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Holding the Leadership of the Islamic Republic of Iran Accountable for International Crimes in Syria

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By Shadi Sadr

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Following the fall of the Assad regime, calls for accountability for international crimes committed under Assad's rule are gaining momentum. These calls have particularly focused on the brutal crackdown on protests that began in March 2011 and escalated into one of the bloodiest non-state armed conflicts in recent history. The final statement of Syria's national dialogue conference, organised by the interim government and held on 24–25 February in Damascus, urges the need for “achieving transitional justice by holding accountable those responsible for crimes and violations, [...] and appropriate mechanisms to ensure the achievement of justice and the restoration of rights.” There have been various proposals by international law scholars and analysts, as well as the Syrian civil society regarding the structure and mechanisms of the transitional justice process. Discussions have explored referring the Syrian situation to the International Criminal Court (ICC), or establishing an ad hoc tribunal similar to the Special Court for Sierra Leone (SCSL). Meanwhile, there are ongoing universal jurisdiction cases in European countries against Syrian perpetrators, and it is expected that more cases will emerge soon with the influx of Assad's regime officials fleeing to other countries.



Nevertheless, debates on the scope of criminal proceedings have seldom gone beyond Syrian national perpetrators, if at all. This article aims to examine whether the political and military leaders of the Islamic Republic of Iran (IRI) can be also held accountable for international crimes committed in Syria.

Iran's involvement in the Syrian conflict

Iran intervened early in the Syrian conflict, helping form and train local militias known as the National Defence Forces (NDF), which committed massacres and other crimes, including sexual violence against civilians. Simultaneously, Iran-supported Hezbollah forces were deployed under the guise of protecting Lebanese citizens in Syria's border regions. By early 2012, when training and artillery support proved insufficient to save the Assad regime, Iran positioned its Islamic Revolutionary Guard Corps (IRGC) troops augmenting Hezbollah and Assad's forces. Over time, Iranian Basij militia, as well as the IRI-supported Shia armed groups, including Afghan Fatemiyoun, Pakistani Zainabiyoun, and Iraqi Popular Mobilization Forces, joined the fight as part of the 'Axis of Resistance'. Russia's direct military intervention in September 2015 marked a turning point, but until then, the Axis of Resistance had been the Assad regime's primary saviour.

A mapping study by Justice Beyond Borders confirms the involvement of the IRI-supported forces in numerous military operations against opposition groups and civilians in several regions. Gross human rights violations committed by these forces have been documented by the UN Independent International Commission of Inquiry on the Syrian Arab Republic, Amnesty International, Human Rights Watch, and others. These violations include, but are not limited to, prolonged sieges, the forced starvation of civilian populations, extrajudicial executions, and enforced displacement in cities such as Darayya, Madaya, Dara'a, Homs, and Aleppo.

The old question of attribution in the context of mass criminality

International crimes are rarely the result of a single individual's actions; they are typically the outcome of many individuals or groups working together to achieve a strategic goal based on an overarching plan. These crimes are committed on a massive scale, and the roles of the participants, especially those who are the architects of those plans, may often be unclear or diluted. As Ohlin points out, such leaders are often vertically far removed from the commission of the crime through their indirect involvement and horizontally distant through co-perpetration with other collaborators at the same level. What further complicates the situation is that overarching plans are often non-criminal in nature and typically constitute the sole contribution of those leaders to the crimes committed in their pursuit.

These are precisely the challenges faced when assessing the responsibility of senior Iranian political and military figures for crimes committed by Axis of Resistance forces in Syria. The IRI leadership denied direct involvement in the conflict until 2013, when the number of IRGC and Basij casualties in Syria reached an undeniable threshold. Since then, they have consistently stated that they intervened at the invitation of Syria's legitimate government, solely to help maintain its sovereignty. Furthermore, they have claimed that non-Iranian Shia armed groups acted independently, voluntarily joining the conflict, without any Iranian coordination or command over their operations. As al-Abdeh and Hauch observed, the situation is further complicated by the fact that Iranian forces were "so deeply embedded in Assad's Syria, including within Syrian army units, that it is easy to miss the forest for the trees."

To address similar complexities, international criminal proceedings have utilised various doctrines of collective criminality and co-perpetration. The most commonly applied modes of liability for imputing crimes to accused who did not directly commit the acts are co-perpetration based on "joint control over the crime" and "joint criminal enterprise (JCE)". The ICC has employed the former, while ad-hoc tribunals and hybrid courts have applied the latter.

Inspired by the use of common plan mode of liability in a few post-World War II trials, the International Criminal Tribunal for the Former Yugoslavia (ICTY) introduced JCE in the 1999 Tadić appeal judgement and applied it in several cases involving individuals at the highest echelon of power. According to the jurisprudence of the ICTY and its sister tribunal, the International Criminal Tribunal for Rwanda (ICTR), JCE liability arises when

individuals are part of a group with a common criminal purpose or plan, involving the commission of crimes. Participants can be held liable for crimes committed by others in furtherance of the enterprise, even if they did not personally commit the acts. JCE encompasses three forms: (1) basic JCE (JCE I), where there is shared intent to commit a specific crime; (2) systemic JCE (JCE II), where the enterprise involves a broader range of criminal acts; and (3) extended JCE (JCE III), where the accused foresaw and accepted the risk that other crimes would occur as part of the enterprise. The material elements (*actus reus*) involve crimes committed by others within the enterprise, while the mental elements (*mens rea*) require shared criminal intent or, in some forms, the foreseeability of the crime as part of the enterprise.

Drawing on the German doctrine of Tatherrschaftslehre, the ICC applies the joint control over the crime mode of liability to hold principal perpetrators responsible if a common plan or agreement exists between at least two individuals, and each makes an essential contribution to the commission of the crime such that any may frustrate the crime by withdrawing participation. In addition to the requisite *mens rea* for the charged crimes, the accused must intend to participate in the plan with the aim of committing the crime, or be aware that the crime would occur in the ordinary course of events.

In both doctrines, the contribution of participants does not necessarily have to involve a criminal act (*Krajišnik* case, Appeal, 2009, para. 215). The existence of a common plan need not be documented in writing, nor must it be pre-arranged or formulated. Instead, it can be inferred from patterns of large-scale crimes and other factual evidence (*Djordjević* case, Trial, 2011, paras. 1862, 2007, 2128). Finally, participants in a common plan do not need to belong to a single institutional framework (*Muthaura and Kenyatta* case, Decision on the confirmation of charges, 2012, paras 186, 190, 297) and the accused can be held responsible for crimes committed by forces under the command of another co-perpetrator (Katanga Case, Appeal, 2009).

Application of co-perpetration liability to Iran's involvement in Syria

On the surface, both joint control over the crime and JCE seem fitting modes of liability for determining the criminal responsibility of the IRI's leadership for the atrocities in Syria. However, a closer examination may suggest otherwise.

Sufficient evidence from official statements confirms the existence of an overarching plan or agreement between Assad, the now-deceased leader of Hezbollah, and the political and military leaders of the IRI to preserve the Assad regime by any means necessary. If existing or future evidence demonstrates that atrocity crimes were committed from around mid-2011, jointly by Assad's forces and the Axis of Resistance, in pursuant of such a common plan, the question arises whether the political and military leaders of the IRI, including but not limited to the Supreme Leader and the IRGC commanders, could be held accountable for those crimes.

A plan as broad as preserving the Assad regime is not inherently criminal and, in theory, could be pursued through both lawful and unlawful means. According to ICTY/ICTR jurisprudence, the common plan must be specifically directed at committing a crime, either as an objective in itself or as a means to achieve a non-criminal goal. By contrast, the ICC has consistently held that co-perpetration based on joint control does not require the common plan to be inherently criminal. However, the plan must involve the commission of crimes, or at least create a high probability that crimes will be committed in its execution and in the ordinary course of events. Moreover, the co-perpetrators must be aware of this risk and accept it as part of implementing the plan.

Given the situation on the ground and the strength of the opposition, which was on the verge of taking control of cities and regions in the early years of the conflict, as well as their blending with the civilian population achieving this common goal inevitably resulted in the commission of crimes in the ordinary course of events. This should satisfy the common plan requirement under the joint control over the crime doctrine but may not fulfil the criteria necessary to invoke JCE. However, other elements of the control over the crime mode of liability could complicate its application to the case. A key distinction between the two modes of liability is the nature of the co-perpetrator's contribution to the common plan. The ICC requires an essential contribution, meaning each participant's actions were indispensable to the crime's commission; without them, the plan would have become futile. In contrast, ICTY/ICTR jurisprudence accepts a significant contribution, one that is substantial enough to facilitate or enable the crime (*Brđanin* case, Appeal, 2007, paras. 430, Gotovina and Markac, Appeal, 2012, para. 89, *Ildéphonse Nizeyimana* case, Appeal, 2014, para. 325). Applying these tests, one might argue that while the IRI leadership's contribution to the Assad regime's survival, through the deployment of military and paramilitary forces and support for non-Iranian Shia armed groups, was undeniably significant, it may not have been essential. Assad could have potentially preserved his regime with Russian assistance, as occurred after 2015. This remains a subject for further factual investigation.

In summary, while applying JCE to hold the IRI leaders criminally responsible would be challenging due to the perceived non-criminal nature of their agreement with Assad, the use of joint control over crime doctrine may also be challenging. On the other hand, and as previously stated, the allegations regarding the significant contributions of the Islamic Republic's IRGC and Basij forces, both controlled by Iran's political and military leadership, are serious. However, determining the extent to which their involvement was essential in achieving the ultimate objective, namely the preservation of the Assad regime, remains a complex and challenging assessment.

In such a situation, one may argue that the broader interpretation of the common plan, as introduced by the SCSL and adopted by the Extraordinary Chambers in the Courts of Cambodia (ECCC) and certain internationalised tribunals, may be the best available option in international law. It ascribes JCE liability based on participation in common plans that neither had a criminal objective nor directly intended a particular offence as the agreed means to an end, but merely entailed an objective risk of crime (contemplation)

(*Brima et al. Appeal*, para. 80; *Sesay et al. Appeal*, para. 475, *Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan case, Decision on the Applicability of Joint Criminal Enterprise*, 2011, para. 17). Theories of co-perpetration that include a common plan element have been subject to controversy, albeit to different extents. Many international law scholars have referred to them as forms of guilt by association, arguing that they are doctrinally unsound and violate the principle of culpability. Within the spectrum of criticism, the ICC's approach is generally considered the most justifiable due to its strictness, whereas the expansive interpretation of the JCE is the least defensible, if at all. While JCE I and JCE II are widely recognised, JCE III is typically placed at the unacceptable end of the spectrum. Nevertheless, international criminal law proceedings have continued to employ different common plan-based modes of liability in order to bring the architects of atrocity crime master plans to justice.

It is too early to predict where the discussion on justice and accountability in Syria will go, and which kind of transitional justice process, if any, Syria will embark on. However, whatever direction this process takes, it must address the full scope of the suffering experienced by millions of Syrians by holding all those "most responsible" accountable. This includes not only high-ranking officials of the Assad regime but also the IRI. Whether the Syrian situation is referred to the ICC, likely applying the joint control over the crime doctrine, or a special tribunal is established, probably employing JCE, neither framework appears entirely suitable for this particular purpose. Therefore, even at this early stage, the issue of criminal responsibility for senior political and military leaders of the IRI, as well as seeking a comprehensive framework, should be included in the discussions on transitional justice for Syria and within the scope of any future investigation.