

The case for restraint: Syria and the International Criminal Court
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March 2013 will be notable in the history of the Syrian conflict for several reasons, two of which include the second anniversary of that conflict and the number of refugees surpassing the one million mark. Navi Pillay, the UN High Commissioner for Human Rights, places the number of dead at approaching 70,000. That count very likely underestimates the toll this conflict has taken on the civilian population. These figures are difficult to absorb, and they tell us little about the individual experiences of those who make up these numbers caught up in this human tragedy.

Yet, the violence and bloodshed from all sides continues, and the international community remains stalemated as to its response to the ongoing crisis. It has explored a number of options, from diplomacy to more coercive action like economic sanctions and military force. Recently, there have been calls for judicial intervention by the International Criminal Court (ICC). Is this a viable option? This piece examines the effectiveness of an ICC investigation as a means of halting the Syrian conflict. It first discusses non-judicial options currently on the table. By illustrating how difficult these options are, a case can be made for why pursuing the judicial option right now may not be effective in helping Syrian civilians or sustaining international law.

Non-judicial options for ending the Syrian conflict

The UN Security Council has been stymied from acting because three of its members with veto powers - the United States, China and Russia - disagree on what to do about the civil war. The United States and its allies in the Security Council advanced a number of resolutions designed to pressure Bashar al-Assad's regime to end the conflict, including the threat of imposing economic sanctions. For the United States-led coalition, the mass atrocities attributed to al-Assad have delegitimised him as Syria's leader and thus, it is time for him to step down.

China and Russia have vetoed these resolutions. One reason is that Russia and China feel the resolutions are one sided, placing blame primarily on the Assad regime without acknowledging the contributions of the opposition to civilian suffering. Their actions also reflect a consistent policy of upholding the notion of non-intervention in the domestic affairs of a state. For them, intervention really means regime change in Syria; this would not only destabilise the country, but the region as well. To these countries, this possibility would be a far greater threat to human security.

Counterarguments in this critical debate are not solely based on appeals to humanitarianism. In fact, both sides also claim each other's arguments for intervention/non-intervention on humanitarian grounds are really a mask for more strategic, utilitarian considerations.

This impasse is centred around non-military intervention. Reaching an accord on UN-sanctioned military action is even less likely. One reason is that Russia and China feel burned by the UN-authorized military intervention in Libya. They felt a seemingly neutral Security Council resolution authorising military force to protect civilians transformed into an instrument for the pursuit of political objectives. However, a number of countries have lobbied outside the Security Council for support to arm the rebels. And there have been allegations that the Syrian regime receives arms from its state backers.

Judicial options - the International Criminal Court

UN rights chief urges Syria war crimes probe

Acting out of frustration from inaction in the face of large scale suffering in Syria, 57 countries urged the UN Security Council to refer the Syrian situation to the ICC as another avenue to ending the conflict. These countries, representing various regions, state that the UN's Commission of Inquiry has uncovered evidence of human rights abuses committed in Syria.

Furthermore, Syria has not heeded calls from the international community to pursue justice for these alleged crimes. Consequently, they conclude [PDF] that "[w]ithout accountability... there will be no sustainable peace in Syria". If Syrian authorities will not pursue a judicial process for examining possible crimes, then the international community must do so through the ICC.

The UN Security Council would have to refer the Syrian situation to the ICC in order for the ICC to investigate potential violations of international law there. This is because Syria has not ratified the Rome Statute [PDF], which established the ICC. Consequently, the ICC would have jurisdiction over Syria only if Syria refers itself to the ICC, or if the UN Security Council does so. Once a situation comes before the ICC, it can then investigate possible violations of international law committed by any relevant actor in that situation. In other words, it does not take sides by only investigating one party, say, for example, the Syrian government. Opposition forces are also liable to prosecution.

Why a Security Council referral could pose problems for the ICC

Getting the necessary consensus to pursue a referral is difficult for many of the same reasons the Security Council has been stilled in its other efforts to do something about Syria. Russia does not support an ICC referral. It also does not appear as if the United States would support a referral either. It did not sign the letter requesting the Security Council to advance an ICC referral, and Hillary Clinton, as Secretary of State, said calling Assad a war criminal would "complicate" matters.

But if the Security Council were able to muster the necessary votes to actually get the ICC involved, would this necessarily be a good idea? From an international law perspective, it might not be for a number of reasons. In order to explore these reasons, some background information about the ICC might be helpful to that discussion. The ICC was designed to be a permanent venue to try individuals accused of the most serious international law violations. It was to replace the UN's system of creating ad hoc tribunals with more limited jurisdiction like the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda. It is also supposed to be an independent judicial body which can investigate alleged crimes wherever it holds jurisdiction. Thus, while the UN Security Council can refer situations to it, it is not a UN organ. It is separate and independent of the Security Council.

It is from this independence that the ICC can ostensibly promote the viability of international law. The core element in the concept of rule of law is equality before the law. In other words, the law is supposed to apply equally to all relevant parties, regardless of their status or the power they possess. Compromises made on this core principle can lead to diminished legitimacy, undermining the ICC's ability to effectively carry out its mission.

And this is why a UN Security Council referral might prove problematic to the ICC. If the Security Council did issue a referral, it might look very similar to its referral of the Libyan situation. That case shared a similarity with the Syrian case in that the ICC did not have jurisdiction over Libya without a Security Council referral. However, in that instance, the Security Council managed to coalesce around the idea of a referral, enabling the ICC to investigate violations of international law committed in the Libyan conflict. Yet, for the ICC, this referral was problematic because it limited its jurisdiction. For one thing, the ICC could not investigate the actions of non-States parties, which included some of the countries participating in NATO's Libyan operation. As Mark Kersten argues, accepting restrictions like this compromises the ICC's independence and integrity by weakening the notion of equality before the law. If the Security Council manages to agree to an ICC referral, it may well impose similar types of restrictions because of concerns that the actions taken by its veto-wielding members in Syria might open them up to ICC prosecution. Accepting such a restricted referral potentially undermines the idea of rule of law.

Second, advancing an ICC referral as a way to end the conflict when the international community is paralysed to do so also undermines the rule of law. For instance, some have argued that an

ICC referral could be used as a bargaining chip to persuade Assad to step down. Yet, as Alana Tiemessen notes, such bargains politicise what is supposed to be a neutral body and undermine equality before the law. Passing the buck on to the ICC to do what the international community is unable or unwilling to do can cause serious long term damage not only to the ICC itself, but to the effectiveness of international law more broadly.

The ICC must take these possibilities seriously as its credibility has already been challenged by a number of states. Claims that it pursues justice unequally and serves as a tool for powerful states arise from the fact that all the cases currently before it are from Africa. Such sentiments can erode the Court's ability to prosecute serious violations of international law, impairing in the long run civilian protections that form the foundation of contemporary international law. In light of these issues, the ICC might consider declining a conditional Security Council referral of Syria, should one manifest.

That being said, does that mean the ICC has no role to play in addressing international law violations in Syria? Not necessarily. One possibility is to wait until the opposition forces assume control of the government. At that point, they can then refer Syria to the ICC. Such a referral is less likely to contain exceptions which harm the rule of law or taint the ICC. Studies have shown that transitioning countries with democratic aspirations are more likely to sign on to human rights treaties, like the Rome Statute, than more established democracies or autocracies. Post-conflict, the international community could pressure a fledgling Syrian government to ratify the Rome Statute, enabling the ICC to investigate the situation unencumbered.

An ICC investigation on its own is not going to stop the atrocities in Syria. The scale of destruction and pain there strains comprehension, yet is beyond the mission and capacity of the ICC to address. At this point in the conflict, the international community needs to be engaged in a more unified and meaningful manner if it is serious about ending civilian suffering. It will have to make a tough choice among unattractive options. The international community cannot expect the ICC to do its dirty work. Such expectations are not only unrealistic, they also threaten to weaken international law. In the interests of Syrian civilians and those caught up in future conflicts elsewhere, the ICC might do well to exercise restraint in the unlikely event a referral materialises, especially if it contains jurisdictional limits. Instead, it should wait until it is in a better position to negotiate an unconditional referral from a new Syrian regime. In doing so, not only does the ICC potentially guard itself, it can also preserve the idea of rule of law in the long term, enabling it to be used as part of a large toolkit to protect civilians wherever they may be threatened.