

‘Arab Spring’ to Accountability: Using Technology to Support Criminal Justice for Atrocity in North Africa and the Middle East

By **Emilie Hunter and Alexandre Skander Galand**
FICHL Policy Brief Series No. 15 (2013)

1. Addressing Impunity for Atrocity in Arab Countries

As the optimism generated by what is now commonly referred to as the ‘Arab Spring’ slowly settles into the hard work necessary to establish stable democracy, calls for accountability for gross human rights violations that may amount to core international crimes continue to be made by individuals and actors across Arab countries, and are often amplified by the international community. While governments may be slow to respond to these calls, the opportunities for the International Criminal Court’s (ICC) engagement are limited. For impunity to be addressed, civil society, lawyers, judges and government officials need to be informed of the options available to them; incentives for prosecution need to be made clearly and persuasively; and different means and methods need to be understood, with an appropriate balance struck between national capacity and international obligations. National and regional civil society, including NGOs, lawyers and academics, as well as government institutions, will continue to play a pivotal role in developing this process, alongside regional actors (like the League of Arab States) and international supporters, including the donor community. In support of this process, the ICC Legal Tools Project has made a small contribution, with the objective of legal empowerment, by providing its Legal Tools Database of over 64,000 documents, with Arabic language features, to the public at no-cost and on an open-access basis.

2. The ICC System and Arab Countries

Since 2002, the ICC has endeavoured to pursue criminal accountability of those responsible for such gross violations, by using its rather limited powers, but also through the wider system of global justice whereby, ac-

ording to the ICC Statute, national criminal justice systems remain the primary medium through which justice for such violations is to be practiced and impunity addressed. Despite 122 States joining the ICC, Arab States remain largely outside: of the 22 members of the League of Arab States, only Jordan, Djibouti, the Comoros Islands and Tunisia have formally become parties to the Statute, accepting the ICC’s complementary jurisdiction over their criminal justice systems. Ten other States have indicated their support for the goal that the ICC pursues – the reduction of impunity for the crimes of genocide, crimes against humanity, war crimes and aggression through criminal justice measures – by signing the Rome Statute, but have yet to take the definitive step to join, that is, ratification. They are Algeria, Bahrain, Egypt, Kuwait, Morocco, Oman, Sudan, Syria, United Arab Emirates and Yemen. Notwithstanding the recent upgraded status of Palestine as a non-member Observer State at the United Nations, the Office of the Prosecutor chose not to pursue the self-referral submitted by the Palestinian Authorities to the ICC, in which they requested the intervention of the Court.¹

The relative absence of Arab states from membership of the ICC has previously been felt after the Darfur crisis in Sudan as well as following conflicts in Tunisia, Egypt, Bahrain and Libya, and poignantly in the on-going armed conflict in Syria, as too often the affected States have failed to develop measures to repress them. Five alternatives to impunity remain available in these circumstances: declarations of acceptance,

¹ For a critical analysis of the way the Office of the Prosecutor handled this preliminary examination, see CHAN James, *Judicial Oversight over Article 12(3) of the ICC Statute*, Torkel Opsahl Academic EPublisher, Oslo, 2013, ISBN 978-82-93081-65-4.

UN Security Council referrals, creation of *ad hoc* tribunals, adoption of national accountability measures and universal jurisdiction.

3. Declarations of Acceptance

States who have yet to ratify the ICC Statute can declare acceptance of jurisdiction, whereby they submit themselves to the jurisdiction of the ICC. Although this does not act as an automatic referral, or request to the ICC to investigate the alleged conduct, in the two instances where such declarations have been made public, the Office of the Prosecutor has pursued preliminary examinations. The Palestinian National Authorities submitted the second public declaration in January 2009, where it accepted the jurisdiction of the ICC in Palestinian territory, which would have provided the Court with jurisdiction over all ICC crimes committed on relevant territory, including those committed by Israeli nationals. The OTP concluded that it did not have the competence to determine whether Palestine was a State, thereby declining to pursue the Palestinian declaration any further, with the consequence that their allegations of war crimes and crimes against humanity remain outside of the territorial ambit of the ICC.

4. UN Security Council Referrals

The UN Security Council can make referrals to the ICC, when there is consensus amongst its permanent members and a majority vote. Through this mechanism, conflicts in Sudan and Libya have been referred to the ICC. Conflict in the Darfur region of Sudan prompted the Security Council to issue its first referral to the ICC Prosecutor in 2006. Ultimately, this led to the issuance of summonses to appear and arrest warrants against several Sudanese defendants, including Sudan's Head of State, President Omar Al Bashir. National moves to create a Special Crimes Court by the use of the Sudanese Criminal Code and international humanitarian law have drawn widespread criticism. It appears that the Court lacks proper laws covering crimes against humanity and command responsibility. Undeniably, a proper political will is desirable for a national court to genuinely be able to investigate and prosecute international crimes, but an applicable law in line with international law is preferable.

The Libyan uprising of early 2011 and the lethal use of force by the late Muammar Gaddafi's forces impelled the Security Council to use its trigger mechanism for a second time. While Muammar Gaddafi was killed during the conflict, his son Saif al Islam Gaddafi and former intelligence chief Abdullah Al-Senussi – both in custody at the time of writing – are wanted by the ICC. Libya has challenged the admissibility of both

cases: it is appealing the recent Pre Trial Chamber decision that it is unable to obtain custody of Saif Al Islam Gaddafi, while the admissibility determinations over the case of Al Senussi continues. The adoption of an amnesty law – Law 38 of 2 May 2012 – which grants amnesty to those whose actions were aimed at “promoting or protecting the revolution”, violates the duty of Libya to exercise its criminal jurisdiction over those responsible for international crimes. When circumstances permit, national courts can be the most appropriate and effective *fora* for ensuring that perpetrators of international crimes be punished. The complementarity regime, embodied in the admissibility provisions of the ICC Statute, was drafted with this reality in mind. However, the consistent application of international criminal law strengthens the guarantees that the accused, the victims and the international community engage in a process that is not flawed by politics but regulated by law.

Calls for a third Security Council referral, of the situation in Syria, have grown over the duration of the conflict there. The international commission of inquiry on Syria² reported that the Syrian government and the opposition forces have perpetrated war crimes and crimes against humanity. However, the unlikelihood of consensus amongst the permanent members of the Security Council may mean that accountability will have to be sought through an *ad hoc* procedure or through a domestic process.

5. Ad Hoc International Tribunals

In response to the 14 February 2005 attack that killed 23 people, including the former Prime Minister of Lebanon, Rafiq Hariri, the Security Council created the Special Tribunal for Lebanon, which has issued landmark decisions on the conformity of *in absentia* proceedings with international human rights law and on the customary international law definition of terrorism.

6. Universal Jurisdiction

The relative absence of Arab States among the membership of the ICC means that armed conflict in the region will often remain outside of its jurisdiction. This can lead to a stagnation of justice, as international measures are excluded and territorial States remain inactive. This creates a paradox: the incentives for States to establish and maintain criminal justice mechanisms to prosecute individuals who are criminally responsible for conduct prohibited by the Rome Statute may diminish, while the victims of such abuses are denied justice and impunity reigns. It can also lead to justice being

² Established on 22 August 2011 by the Human Rights Council through resolution S/17-1.

sought elsewhere, through universal jurisdiction, as we see in Switzerland, where a Swiss Federal Criminal Court is instituting proceedings against Khaled Nezzar for war crimes and crimes against humanity for his role as former defence minister of Algeria during the civil war of the 1990's. Moreover, in light of the *Pinochet* case and of the International Court of Justice judgment on the *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Saudi Arabia as a State Party to the Convention Against Torture is under an obligation to prosecute or extradite the former President of Tunisia, Ben Ali.

7. National Accountability Measures

Notwithstanding political reluctance or the refusal to establish accountability mechanisms, and indeed, to address this shortcoming, national (and international) actors will need to be fully informed on the appropriate international legal instruments and jurisprudence, as well as their applicability and interaction with national laws. Reports of Libyan lawyers collecting evidence during the conflict, and appealing to members of the opposition forces and the public to preserve evidence from official locations, is just one indicator that the importance of accountability and its location within international law is understood.

Despite the efforts of NGOs and individuals, the regime changes in Egypt and Yemen have yet to stimulate genuine processes of transitional justice to account for the crimes of previous regimes. Whereas former Egyptian President, Hosni Mubarak, was jailed for life for ordering the killing of protesters, though granted a retrial in January of 2013, many officials have been acquitted on grounds of lack of evidence or self-defence. Conversely, the former President of Yemen, Ali Abdullah Saleh, and other government officials, were granted immunity from prosecution in exchange for stepping down from power after months of protests and their crackdowns by the authorities. Finally, the authorities in Bahrain still have to show a genuine commitment to implement the recommendations of the Bahrain Independent Commission of Inquiry. While some steps were taken to redress the various violations committed between February and March 2011, the few prosecutions undertaken involved mainly low-ranking officers.

While the 'culture of impunity' remains a pervading theme in the region, it is a plague that can begin to be dismantled, in part, through the use of international legal instruments and jurisprudence, where States are *willing* or at least not opposed the pursuit of criminal accountability, and where civil society have the security and independence to engage with international crim-

inal law. The additional challenges, including the complexity of the cases, the large numbers of both perpetrators and victims, and lack of national precedents can benefit from comparisons with the experiences and solutions of other countries emerging from armed conflict, as well as with new technology-driven tools. Genuine respect for rule of law standards and principles of justice can ensure that the sovereignty of States from the MENA region be preserved and that the commission of the most serious crimes of concern to the international community as a whole be punished and prevented.

8. Developing Capacity and Knowledge of National Accountability: the IT Revolution

The 'Arab Spring' highlighted the importance of social media in alerting the world to violations as they occur, in real-time, altering citizen capacity to affect domestic politics. Similarly, knowledge media can support lawyers and the human rights community to affect policies for justice and accountability and understand the qualities they entail, with greater speed, accuracy and efficiency. The ICC's Legal Tools Project aims to support criminal justice actors in this way, by providing them with IT-driven tools that provide information, knowledge and analysis applications, without cost. In recognition of the importance of these tools, its services have been translated into Arabic, as the first step of its engagement with criminal justice actors in the region.

9. Accessing Information, Knowledge and Analysis

The ICC Legal Tools Database (LTD) is the largest online library of documents relevant to international criminal law practice. Designed by the Office of the Prosecutor from 2003–05, it contains over 64,000 documents, including national legislation, national cases of core international crimes, international cases and legislation, all preparatory works of the ICC, its Statute, rules, regulations, judgments, decisions and orders, and relevant international and regional human rights decisions. Documents can be accessed through an easy-to-use search engine or by browsing a series of folders. They are provided online without charge or password. In collating and verifying these materials, the LTD aims to provide national actors with the raw materials they need to inform themselves on core international crime adjudication, in a centralized, stable and trusted location.

Two analytical *Digests* contained within the ICC Case Matrix Database (CMD), establish the elements of crime and modes of liability required to successfully prosecute core international crime conduct, using easy-

to-reference jurisprudence drawn from international criminal tribunals. At over 7,500 pages, the Digests provide full citation references to the relevant paragraphs of judgments and use hyperlinks to ensure swift navigation. If a user needs to know the means of proof required to successfully prosecute torture as a crime against humanity, or intentional attacks on civilian populations as a war crime, they can, at the click of a button, view concise analyses of these requirements.

10. Applications for Case Preparation and Management

Successfully investigating and prosecuting core international crime cases requires linking a complex web of evidence and materials to suspects, victims and witnesses. The CMD helps to organize these details and test the strength and sufficiency of evidence, in a secure environment. It breaks down the substantive elements of core international crimes, showing the means of proof that are required for each crime, its contextual elements and specific elements, as well as the modes of individual liability that must be assigned to every individual for every crime that they are charged with committing. The ICC Case Matrix is provided free of charge. It is currently used by 125 actors in the field, including judiciaries, prosecution services, defense counsel, government ministries, NGOs, and international and hybrid tribunals.

The quantity of cases and an inability to comprehend the scale and nature of criminal conduct across a country can also lead to the stagnation of justice or the biased or imbalanced prosecution of suspects and crime categories, further undermining transitions and stability. Without an overview of open case files, prosecutorial strategies including the prioritization or selection of cases according to criteria can incur selective bias. Due to the expected quantity of open cases, prisons can become over-crowded, suspects can get 'lost' in remand, and delays can mount, without a clear overview of where the bottlenecks occur. Districts may prosecute particular crimes or ethnic groups disproportionately, according to the known facts. The Database of Open Case Files addresses these challenges and has been used in Bosnia and Herzegovina and the Democratic Republic of Congo.

The use of technology-aided tools can help reduce the complexity of core international crime cases by providing knowledge directly to national practitioners, within their work environment and on a permanent basis. While empowering and informing criminal justice actors sustainably, this can improve the quality and effectiveness of their work and reduce unnecessary repetitions and mistakes, thereby contributing to the reduction of costs associated with criminal justice based on international human rights standards.

11. Invitation to Participate

According to the Coalition for the International Criminal Court, over 200 human rights organisations are actively engaged in the national and international dimensions of ending impunity for mass atrocity, including Al Haq, the Arab Centre for the Independence of the Judiciary and Legal Profession, the Bahrain Centre for Human Rights, the Cairo Institute for Human Rights, the International Centre for Supporting Rights and Freedoms, the Iraqi Organization for Human Rights Coordination and the Yemen Centre for Transitional Justice.

As the ICC Legal Tools Database moves to support practitioners in Arab countries, and catalogue relevant documents, individuals and organisations are warmly encouraged to submit public materials that they think may be relevant to the Legal Tools, by sending an email to info@casematrixnetwork.org. All materials are verified for authenticity and copyright, before being catalogued according to carefully constructed metadata. Evidence and other materials should not be sent, although they can be analysed by users by requesting the ICC Case Matrix applications.

Emilie Hunter is a Ph.D. researcher at the European University Institute. She thanks Mervat Rishmawi for her comments on parts of the text. Alexandre Skander Galand is a Ph.D. researcher at the European University Institute, Member of the Bar Association of Quebec, and former analyst in the War Crimes Justice Project for the United Nations Inter-regional Crimes and Justice Research Institute. TOAEP wishes to acknowledge the anonymous peer reviewers for this brief. Work on this Policy Brief ended on 16 July 2013. ISBN 978-82-93081-68-5.



Torkel Opsahl Academic EPublisher
E-mail: info@toaep.org
www.toaep.org