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THE (NOT SO) ROARING TWENTIES?



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AN ERA OF ACCOUNTABILITY THROUGH INNOVATION AND PARTNERSHIP

MEANINGFULLY DELIVERING INTERNATIONAL CRIMINAL JUSTICE

Karim A.A. Khan QC

THE recent history of international criminal justice can be viewed through many lenses. Through one, incremental progress has been made, precedent expanded, and the cause of justice gradually strengthened through the collective work of national and international authorities. Through another, one that we have too rarely been willing to look through, survivors and impacted communities have been promised much but received little.

While we must recognize where positive steps have been taken, it is the second lens—that through which our

efforts are viewed by victims' families, by those waiting for justice to be delivered—that we must judge our work to date. From this perspective, it can too often appear that the cause of accountability is not pursued in a manner reflecting the urgency of the calls for action made by impacted communities. If we are to realize the vision codified in the Rome Statute and place survivors at the center of our work, we must acknowledge that more can be done for them.

When looking closer at the current landscape, hope can be found in a renewed spirit of creativity and dynamism

Karim A.A. Khan QC is a barrister, Queen's Counsel, and Bencher of Lincoln's Inn. An Assistant Secretary-General of the United Nations, he serves as Special Adviser and Head of the United Nations Investigative Team to promote accountability for crimes committed by Da'esh / Islamic State in Iraq and the Levant (UNITAD). The opinions reflected in this article are expressed by the author in his personal capacity and do not purport to reflect the views of the United Nations. You may follow him on Twitter @KarimKhanQC.

cutting across national and international planes of action. From the adoption of new methods in the prosecution of international crimes by domestic authorities, to unprecedented approaches in the establishment and implementation of international investigative mandates, an age of innovation is emerging to buttress the existing international criminal justice architecture. At the apex of this movement, the International Criminal Court (ICC) must be ready both to imbue its own action with this spirit of innovation and to further support national authorities in delivering accountability through this approach.

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To capitalize on the renewed hope that such dynamism can bring, our work must be collective, built on partnerships across the international and national planes and between formal institutions and the communities they seek to serve. If this is realized, the coming decade could be that in which international justice is converted from a laudable aspiration to a meaningful reality for those that have suffered from the most serious of crimes.

DELIVERING JUSTICE BEFORE DOMESTIC COURTS

While focus is often placed on how renewed action at the international-level can address the

accountability gap with respect to international crimes, it is within national jurisdictions that the dynamo of innovation and progress has often been found in recent years. An increase in the flow of individuals from areas impacted by atrocity crimes to other jurisdictions, combined with technological advances allowing for the easier capture and flow of information relevant to investigations, has presented national authorities with increased opportunities for action.

As a consequence of these developments, the number of international crimes cases being investigated by national authorities from EU Member States has risen by over one third between 2016 and 2019, with over 1,000 new investigations into international crimes opened each year and over 3,000 cases now pending or ongoing. As part of this increased activity, national authorities have demonstrated significant agility and imagination so as to ensure those potentially responsible for international crimes are effectively investigated and prosecuted.

Here we can highlight two key emerging trends: innovations in the application of universal jurisdiction and addressing terrorist acts as international crimes.

Faced with an increased number of cases in which atrocity crimes were neither committed within their geographic jurisdiction nor by their own citizens, national authorities have sought to further leverage the application of universal jurisdiction. This trend pre-dates even the more recent increase in action on international crimes within European jurisdictions, with 815 such cases taken forward from 2008 to 2017, nearly as many as in the previous two decades put together. Globally now, at least 16 countries have now heard cases under universal jurisdiction.

This spirit of innovation can be found in the current case of Gibril Massaquoi in which Finnish prosecutors are pursuing war crimes, crimes against humanity charges against the former commander and spokesperson for the Revolutionary United Front. While taken forward within the Finnish legal framework, these proceedings are not found in the courts of Helsinki but instead in specialized hearings established in Liberia and Sierra Leone to allow witnesses to come forward with their accounts. Just over two years since the commencement of the investigation, judges, prosecutors, and

defense lawyers flew to Freetown in mid-February this year and will move to Monrovia for about two months of hearings with the participation of over one hundred witnesses. By bringing the proceedings to the location of the alleged criminal activity, the Court will also have the opportunity to visit key crime scenes. Far from the often remote and disconnected feel of such cases played out in European capitals, this creative and survivor-centered approach strengthens the breadth and depth of participation of those impacted by the alleged crimes. Through this approach,

Finnish prosecutors are bringing accountability processes directly to the communities seeking justice.

In the German city of Koblenz, former Syrian intelligence officer Anwar Raslan has since April last year listened to extensive witness testimony presented before the Higher Regional Court alleging his participation in crimes against humanity. This is a landmark trial, using universal jurisdiction to address the alleged Syrian state torture campaign in criminal proceedings for the first time. Mr. Raslan stands accused of 4,000 cases of torture, 58 killings, and two cases of rape or sexual

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assault allegedly committed between April 2011 and September 2012 during his time in charge of the Syrian Secret Service Branch 251. As part of the same trial, Eyad al-Gharib, an alleged subordinate of Mr. Raslan, was in February this year convicted of aiding and abetting crimes against humanity. This represents the first time an individual has been prosecuted for international crimes in connection with alleged state-sponsored torture in Syria.

Germany has played a highly proactive role in recent years in taking forward cases of international crimes. The case of Mr. Raslan underlines how progressive approaches to this endeavor are being rewarded. The enhanced use of structural investigations has supported the collection of evidence for the purpose of building the constituent, contextual elements of large-scale international crimes. This has allowed prosecutors to act swiftly when individual suspects are identified. Such a structural investigation on crimes committed by the Syrian regime and opposition forces had been opened by the German Federal Prosecutor in September 2011. As a result, when Mr. Raslan contacted a police station in Berlin to report suspicions he was being followed by members of the Syrian regime from which he had defected, investigators were able to build the case against him rapidly on this structural basis. Through this approach, German

authorities have provided a potentially vital avenue for survivors and witnesses to come forward with their accounts and have their allegations of mass, state-sanctioned crimes validated in accordance with the rule of law.

A potential template for action by other national authorities in the coming years can also be found in the use of universal jurisdiction by German authorities in the prosecution of individuals participating in the crimes of Islamic State in Iraq and the Levant (ISIL) in Iraq and Syria. In a recent case commenced in Frankfurt, an Iraqi national, Taha Al J, is charged with war crimes, crimes against humanity and genocide as part of crimes committed by ISIL against the Yazidi community from August 2014. According to the case presented, Al J purchased two Yazidis as slaves—a mother and her five-year old daughter—proceeding to severely mistreat them including by handcuffing the minor to a window in extreme temperatures, leading to her death.

This is a watershed moment in a number of ways, representing both the first time that the crime of genocide has been charged against an individual with respect to acts inflicted on the Yazidi community and the first time that universal jurisdiction has been used to prosecute genocide under the international crimes legislation introduced in 2002 following the ratification

by Germany of the ICC's Rome Statute. Through a willingness to break new ground, this case strengthens the hope for justice for the Yazidi community and indeed all communities impacted by ISIL crimes.

The case of *Al J*, and the associated case of his German wife, *Jennifer W*, also presently before German courts, reflect a further identifiable progressive trend in the domestic sphere, with national authorities increasingly willing to address the acts of terrorist organizations through the prism of

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international criminal law. This is an approach that should be both applauded as responding directly to the demands of survivors and supported as part of a comprehensive criminal justice response to the challenge of terrorist accountability, in particular the conundrum posed by Foreign Terrorist Fighters (FTFs).

To date, national authorities in States including Finland, France, Germany, Hungary, the Netherlands and Sweden are taking forward investigations and prosecutions at varying stages, with a number of these States adopting a cumulative approach through which individuals are charged both

for terrorist offences and international crimes. These proceedings have included prosecutions of individuals for war crimes associated with posing with murder victims or body parts, slavery, pillaging, enlisting child soldiers, and

the above-referenced case of genocide.

Of course, the prism of international criminal law for the prosecution of ISIL fighters should not be available only within European jurisdictions; greater efforts should be made to support authorities in other regions to leverage this framework. In my role

as Head of the United Nations Investigative Team to promote accountability for crimes committed by Da'esh / ISIL (UNITAD) I have been consistent in my support for efforts by the Iraqi Council of Representatives to adopt legislation that would allow for the prosecution of members of ISIL for war crimes, crimes against humanity and genocide. Survivors and families of victims across Iraq have been resolute in their calls for these acts not to be treated merely as acts of terrorism but as targeted attacks on their communities that may include constituent elements for international crimes. This legislation remains pending before the Council at present but I have been encouraged by the clear

support it has received from key Iraqi parliamentary groups, the Iraqi Government, and the Presidency.

The addition of the lens of international criminal justice to the acts of terrorist organizations has the potential to have a profound effect on the ability of national authorities to deliver meaningful justice for victims. These efforts have further been strengthened through cooperation facilitated by actors such as the EU Genocide Network, which has worked to bring relevant domestic investigative and prosecutorial actors together in order to share good practices and identify further avenues for cooperation. However, while momentum has built in recent years, domestic authorities still require further support in addressing the inherent and often significant hurdles they face when seeking to prosecute international crimes committed in other jurisdictions.

In working with such authorities in recent years, two key areas stand out as requiring further assistance and support from the international community. *First*, domestic prosecutors in many jurisdictions may still not be entirely familiar with the contours of the key offences under international criminal law as relevant to the factual matrix they are investigating. Support should be provided to national investigators and prosecutors in founding such cases on the key constituent elements of the

international crimes they are seeking to establish. *Second*, limited access to relevant crime scenes can lead to cases based only, and in some cases disproportionately, on testimonial evidence. In this regard, established mutual legal assistance mechanisms and, as outlined further below, the support of newer international investigative mechanisms have a crucial role to play in filling the evidentiary gap.

EMPOWERING DOMESTIC ACTION THROUGH INTERNATIONAL COOPERATION

These significant developments in domestic accountability processes can perhaps pose an awkward question for those who have played a part in the development of the international criminal accountability architecture over the last 20 years. Does this national-level dynamism render the complementary international pillar less relevant? Is it a symptom of the limitations of the existing global architecture that domestic prosecutors and courts seem more willing than ever to shoulder responsibility for combating impunity?

The answer must be to embrace this dynamism, to strengthen collaboration between actors at the national and international level, and to draw inspiration from the efforts of domestic authorities globally. By renewing a spirit of partnership across these different strata of action, we can further narrow the

practical and jurisdictional gaps which perpetrators can use to avoid justice.

Here a discussion can be focused on two aspects. First, how to bridge the accountability gap and second how established international accountability actors can both lead through example and extend support through partnership.

In this spirit, and with a view to addressing the inherent challenges faced by domestic authorities in the prosecution of international crimes, the international community has responded positively through the development of new models of action in support of domestic accountability processes. While the international political context at present is perhaps not conducive to the establishment of new international tribunals or courts, UN entities in particular have demonstrated an ability to implement creative solutions so as to address potential accountability gaps, at least in part. This has included the establishment of a number of international investigative mechanisms aimed at supporting domestic authorities in taking forward investigations and prosecutions for large-scale crimes. Such mechanisms

must be fully harnessed in the coming years so as to assist national authorities in bridging the evidentiary hurdles they currently face.

In 2017, in response to the persistent calls for action by communities in Iraq most impacted by ISIL crimes, and thanks in particular to the relentless advocacy of Nobel Laureate Nadia Murad, the UN Security Council authorized the establishment of UNITAD. Initiated at the request of the Government of Iraq, UNITAD represents a unique partnership between the international community, Iraqi national authorities, and

the religious and ethnic communities that continue to suffer as a result of the legacy of ISIL crimes in Iraq. Having commenced its work in late 2018 to collect, store and preserve evidence of international crimes committed by ISIL in Iraq, progress has been made both in the development of case-briefs and individual case-files in relation to senior ISIL members and the provision of ad hoc support to domestic authorities with respect to ongoing proceedings. A key lesson that may be drawn from the UNITAD experience to date is that what may have originally been

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viewed as a vulnerability in its mandate—the perceived tension between its independent investigations and close cooperation with Iraqi authorities—has in fact served as its key strength.

It has been by both leveraging its status as an independent, impartial entity and simultaneously harnessing cooperation with national and local authorities that the most significant steps have been taken by the Team in the implementation of its mandate. This is reflected in areas including the provision of support to Iraqi investigative judges in building case-files against ISIL members for international crimes and the delivery of training to Iraqi investigators on dealing with victims of trauma. In parallel, building on its position in-country, the Team has been able to establish strong relationships with survivor groups and impacted communities. Through this engagement, the Team has sought to support the most vulnerable survivors to come forward with their accounts while addressing risks of re-traumatization and has also ensured its working practices are adapted to the cultural and religious customs of all communities with

which it works. By demonstrating an ability for a UN mechanism to operate effectively and independently within a national jurisdiction while continually deepening our cooperation with national authorities and impacted

communities, UNITAD may serve as a model for similar action in other jurisdictions.

The harnessing of these dual elements of international expertise and national engagement has allowed for the provision of tangible support to domestic accountability processes, both in Iraq and in States seeking to prosecute nationals that travelled to Iraq in order to join in the criminal

activities of Daesh. In Sinjar, the Team has provided extensive support to Iraqi authorities in order to ensure that mass grave sites are excavated in a manner that supports the collection and preservation of evidence in line with international standards. In Baghdad, Mosul, and other locations across Iraq our Team is working with investigative judges and government officials to digitize millions of existing files and battlefield evidence which to date have not been exploited for the purpose of accountability processes.

A key lesson that may be drawn from the UNITAD experience to date is that what may have originally been viewed as a vulnerability in its mandate—the perceived tension between its independent investigations and close cooperation with Iraqi authorities—has in fact served as its key strength.

Recognizing that meaningful accountability efforts must be holistic in addressing the needs of communities, UNITAD has also worked closely with the Yezidi community and Iraqi national authorities to ensure the remains of victims are returned and buried in accordance with religious and cultural custom. It was the profound honor of UNITAD support the ceremony held in Kocho village in February marking the return of the remains of 104 of the victims of mass killings undertaken by Daesh in August 2014. Attended by hundreds of family members of the victims, including Ms. Murad who laid to rest her brother as part of the ceremony, along with civil society organizations, Iraqi authorities and international partners, this marked a somber but crucial moment for reflection and recognition of the crimes inflicted on the Yezidi people. In addressing those present, I underlined that the collective action which allowed for the return of victims to their families must and will continue through to the prosecution of those responsible.

Seeking to bridge the evidence gap faced by other national authorities, the Team has received requests for

assistance from 11 States so far in relation to ongoing investigations and prosecutions of ISIL members. Such support can take many forms, from the identification of individual witnesses who may wish to provide their

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accounts in support of ongoing proceedings, to the cross-checking of information on persons of interest against our evidence holdings. Harnessing our advanced evidence management system and analytical tools—including facial and voice recognition technology—the Team has been able to identify relevant information in response to such requests on a consistent

basis. This has included a wide range of internal ISIL administrative documents through which a personal history of individual ISIL members can be developed, including their receipt of payments, medical treatment, and housing from ISIL and confirmation of their participation in combat activities.

Where the unanimity of approach amongst the international community that underpinned the establishment of UNITAD has not been possible, the UN has still found a way to act to support accountability efforts in relation to large-scale crimes. With respect

to crimes committed in Syria since March 2011, the General Assembly in 2016 established the International, Impartial and Independent Mechanism (IIIM) in order to collect, consolidate, preserve, and analyze evidence of violations of international humanitarian law and to prepare case-files for use in fair and independent criminal proceedings whether before domestic courts or, potentially, any international court or tribunal that may have jurisdiction in the future. While not in place in-country, the IIIM has been able to leverage its role as a central repository of information in order to collect over 2,000,000 documents relevant to its mandate and is developing evidentiary modules in order to address the contextual requirements necessary for the prosecution of war crimes charges in competent domestic jurisdictions.

The more recently established Independent, Impartial, Investigative Mechanism for Myanmar builds on the model established through the IIIM and has commenced work in constructing a central repository of information on the most serious international crimes and violations of international law committed in Myanmar since 2011. In a recent statement in the context of the ongoing developments in Myanmar, the Head of the IIIM noted that wherever they see indications that serious international crimes or violations of international law have been or are being committed, they

will fulfill their mandate, and collect evidence and build criminal case files to hold to account those individuals responsible.

Whether following the in-country model of UNITAD or the international repository model of the IIIM and IIMM, this new generation of mechanisms have the ability to serve as a crucial bridge between the increasing willingness of national authorities to take forward proceedings in relation to international crimes and the hard reality that evidence needed is extremely difficult to access. In the case of the IIIM and IIM, they may also potentially serve as a bridge to efforts by the ICC to take forward prosecutions, depending on the gravity of the crime and provided relevant jurisdictional elements are met.

Further engagement is needed between these mechanisms and national authorities in the coming years to ensure that domestic proceedings benefit fully from the new avenues for cooperation that have been created through action taken in the Security Council and General Assembly.

Beyond these newer mechanisms, the more established actors in the international accountability framework also have important role to play in both supporting and harnessing the innovative spirit demonstrated by national

counterparts. This should be done by both extending their support through partnership and leading by example.

The International Criminal Court can and does serve as a source of inspiration and guidance through its own policies, practices, and procedures. This is particularly important in areas in which domestic authorities continue to find their feet as they explore the potential scope of action available to them within their national legal framework. The adoption of a trauma-informed approach to the engagement of witnesses and survivors, the investigation of sexual and gender-based crimes, and the investigation of crimes concerning children are all areas in which the experience of the ICC, and other relevant international actors, can serve as a crucial guide for national authorities in the initial stages of investigations touching on these themes.

In more concrete terms, the ICC is also able to provide direct support to national jurisdictions through the provision of information and the coordination of action with situation countries. There is positive precedent in the situations of Uganda and the Central African Republic, and it was highlighted in the recent Independent

Expert Review of the International Criminal Court and the Rome Statute System that this should be built upon through further information-sharing with other relevant national jurisdictions and the provision of assistance to local investigations and prosecutions. As the Expert group authoring the report noted, not to do so ultimately risks the wealth of evidence collected by the Office of the Prosecutor going to waste. In addition, by empowering domestic authorities through assistance and the provision of information, the OTP will strengthen the basis on which it can further prioritize its own cases.

To this end, it was recommended by the Expert group that the Assembly of State Parties consider establishing a working group to assist and support the ICC in addressing impunity gaps and facilitating domestic justice processes. In this area, the ICC may itself be able to benefit from the experience of newer entities such as the IIIM and UNITAD with respect to the proactive provision of support to relevant domestic jurisdictions. Again, a willingness to build partnerships across different channels of action will be crucial in ensuring opportunities for learning and mutual strengthening of practice are exploited.

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WE ARE ONLY LIMITED BY OUR WILLINGNESS TO CHANGE AND TO COLLABORATE

In assessing the current landscape of criminal justice, and in considering what the next era in criminal justice may look like, an optimist would be able to identify a movement of dynamism and innovation emerging. This energy and progressive approach to delivering accountability will be essential if we are to adapt the process of justice to the realities of a world in which persons, information and criminality can move more freely than ever before.

However, real progress can only be achieved by bringing these strands of innovation together, across national authorities, international investigative

mechanisms, and transitional justice initiatives, with this partnership-building further supported and inspired by established actors including the International Criminal Court. Barriers must be broken down with respect to information-sharing, collaboration, and dialogue so that innovations on one plane of action can serve to inspire and accelerate progress in others. This is all possible, provided we remain focused on the urgency of the calls for action by those we seek to serve, the survivors of the gravest crimes, and the families of those that have fallen victim to their perpetrators. If we do so, we may finally hope to live up to the expectations of those that looked to the adoption of the Rome Statute as the beginning of the end of impunity. ●