

GENOCIDE IN SYRIA: INTERNATIONAL LEGAL OPTIONS, INTERNATIONAL LEGAL LIMITS, AND THE SERIOUS PROBLEM OF POLITICAL WILL

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I. INTRODUCTION

The Syrian Civil War began in March 2011. Protestors demanded political liberalization and criticized the government of Syrian President Assad, who took power in 2000 after his father's death. The conflict followed an all-too familiar pattern: Peaceful protests were met with repressive government action; the failure of peace negotiations led to civil war; civil war led to credible allegations that war crimes and crimes against humanity had been committed. As in many cases, the conflict has spread, causing extraordinary refugee flows and war to spill across borders, particularly Iraq, Jordan, Lebanon and Turkey. The destabilization of Syria has also made it a hunting ground for the ruthless fighters of the so-called "Islamic State of Iraq and Syria" ("ISIS"), which gained control of territories in Syria in summer 2014, and has attacked villages there.¹ Indeed, attacks have been so ferocious, particularly as directed against ethnic minorities, including Kurds, that on October 12, 2014, *Le Monde* asked whether ISIS' siege of Kobani – a town on the Syria/Turkish border – would be the "Srebrenica" of the Syrian conflict,² evoking the possibility that genocide could occur in Syria as well.³

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¹ *What is Islamic State*, BBC NEWS (Sept. 26, 2014), available at <http://www.bbc.co.uk/news/world-middle-east-29052144>.

² Yves-Michel Riols, *Le Sort de Kobané Tétanise la Turquie et la Coalition Anti-Djihadiste*, LE MONDE (Oct. 11, 2014), available at http://www.lemonde.fr/international/article/2014/10/11/le-sort-de-kobane-tetanise-la-turquie-et-la-coalition-anti-djihadiste_4504610_3210.html?xtmc=kobane&xtr=7.

³ On October 21, 2014, a UN official suggested that the campaign of the ISIS militants against Iraq's Yazidi minority may be attempted genocide. See *Islamic State*

Meanwhile, a peace agreement seems out of reach. Although an American led coalition began airstrikes against ISIS targets after the beheading of two American journalists by the group's affiliates in Iraq, most observers do not expect the strikes to end Syria's civil war.⁴ Moreover, human rights groups have objected that ISIS has killed far fewer Syrians than government troops, which have been credibly accused of using chemical weapons, barrel bombs and torture to suppress the Syrian opposition.⁵ As death tolls, displacements and mayhem have climbed, the United Nations Security Council has frequently convened. It issued a Presidential Statement on August 3, 2011, following the massacre at Hama, which condemned the Syrian authorities and called for an immediate end to the violence.⁶ This unanimity was shattered however, as a total of twelve (12) Resolutions have been proposed, four (4) of which have been vetoed by China and Russia, as follows: October 4, 2011; February 4, 2012; July 19, 2012; and May 22, 2014. The May 22nd Resolution included an attempted referral of the situation in Syria to the International Criminal Court.

Eight Resolutions have been adopted since 2011, including Resolution 2042 endorsing Special Envoy Kofi Annan's six-point plan,⁷ Resolution 2043 on implementation of the six-point plan and establishing the United Nations Supervision Mission in Syria,⁸ Resolution 2118 on the destruction of Syria's chemical weapons stock,⁹ Resolutions 2139, 2165 and 2191 regarding humanitarian relief activities,¹⁰ and most recently on August 15, 2014, Resolution 2170 regarding the ongoing threat from ISIS and the Al Nusra Front and the "negative impact of their presence, violent extremist ideology and actions on stability Iraq, Syria and the region."¹¹ Only Resolution 2170 imposed any real sanctions, and those are not addressed to

Onslaught on Yazidis may be Attempted Genocide, REUTERS (Oct. 21, 2014), available at <http://in.reuters.com/article/2014/10/21/mideast-crisis-iraq-un-idINKCN0IA2PS20141021>

⁴ *Syria's Deadlocked War: No Solution*, ECONOMIST (Sept. 27, 2014), available at <http://www.economist.com/news/briefing/21620217-it-will-take-more-air-strikes-end-conflict-no-solution>.

⁵ *Id.*

⁶ S.C. Pres. Statement 2011/16, U.N. Doc. S/PRST/2011/16 (Aug. 3, 2011).

⁷ S. C. Res. 2042, U.N. Doc. S/RES/2042 (Apr. 14, 2012). UNSMIS mandate was renewed on July 20, 2012 for an additional 30 days after the failure of a stronger Resolution was vetoed on July 19, 2012.

⁸ S.C. Res. 2043, U.N. Doc. S/RES/2043 (Apr. 21, 2012).

⁹ S.C. Res. 2118, U.N. Doc. S/RES/2118 (Sept. 27, 2013).

¹⁰ S.C. Res. 2139, U.N. Doc. S/RES/2139 (Feb. 22, 2014); S.C. RES. 2165, U.N. Doc. S/RES/2165 (July 14, 2014); S.C. Res. 2191, U.N. Doc. S/RES/2191 (Dec. 17, 2014).

¹¹ S.C. Res. 2170, U.N. Doc. S/RES/2170 (Aug. 15, 2014).

the Assad government, but to six individuals placed on the Al-Qaida Sanctions List.

The Human Rights Council was seized of the Syrian crisis and established an independent commission of inquiry in August 2011.¹² The Commission of Inquiry has issued reports, taken testimony and endeavored to influence the situation, or at least to call attention to the plight of the Syrian people. The four-member commission is chaired by Paulo Sérgio Pinheiro of Brazil, and includes Carla Del Ponte, former chief prosecutor of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”) (Switzerland), Karen AbuZayd (United States) and Vitit Mubahorn (Thailand). The Syrian government has denied the Commission’s requests to enter the country.

In June 2014, the Chair of the Commission labeled the Syrian situation as “intolerably serious,” with an estimated 6.5 million Syrians internally displaced and 2.9 million registered refugees, making Syria the world’s worst humanitarian catastrophe.¹³ Experts have calculated the death toll to be in the region of 200,000 persons, mostly civilians,¹⁴ and it is estimated that thousands of detainees are held in overcrowded and unsanitary prisons, and thousands of instances of torture, killings and disappearances have occurred.¹⁵ The United Nations Human Rights Council noted in June that the Syrian authorities and affiliated militias are committing “gross, systematic and widespread violations of human rights and . . . international humanitarian law” including the aerial bombardment of civilian areas, in particular the indiscriminate use of barrel bombs, ballistic missiles, chlorine gas and cluster bombs, and other actions that may amount to war crimes or crimes against humanity,¹⁶ and underscored the obligation of the Syrian

¹² Human Rights Council Res. 17/1, Rep. of the Human Rights Council, 17th Sess., Aug. 22, 2011, A/HRC/S-17/1 (Aug. 22, 2011) (reporting the “Situation of Human Rights in the Syrian Arab Republic”).

¹³ Human Rights Council, Oral Update of the Independent Int’l Comm’n of Inquiry on the Syrian Arab Republic, 26th Sess., June 16, 2014, A/HRC/26/CRP.2 (June 16, 2014).

¹⁴ Megan Price, Anita Gohdes & Patrick Ball, *Updated Statistical Analysis of Documentation of Killings in the Syrian Arab Republic, Commissioned by the Office of the UN High Commissioner for Human Rights* 3 (Aug. 2014), available at <http://www.ohchr.org/Documents/Countries/SY/HRDAGUpdatedReportAug2014.pdf> (estimating 191,369 unique records of documented killings between March 2011 and April 2014).

¹⁵ Human Rights Council Res. 26/23, The Continuing Grave Deterioration in the Human Rights and Humanitarian Situation in the Syrian Arab Republic, 26th Sess., June 25, 2014, A/HRC.26/L.4/Rev. 1, pmbl. para. 4 (June 25, 2014).

¹⁶ H.R.C. Res. 26/23, *supra* note 15, at para. 12.

government to protect the Syrian population and ensure that all those responsible for violations of international humanitarian law or violations and abuses of human rights law are held to account, through appropriate fair and independent domestic or international criminal justice mechanisms.¹⁷

In June the Human Rights Council expressed “grave concern” at the rise of extremism and extremist groups,¹⁸ and in August the Commission of Inquiry noted with alarm the rise of ISIS in Iraq and Syria, with devastating results.¹⁹ In a recent, emotional plea to the Council, the Chair of the Commission stated:

We have charted the descent of this conflict into the madness where it now resides. . . . We have asked the Security Council to refer this situation to the International Criminal Court. But we have been faced with inaction. This inaction has allowed the warring parties to operate with impunity and nourished the violence that has consumed Syria. Its most recent beneficiary is ISIS.²⁰

The Commission has also noted the complicity of governments furnishing weapons to the parties to the conflict, weapons that have been used to target civilians. The latest Resolution of the Security Council takes the view that “some of the violations and abuses committed in Syria may amount to war crimes and crimes against humanity[,]”²¹ but is neither taken under Chapter VII, nor includes any sanctions for non-compliance, although it somewhat curiously refers to the obligations of Member States under Article 25 of the Charter to comply with Security Council Decisions.²² The Resolution

¹⁷ The Resolution also “[c]ondemns the intentional denial of humanitarian assistance to civilians, from whatever quarter, and in particular the denial of medical assistance and the withdrawal of water and sanitation services to civilian areas, which has recently worsened, noting especially the primary responsibility of the Government of the Syrian Arab Republic in this regard.” *Id.* at para. 27.

¹⁸ *Id.* at para. 20.

¹⁹ Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, paras. 16-17, A/HRC/27/60, 27th Session (Aug. 13, 2014).

²⁰ Paulo Sérgio Pinheiro, Chair of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic (Sept. 16, 2014), *available at* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15039&LangID=E>.

²¹ S.C. Res. 2191, *supra* note 10, at para. 1 (demanding that all parties to the conflict respect international humanitarian and international human rights law).

²² *Id.* at final pmb. para. It is unclear what this reference to Article 25 means. It appeared in Resolution 2165, referred to by reference in Resolution 2191, para. 2, and Samantha Power argued at the time that it meant Syria was “obligated to accept and carry out the decisions made by the Security Council in the Resolution,” namely, to admit UN humanitarian agencies and their implementing partners to enter Syria and use routes across

bemoans the “impunity” in Syria and stresses the need to “end impunity” for violations and abuses of human rights and international humanitarian law, but proposes no concrete mechanism for doing so. The remainder of this Essay will address the question of impunity in the context of the Syrian situation.

II. THE INTERNATIONAL LEGAL FRAMEWORK APPLICABLE TO STATES IN THE CONFLICT REGION

International law imposes limits on the behavior of the States directly affected by the civil war in Syria. Even without specific treaty obligations imposed upon it, the Syrian government and other States in the region are bound to respect customary international law, including the customary international law of war, international criminal law and international human rights law. This includes, at a minimum, the prohibition against torture, the requirements of proportionality and distinction in war, and, as we have seen, the prohibition against the use of chemical weapons. As one of the founding members of the United Nations, Syria is also bound to respect its Charter obligations, in particular any obligations imposed on it by the Security Council acting under Chapter VII. The Security Council reminded the parties to the conflict of this obligation in its most recent Resolution, as well as recalled their obligation of compliance under Article 25 of the Charter.²³

In terms of their treaty obligations, it is useful to examine whether States in the region – as well as the Permanent Members of the Security Council – have ratified specific instruments imposing concrete obligations such as cooperation with the International Criminal Court, for example. Without entering into extensive detail, Syria and its neighbors have a mixed record of signing on to human rights treaties, criminal and humanitarian law conventions, and the International Criminal Court Statute.

conflict lines and border crossings to deliver humanitarian assistance and to establish a monitoring mechanism to confirm the humanitarian nature of the relief consignments. Samantha Power, Explanation of Vote by Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, after a Security Council Vote on a Resolution on Syria (July 14, 2014), *available at* <http://usun.state.gov/briefing/statements/229230.htm>.

²³ S.C. Res. 2191, *supra* note 10.

All the States in the region have ratified the Geneva Conventions of 1949. All have also ratified the Genocide Convention of 1948.²⁴ It is perhaps surprising to observe that the Syrian Arab Republic is a party to many international human rights treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), the Convention on the Elimination of all forms of Racial Discrimination (“CERD”), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and the Convention on the Rights of the Child (“CRC”).²⁵ Syria signed the Rome Statute for the International Criminal Court in 2000, but never ratified it. (The Syrian government claims that its opposition to the Court was the omission from the Statute of the crime of aggression).²⁶ It has not adhered to optional protocols providing for human rights monitoring mechanisms.

Turkey, Syria’s neighbor to the north, has also ratified many core human rights instruments, although it has not ratified many of the recent weapons conventions and did not sign the Statute of the International Criminal Court. It has received pressure from the European Union to ratify the Rome Statute as part of its bid for accession and has been the focus of intense NGO activity.²⁷ As a member of the Council of Europe and a party to the European Convention on Human Rights it is subject to the supervisory activity of the European Court of Human Rights.

Iraq, which also shares a long border with Syria, is not an ICC State Party. Indeed, Iraq voted against the adoption of the ICC Statute in Rome,

²⁴ The Geneva Academy Rule of Law in Armed Conflicts Project has a very helpful chart showing international treaties adherence for each State. *See generally* GENEVA ACAD., *available at* http://www.geneva-academy.ch/RULAC/international_treaties.php. [hereinafter GENEVA ACAD. DATABASE]. A list of parties to the genocide convention is also available on the website of the Office of the High Commissioner for Human Rights, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en.

²⁵ *See Syria*, GENEVA ACAD. DATABASE, *supra* note 24, *available at* http://www.geneva-academy.ch/RULAC/international_treaties.php?id_state=211.

²⁶ *See infra* note 38.

²⁷ Resolution on EU Support for the ICC: Facing Challenges and Overcoming Difficulties, EUR. PARL. DOC. TA 0507 (2011); Press Release, Coalition for the International Criminal Court, Global Coalition Calls on Turkey to Promptly Accede to the Rome Statute of the ICC (Sept. 4, 2014), *available at* http://www.iccnw.org/documents/CICC_PR_CGJ_Turkey_Sept2014.pdf.

along with China, India, Israel, Qatar, the United States and Yemen.²⁸ Like the other States in the region, it has joined many other international human rights instruments and international criminal law conventions, but not all. It has ratified the 1997 Anti-Personnel Mine Ban Convention (Landmines Convention) (unlike its neighbors), but has not signed on to the verification mechanisms for the human rights treaties it has ratified.

Lebanon did not sign the ICC Statute and has not acceded to it; it is party to the Genocide Convention and many other core human rights and humanitarian law instruments.

Israel signed the ICC Statute but then attempted to withdraw its signature, following the U.S. attempt to do the same. Israel is a party to many major human rights conventions but has not accepted any of the optional protocols (except on Children in Armed Conflicts) and does not accept the jurisdiction of any of the treaty body committees, thus individual communications cannot be considered. It has entered significant reservations to many of the treaties it has ratified.²⁹

Indeed, in the immediate region of the conflict, only Jordan has ratified the International Criminal Court Statute, making it one of two countries in the Middle East and North Africa (“MENA”) region to join the Court (along with Tunisia). Djibouti and Comoros have ratified as members of the Arab league. Jordan is a party to the core international human rights treaties but not their optional protocols.

The legal position of the Permanent Five Members of the Security Council (which have the capacity to take or prevent action on Syria), are divergent. France and the United Kingdom are both ICC States Parties, members of the Council of Europe (and therefore subject to the supervision of the European Court of Human Rights), and parties to virtually all the major human rights treaties of the world and the European region. The United States signed the Rome Statute but then attempted to withdraw its

²⁸ Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381, 384 n.8 (2000).

²⁹ *Israel*, GENEVA ACAD. DATABASE, *supra* note 24, available at http://www.geneva-academy.ch/RULAC/international_treaties.php?id_state=113. In addition to substantive declarations and reservations, Israel and its Arab neighbors have entered a series of political declarations in which Iraq, Jordan, Lebanon and Syria stated that ratification did not imply recognizing Israel or the establishment of relations with Israel (e.g., Iraq’s declaration to the ICCPR and ICESCR), and Israel has responded in its instrument of ratification. *Id.*

signature; it now cooperates with the Court, but has no apparent intent to ratify the Statute.³⁰ The United States has ratified the ICCPR but not the optional protocol; it has not ratified many other international human rights treaties including the ICESCR, CEDAW, the CRC and humanitarian law conventions such as the Landmines Convention and Protocols I and II Additional to the Geneva Conventions of 1949. It has ratified the Torture Convention and the Genocide Convention.

Russia signed the ICC Statute but there is no evidence of any effort to ratify it. Russia is a member of the Council of Europe and subject to the supervisory jurisdiction of the European Court of Human Rights. China has not signed or ratified and indeed, voted against the Court's establishment at the Rome Diplomatic Conference. China also has not ratified many core human rights treaties including the ICCPR.

This brief survey suggests that, with the exception of Jordan, the States in the conflict region have ratified some, but not all international human rights, criminal law and humanitarian law conventions, and often act without much regard to the treaties they do ratify. They are typically slow to ratify new conventions or accept enforcement obligations attached to treaties that they do ratify. Regarding the International Criminal Court in particular, none of the States in the region have ratified the Rome Statute, again with the exception of Jordan. This is also true of the Permanent Members of the Security Council, with the exception of the United Kingdom and France. Four relevant players – China, Iraq, Israel and the United States – declared their hostility to the International Criminal Court – at least at some time during the past 16 years, if not consistently – by voting against the Rome Statute at its creation.³¹ Sadly, it is clear that most of the human rights treaties ratified by Syria, in particular, have not been and are not being respected by the Syrian government. Unfortunately, given the weakness in the enforcement mechanisms of the international human rights system, it is unlikely that any of these conventions will be directly enforced

³⁰ Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary General (May 6, 2002), *available at* <http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>; Beth Van Schaack, *State Cooperation & the International Criminal Court: A Role for the United States?* (Santa Clara Law Faculty Publications, 2011), *available at* <http://digitalcommons.law.scu.edu/facpubs/614/>.

³¹ And in the case of the United States, working actively to undermine the Court. *See, e.g.,* Leila Sadat, *Summer in Rome, Spring in The Hague, Winter in Washington? U.S. Policy toward the International Criminal Court*, 21 WISC. INT'L L.J. 557 (2003).

against the Assad government – or other states in the region – any time soon.³²

III. REFERRAL OF THE SYRIAN SITUATION TO THE INTERNATIONAL CRIMINAL COURT?

Under these conditions, what is the prospect of the Syrian situation's referral to the International Criminal Court? Because Syria is not an ICC State Party, the only way for the Syrian situation to come before the Court is the Security Council.³³ However, the Security Council has been unable to achieve consensus. As noted above, the Syrian conflict has been particularly brutal, with extensive violations of the laws of war and the prohibition on crimes against humanity. With rising death tolls and an extraordinary humanitarian crisis ongoing, on May 22, 2014 France, with support from the United States, proposed a Resolution attempting to refer the situation in Syria from March 11, 2011 to the International Criminal Court. It was vetoed by China and Russia and the meeting became heated, with sharp exchanges by the French, Russian, American and Syrian representatives.

Samantha Power, representing the United States stated:

Today is about accountability for crimes so extensive and so deadly that they have few equals in modern history. Today is about accountability for Syria, but it is also about accountability for the Security Council. It is the Council's responsibility to stop atrocities if we can and, at a minimum, to ensure that the perpetrators of atrocities are held accountable.

...

³² None of the States have accepted compulsory mechanisms for human rights enforcement. Syria has submitted reports to the Human Rights Committee in 1977, 2001, 2005 and 2009. *See Ratification, Reporting & Documentation for Syrian Arab Republic*, UN OHCHR, available at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx. In 2005, the Human Rights Committee welcomed Syria's accession to other international human rights instruments, but noted that Syria had not lifted the 40 year old state of emergency nor established a national human rights institution, and noted its deep concern at continuing reports of torture and cruel, inhuman or degrading treatment or punishment. *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Syrian Arab Republic*, U.N. Doc. CCPR/CO/84/SYR, at paras. 8-9 (Aug. 9, 2005).

³³ Rome Statute of the International Criminal Court, arts. 12 & 13, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

Sadly, because of the decision of the Russian Federation to back the Syrian regime no matter what it does, the Syrian people will not see justice today. They will see crime but not punishment. On 15 April, the members of the Council were briefed on a report that included 55,000 gruesome photos of the emaciated and tortured bodies of dead Syrians whom world-renowned international lawyers concluded had been methodically eliminated by a Government killing machine.

The photos were reportedly provided by an individual, alias Caesar, who worked for 13 years as a member of the Syrian military police. When the fighting began, he says that he was instructed to record the images of people starved, beaten, tortured and executed by Syria's security forces. Those photos shock and horrify, even after some of us wondered if there was anything that the regime could do that would still shock. Syrian soldiers had already compelled doctors not to care for the wounded, dragged patients out of hospital beds, laid siege to whole neighbourhoods, cut off access to desperately needed supplies, and carried out chemical weapons attacks and barrel bomb attacks with the full confidence that meaningful action by the Council would be obstructed.³⁴

...

The [Russian and Chinese] vetoes cast today prevent that from happening. Strikingly, those vetoes also protect the monstrous terrorist organizations operating in Syria. Those who would behead civilians and attack religious minorities will not be soon held accountable at the ICC either, for today's vetoes by Russia and China protect not only Al-Assad and his henchmen but also the radical Islamic terrorists who continue a fundamentalist assault on the Syrian people that knows no decency or humanity. Such vetoes have aided impunity not just for Al-Assad but for terrorist groups, as well.³⁵

Mr. Churkin, representing the Russian Federation, retorted:

What justice can one talk about when the overriding policy is aimed at escalating the conflict? The draft resolution rejected today reveals an attempt to use the ICC to further inflame political passions and lay the ultimate groundwork for eventual outside military intervention. It should be noted that the so-called Caesar report (S/2014/244, annex), which was used to build up tension in the run-up to the introduction of the draft resolution, was based on unconfirmed information obtained from unverifiable sources and therefore cannot serve as a platform for taking such a serious decision.

³⁴ U.N. SCOR, 69th Sess., 7180th mtg. at 4, U.N. Doc. S/PV.7180 (May 22, 2014), available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7180.pdf.

³⁵ *Id.* at 5.

One cannot ignore the fact that the last time the Security Council referred a case to the International Criminal Court (ICC) — the Libyan dossier, through resolution 1970 (2011) — it did not help resolve the crisis, but instead added fuel to the flames of conflict. After the cessation of hostilities, the ICC did not exactly rise to the occasion, to put it mildly. It did not contribute to a return of normalcy or justice in Libya, and instead evaded the most pressing issues. The deaths of civilians as a result of NATO bombardments was somehow left outside its scope. Our colleagues from NATO countries arrogantly refused to address that issue altogether. They even refuse to apologize, even as they waxed eloquent about shame. They advocate fighting impunity but are themselves practicing a policy of all-permissiveness.

The United States frequently indicates the ICC option for others, but is reluctant to accede to the Rome Statute itself. In today's draft resolution, the United States insisted on an exemption for itself and its citizens.³⁶

Following the interventions of China and other States, Mr. Araud, representing France, rebuked his Russian counterpart in extraordinarily strong language:

I had hoped that the tone of my speech would have demonstrated to everyone seated around this table and in the Chamber our determination that the Council not again manifest the same divisions. I wanted my statement to reflect my desire to respect the dignity of the debate — a debate that has to do with the infinite suffering of the Syrian people — and my desire that those who committed crimes be one day held to account for them. I see no other way except to appeal to the International Criminal Court. It was therefore a quite simple intervention. I regret the fact that the representative of the Russian Federation replied with an invective and direct personal attacks. I will refer to four points raised in my Russian colleague's intervention: absurdity, confusion, error and, lastly, effrontery.³⁷

Finally, the Syrian Representative took the floor, and after complaining of French aggression and misconduct, outlined Syria's opposition to the proposed referral:

The Syrian Arab Republic believes in international criminal justice, and was among the States that participated actively in the United Nations Diplomatic Conference in Rome that adopted the Statute of the International Criminal Court and were its first signatories. Syria's view is based on how important it is that justice be comprehensive, transparent and in no way politicized, selective or subject to double standards. Against that backdrop, Syria called for the crime of aggression, as the

³⁶ U.N. Doc. S/PV.7180, *supra* note 34, at 13.

³⁷ *Id.* at 13-14.

chief of all crimes, to be included in the Court's jurisdiction. That, however, was denied, which is why my country has not ratified the Rome Statute. Today, the Government of the Syrian Arab Republic emphasizes that in order to achieve justice we must have the following.

First, we must hold accountable the Governments of Turkey, Saudi Arabia, Qatar, France, Israel and other States that are openly inciting violence and terrorism, including by funding, arming, sponsoring, training, recruiting and facilitating the entry of thousands of mercenaries and terrorists from various parts of the world into Syria.³⁸

...

Secondly, there is a lack of accountability for the documented war crimes, crimes against humanity and acts of aggression and occupation committed by the Israeli authorities in the occupied Arab territories, including the occupied Syrian Golan, for over seven decades. Those crimes were committed with the support of some permanent members in the Council that have thus far enabled the Israeli war criminals to escape punishment and have obstructed all initiatives aimed at holding them accountable.

Thirdly, we are concerned about attempts to undermine justice through the immunity that some of the great Powers have arrogated exclusively for themselves. That immunity has helped them escape any accountability for their human rights violations their crimes committed in other Member States, with the aim of implementing colonial agendas and schemes for domination and oppression. Abu Ghraib, Guantanamo, the bombing of the Chinese Embassy in Belgrade, the flooding of Libya with blood, the secret prisons, the use of drones to kill innocent civilians, the practices of mercenary companies, such as Blackwater in Iraq, and others — all these are vivid examples of double standards that have escaped accountability and punishment.³⁹

These tendentious interventions were followed by a tit for tat between Messrs. Araud and Churkin. The strong language and aggressive behavior by the Permanent Members of the Security Council is reminiscent of the cold war era — although one would be hard put to find equally disrespectful colloquies even during that period⁴⁰ — and signals a dangerous return to the kinds of stalemates the international community experienced prior to the

³⁸ U.N. Doc. S/PV.7180, *supra* note 34, at 16.

³⁹ *Id.* at 17.

⁴⁰ The example that comes to mind is Adlai Stevenson's interactions with his Russian counterpart during the Cuban Missile crisis. I am grateful to Feisal al-Istrabadi for the reference. On the Libya and Syrian conflicts generally, see Feisal al-Istrabadi, *The Limits of Legality: Assessing Recent International Interventions in Civil Conflicts in the Middle-East*, 28 MD. J. INT'L L. 129 (2014) (forthcoming).

fall of the Berlin Wall in 1989. It imperils the effectiveness of the United Nations system, and operates as a complete check upon the International Criminal Court as well, which lacks jurisdiction to proceed in the absence of a Security Council Resolution referring the Syrian situation to it.⁴¹

Although the Russian representative complained of the Libya example, it is notable that when a referral to the International Criminal Court, backed with Security Council enforcement power, was inserted into the conflict early – even before the onset of civil war casualty levels were relatively low compared to other conflicts.⁴² As for the ICC intervention itself, the Appeals Chamber has found that under the principle of complementarity, Libya can proceed with the Al-Senussi case, with the understanding that if no actions are taken, the Prosecutor may go back to the Court to reopen the admissibility question.⁴³ Conversely, the case against Saif al Qaddafi was found to be admissible and his transfer to the ICC required.⁴⁴ Although the ICC cannot bring about a peaceful transition to liberal government in Libya – or any country – and Libya continues to struggle with rebuilding its society following the civil war⁴⁵ – the Libyan example may suggest that timely – early – intervention might lessen the loss of life that might otherwise occur. Certainly, the conflict has not degraded in the way that the Syrian conflict has.

⁴¹ Rome Statute of the International Criminal Court, *supra* note 33, art. 12.

⁴² An estimated 10,000 to 15,000 persons are estimated to have been killed on both sides of the fighting according to Professor Cherif Bassiouni, who led a U.N. Human Rights Council investigation of the Libyan conflict. See Youssef Boudlal, *Up to 15,000 Killed in Libya War: U.N. Rights Expert*, REUTERS (June 9, 2011, 12:59 PM), available at <http://www.reuters.com/article/2011/06/09/us-libya-un-deaths-idUSTRE7584UY20110609>.

Although there have been complaints regarding both the ICC referral and the Security Council's authorization of force on the grounds that the Libya situation was simply not serious enough. See, e.g., al-Istrabadi, *supra* note 40, at 138-41. If one takes a victim centered approach, the intervention in Libya may be preferable to the appalling level of non-action in Syria.

⁴³ Prosecutor v. Saif al-Islam Gaddafi & Abdullah al-Senussi, Case No. ICC-01/11-01/11, Appeal of Mr. Abdullah al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 (July 24, 2014).

⁴⁴ Prosecutor v. Saif al-Islam Gaddafi & Abdullah al-Senussi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif al-Islam Gaddafi (May 31, 2013).

⁴⁵ *Anarchy looms: Foreign Involvement and Reckless Militias Make a Flammable Cocktail*, ECONOMIST (Aug. 30, 2014), available at <http://www.economist.com/news/middle-east-and-africa/21614231-foreign-involvement-and-reckless-militias-make-flammable-cocktail-anarchy-looms?zid=304&ah=e5690753dc78ce91909083042ad12e30>.

IV. SEVEN IDEAS ABOUT THE WAY FORWARD IN THE SYRIAN SITUATION

In addition to immediately furnishing additional humanitarian assistance and building a framework for peace, there *are* options that can move the situation in Syria forward, particularly as regards the problem of impunity. Some are short term, some medium term, and others may require a longer timeline. A few possibilities are noted below.

First, all States must be reminded of their existing legal obligations. Whether imposed by treaties they have ratified or customary international law, the States in the MENA region, and the Permanent Members of the Security Council, have assumed or are subject to a multiplicity of international legal obligations that prohibit the targeting of civilians, the expulsion of civilian populations, and the mistreatment of refugees. The Syrian government has a responsibility to protect all its people from genocide, war crimes, crimes against humanity and ethnic cleansing; and the international community has a responsibility to assist it in doing so, and to use “appropriate diplomatic, humanitarian and other peaceful means” to protect the Syrian population, and to use collective force through the UN Security Council if all else fails.⁴⁶

Second, continuing efforts should be made to refer the situation in Syria to the International Criminal Court. The ringing rhetoric of Ambassador Power notwithstanding, it would obviously be much easier for the United States to do so effectively if it could eliminate the allegation of double standards by committing itself fully to the project of international justice.⁴⁷ Ambassador Power and other U.S. officials should commit themselves to ICC ratification at the earliest possible opportunity; and even prior to ICC ratification, when the United States supports an ICC referral, the language about immunities and nonpayment of expenses included in the Darfur, Libya and proposed Syria referrals should not be included.⁴⁸

Of course, even if the United States stood with its European allies on ICC ratification, Russia and China could still veto further referrals to the

⁴⁶ G.A. Res. 60/1, ¶ 139, U.N. GAOR, 60th Sess., U.N. Doc. A/Res/60/1, at 30 (Oct. 24, 2005).

⁴⁷ Opponents of referral on each of the Security Council debates on Syria refers to U.S. “hypocrisy” in this regard.

⁴⁸ The May 22nd Resolution contained two paragraphs providing that for the non-payment of expenses by the United Nations related to the referral, and to the immunity of non-ICC State Party personnel before the Court.

Court or block other action on Syria, although they might be more diplomatically isolated if they did so. Moreover, the ICC Prosecutor cannot proceed on her own initiative under Article 15 of the Rome Statute, because Syria is not a State Party, and the government of President Assad is unlikely to ratify the Statute or submit an Article 12(3) Declaration to the Court. After a change of government or if the opposition government were to be widely recognized by other States, it might be possible for Syria to ratify the ICC Statute and ask the ICC to intervene.

There are significant obstacles to the implementation of this idea, of course, and there is some precedent: former President Morsi of Egypt attempted to do this, and failed, but the Syrian case is rather different. Morsi, it may be recalled, filed an Article 12(3) declaration purporting to accept the ICC's jurisdiction in December 2013.⁴⁹ The ICC Prosecutor rejected it in May, stating that Morsi did not have full powers at that time.⁵⁰ The Office noted that the UN General Assembly had already accepted the credentials of the Al Sisi government and that Morsi did not have effective control of the country at the time the declaration was made.⁵¹ These would be the obstacles that any effort by the Syrian opposition would need to overcome.

It is worth observing that on December 18, 2014, the General Assembly adopted a resolution encouraging the "Security Council to take appropriate action to ensure accountability, noting the important role that the International Criminal Court can play in this regard."⁵² The Resolution was adopted by a vote of 127 in favor, 13 opposed and 48 abstentions,⁵³ and was

⁴⁹ Press Release, International Criminal Court, The Determination of the Prosecutor on the Communication Received in relation to Egypt (May 8, 2014), *available at* http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1003.aspx.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Situation of Human Rights in the Syrian Arab Republic, G.A. Res. 69/189, U.N. Doc. A/RES/69/189 (Dec. 18, 2014).

⁵³ The vote is reported in the media but is not yet available in the official UN Records. *See* Press Release, General Assembly, Adopting 68 Texts Recommended by Third Committee, General Assembly Sends Strong Message towards Ending Impunity, Renewing Efforts to Protect Human Rights, U.N. Press Release GA/11604 (Dec. 18, 2014), *available at* <http://www.un.org/press/en/2014/ga11604.doc.htm> [hereinafter UN Press Release GA/11604]; *see also* 2014-2015 UNGA Session: 20 Resolutions Against Israel, 3 on Rest of the World, UN WATCH (Jan. 22, 2015), *available at* <http://blog.unwatch.org/index.php/2015/01/22/2014-at-the-un-20-resolutions-against-israel-3-on-rest-of-the-world/>.

somewhat less forceful than the similar Resolution adopted the same day calling for referral of the situation in North Korea to the Court.⁵⁴

Third, the current impasse in the Security Council needs to be addressed. It has been suggested that General Assembly Resolution 377 of November 3, 1950, known as the Uniting for Peace Resolution – could be used. It allows the General Assembly to call an emergency special session where the Security Council is failing to exercise its responsibilities for the maintenance of international peace and security because of a lack of unanimity of the Permanent Members.⁵⁵ The United States proposed the Resolution which was adopted by a vote of fifty-two in favor, five against, one abstention, and two non-votes,⁵⁶ and has been used several times. Although vetoes by the Soviet Union precipitated the adoptions of Resolution 377, it was first used against France and the United Kingdom, which were blocking the adoption of a resolution on the Suez crisis.⁵⁷ The adoption of Resolutions by the General Assembly regarding the possible referral of the Syrian and North Korean situations to the ICC are along these lines; note, however, that they do not purport to be referrals, but clearly are deferential to the responsibility of the Council under the Rome Statute to refer cases to the Court.⁵⁸

Another possibility was alluded to by the Rwandan government in its remarks on May 22, 2014. This would be the adoption of a “Code of Conduct” amongst the Permanent Five (“P5”) members of the Security Council by which they would voluntarily refrain from using the veto in situations of genocide, war crimes, ethnic cleansing and crimes against humanity. This could, as the Rwandan government underscored, help rebuild the Council’s credibility.⁵⁹ Other formulations have been advanced and some authors have even suggested that rather than a voluntary code, the Charter should either be amended or reinterpreted to prevent arbitrary uses of the veto by the P5.⁶⁰

⁵⁴ Situation of Human Rights in the Democratic People’s Republic of Korea, G.A. Res. 69/188, A/RES/69/189 (Dec. 18, 2014); see UN Press Release GA/11604, *supra* note 53.

⁵⁵ G.A. Res. 377 (V), ¶ 1, U.N. Doc. A/Res/377 (V) (Nov. 3, 1950).

⁵⁶ U.N. GAOR, 5th Sess., 302d plen. mtg., U.N. Doc. A/PV.302 (Nov. 3, 1950).

⁵⁷ S.C. Res. 119, U.N. Doc. S/RES/119 (Oct. 31, 1956).

⁵⁸ The drafters explicitly rejected the possibility that the General Assembly might refer cases to the Court during the ICC Statute’s negotiation.

⁵⁹ U.N. Doc. S/PV.7180, *supra* note 34, at 8.

⁶⁰ See, e.g., Yehuda Z. Blum, *Proposals for UN Security Council Reform*, 99 AM. J. INT’L L. 632 (2005).

Fourth, although there is no fora yet in which those responsible for the crimes committed since March 2011 may be tried, there are many groups and governments now documenting atrocities for future trials. It is cold comfort to current victims that someday in the future there might be prosecutions, but having seen how important contemporaneous evidence collection was for future trials – and for psychological purposes – in Chile, in Cambodia, and in other conflicts – this is, at least, something concrete that can be done now. Mapping crime sites, taking victim testimony, even doing whatever forensics are possible under the circumstances can help to prepare future cases. The photos smuggled out by “Caesar” have become the subject of an exhibit at the Holocaust Museum, and have been sent to experts for forensic analysis.⁶¹ It is also possible to imagine the establishment of an ad hoc or mixed tribunal if the ICC cannot act, an effort that Professor David Crane, amongst others, has been spearheading. The *New York Times* recently published a very interesting story on atrocity crime evidence being collected suggesting perhaps future trials might be held in neighboring Iraq.⁶²

Fifth, States wishing to move from rhetoric to action regarding the atrocity cascade in Syria must use legal argumentation to much greater effect. The United States, in particular, often asserts vague justifications like self-defense (or defense of others), which may mask acts that are in fact violating the sovereignty of other States, and are unlikely to convince allies of the need for and legality of intervention. It can endeavor to make a clear case for humanitarian intervention, for the Responsibility to Protect, and for Security Council action to be constrained by law. The rhetoric of France and the United States during the debate on the May 22nd Resolution was not supported by sophisticated legal argumentation but was an emotional appeal that proved less than persuasive. Those supporting action in Syria must show those resisting action in Syria why and how international law may support or even require intervention – penning thoughtful and solid justifications for international action – and, conversely, eschewing actions that cannot be solidly justified.

⁶¹ *Evidence of Atrocities in Syria*, U.S. HOLOCAUST MEM’L MUSEUM, available at <http://www.ushmm.org/confront-genocide/cases/syria/syria-photo-galleries/evidence>; Stav Viv, *Photos from Syria Allegedly Show Torture, Systematic Killing*, NEWSWEEK (Oct. 21, 2014), available at <http://www.newsweek.com/photos-syria-allegedly-show-torture-systematic-killing-278894>.

⁶² Marlise Simons, *Investigators in Syria Seek Paper Trails That Could Prove War Crimes*, N.Y. TIMES (Oct. 7, 2014), available at <http://www.nytimes.com/2014/10/08/world/middleeast/investigators-in-syria-seek-paper-trails-that-could-prove-war-crimes.html>.

None of the States involved have yet evoked the Genocide Convention, one of only two treaties that all parties in the region have ratified (the other are the Geneva Conventions of 1949). There is a clear obligation on States to prevent genocide, which is found in the Convention and was upheld by the International Court of Justice in *Bosnia v. Serbia*.⁶³ Although it has been difficult to argue the case of genocide with respect to crimes committed by government forces, the entry of ISIS into the fray, with its targeting of minority populations, makes this argument easier and more convincing, not only in Syria but in neighboring Iraq. Turkey's initial intransigence with respect to Kobani could have been seen as complicity in ISIS' destruction of that village and its population.

Sixth, while endeavoring to address the situation in Syria, the entire region must be the focus of attention. As noted earlier, the treaty ratification and compliance patterns of the region are weak. There should be a concerted effort to combat extremism not only by using force, but also through soft power. To the extent that religious extremism is fueling conflict, it can be combatted by supporting moderates and promoting economic development. Progress will be easier if other regional players enhance their compliance with international legal norms on human rights. This is true for Iraq and Lebanon; it is equally true for Israel, which tends to see itself as outside the region. Indeed, the failure to arrive at agreed upon borders for Israel and Palestine is like a cancer that invades and poisons the entire region.

There is a deep distrust of international institutions in the Arab world for a variety of reasons. For this reason, perhaps it could be useful to develop a regional human rights system and work hard on improving human rights in all the Arab League countries. While this will not immediately help Syrian victims, it may be important in the long term.

The success of the Inter-American system and the European system are impressive. These regional systems work well because they work more locally. While the African proposal for a regional criminal court in Africa may have emerged as a purely cynical response to the ICC's interventions in Africa, if it *were possible* to create such a court and have it be independent, effective and impartial, it would be a good thing for Africa and for international justice. As we have seen, it is not enough to have

⁶³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. 43 (Feb. 26, 2007).

treaties and even enforcing institutions; the rule of law only works when it is embedded in a legal culture that accepts it. Enhancing this culture in the Middle East is critically important.

Seventh, although military action should not be ruled out, great care must be taken when using force to address atrocity crimes. Certainly, military action now against ISIS cannot assist the Assad government. That could make coalition forces complicit in the commission of the crimes his government is alleged to be committing. Moreover, as my fifth point suggests, the legal justifications for that intervention should be set forth clearly and convincingly, which has not been done.

Perhaps there was a possible right of humanitarian intervention in August 2013 after the chemical weapons attacks which were attributed to government forces; or at least for the imposition of no fly zones or the possible targeting of chemical weapons facilities and delivery systems. Scholars certainly debated the question. Force was averted by a decision to order Syria to destroy its arsenal of chemical weapons, but recently, new sites have been revealed. If Syria is not complying with the Security Council's requirement that it destroy its chemical weapons, there should be debate in the Council as to the consequences of that failure.

States should also be cognizant of their legal obligations under the Genocide Convention to prevent and punish genocide. The initial decisions of the United States and Turkey to watch passively while Kobani fell arguably violated these obligations. The Assad government may be complicit in genocide as well.

V. CONCLUSION

There have been eight Security Council Resolutions adopted regarding the situation in Syria, none of which have been explicitly taken under Chapter VII or called for referral of the situation to the International Criminal Court in spite of the clear threat to international peace and security posed by the conflict. As frustrating as this is, it is important not to use the current impasse as an excuse for future inaction. Peace negotiations will hopefully continue, as well they should. Negotiators however, may be tempted to trade peace for justice during that process, giving those seemingly responsible for the commission of war crimes, crimes against humanity and perhaps genocide, a pass in exchange for a cessation of hostilities. This would be an undesirable result. There is now talk of

President Assad remaining in power, something that was unthinkable a year or two ago, given the ferocity of the conflict. Of course, President Assad may retain his position – as may others in his government or in the opposition – but whatever political solution is devised should be without prejudice to the rights of the international community and the Syrian people to demand accountability for the international crimes committed during the conflict. No amnesty for crimes of the magnitude alleged to have been committed in Syria can or should be accepted, nor is it clear that any amnesty would be lawful, at least outside of Syria. Moreover, amnesty would be unlikely to either resolve the current impasse or prevent the commission of future atrocities. History has shown that impunity typically emboldens individuals perpetrating atrocity crimes; it does not stop them.⁶⁴

⁶⁴ See, e.g., Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955 (2006).