

Syria: Vote on ICC Referral

 securitycouncilreport.org/whatsinblue/2014/05/syria-vote-on-icc-referral.php

What's In Blue

Posted Thu 15 May 2014

It seems France is ready to put a draft resolution referring the situation in Syria to the International Criminal Court (ICC) in blue quite soon. At press time, some Council members appear to be looking at the possibility of a vote early next week. The draft resolution was circulated on 12 May to all 15 Council members, followed by one round of negotiations on 14 May. It seems the draft resolution has enough votes to pass if it is not vetoed.

A Security Council referral of a situation to the ICC has never been vetoed. Council members are nevertheless bracing themselves for the possibility that the resolution may be vetoed by Russia or China. To date, the Security Council has referred two situations to the ICC: Russia voted for resolution 1593 adopted on 31 March 2005 referring Darfur to the ICC (China and the US abstained, along with then-Council members Algeria and Brazil), while resolution 1970 adopted on 26 February 2011 referring Libya to the ICC was adopted unanimously.

Over the last few weeks there were signs that France was moving towards putting this resolution on the table. As it became increasingly apparent that the 10-13 February Geneva II peace talks had failed, France initiated a strategy to bring accountability to the fore of Council action. It argued that after more than three years of mass atrocities in Syria the situation should be referred to the ICC. At its request, High Commissioner for Human Rights Navi Pillay briefed Council members on 8 April and called for the Council to refer the situation in Syria to the ICC—reiterating a call she had made as early as 18 August 2011. Pillay said that a political solution cannot trump justice and that the Human Rights Council-mandated Commission of Inquiry had produced massive evidence that war crimes and crimes against humanity have been committed. She also said that responsibility for those crimes reached the highest level, including President Bashar al-Assad. Pillay stated that the actions of the government forces far outweighed the violations by the armed opposition and that her office would be able to identify the perpetrators in the case of an ICC referral.

However, keeping in mind past reactions on Syria draft texts, France chose to keep this draft resolution carefully neutral on the issue of assigning blame for violations of human rights and international humanitarian law. It seems this was done to make the text as palatable as possible to Russia. The draft resolution specifies that the ICC should investigate all violations by the Syrian authorities, pro-government militias and non-state armed groups. The text also demands that both Syria and non-state armed groups cooperate fully with the ICC investigation.

On the issue of Syria and accountability, to date, the Council has never been able to agree on anything stronger than a general call for those responsible for violations of international humanitarian law and human rights to be brought to justice. This was most recently the case with resolution 2139 on humanitarian access, adopted on 22 February 2014, even though the Council currently has 11 members that are state parties to the Rome Statute of the ICC—the highest concentration ever.

Council members have been reluctant to take this step for a number of reasons. A *realpolitik* argument among some members has been that an ICC referral would elicit automatic rejection by Russia. A second argument has echoed the “peace vs. justice” trope, in that an ICC referral would ensure that Assad would never relinquish power in a negotiated political transition if that was guaranteed to result in an ICC arrest warrant. However, the lack of strong accountability language in Council outcomes has not stopped China and Russia from vetoing three draft resolutions, nor has avoiding the issue of accountability led Assad to the path of peaceful reconciliation.

A less discussed aspect of the accountability gap in Security Council outcomes on Syria over the past three years has been the contrast between the US’s public calls for an end to impunity while simultaneously being quite reluctant to use the power of the Council under Article 13(b) of the Rome Statute to refer the situation in Syria to the ICC. The US has historically had a problematic relationship with the ICC. It is not a party to the Rome Statute and aggressively pursued bilateral immunity agreements with 102 of the 122 state parties to the Rome Statute under the administration of former President George W. Bush. Noticeably, however, the US attitude towards the ICC has swung towards modest support under the administration of President Barack Obama, particularly when it does not affect US direct interests.

In the Council, the US has insisted on carve-outs to ICC jurisdiction in both the Darfur and Libya referrals so that nationals of a non-party to the ICC would be exclusively subject to their own state’s jurisdiction when acting under Council authorisation. The US has not unsurprisingly insisted on such language in the current draft resolution referring Syria to the ICC. It seems during P3 discussions of the draft resolution over the course of April and May, a wider carve-out was sought by excluding the previously agreed language related to operations “established or authorized by the Council” used in resolutions 1593 and 1970. However, it seems agreement among the P3 on this issue could not be reached and the text circulated to the P5 on 7 May and to the entire membership on 12 May mirrored that of resolutions 1593 and 1970.

Some Council members who are also parties to the Rome Statute, such as Argentina and Chile, have argued that despite past agreed language on this issue, exclusions from ICC jurisdiction are a double standard incompatible with the Rome Statute. These Council members also find it difficult to accept that the draft resolution places the financial burden of the referral on the ICC, contrary to the provisions of the Rome Statute which make such referrals the financial prerogative of the UN General Assembly. (The two previous referrals also contained language that put the financial burden of ICC proceedings arising from the Security Council referrals exclusively on the ICC.) Many

other Council members agree in principle with these positions but are cognisant that without these provisions the US, due to its own congressional constraints, would be unable to support the draft resolution.

The US's willingness to back an ICC referral for Syria is recent and is very much contingent on the exclusions to jurisdiction described above. It seems the language in the draft was painstakingly negotiated between France and the US for four weeks and it does not seem likely that any further significant changes to the text will be possible. The US has had several concerns, aside from its general stance on the ICC, which has made it disinclined to proceed on the accountability track until now.

It seems that over the course of some time, the US has expressed concern to other Council members that a referral could place Israel under ICC jurisdiction given that Israel occupies the Syrian Golan. (Israel is not a state party to the Rome Statute but, theoretically, territorial jurisdiction could apply.) This concern is addressed in the draft resolution by describing the situation being referred to the ICC as the conflict in Syria since March 2011 between the Syrian authorities, pro-government militias and non-state armed groups. While the issue of the Golan Heights may have made the US hesitate for some time, it is not a controversial issue among the broader Council membership who have accepted both the premise and the language in the draft to address the Golan Heights issue. No Council member is interested in using a Syria referral as a back door to bring Israel before The Hague.

On a positive note, many Council members have noted that the draft resolution includes several operational paragraphs that could signal an improved overall approach to the ICC. The draft includes the Council's commitment for effective follow-up of this particular referral regarding cooperation, arrest and transfer to the ICC of persons against whom arrest warrants are issued—an indirect acknowledgement of the Council's failure to follow-up its previous referrals of Libya and Sudan*. It also recalls the Secretary-General's guidance on essential contacts to avoid any unnecessary interaction between UN personnel and those who are the subject of ICC arrest warrants. Finally, it also decides that Syria, despite not being a state party to the ICC, will implement the privileges and immunities afforded ICC personnel to prevent an incident like the arrest of four ICC staff in Libya from 7 June to 2 July 2012.

The timing of this resolution is also linked to the failure of the Geneva II peace talks. While there was some hope for the political track, the US, as well as many other Council members including Russia, eschewed any genesis of a credible accountability track in the Council. The collapse of peace talks, followed by the announcement of presidential elections in Syria for 3 June and the resignation on 13 May of UN-Arab League Joint Special Representative Lakhdar Brahimi, seems to have rendered the political track dead for the time being, apparently contributing to the shift in the US position to support an ICC referral.

Russia has said the idea of an ICC referral is poorly timed and counter-productive, in that it may hinder progress on the political track, and that it will only serve to exacerbate existing divisions. Russia has further argued that the ICC referral is unnecessary since the

30 June 2012 Geneva Communiqué addresses the need for accountability for acts committed during the conflict in the context of a future national reconciliation. However, Brahimi has now briefed Council members twice, on 13 March and 13 May, on the failure of the Geneva process. With no viable political track in sight in the near future, most Council members find such arguments against an ICC referral disingenuous at best.

In terms of voting, the P3—along with Argentina, Australia, Chile, Jordan, Lithuania, Luxembourg and South Korea—have voiced support for an ICC referral and are expected to vote in favour of the resolution. Many Council members will be watching the votes cast by Chad and Nigeria (both state parties to the Rome Statute), given the African Union's recent criticism of the ICC, as well as perhaps a certain degree of discomfort over the follow-up provisions in this draft resolution. ICC indictee Omar al-Bashir of Sudan has visited both countries in the past. Rwanda's vote will also be of great interest given its consistent push-back against ICC references in a broad spectrum of Council outcomes. However, there are strong indications that these three Council members will support the draft resolution. It seems the 15 April Arria-Formula meeting organised by France to present the Ceasar Report, documenting pervasive torture in Syrian detention facilities, has played a role in consolidating these Council members' support for the referral. China's position is less clear. It has been quiet during negotiations, apparently only commenting that the unity of the Council should be preserved.

In advance of the vote, France reached out to the 58 member state signatories of the letter sent by Switzerland on 14 January 2013 to the Security Council requesting an ICC referral (S/2013/19) to co-sponsor this draft resolution. In addition, it seems Switzerland is set to send another letter to the entire UN membership encouraging member states to co-sponsor the draft in order to demonstrate broad support for ending impunity in Syria.

The next area of focus for Council members this month will be on the humanitarian track. On 29 May, Assistant Secretary-General for Humanitarian Affairs Kyung-wha Kang is expected to brief Council members on the third monthly report on the implementation of resolution 2139 on humanitarian access. Implementation remains abysmal and some Council members speculate that there may be increased momentum for a vote on a draft resolution—penned by the humanitarian leads Australia, Jordan and Luxembourg—in the coming weeks to strengthen the UN's ability to deliver aid. Russia circulated its own draft humanitarian resolution on 13 May. At press time it was unclear how Russia's draft might impact the timing of any follow-up to resolution 2139 by the leads on the humanitarian track.

*After publication, one final amendment was made to the draft resolution, replacing the detailed follow-up operational paragraph with a more general commitment to “effective follow-up to the present resolution.”

Tags: [Insights](#), [Insights on the Middle East](#), [Syria](#)