

Conference Report

Justice for international crimes: Challenges and strategies in West Africa and elsewhere

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Conversation: Collecting Evidence for Upcoming Trials - New Investigative Mechanisms

- MODERATOR: **Philipp Ambach**, Chief, Victims Participation and Reparations Section, Registry, International Criminal Court
- **Catherine Marchi-Uhel**, Head of the International, Impartial and Independent Investigative Mechanism (IIIM) into the most serious crimes committed in Syria

Conversation

Philipp Ambach: What is the International, Impartial and Independent Mechanism for Syria (IIIM)? What is its mandate and what are its objectives?

Catherine Marchi-Uhel: To answer this question, it is necessary to understand the context in which the IIIM was created. First of all, there was particularly comprehensive documentation of the violations of crimes committed in Syria since March 2011 and, at the same time, a complete blockade by the Security Council that prevented the Syrian situation from being referred to the International Criminal Court. In addition, national courts were prosecuting - and still prosecuting - international crimes committed in different countries of the world (e.g. Rwanda, former Yugoslavia). *The IIIM was established by the General Assembly in December 2016, and the idea behind it was to support the investigations that currently exist, and to support longer-term justice efforts.* Its work has begun to bear fruit even though it is known that this will take time. We are now in a situation where the IIIM has built a Central Repository of evidence and relevant information on the Syrian situation. We have more than 2 million data files that consist of many forms of evidence, such as witness accounts of abuses and attacks, but also exfiltrated documents. One thinks, of course, of Caesar's photographs, as well as documents that were seized by the Syrian regime's opposition forces, satellite images, numerous video documentations, and photographs. This Central Repository is put at the service of justice efforts. This directory makes it possible to search for relevant information, develop analysis and respond to requests from the courts with which the mechanism cooperates. The IIIM cooperates with 13 jurisdictions on more than 133 investigations, which concerns 150-160 requests for assistance, since some investigations require more than one request for assistance.

Philipp Ambach: The IIIM was created by the General Assembly to circumvent the blockages in the Security Council. A similar mechanism has been put in place for Myanmar. Is there sequencing of efforts in the areas of justice and the fight against impunity?

Catherine Marchi-Uhel: The short answer is no; there is no need for sequencing. It was especially in situations where there was no possibility of sufficiently comprehensive justice that these mechanisms were created (Syria and Myanmar). It is a concept that is quite interesting, including for national or regional jurisdictions, because the United Nations is at the service of those jurisdictions and does not replace those jurisdictions.

Philipp Ambach: Commissions of inquiry are also often mandated to work on human rights violations and/or atrocities, such as the Commission of Inquiry on the Tigray Region of Ethiopia. What are the differences between mechanisms (such as the IIIM) and the commissions of inquiry? Can they work together?

Catherine Marchi-Uhel: The goals are very different. The purpose of commissions of inquiry is to publish public reports on the existence of violations. A mechanism such as the one I lead is intended to be at the service of the courts. Evidence is collected according to the methodology and standards in criminal matters (collection, traceability, preservation and analysis of evidence). The Independent International Commission of Inquiry on the Syrian Arab Republic, set up by the UN Human Rights Council in 2011, has warned of the violations, and the work of this Commission has been very useful for the IIIM. In order for the IIIM to be able to use this evidence, the Commission must return to the sources, or interpret the consent given to it, which is also the case for other evidence that does not come from commissions of inquiry. I am thinking in particular of the fact-finding mission of the Organisation for the Prohibition of Chemical Weapons (OPCW), which collected material to establish the facts on the use of chemical weapons and accessed that material, which is not very simple. After 15 years of discussions in the OPCW Assembly of States Parties, there is now an agreement between the OPCW and the IIIM to transmit these documents. Cooperation with these organisations is indispensable, complex and requires a great deal of effort to reassure that the IIIM will treat information with due diligence and security measures, and that it will not go beyond the authorisations given.

Philipp Ambach: Unfortunately, there is currently no prospect of a court for Syria to be set up or for the ICC to have jurisdiction to try international crimes committed in Syria. In the absence of a specific court or tribunal, how is the IIIM's evidence used? Are they shared with national courts and for other proceedings? Do you have any concrete examples?

Catherine Marchi-Uhel: Following a request for assistance, the IIIM verifies that the court has jurisdiction and that the death penalty cannot be imposed in this case. The IIIM also ensures respect for the right to a fair trial, as well as all other relevant rights. Requests for assistance can be very diverse: this could be a request to share information about a person who had or might have committed crimes in Syria, the operation of a detention centre of the Syrian Military Intelligence Service, the treatment of a group by members of Daesh, or the geolocation of a crime scene. ***The mandate of the IIIM is to collect, group, preserve, analyse and also constitute the files.*** For crimes against humanity, war crimes and the crime of genocide, a very large amount of contextual information is required. For example, it must be proven that there is an international or non-international conflict at a given time. The establishment of the existence of a widespread, or systematic, attack on civilian populations is extremely precarious in evidence. National courts often have evidence on the conduct of particular individuals, but they encounter difficulties in situating them in a broader context. To be more useful, we have developed our analytical capacity. We have therefore carried out investigations, notably alongside journalists in Syria, to answer these fundamental questions. The IIIM also addresses the issue of crimes committed in detention. The aim is to establish a mapping of the detention entities, to establish their functioning, their relations with each other, the course of the detainees, as to identify the individuals who play a role, and who can, if necessary, be considered to have sufficient knowledge and involvement in the commissioning of the crimes. When the IIIM receives a request for assistance, instead of simply transmitting individual evidence, we also offer to transmit the analyses already carried out by our analysts and lawyers. ***The IIIM does not replace local courts, it is there to assist the courts.*** We will see over time what the successes will be, and whether we would need to change things.

Philipp Ambach: When you share information with national courts, how do you ensure witness protection?

Catherine Marchi-Uhel: It is important to know the inner workings of these witness protection issues. The IIIM returns to the source of information to ask for permission to disclose their identity with a national court. We want to be able to be honest with the source about the procedure that is now possible. It is obvious that we are not going to communicate this information without their agreement, even when the agreement had already been given to a committee of inquiry. It will also be necessary for the source to agree to reveal the origin of the elements of information.

Philipp Ambach: Could the IIIM be a model in other situations, especially in West Africa?

Catherine Marchi-Uhel: *I don't see the Mechanism as a model. I think it's one tool among a panoply of possible mechanisms.* It is clear that the solution in complex situations such as Syria is not a solution for all situations. The IIIM cannot deliver justice, it has intrinsic limits. On the other hand, one can well imagine national jurisdictions in Africa, for example, deciding to take their share of responsibility, whether for crimes in their country or crimes in the region, and to use universal or extraterritorial jurisdiction through a mechanism supported by the United Nations. This possibility exists and can be useful.

Philipp Ambach: How can West African countries support the IIIM?

Catherine Marchi-Uhel: We can say that for West Africa, Syria is very far away. I have worked in extremely difficult situations around the world, in the former Yugoslavia, on issues in Rwanda, Cambodia, and now Syria. *At the end of the day, these fundamental crimes concern us all. No justice for Syria today, means no justice tomorrow in West Africa.* To support the IIIM is to express its support for the fight against fundamental crimes, to vote in favour of the resolution on Syria that comes up every year, and to provide financial support to the Mechanism.

Philipp Ambach: Our collective understanding of the concepts of justice and the fight against impunity is evolving. It encompasses many elements: transitional justice, truth and reconciliation, the search for missing persons, the centrality of victims and survivors, increased attention to factors such as gender, religion, ethnic origin, sexual orientation and how all this directly or indirectly affects children. The Gambia's Truth, Reconciliation and Reparations Commission is a recent example. From your experience, how do you see the interaction between these different goals? What trends in the world should and could states support to collectively address impunity?

Catherine Marchi-Uhel: We must fight collectively against impunity. A single entity or a State alone does not have the solution when it comes to international justice. Cooperation between states and national courts, as well as the use of networks (such as the European Genocide Network) are essential. The EU Genocide Network regularly connects prosecutors and national teams fighting national crimes, to exchange information both on the investigations they carry out jointly, but also on common methodologies and issues. *IIIM is convinced that a victim- and survivor-centred approach is essential.* The IIIM investigates crimes against humanity committed in detention, or attacks on hospitals because the prosecution of these crimes is central to the communities of victims. Gender issues are also essential. What are the specific harms that people suffer based on their gender? *Gender issues must be integrated into all stages of our work, whether in terms of design, hearing witnesses, analysis or preparation of the case.* Children are often the invisible victims. Here again, we must have a transversal approach. We must look for the evidence and bring it to the surface in order to avoid seeing these children tomorrow, being involved themselves in the production of violence. The issue of missing persons also arises. When we collect information for criminal purposes, we collect a lot of information that can be useful in identifying the fate of missing persons. The problem is that if it is not dealt with from the beginning, the information is lost in the mass of elements, which will later require a lot of effort from specialised organisations to do their investigations. The IIIM has integrated the issue of missing persons into its data analysis, and it transmits this information regularly with the jurisdictions concerned.

Philipp Ambach: Given your experience working with countries that are unwilling or unable to investigate or prosecute individuals, and where there are not necessarily competent courts, what advice would you give to people working for international justice in such situations?

Catherine Marchi-Uhel: Do not give up, preserve and collect information, ask for a public report on the situation. We must also think upstream about the transfer of data and evidence. If you are a State, you will have to think about the different instruments available. It is together that we can achieve something, we must exploit the possibilities of cooperation. The country may request support to strengthen its own investigative and prosecution capacities with the dispatch of a few experts, analysts, or specialised investigators. Experts can also help integrate gender and children's issues into the workplace.

Q&A with the audience

- **Anta Guissé, International Defence Lawyer, Cabinet GUISSÉ:** With which courts are you authorised to transmit information? There are courts that are in charge of the right to asylum. There is information that you have that is fundamental to the victims, and perhaps sometimes to agencies that are responsible for verifying possible accusations against certain people who are also refugees. Do you have permission to transmit the information for this type of case?
 - **Catherine Marchi-Uhel:** The Mechanism transmits information to the criminal courts – it must be a court. From the moment there is a review by a court of fundamental crimes committed in Syria, the Mechanism may transfer information. The IIIM cannot cooperate on cases with anti-democratic prosecutions. The IIIM could support a reparation effort undertaken by victims. You may have seen that the Netherlands has taken action that could end up before the International Court of Justice, citing the Syrian government's violation of its obligations under the Convention against Torture. The Netherlands was joined by Canada in this process. The mechanism could support the Court. The Gambia has made the same move regarding the fate of the Rohingya before the Court of Justice.
- **Emmanuelle Marchand, Deputy Director, Civitas Maxima:** You receive information from intermediaries and sources. How do you assess the reliability and credibility of sources and information? What are the criteria?
 - **Catherine Marchi-Uhel:** The evaluation of intermediaries is indeed essential. We do not have the capacity to do a review of the credibility of every piece in the inventory of millions of pieces of evidence. For information from an entity that respects the criminal chain, we transmit it to the Court. For information received from other entities that do not have this approach (vast majority), we take declarations of origin, and we ask questions to understand what the approach was. If we have information that allows us to doubt the reliability of the process, we share it with the Court as well. On the other hand, when we talk about the development of analytical material, or a dissertation on generalised violence or violence in detention, the Mechanism makes its own assessment. We rely only on reliable and credible equipment. We have developed a list of criteria, which we share with CSOs that carry out documentation work, or even the assembly of files. It is therefore rather in this context that we exchange this type of information.
- **Serge Brammertz, Under-Secretary-General of the United Nations:** How do you organise your work on Syrian territory? I imagine that the IIIM is not cooperating with Syria. Do you work with intermediaries?

- **Catherine Marchi-Uhel:** There is no cooperation with Syria, but we work with intermediaries who are there. We have tried to take steps, including through intermediaries and in particular States that could exert decisive influence. It is a problem not to have access to Syrian archives for example, but we are still able to carry out our work. We could have possibly had access to northern Syria, but we chose not to go to Syria without the permission of the Damascus authorities.
- **Bettina Ambach, Director, Wayamo Foundation:** With the challenge of terrorist crimes in the Sahel region, would a mechanism similar to the IIIM, supported by the states concerned, be useful?
 - **Catherine Marchi-Uhel:** It's difficult for me to answer. You have to grab the model, think and see if it can be useful. After that, we must not substitute a mechanism for real justice authorities, it can only be a support.
- **Hajer Gueldich, Associate Professor of International Law at the University of Carthage and Commissioner of the African Union Commission on International Law (AUCIL):** There are many mechanisms in place at the AU in the fight against terrorism, including the 1999 OAU Convention, reinforced by a protocol in 2004; and then, at the institutional level, there is a whole architecture called apsa (Continental Architecture of Peace and Security). There is a centre in Algiers, operational for about 5 years, which is called the African Centre for Studies and Research on Terrorism (ACSRT). The centre works on conceptualisation and logistical issues in the fight against terrorism. This centre also publishes a journal which I invite you to consult. There is also a very interesting mechanism in Algiers called AFRIPOL, which has already existed since 2016. There are many other mechanisms in relation to these counter-terrorism issues, including the G5 Sahel. I am working on the AU Convention on Mutual Legal Assistance and Extradition against Terrorism. At the level of the European Union and other continents, these mechanisms have existed since the 50s and 60s. At the African level, this kind of mechanism is done at the bilateral level. Compared to the African continent, there is no question of inventing mechanisms that already exist. There is a great problem of political will and financial means. There is also a strong presence of foreign forces (notably Turkey and Qatar), which unfortunately support and finance these terrorist networks. The problem is that political and geostrategic realities prevail over these mechanisms. I propose that the next conference focus on terrorism and counter-terrorism strategies with comparative experiences.
 - **Catherine Marchi-Uhel:** We are missing a very important objective if we consider the issues of terrorism only from the terrorist angle. Some individuals have participated in mass crimes in the name of an ideology, jihadist group, or something else. We have taken the position in Syria not to close the door to investigations that may target both aspects, but not to support investigations that are limited solely to the participation of an individual in a terrorist group. From the victims' point of view, it is not the same thing at all. Look at the contents of a purely terrorist dossier today: the impact and suffering of the victims does not appear. The emphasis is on the ideological part of the crime without taking into account the victims. This is my personal conviction, but it seems to me that international criminal law has a lot to offer in terms of the criminal response to this type of event.