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A Syrian Perspective on the Special Tribunal for Lebanon: What Lessons to Be Learnt?

→ Mansour Omari



A general view of the court room during a special session of the UN-backed Special Tribunal for Lebanon, meant to determine whether to stage a trial in absentia for four Hezbollah members indicted in the political assassination of former Lebanese Prime Minister Rafik Hariri in Leidschendam, near The Hague, Netherlands, 11 November 2011. © EPA/PETER DEJONG / POOL



On 18 August 2020, after a decade and a half, the Special Tribunal for Lebanon (STL) published its ruling on the explosion of 14 February 2005 which killed 22 people, including former Lebanese Prime Minister Rafik Hariri. The court found only one of the accused guilty – Salim Ayyash – and exonerated the other three, all of whom were absent from the courtroom.

The Lebanese were not the only ones waiting for the court's decision. Syrians also were, given suspicions of the Syrian regime's involvement in Hariri's assassination and the growing interest of a group of Syrians in international justice options as a way to hold the Assad regime accountable for the violations and crimes it committed since 2011. Which lessons from the STL can Syrians then benefit from in their goal to hold those responsible for war crimes and crimes against humanity accountable?

The search for international justice for Syrians

The route of national justice is not open in Syria, as the Syrian judiciary is neither independent nor impartial. It is directly subject to the executive power and its security branches, as the hybrid “Counterterrorism Court” and the military judiciary impose their jurisdiction upon most courts connected to the events in Syria since 2011. Both violate the most fundamental principles for fair trials and due process.

Therefore, a number of Syrians are now looking towards international options for justice, which fall under a number of legal bodies including the International Criminal Court (ICC), the International Court of Justice (ICJ), special and hybrid international tribunals, and national courts in other countries that accept universal jurisdiction.

Efforts to advance Syria's case to the ICC have not succeeded due to Russia and China's right to veto the submission. Additionally, the formation of a special international tribunal in Syria requires conditions that are not currently available.

Nevertheless, bringing cases before universal jurisdiction has remained possible.



So far, Germany issued arrest warrants for various current senior officials in the Assad regime and tried members of Syrian intelligence services for torture at the German court of Koblenz. Furthermore, complaints are being presented before legal bodies in a number of European countries based on the principle of universal jurisdiction, including in Sweden and Norway. These include crimes of gender-based sexual harassment and violence, the use of chemical weapons, torture and other international crimes. The Netherlands recently decided to hold Syria accountable via international law for its gross violations of human rights, and especially its use of torture, by heading to the ICJ.

It is worth mentioning the neutral and independent international mechanism set up by the UN General Assembly decision 248/71 to aid the investigation and prosecution of those responsible for international crimes connected to Syria since March 2011. While such a mechanism is not a court as such, it may, however, serve as the primary authority for evidence and investigations, and will play a central role in preparing for future trials, be they international or national.

The acceptance of international jurisdiction or hybrid international courts presupposes the acknowledgement of several important points. These include the long duration of the trial, limitations on verdicts connected to human rights, such as the exclusion of the death penalty, and the protection of the right to a fair trial. Syrians should, therefore, be aware of these details as there are some who reject the death penalty as a sentence, while others insist upon it.

What lessons does the STL offer?

The STL decision, being international in character, came as a shock to many Syrians. Comparisons to the situation in Syria and projections regarding Syrian's aspirations for justice started to emerge. Among Syrians, these comparisons involved substantial questioning about the efficacy of international justice, and perhaps shook the faith of some in its overall principle. These viewpoints also drew on past expectations and hopes about the Tribunal's jurisdiction and function.

Is it possible, however, to compare the Lebanese Tribunal with expected international courts in Syria? In principle, while it is possible to consider both of



them under the umbrella of international justice broadly defined, substantial differences between the two exist on several levels. In this sense, the STL does not fully encapsulate international justice, as there are other international courts with different experiences. The STL -- and its focus on the assassination of one individual -- is perhaps not the best model for the Syrian situation. As it would presumably involve crimes against humanity and war crimes, the Syrian case is much closer to the experiences of the international tribunals in Yugoslavia and Rwanda, or the mixed/hybrid tribunals of Cambodia and Sierra Leone. Nevertheless, the Lebanese experience poses several questions.

Given its findings, does the STL merit these material costs? Why did the price of international justice, and the time spent waiting for it, reach such a high level? Were there other options? What about the efficacy of judgments in absentia (allowed in this case, although often refused in the rest of international courts)? And what of the court's ability to reach out to victims?

The Lebanese experience presents an important lesson in international justice, especially for Syrians working in this field, in addition to its value as a case for study and research.

One can analyze several points related to the STL and its similarities with the Syrian situation:

- Establishment and mandate
- The Accountability of perpetrators and the challenges of trials in absentia
- Victims and compensation
- Material and temporal costs

Establishment and mandate

The establishment of the Tribunal came at the request of the Lebanese government. This is a step it appears no government under the Assad regime would take. Furthermore, the Tribunal was a result of a decision issued from the UN Security Council under Chapter 7, which required no objections from Russia and China.



Special international tribunals are often formed:

- With the agreement of the Security Council such as “the International Criminal Tribunal for Rwanda” and “the International Criminal Tribunal for Former Yugoslavia.” This option is not feasible given Russia and China’s continued use of their veto powers on any move against the Assad regime; or
- By agreement between a specific country and the UN to form a mixed or hybrid special tribunal such as “The War Crimes Tribunal in Cambodia” and “The Special Tribunal in Sierra Leone.” It does not seem, however, that the Syrian government would accept this as it itself is involved in war crimes and crimes against humanity and does not wish to find itself liable.

Mandate

The STL’s mandate only allows it to tackle the crime of terrorism connected to the killing of Hariri and the victims of the 14 February explosion and related assassinations. War crimes and crimes against humanity are not included on all sides, as would be assumed for the mandate of any special international tribunal in Syria. As for a mixed or hybrid court, its mandate would be defined by an agreement between the Syrian government and the UN, which may not include all crimes or parties. In Cambodia, for example, the special hybrid court’s mandate stipulated that it emerged from a spirit of justice, truth, and national reconciliation. The court's purview was limited to the chief officials of the Khmer Rouge in addition to those from the party who carried the greatest responsibility for the international crimes committed in Cambodia. Naturally, this agreement did not come until after the fall of the Khmer Rouge regime. This is not available in Syria’s case, as the regime that has committed the most serious crimes remains in power.

The accountability of perpetrators and challenges of trials in absentia

Despite all the effort, cost, and time that the STL expended, it did not punish



anyone, and the only person convicted remains free. Furthermore, the court sentenced only one of the four accused and failed to contact “all involved,” even though this was one of the goals of its establishment. Among the perpetrators were those who issued the orders to kill, provided the tools of the crime, and facilitated their implementation. The crime is not only limited to those who executed it. Here emerge key points of differentiation between the Lebanese Tribunal and any special future international tribunal in Syria. The nature of the crimes committed in Syria that would presumably be brought to the tribunal include war crimes and crimes against humanity. A large number of Syrian employees in government bodies systematically perpetrated these crimes at the behest of its ranking officials, placing accountability upon these leaders according to the principle of leadership responsibility.

Default judgement

The Special Tribunal for Lebanon allowed for trials in absentia, according to the rules of the Tribunal: “In case of conviction in absentia, the accused, if he or she had not designated a defence counsel of his or her choosing, shall have the right to be retried in his or her presence before the Special Tribunal, unless he or she accepts the judgement.” Additionally, the ruling can be appealed, or a reconstitution of the court can be requested under certain circumstances.

Default judgements, however, have no punitive power except by way of restricting freedom of movement and travel. They also infringe upon the principles of fair trials. This points to the futility of the punitive aim of trials in absentia in the Lebanese Tribunal. Included in its rules is the right of convicts to request a new trial if they give themselves up, in line with due process of the law. The sole convict, in light of his ability to recall court, can thus argue that he is not guilty because it is his right to stand trial again in which his innocence may or may not be proven. International courts do not generally accept trials in absentia. Syrians have sought refuge in various countries in order to benefit from their international legal jurisdiction. Germany for example, which does not allow for trials in absentia, has published arrest warrants for Syrian officials responsible for torture, including Jamil Hassan, once president of the Air Force Intelligence. Germany, however, will not announce its ruling without him present. Despite this, the publishing of arrest



warrants in preparation for proceedings plays an important role in restricting the movement of the accused geographically and politically, especially if they are senior officials in important positions. Moreover, default judgements against government officials send a message to the governments and perpetrators that their crimes have become known and are awaiting a trial that may one day actually occur.

The victims and compensation

According to the rules of the Lebanese Tribunal, no compensation will be award to the victims. It merely allows victims to raise compensation claims in Lebanon, which suffers fundamentally from a politicized judiciary. Likewise, international courts do not present compensation to victims. Rather, they may issue verdicts ordering a certain country to offer moral and material compensation.

The lack of cooperation between some of the Lebanese and Syrian sides during the investigations and the Lebanese Tribunal in providing evidence and witnesses, concealing evidence, and prosecuting and removing witnesses, led to their deficiency and inadequacy. As such, there was a lack of strong and coherent legal claims, which has caused this ruling to be considered by many as bad for both the victims and the principle of justice. As for the Syrian case, most of the claims raised today in Europe, in accordance with its legal jurisdiction, are based on the claims of Syrian victims and witnesses who reside in Europe itself. This factor has been crucial in the initiation of these claims as the witnesses and victims enjoy freedom of movement and access to the courts. They are also protected from the interference of the agencies responsible for those crimes. Presumably, these freedoms and protections for witnesses and victims will also be included in the case of international tribunals.

The material and time cost

The formation of special international tribunals including hybrid ones requires time, effort, massive financing, and competencies and employees to establish internal rules, its jurisdiction, structure, buildings, offices, and equipment. The Lebanese Tribunal cost approximately 750 million dollars, almost half of which



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Lebanon paid according to what has been documented in the budgetary section of the Tribunal's annual report. The number of the Tribunal's employees reached 456 in 2016, and 399 in 2019. Since the tribunal's establishment, the number of employees has hovered around this number. National courts, meanwhile, which recognize the principle of international jurisdiction such as the ICC or the Court of Koblenz (that is prosecuting Syrians accused of war crimes), do not require such effort and measures as they are already in place.

However, another important aspect that should also be taken into consideration when looking for justice options is that the ICC and international tribunals do not recognize the immunity of the heads of States (and other officials with immunity) under customary international law, while national courts with universal jurisdiction mandate do. This leaves the Syrian president and his prime minister at least immune from any trial in national courts under universal jurisdiction.

The long time which the courts often take is the result of investigations, the search for evidence, and the building of files. Syrian and international legal organizations have taken on this role for some years, alongside the special international mechanism in Syria and the "Independent International Commission of Inquiry on the Syrian Arab Republic." The work that these organization and UN committees have undertaken will shorten the required time for any future trial. Therefore, it is of the utmost importance that Syrian organizations develop their own mechanisms of documentation and should adopt the legal documentation according to the highest of standards. A part of the Syrian effort should also be diverted to following up on UN mechanisms for collecting evidence and to the seriousness of its work.

In light of international justice principles, its complex and diverse options, and the experience of Lebanon, it is important that Syrians' approach encompasses careful study and deep research into its options under current and future circumstances. Moreover, Syrians should consult with one another to coordinate their vision and efforts with participation of victims and their families, in addition to researching required strategies and learning from important steps that have been achieved up until now. One should not wait for the day that options of justice become available. Instead, one should be prepared in advance for a number of scenarios that require different directions where accountability and justice are concerned.



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These include the following:

- The survival of the Assad regime with the support of Russia under international isolation

This scenario precludes the realization of justice within the Syrian national courts or hybrid courts established in agreement with the government. The options that then remain for Syrians are special international tribunals that require a decision from the Security Council (supposing that Russia does not use its veto), the ICC if it accepts its jurisdiction to be defined similarly to the cases of Myanmar and Bangladesh, or universal jurisdiction applied today in a number of countries, even if its scope is limited in its ability to charge anyone outside those countries.

National courts, however, can be used in areas that the Syrian government does not control on the condition that they respect the conditions of fair trials. These courts are not subject to the control of the Assad regime and are thus able to accept cases against it. One should also take into consideration the deficiency of the legal regime in Syria in terms of judicial capacity and expertise in the prosecution of international crimes. These courts also currently follow different legal references. In this case, perhaps these courts could look to cooperate with the UN or international organizations in amending laws and training judicial staff. This would be in addition to the problem of punitive power in case of a trial of absentia. The verdicts issued from these national courts may not have punitive power today, especially if the Assad regime does not cooperate with them. Nonetheless, it will be an enriching experience that will set a legal precedent. It will also contribute to the preparation and conservation of case files, including the testimonies of witnesses and victims. Perhaps this practice will form one of the important means of legally preserving memory if supervised or in close cooperation with specialized international organizations, the UN, or legal bodies of nations with developed legal systems. For example, the powers in Northeastern Syria are currently calling for the establishment of a special court for ISIL's crimes. It can perhaps look into options to prosecute the Assad regime in addition to ISIL.

- The formation of a transitional government in which the opposition and the Assad government participate



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In this case, the opposition may be able to communicate with the regime in order to reach an internal agreement. This agreement would fall within the framework of a process of transitional justice with UN stewardship or facilitation to look into the question of accountability. According to current information, the Syrian regime will not acquiesce to any agreement that leads to the accountability of its leaders. It will direct the efforts of the agreement primarily to national reconciliation, the return of fake stability, and perhaps the compensation of victims, but without any real criminal accountability. Furthermore, efforts for justice in this case might be exposed to a lack of cooperation and breakdown at the hands of agencies that Assad controls. This agreement will come as a barter between justice and a political settlement. In Tunisia for example, the process of transitional justice faced various constraints, including the executive powers' lack of cooperation with the independent "Truth and Dignity Committee" mandated to establish transitional justice. In turn, these two were confronted with attempts of obstruction by former officials under Ben Ali, the ousted Tunisian president.

- Removal of Bashar al-Assad from power

This scenario may bring with it a serious process of transitional justice that redresses all parties and incorporates criminal trials in the Syrian national courts. However, it may suffer from several problems on top of them deficiency of the Syrian judicial system concerning legal materials and expertise in the prosecution of international crimes, including the procedures of fair trials. This may prompt the establishment of a hybrid or UN-supported legal body. Additionally, that all parties accept and cooperate with the trials under a just and national judicial system seems too idealistic, as many sides of the conflict have committed international crimes. It does not seem that any of the various actors in the conflict in Syria will accept fair trials under the current circumstances. They will most likely convene political agreements that prohibit their being held accountable, undermining criminal justice for a large number of Syrians.

Conclusion

The Special Tribunal in Lebanon presents important lessons for Syrian and other



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nations seeking international justice. However, the most important take-away is that the available options for justice today or in the future, whether from within the international framework or national courts, will not live up to the complete and idealized concept of justice that includes all, and that I think many Syrians adopt. The downsides are not limited to international justice, as the roadblocks related to the situation in Syria and its national courts eliminate dreams of complete justice and include impediments that are perhaps insurmountable.

Perhaps assessing justice through its material costs and outcomes is not possible. On the other hand, what is irrefutable is that we must confront the reasons that have led the process of justice to its tragic state. Therefore, studying possible scenarios of justice should include in their work efforts that seek to deter crime in the first place. This highlights the great importance of working on guarantees of non-recurrence in any transitional justice processes, which are based on understanding the causes of what happened and trying to remedy them in a way that guarantees long-term justice and protects society as a whole. Any efforts directed at achieving justice without establishing guarantees of non-recurrence and protection from violations and crimes will be incomplete.



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About the author



Mansour Omari

Mansour Omari is a Syrian journalist and human rights defender. He has a Masters in Law (transitional justice).

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contact@arab-reform.net



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