people, had a perfect forum to rehabilitate his reputation as champion of beleaguered Serbs. Surveys showed that after so much broadcast time to present his own views, Milosevic made himself more popular than any politician in Serbia. That was not helpful to Serbian efforts to stabilize a new democracy. It is not surprising that Iraqis sought much tighter control over what Saddam was allowed to say in his trial – which was also, by design, a much less extended proceeding.

Past problems do not prove that an international tribunal would necessarily work badly in Syria. A hybrid tribunal, involving international assistance to a special Syrian institution (in some adaptation of the model developed for Sierra Leone), might be feasible and effective in the future. But this is not a project that can have credibility if established in partnership with the current Assad government. In the meanwhile, we can’t plan for cooperation with a different government until we see what sort of government actually does emerge when Assad leaves power (if he does leave power).

What might therefore be most appropriate in the near future is an International Independent Investigative Commission, somewhat similar to the commission created by the Security Council to investigate the assassination of former Lebanese Prime Minister Rafic Hariri in 2005. For Syria, a commission of this kind should have a much broader mandate. Where past tribunals have taken years to get started, an investigative commission might get to work very quickly. It could investigate war crimes while the evidence remains fresh. And it might be of immediate help in establishing basic facts about particular episodes of the sort that are now shrouded in conflicting claims: how many people were killed, how many were civilians, how many associated with combatant forces, how they died, what was going on at the time, what weapons seem to have been involved, etc.

Investigations of this kind would help the international community understand what is actually occurring in Syria. Their findings might provide material for future trials. The mere fact that abuses are being investigated – now - might help persuade all factions in Syria that they need to reckon with the likelihood of determined prosecutions in the future. It is at least a plausible hope that this will have some restraining effect on military commanders. It will register international concern for victims – especially those, like Syrian Christians, who do not now have major armed factions to champion their claims.

There will certainly be problems for such an institution. The IIC in Lebanon seems to have experienced a great deal of frustration. But it did accumulate evidence that helped persuade the Security Council to establish a special criminal tribunal to prosecute suspects in this episode. It kept the crime in the spotlight, even as rival factions in Lebanon became distracted by their ongoing political maneuvers.

If the international response needs the backing of the Security Council, we may find that likely opponents of an international tribunal – including Russia and China – may be more willing to support an investigative commission. The United States is by no means the only country on the Security Council which has concerns about international criminal tribunals. Governments that are skeptical of the ICC or other judicialized forums may be prepared to endorse an investigative commission, since it does not commit them to anything beyond that. Still, it is a plausible hope that if the investigators compile a sufficiently compelling record, even skeptical states on the UNSC will be more open to the notion of a formal tribunal – or an international role in a Syrian tribunal – down the road. The IIC for Lebanon did generate support for a follow-on tribunal in just this way.

It does not make sense for Congress to debate the most suitable institutional arrangements for this sort of project – certainly not now. Congress can urge the executive to negotiate with other governments. It can't draw up its own plan. When it comes to international negotiations, the President and State Department will need great flexibility to deal with changing facts on the ground in Syria and evolving international priorities.

But I think Congress can make a valuable contribution by focusing attention on the challenge and giving a nudge to the executive to pursue a serious and practical international response. The United States still has a role to play in addressing the humanitarian catastrophe in Syria. There are genuine limits on what we can do, given our unwillingness to take sides in the conflict. But that is no excuse for doing nothing.