Legal perspectives on the recent findings on war crimes in the Syrian conflict

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So far, non-international armed conflict in Syria has left an estimated 130,000 dead, 2.3 million refugees, and four million internally displaced. Ongoing conflict between the state and the opposition has turned into a civil war including different groups. Moreover, UN experts found through their investigations that chemical weapons had been used in five instances. The clearest case was the large-scale use of chemical weapon against civilians, including children, in the Ghouta area of Damascus on 21 August 2013, resulting in 1,300 dead.

Recently, well-known war crime prosecutors and forensic experts have released a report based on almost 55,000 photographs that are direct evidence of systematic torture and killing by the Assad regime. These recent findings have ignited debates on the responsibility of the regime and war crime trials.

Commission reports

The Independent International Commission of Inquiry on the Syrian Arab Republic, established on 22 August 2011, has also conducted many investigations. Throughout 2013, the Commission published five reports based on photograph reviews, video recordings, satellite imagery, forensic and medical reports from governments and non-governmental sources, and academic analyses.

The Commission presented its report named “Without a Trace: Enforced Disappearances in Syria” on 19 December 2013. According to the report, the first cases of enforced disappearances were documented by the Commission during the pro-democracy protests in March 2011 and continued through the end of 2013. As the report states, thousands of people who were arbitrarily detained were subjected to torture or to cruel, inhuman, or degrading treatment or punishment.

Again in December, Navi Pillay, the United Nations High Commissioner for Human Rights, also pointed out that Commission has produced “massive evidence of very serious crimes, war crimes, and crimes against humanity”. More importantly, she stated that evidence indicated responsibility “at the highest level of government, including the head of state”. The Commission had also compiled a list of those believed to be directly responsible for serious human rights violations.

Legal restraints

Syria has both signed and ratified the 1949 Geneva Conventions, 1977 Additional Protocol to the Geneva Convention, 1989 Convention on the Rights of the Child, 2000 Optional Protocol on the Involvement of Children in Armed Conflict. Regarding the recent atrocities evidenced by photographs and forensic experts, Syria and some of the other non-state groups have violated the international humanitarian law and its obligations.

Moreover Syria is also not a party to the International Criminal Court, the permanent war crimes tribunal based in Netherland. Hence, the ICC doesn’t

have jurisdiction over war crimes committed in Syria. There is a three different way to U.N. Security Council can grant jurisdiction and refer the case before the court; whether one of the party state to Rome Agreement or ICC Prosecutor call for an investigation.

Uganda, the Democratic Republic of the Congo, the Central African Republic, and Mali have referred situations occurring on their territories to the Court. For its part, the Security Council has referred to the ICC the situation in Darfur, Sudan, and the situation in Libya -in the case of Libya not only state officials but also non-state parties were held responsible. Lastly, the Prosecutor has initiated an investigation (proprio motu) in Kenya for March 2010 and Ivory Coast for October 2011.

Political implications

In the case of Syria neither a party state has filed a case before the court nor did Security Council granted a jurisdiction for an investigation regarding to the war crimes committed in there so far. The Security Council's ICC referral requires approval of the five permanent members. Russia and China, however, have blocked any action against the Syrian government so far. Furthermore, Fatou Bensouda, the Prosecutor of the ICC, can able to initiate a process of investigation if she convinced that there is a reasonable basis and strong evidences.

Actually, both the reports of the Commission and the explanations of Navi Pillay and recent reports of international experts aim to urge the UN Security Council to hold perpetrators accountable for war crimes and crimes against humanity. Also, the recent findings are clear and strong evidence for an investigation. Additionally, there is a witness who photographed the crimes, tortures etc.

On the other hand, as we might remember, former Prosecutor of the ICC Luis Moreno-Ocampo formally requested an arrest warrant for current Sudanese President Omar Hassan al-Bashir. It was the first time the Prosecutor had brought charges against a sitting head of state. Slobodan Milosevic (Serbia) and Charles Taylor (Liberia) were also charged by ad hoc criminal courts while they were in office. However, warrant is de facto unenforceable, it is

problematic to bring people before the court.

To this end, it's not likely that the Security Council's would refer the case to the ICC, but the Prosecutor can initiate a process for an investigation. In both case, it is problematic to detain perpetrators and bring them before the court.