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ESTABLISHING A SYRIAN WAR CRIMES TRIBUNAL?

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON AFRICA, GLOBAL HEALTH, GLOBAL HUMAN RIGHTS, AND INTERNATIONAL ORGANIZATIONS

AND THE

SUBCOMMITTEE ON THE MIDDLE EAST AND NORTH AFRICA

OF THE

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ESTABLISHING A SYRIAN WAR CRIMES TRIBUNAL?

WEDNESDAY, OCTOBER 30, 2013

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON AFRICA, GLOBAL HEALTH AND
SUBCOMMITTEE ON THE MIDDLE EAST AND NORTH AFRICA,
GLOBAL HUMAN RIGHTS, AND INTERNATIONAL ORGANIZATIONS,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, DC.

The committees met, pursuant to notice, at 1:30 p.m., in room 2172 Rayburn House Office Building, Hon. Christopher H. Smith (chairman of the subcommittee) presiding.

Mr. SMITH. The subcommittees will come to order, and good afternoon, everybody.

The 2-year-old Syrian Civil War has produced increasingly horrific human rights violations, including summary executions, torture, and rape. Most recently, both government and rebel forces have targeted the medical and humanitarian aid personnel. Snipers—and I read this and I was sickened by it—are reportedly targeting pregnant women and children, and actually passing around cigarettes when they kill an unborn child who was put into their sights.

Since the Syrian Civil War began, more than 100,000 people have been killed, and nearly 7 million people have been forced to leave their homes. By December of this year, it is estimated that neighboring countries such as Turkey, Lebanon, and Iraq could see as many as 3.5 million Syrian refugees.

Those who have perpetrated human rights violations among the Syrian Government, the rebels, and the foreign fighters on both sides of this conflict, must be shown that their actions will have serious consequences.

H. Con. Res. 51, introduced on September 9, calls for the creation of an international tribunal that would be more flexible and more efficient than the International Criminal Court to ensure accountability for human rights violations committed by all sides and by more people. This hearing will examine the diplomatic, political, legal, and logistical issues necessary for the establishment of such a court.

Today's hearing will examine the controversial issues such as sovereignty, the ICC versus ad hoc regional tribunals, and the sponsorship of such a tribunal.

Perhaps the most famous war crimes tribunals were the Nuremberg and Tokyo trials—the post-World War II trials of Axis mili-

tary officers and government functionaries responsible for almost unimaginable crimes against humanity. The Cold War rivalry between the U.S. and the former Soviet Union prevented the international cooperation necessary for war crimes tribunals to be convened by the U.N.

After the end of that international political conflict, there have been three particularly notable international tribunals to hold accountable those guilty of genocide or crimes against humanity, in the former Yugoslavia, in Rwanda, and in Sierra Leone.

Each of these tribunals have achieved a level of success that has escaped the International Criminal Court. The Yugoslavia tribunal, for example, has won 69 convictions, the Rwanda tribunal has won 47, and the Sierra Leone tribunal has won 16 convictions. Meanwhile, the ICC, costing about $140 million annually, has thus far seen only one conviction.

The ICC process is distant and has no local ownership of its justice process. It is less flexible than an ad hoc tribunal, which can be designed to fit the situation. The ICC requires a referral. In the case of the President and Deputy President of Kenya, it was Kenya itself that facilitated the referral.

This is highly unlikely in the case of Syria. Russia and the U.N. Security Council would likely oppose any referral of the Syrian matter to the ICC, but might be convinced to support an ad hoc proceeding that focuses on war crimes by the government and by the rebels, one that allows the plea bargaining for witnesses and other legal negotiations to enable such a court to successfully punish at least some of the direct perpetrators of increasingly horrific crimes.

And Syria, like the United States, never ratified the Rome Statute that created the ICC, which does raise legitimate concerns about sovereignty, with implications for our country with this panel, which will also be addressed today.

There are issues that must be addressed for any Syria war crimes tribunal to be created and to operate successfully. There must be sustained international will for it to happen in a meaningful way. An agreed-upon system of law must be the basis for proceedings.

I remember when we were discussing the tribunal for the former Yugoslavia. Sitting right here in this room, not only did I convene hearings on it, I actually passed a resolution that was passed on the Senate side by Alfonse D'Amato, I did it on the House side, because we were so concerned that important information was not being transferred to the chief prosecutor to allow a successful indictment and prosecution of Slobodan Milosevic and others.

I remember also there was concerns about—there were people concerns, a number of very, very interested parties—that it was designed to fail because it was so grossly underfunded, particularly at its onset, so that the kind of work that needed to be done was not being done.

An agreed-upon structure, a funding mechanism, and a location for the proceedings must also be found. There must be a determination on which and how many targets of justice will be pursued. A timetable and time span of such a tribunal must be devised

as well, and there are even more issues that must be settled. If there is a will, they will be.

David Crane, one of today's witnesses, has suggested five potential mechanisms for a Syrian war crimes tribunal. One, an ad hoc court created by the U.N.; second, a regional court authorized by treaty with a regional body; an internationalized domestic court; a domestic court comprised by Syrian nationals within a Syrian justice system; and of course the fifth would be the ICC itself.

Each of these first four models have some benefits, some more than others. The ICC can be ruled out, and a domestic court in the near future seems highly unlikely. However, we are not here today to decide which of these models will be chosen. Rather, our objective in this hearing is to promote the concept of a Syrian war crimes tribunal, whatever form it eventually takes.

Again, those who are now even perpetuating crimes against humanity must be told that their crimes will not continue with impunity. Syria has been called the world's worst humanitarian crisis. According to the World Health Organization, an epidemic of polio has broken out in northern Syria because of declining vaccination rates. One might reasonably also consider it the worst human rights crisis in the world today. Therefore, the international community owes it to the people of Syria and their neighbors to do all that we can to bring a halt to these actions while creating an accountability effort.

We have assembled a highly distinguished panel to discuss the pros and cons of creating and sustaining a Syrian war crimes tribunal. This is not an academic exercise. We must understand the difficulties of making accountability for war crimes in Syria a reality, and we must do it now.

Therefore, we must understand the challenges involved, so that we can meet and overcome them and give hope to the terrorized people of Syria. Their suffering must end, and the beginning of that end could come through the results of today's proceedings.

I would like to yield to my friend and college, Ms. Bass, for any opening comments.

Ms. BASS. Thank you, Chairmen Smith and Ros-Lehtinen. Thank you for your leadership and holding today's joint subcommittee hearing.

As members of these subcommittees are well aware, the Syrian crisis is in its third year. And unless something is done to end atrocities it may well continue. While I am pleased with news reports that indicate the Syrian Government has cooperated with international officials toward dismantling and disposing of illegal chemical weapons, the human tragedy remains deeply disturbing and unanswered.

The Congressional Research Service reports that over 100,000 Syrians have been killed just since March 2011. Globally, estimates indicate that some 2 million Syrians have fled the country, and more than 4 million people have been internally displaced. But it is the indiscriminate slaughter of people, particularly women and children, that is and should move all nations to act to end this tragedy and hold those who have committed crimes against humanity and human rights violations accountable.

We are all aware of the air strikes that have killed thousands, and we know of the attacks by opposition forces that have also killed innocent civilians, fracturing families and leaving mothers and fathers without their children and children without their parents. These attacks, whether by the Syrian Government or opposition forces, are, without question, Syria's human rights violations and stand in stark contrast to international laws and norms created to preserve life and peace.

The international community is unfortunately all too familiar with establishing mechanisms to address war crimes and crimes against humanity, and yet we find ourselves here once again debating what course should be taken to address the evils of war. We have seen the establishment of International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Khmer Rouge tribunal, and, of course, the ICC.

Each of these and other mechanisms were created to address the tragic and deplorable actions of those who cared so little for human life and dignity. While these subcommittees can debate whether a new tribunal for Syria should be established, or whether the current mechanisms that exist are sufficient, I am reminded of the tireless effort of human rights defenders around the world who often put themselves in grave danger in order to both gather evidence and document human rights violations.

One such effort is being conducted by the Syria Justice and Accountability Center, or SJAC. The SJAC is an independent organization that collects, preserves, and analyzes information on alleged human rights violations and other relevant data to inform and contribute to the transitional justice process for Syria. The SJAC is currently reviewing nearly 300,000 videos and 200,000 documents in an effort to track and prepare files for the day when justice can be served.

The SJAC receives support from 40 nations. It is a Syrian-led initiative, and the aim of the center is to document violations of human rights and humanitarian law in Syria in order to support future transitional justice processes that might be adopted by the Syrian people themselves.

We all know the Syrian crisis is not merely a crisis that impacts Syrian people; it is an international crisis that requires global attention. It is my hope that today's hearing and the hearing that will undoubtedly follow will cast a light on policies that will wisely and swiftly end this crisis and heal the lives of those caught in the balance.

Thank you, and I look forward to today's testimony.

Mr. SMITH. I thank my friend. I would like to now yield to the co-chair of this hearing today, but also the former chairman of the full committee, who served with great distinction, and now chairs the Middle East and North Africa Subcommittee, Chairman Ileana Ros-Lehtinen.

Ms. ROS-LEHTINEN. Well, thank you very much, Chairman Smith. Thank you for your leadership on this important issue, and thank you to my good friend Ranking Member Bass for jointly holding this hearing today.

Now in its third year, the Syrian conflict has caused unspeakable damage to the people of Syria. It has placed a heavy burden on Syria's neighbors, like our ally, Jordan, which has taken in over 600,000 refugees, even though it strains the kingdom's security and economic situation. Refugees have also gone to Lebanon, to Turkey, to Iraq, to Egypt. It has seriously jeopardized the safety of our friend and ally, the democratic Jewish state of Israel.

This humanitarian tragedy has resulted in the deaths of at least 100,000 over the last 2 years and has forced more than 2.2 million Syrians—around 10 percent of the population of the country—to flee to neighboring countries, and over 5 million Syrians are classified as internally displaced persons, IDPs. The situation remains bleak and continues to get only worse with each passing day.

Disease outbreaks are rampant in Syria with polio, measles, typhoid, and hepatitis A all on the rise. Children are malnourished, they are not getting an education, and they can be easily radicalized by those extremists who prey upon those most susceptible. Anti-American attitudes are being spread by extremists as refugee camps become breeding grounds for terrorist groups to spread their radical ideologies and recruit young people to join their ranks.

The harsh living conditions in these camps also leave women vulnerable to exploitation by sex traffickers, where girls are forced into short-term marriages for money to help support their families. Christian communities in Syria have taken a huge toll in this conflict as Christians are being targeted for kidnapping, torture, and murder, by radical Islamists who hate them just for being Christians.

And many of their homes, churches, and neighborhoods have been destroyed. And there is no end in sight, yet this administration, whose foreign policy has been plagued with inconsistencies and paralyzed by indecision, has not moved to take decisive action, and not just in Syria but across the region, in Egypt and Iran and elsewhere.

Time and time again the administration takes half-measures or no measures, and its indecision has eroded our credibility in the region, has greatly reduced our leverage over some of these nations, and it has severely strained our relations with many of our allies. And it has done so all for what?

Assad still remains in power, even though he has used chemical weapons to murder hundreds of his people. Extremists still roam the country targeting those who do not share their strict view of Islam, and yet the administration thinks it would be a good idea to provide arms to those people who hate us as much as they do Assad.

So we have sacrificed our standing in the region for the possibility of eliminating chemical weapons, but we still leave the ruthless dictator in power. And no one has been made accountable, not for the chemical weapons use, not for the deaths of over 100,000 Syrians, not for the targeted attacks on Christians or other religious and ethnic minority groups.

President Obama took quite some time to get around to the idea that Assad must be removed from office, but now after the chemical weapons use and the U.S.-Russian framework agreement, it

seems that the administration's position is now that Assad can stay as long as he plays nice on chemical weapons.

We took a back seat to Moscow when it has been Russia who has been backing Assad and giving him the supplies and the weapons he needs to continue to murder his own people. And it is the same Russia that blocked every effort we tried to make at the U.N. to hold Assad accountable for his action, and stonewalls our attempts to prevent Iran from becoming nuclear-capable. And now we expect Russia to take the lead and really hold Assad's feet to the fire over his transgressions.

What kind of message does this send to the people of Syria who are being slaughtered and forced to flee, or to our enemies, and mostly importantly to our allies? Assad must be held accountable, Mr. Chairman, I agree with you. And when it comes to the Syrian war crimes tribunal, we must ensure that those behind these atrocities are held accountable without placing our brave men and women in jeopardy and out of our jurisdiction.

I thank the chairman and Ms. Bass for holding this hearing. Thank you, sir.

Mr. SMITH. Madam Chair, thank you very much for your very powerful statement. Mr. Kennedy.

Mr. KENNEDY. Thank you, Mr. Chairman. I will be brief. I just want to thank the witnesses for being here on such an important topic as we try to learn about the best ways, and some of the ways, that we can try to make sure that we hold those accountable for some of the atrocities that we have been seeing and witnessing over the past several months and years.

And I want to thank the chair and ranking member for putting together an important hearing and giving us an opportunity to learn from some experts about the best way to do that. So thank you very much. I look forward to your testimony.

Mr. SMITH. Thank you. Chairman Chabot.

Mr. CHABOT. Thank you. I just want to thank Chairman Smith and Chairman Ros-Lehtinen, as well as the ranking member, for calling this hearing today. And I want to thank our panel of distinguished witnesses for taking the time to join us as well.

Violence in Syria has been spiraling out of control, and I think most of my colleagues would agree that some measure should be taken to hold the responsible parties accountable for the atrocities committed throughout this brutal conflict. I sincerely hope that our discussion here today will offer some potential solutions for bringing to justice those guilty of the ongoing war crimes in Syria.

And I yield back.

Mr. SMITH. Thank you very much, Chairman. Ms. Frankel.

Ms. FRANKEL. Thank you, Mr. Chair. I just thank you all for being here. We will listen with interest. I think everybody agrees that what is happening in Syria is tragic. We would like to have the wrongdoers—it seems like there are many of them—held accountable. But the big question is, realistically, what can we do? So I will be listening with an open mind.

Thank you.

Mr. SMITH. Mr. Meadows.

Mr. MEADOWS. Thank you, Mr. Chairman, and thank you, Madam Chairman, for holding this joint hearing, and Ranking

Member Bass. In the interest of time, what I am going to do is just submit my opening statement for the record.

I will yield back.

Mr. SMITH. Would any other member like to be heard?

[No response.]

If not, I would like to now introduce our very, very distinguished panelists, beginning with The Honorable Jeremy Rabkin. Dr. Rabkin is a professor of law at George Mason University School of Law. Before joining the faculty in June of '07, he was for more than two decades a professor in the Department of Government at Cornell.

Professor Rabkin serves on the Board of Directors of the U.S. Institute of Peace. He also serves on the Board of Academic Advisors of the American Enterprise Institute, and on the Board of Directors of the Center for Individual Rights, a public interest law firm here in DC. He has published several books, and his articles have appeared in major law reviews, political science journals, and a range of magazines and newspapers.

We will then hear from Mr. David Crane, former chief prosecutor for the United Nations' Special Court for Sierra Leone. Mr. Crane was appointed a professor of practice at Syracuse University College of Law in December of '06. He was the founding chief prosecutor of the Special Court for Sierra Leone, an international war crimes tribunal.

Professor Crane's mandate was to prosecute those who bore the greatest responsibility for war crimes, crimes against humanity, and other serious violations of international human rights, committed during the Civil War in Sierra Leone in the 1990s. He served for more than 30 years in the Federal Government and held numerous key managerial positions during his three decades of public service. And, again, many of those prosecutions that put some of the worst perpetrators of crimes against humanity is a direct result of the work that he did as chief prosecutor.

We will hear then from Dr. Alan White, former chief investigator, U.N. Special Court for Sierra Leone. Dr. White is currently president of AW Associates, a global consultancy specializing in international criminal investigations and training involving crimes against humanity, war crimes, human rights, fraud, and anti-corruption.

As the founding chief investigator of the U.N.-backed Special Court for Sierra Leone, he directed all international criminal investigations involving war crimes. He is a 30-year Federal law enforcement veteran where he last served in the Department of Defense and directed global operations and all criminal investigations involving terrorism, cyber crimes, bribery, corruption, kickbacks, major fraud, and other major crimes.

We will then hear from Mr. Stephen Rademaker from the Podesta Group, who has a wide-ranging experience working on national security issues in the White House, the State Department, U.S. Senate, and House of Representatives, and once sat right here as one of the top counsels for this committee. And he currently advises the Podesta Group's international clients.

Serving as an Assistant Secretary of State from 2002 through 2006, he headed at various times three bureaus of the State De-

partment, including the Bureau of Arms Control and the Bureau of International Security and Non-Proliferation. He also directed the Proliferation Security Initiative, as well as non-proliferation policy toward Iran and North Korea, and led strategic dialogues with Russia, China, India, and Pakistan.

We will then hear from Mr. Richard Dicker, who has been director of Human Rights Watch's international justice program since it was founded in 2001, and has worked at Human Rights Watch since 1991. He started working on international justice issues when Human Rights Watch attempted to bring a case before the International Court of Justice charging the Government of Iraq with genocide against the Kurds.

Mr. Dicker led the Human Rights Watch's multi-year campaign to establish the International Criminal Court and has spent the past few years leading advocacy efforts urging the creation of effective accountability mechanisms. He monitored the Slobodan Milosevic trial in The Hague and made many trips to Iraq before and at the start of Saddam Hussein's trial.

If we could go first to you, Professor Rabkin, and then each of our witnesses.

STATEMENT OF THE HONORABLE JEREMY RABKIN, PROFESSOR OF LAW, GEORGE MASON UNIVERSITY SCHOOL OF LAW

Mr. RABKIN. Well, I am not sure why I was chosen to open this discussion. Maybe it was to lower expectations. I want to start by saying, Congresswoman Ros-Lehtinen, I agree with you it is very disturbing that the Obama administration just seems to be floundering and doesn't seem to have a serious policy, and we do really seem to be forfeiting support in that region.

However, that is not going to be fixed by a tribunal. So we should all understand that. Right? This is, at best, a contribution and probably a somewhat marginal contribution. We started the modern era of international trials with the International Criminal Tribunal for the former Yugoslavia, and that was in 1993 when a lot of people were saying we need to intervene before the situation in the Balkans gets even more out of hand.

And at that time, the Clinton administration said, "Well, we don't want to send troops. We don't actually want to be involved in bombing. Let us send lawyers." And that was not a particularly effective response.

And the first thing I want to say is, I mean, let us all be cautious about this. Sending lawyers is not going to fix the situation in Syria.

The next thing I want to say is if you set up an international tribunal, even an ad hoc international tribunal, our experience in Sierra Leone is a little different because it was based there and had involvement from people there. But the tribunals for Rwanda and the former Yugoslavia, I don't think they were very well received in the countries that they were supposed to help.

And the people on those tribunals, both of which started in The Hague, the Rwanda one later shifted to Tanzania, but they got organized in The Hague, you start a tribunal in The Hague and you take, as your constituency, not the country that you are actually

supposed to be helping but the community of international lawyers because you are in the headquarters of international lawyers, The Hague.

And so they did a lot of things which didn't impress people in Rwanda or in Yugoslavia but made lawyers think, oh, yeah, that is pretty good, that is interesting. I think the particular thing they did which everybody feels is very regrettable is they were excruciatingly slow. They went on and on and on.

In the first 5 years, the Rwanda tribunal didn't have a single conviction as they were getting organized. And this is after the murder of nearly 1 million people, right? And if you compare that to Nuremberg, within 1 year we started the proceedings, and then the people who had to be hanged were hanged.

We were just incredibly slow. I say "we"—the international tribunal was. And when challenged about this, they said, "Well, it is really important to show that we have followed international standards of due process." Why was that really important? And I think it is because they took as their constituency the people they were trying to impress—international lawyers.

That is I think a very bad path to go down. If what you want to do is make a contribution to Syria, we have got to focus on Syria and not what people think in The Hague.

There is very fine testimony on this by Michael Newton. I understand he wasn't able to make it today, but I just want to commend his statement; he had experience advising the Iraqi tribunal that tried Saddam Hussein. And the main point he makes there, one of the main points he makes in his testimony which is I think absolutely central, is you have to understand this as not so much a legal process but the legal application of a political process. And the political process cannot just be determined by outsiders. There needs to be a lot of negotiation with people in Syria before we get this going.

I think it is really out of the question to launch a tribunal while Assad is still in power. And even if, within the next year or so, I hope he is succeeded by something else, we are going to have a lot of difficulties working out how this should be organized, and the focus should be what they will support and what will make them feel that this is justice.

Let me just conclude with a last point. If peace does come to Syria, there is going to be a tremendous amount of bitterness and hatred directed at foreign fighters, because a lot of the worst atrocities are by people who came in from outside. We should all bear that in mind. Are they going to think, "Well, the foreign fighters were horrible, but the foreign lawyers, they are really great. They are our friends."

If we say, "No, no, no. They are lawyers from the good countries," why are they the good countries? They are the countries that stood on the sidelines while they were all being massacred. I think we shouldn't start with the assumption that they are really eager for American or Western European assistance. I think there is assistance that we can give to them, but let us not start from the assumption that we mean well; therefore, they are happy to have us.

So I would suggest this. Before we get to a tribunal, we really need to gather evidence. I think we have a model that is worth

thinking about from Lebanon, which is this independent investigative commission that they had starting in 2005 to investigate the assassination of Prime Minister Hariri. That experienced a lot of frustration, but it did gather a lot of evidence. And afterwards the Security Council was persuaded to establish a tribunal.

That is maybe a model here, some kind of investigative commission which perhaps can work with the Syrian Justice and Accountability Commission, but gather more evidence and then we can see what kind of tribunal that can be handed off to.

Thank you.

[The prepared statement of Mr. Rabkin follows:]

Testimony on H. Con. Res. 51

Committee on Foreign Affairs
U.S. House of Representatives
October 30, 2013

By Jeremy Rabkin
Professor of Law
George Mason University
Arlington, Virginia

I thank the committee for inviting me to testify on this important initiative to address the humanitarian crisis in Syria. I am sympathetic to the underlying aim of H. Con. Res. 51. I would like to suggest grounds for caution, however, before we urge the UN to establish a formal tribunal to judge war crimes in Syria. Instead, I urge the committee to consider a somewhat modified approach, one that might better adapted to the current situation and more feasible to establish, as an interim measure.

Before expressing my concerns about the proposed tribunal, however, I want to express appreciation for two basic aspects of the concurrent resolution proposed by Rep. Smith and others. First, the resolution rightly calls attention to the whole range of atrocities inflicted on civilians in Syria. The United States government has so far focused almost all its diplomatic efforts on removing chemical weapons from Syria. That is a worthy aim. Still, more than 100,000 people have already been killed in Syria – all but a small proportion of them by conventional weapons. We should not minimize the suffering of victims or the gross indifference to international standards that has generated such massive civilian casualties. We risk doing exactly that by focusing almost all our attention on chemical weapons.

Secondly, I commend the resolution seeking a new forum to address the Syrian situation, instead of simply urging a Security Council resolution to confer jurisdiction on the International Criminal Court. The ICC is an experiment in which the United States has declined to participate. There are sound reasons for U.S. caution about the ICC. Down the road, the Court may prove a threat to American military flexibility, by threatening to second-guess our commanders and inhibiting potential allies. So we should always be wary of helping to build up the ICC's authority.

But there are more immediate objections to calling in the ICC here. The Court has so far devoted all its efforts to prosecutions in Africa. It has achieved so little in these efforts that African countries, even signatories to the ICC Statute, have openly challenged its authority and declined to assist it in even the most basic ways. The least one can say is that the ICC has no proven capacity to persuade people in

conflict zones that it is seeking real justice. It makes sense to tailor our response to the Syrian civil war to the particular circumstances of that conflict.

We should not, however, be naïve about the difficulties that even a new, special tribunal for Syria would face. The first thing to remember is that cooperation from local authorities cannot be taken for granted. Even in Rwanda, the new government was so angry at the priorities of the UN tribunal that it declined after a while to allow UN officials to enter Rwandan territory. And that was a Tutsi government, which had already secured its control over Rwanda and was very eager to see Hutu officials of the deposed government punished for the genocide they had implanted against the Tutsi population.

In Syria, things will be much more difficult. If the conflict is still continuing, when the special court starts to operate, it may have great difficulty persuading witnesses to give public testimony. Even if some sort of peace returns to Syria within the next few years, we cannot assume the government in place will want to cooperate. If the post-war government is headed by Assad or a Baathist or Alawite successor, it will not want to allow close scrutiny of atrocities committed by their own, victorious forces. If the new government is drawn from rebels, they will not want to publicize atrocities committed by their forces during the civil war.

Even in the most hopeful scenario, in which Assad is succeeded by a coalition drawn from a range of Syrian factions, we cannot assume that they will all be equally inclined to cooperate with an international tribunal. It is much more likely that a new government will give priority to accommodating the various factions and so allow particular groups to resist prosecutions that seem most threatening to their own leaders. If there is a broad coalition in charge of Syria in the next few years, we should expect that many of the participants at the top level will have blood on their hands – or owe their success to the ruthlessness of local commanders or supporters with very bloody hands.

The preamble to the current resolution asserts that "any lasting, peaceful solution to civil war in Syria must be based upon justice for all . . . . " That may be true, but Syria's immediate future will probably be a search for some attainable halt to all-out war, even if that "resolution" is not, in itself, assured of being "lasting" or entirely "peaceful." Most countries that made a transition to democracy in the 1990s accepted a general amnesty. That was true in South Africa, in most countries in Latin America and almost all countries in Eastern Europe. They preferred to sacrifice justice in order to strengthen prospects for peace. I do not at all mean to recommend that approach in Syria. I simply want to emphasize that what outsiders regard as the best hope for peace may not be what locals regard as the best hope.

Then we need to acknowledge that international jurists are bound to have different priorities from locals. I don't think that is simply because "western" or "advanced" countries have developed a different legal culture. International tribunals have developed their own legal culture. So, for example, Rwandan Tutsis

were bitter that the International Tribunal for Rwanda was barred by its charter from imposing the death penalty. When Europeans sentenced fellow Europeans for comparable crimes after World War II, they were quite prepared to impose capital sentences. The United States still allows capital punishment for aggravated murder. In unstable countries, a long prison term may be an invitation to the supporters of the convicted mass murderer to break into the prison or extort a pardon through terror threats. Iraqis preferred to forfeit most international cooperation in the trial of Saddam Hussein, rather than forego a capital sentence (as Europeans demanded).

The "justice" delivered by international tribunals in the last twenty years has been excruciatingly slow because international jurists have given priority to procedural fairness. I don't think that is a matter of western values, per se. The International Military Tribunal at Nuremberg lasted only one year, from the opening gavel to the execution of capital sentences on the worst offenders. In post-war France, Pierre Laval was dispatched to the guillotine with comparable speed. But the Rwanda Tribunal did not achieve a single conviction in its first five years; after ten years, it had reached convictions on only twenty perpetrators, promising to reach verdicts on another twenty-five defendants before the end of fifteen years. The government of Rwanda, with one tenth the funding of the international tribunals, reached verdicts in 5,000 cases within five years of starting its own justice program. If the point is to reassure local people that justice is being done, making them wait for a decade will not be reassuring – nor helpful to a new government.

To cite another example of differing priorities: the International Criminal Tribunal for Yugoslavia decided it was important to allow Slobodan Milosevic all the time he wanted to speak in his own defense – and denounce NATO for what he depicted as its own war crimes against Serbia. The ICTY thought it was important to have these speeches televised and broadcast into Serbia. The result was that Milosevic, who had been overthrown by his own people, had a perfect forum to rehabilitate his reputation as champion of beleaguered Serbs. Surveys showed that after so much broadcast time to present his own views, Milosevic made himself more popular than any politician in Serbia. That was not helpful to Serbian efforts to stabilize a new democracy. It is not surprising that Iraqis sought much tighter control over what Saddam was allowed to say in his trial – which was also, by design, a much less extended proceeding.

Past problems do not prove that an international tribunal would necessarily work badly in Syria. A hybrid tribunal, involving international assistance to a special Syrian institution (in some adaptation of the model developed for Sierra Leone), might be feasible and effective in the future. But this is not a project that can have credibility if established in partnership with the current Assad government. In the meanwhile, we can't plan for cooperation with a different government until we see what sort of government actually does emerge when Assad leaves power (if he does leave power).

What might therefore be most appropriate in the near future is an International Independent Investigative Commission, somewhat similar to the commission created by the Security Council to investigate the assassination of former Lebanese Prime Minister Rafic Hariri in 2005. For Syria, a commission of this kind should have a much broader mandate. Where past tribunals have taken years to get started, an investigative commission might get to work very quickly. It could investigate war crimes while the evidence remains fresh. And it might be of immediate help in establishing basic facts about particular episodes of the sort that are now shrouded in conflicting claims: how many people were killed, how many were civilians, how many associated with combatant forces, how they died, what was going on at the time, what weapons seem to have been involved, etc.

Investigations of this kind would help the international community understand what is actually occurring in Syria. Their findings might provide material for future trials. The mere fact that abuses are being investigated – now - might help persuade all factions in Syria that they need to reckon with the likelihood of determined prosecutions in the future. It is at least a plausible hope that this will have some restraining effect on military commanders. It will register international concern for victims – especially those, like Syrian Christians, who do not now have major armed factions to champion their claims.

There will certainly be problems for such an institution. The IIIC in Lebanon seems to have experienced a great deal of frustration. But it did accumulate evidence that helped persuade the Security Council to establish a special criminal tribunal to prosecute suspects in this episode. It kept the crime in the spotlight, even as rival factions in Lebanon became distracted by their ongoing political maneuvers.

If the international response needs the backing of the Security Council, we may find that likely opponents of an international tribunal – including Russia and China – may be more willing to support an investigative commission. The United States is by no means the only country on the Security Council which has concerns about international criminal tribunals. Governments that are skeptical of the ICC or other judicialized forums may be prepared to endorse an investigative commission, since it does not commit them to anything beyond that. Still, it is a plausible hope that if the investigators compile a sufficiently compelling record, even skeptical states on the UNSC will be more open to the notion of a formal tribunal – or an international role in a Syrian tribunal – down the road. The IIIC for Lebanon did generate support for a follow-on tribunal in just this way.

It does not make sense for Congress to debate the most suitable institutional arrangements for this sort of project – certainly not now. Congress can urge the executive to negotiate with other governments. It can't draw up its own plan. When it comes to international negotiations, the President and State Department will need great flexibility to deal with changing facts on the ground in Syria and evolving international priorities.

But I think Congress can make a valuable contribution by focusing attention on the challenge and giving a nudge to the executive to pursue a serious and practical international response. The United States still has a role to play in addressing the humanitarian catastrophe in Syria. There are genuine limits on what we can do, given our unwillingness to take sides in the conflict. But that is no excuse for doing nothing.

Mr. SMITH. Professor Rabkin, thank you very much for your testimony. I look forward to asking you some questions when we get to it.

We will take a very brief time off because there are three votes on the floor of the House.

I would just—you know, we will go to Mr. Crane next. I will have a number of questions to ask you, because, you know—and I just want this on the record because I hope members will come back. Sending lawyers wasn't the only thing we did with Yugoslavia.

And as I said in my opening, and we will get into it a little bit later, but part of the problem was many of us thought it was designed to fail because it was not being adequately resourced, and I was the one who introduced, along with Steny Hoyer—he was the chief co-sponsor of my bill—to lift the arms embargo because it was a one-sided fight, Milosevic versus two countries at least. Slovenia set them back, but certainly Croatia and the Bosnians had no way of defending themselves.

So what we are trying to do here is a lessons learned, and I agree with you fully it was too slow and I felt there was a disingenuous effort by some to do a Yugoslav war crimes tribunal that was more of a showcase rather than a workhorse, and that is what we hope to learn from. But I do appreciate your testimony. If you want to respond briefly, and then we will take a brief recess.

Mr. RABKIN. Just one thing. I mean, later on we did what we had to do. I mean, later on we had real military intervention. At the beginning, though, I think this illustrates the moral hazard of international legal process, which is people feel they are doing something when they are not doing something. And I think in 1993 the Clinton administration didn't really want to do anything, and so they said, "Yeah, let us have a legal process," right? And that is not, by itself, serious.

Mr. SMITH. Thank you. We stand in short recess, and I apologize to our witnesses. I do hope the members will come back.

[Recess.]

Mr. SMITH. The hearing of the subcommittees will resume. And, again, I apologize to our witnesses and all assembled for the delays.

I would like to now recognize Mr. David Crane.

STATEMENT OF MR. DAVID M. CRANE, PROFESSOR OF PRACTICE, SYRACUSE UNIVERSITY COLLEGE OF LAW (FORMER CHIEF PROSECUTOR, UNITED NATIONS SPECIAL COURT FOR SIERRA LEONE)

Mr. CRANE. Well, thank you, Mr. Chairman. It is indeed an honor to be here this afternoon, and I do want to say for the record that I have submitted my remarks to you and the members of this panel, along with two appendices which I believe you do have, one on the Syrian Accountability Project, an information PowerPoint, as well as the Chautauqua Blueprint, which is also a methodology by which we can create a court. And so I would humbly ask that this be submitted into the record.

Mr. SMITH. Without objection, your statement and those of all of our distinguished witnesses and appendices to it will be made a part of the record.

And I know normally 5 minutes is what people are allotted. Please feel free to use whatever time you feel necessary, and I say that to all of our witnesses.

Mr. CRANE. Well, we thank you for your time, sir. I do want to note before I continue that you and I go way back, along with a couple of members of this panel.

Once again, sadly, we are back considering justice for another country that is being destroyed by another head of state. You were in your leadership, along with Chairman Royce and others, a bipartisan issue on both sides of the aisle.

We do appreciate the support that you gave the Special Court for Sierra Leone and the work that myself and Dr. White were doing in trying to seek some justice for the victims of the atrocities in Sierra Leone. So I commend you, sir, for that continued leadership when we move into Syria.

I am going to address two items for you that are in my remarks, one of which is what you wanted me to talk about and that certainly is the five possible justice mechanisms related to Syria. But I also want to talk a little bit about the Syrian Accountability Project and the Chautauqua Blueprint just to highlight that there is an international effort working all across the board, to include our Syrian colleagues, to have in place a cornerstone mechanism by which a regional, local, or international prosecutor can start building a trial-ready case.

And the reason why we are doing it such is we have already done it once before, and that is the takedown of President Charles Taylor of Liberia. We have taken the lessons learned there, and we have modified them and are developing this package called the Syrian Accountability Project.

But, first, let us go to the questions that you are most interested in first, Mr. Chairman, and that is the five possibilities of a justice mechanism in Syria. And I don't have them in order; I am just listing them as the five possible mechanisms.

The first is the International Criminal Court. Why the International Criminal Court? Because it is the permanent criminal court that possibly would have both subject matter and in personam jurisdiction over potential perpetrators of the atrocities in Syria.

It is the world's only permanent international court, and it certainly is one of the viable mechanisms that the international community may consider in seeking justice for the people of Syria.

A second option is an ad hoc court created by the United Nations. We have had two ad hoc courts. They are continuing their work now. It has been a stop-start process, but the ad hoc tribunals are moving forward and finishing their work, and there has been justice for the people of Rwanda as well as Yugoslavia.

However, I must caution the chairman and members who are present that an ad hoc tribunal practically and frankly is a political non-starter. It is too expensive and their reputation of being too long and too nimble to create a justice mechanism probably would not get very far as far as an option before the Security Council, because it would be the Security Council itself under Chapter 7 of the U.N. Charter that would have to agree to that. And I don't think that that would happen, but I think for—to be open and in general,

that still is an option. And of course certainly we don't have any idea how this is going to play out over time.

A third option would be a regional court, something very much like the international hybrid tribunal in Sierra Leone, and that model of course certainly has proven in general to have been a good model for that particular region of the world. I am not saying that it would be for Syria, but, again, it is another one of those options which we might want to consider as far as justice.

A fourth option is an internationalized domestic court. We would have a chamber within the Syrian justice system, but it would be backed by and supported by the international community, and we have done that before. We have one that is very similar in Cambodia, and what have you, but it is certainly working well in the Balkans where we have international experts and practitioners assisting the Syrians, or whatever country that is trying these cases actually assisting them and helping them in their work.

A fifth and final option would be a domestic court, a pure domestic court. In consideration of all of these, and having worked with the Syrian leadership and the Syrians, talking to Syrians, working with Syrians over the past 2-plus years, this is starting to evolve into the preferred system.

You know, what is wrong with Syrians trying Syrians for violations of Syrian law? And that is starting to become a more specific option for both this House and this committee to be thinking about, but also the international community, which leads me to my final part to my remarks, Mr. Chairman, and that is, how do we do that? In other words, we have these five mechanisms. Some of them have their challenges and some of them are viable options.

For 2½ years, and we have been working with the Syrians, the international community, as well as non-governmental organizations, putting together a cornerstone package called the Syrian Accountability Project and the Chautauqua Blueprint, where we have mapped the conflict, we have developed a crime-based matrix of all of the major incidents that have taken place in this tragedy on both sides, on all sides I should say, because, again, it used to be both sides and now that civil war has grown to where we have all kinds of actors. But this is a neutral effort ensuring that we are accounting for all of the violations of international as well as Syrian law.

We also have a mapping exercise, a unit mapping exercise. We have a team looking at crimes against women and children, as well as developing sample indictments, so that a future prosecutor, be they domestic, regional, or international, will have a sample of what an indictment would look like.

We have done this in West Africa, so that this has already the true test of time and practice. And all of this work is put together by some of the best and brightest at the international level, along with our Syrian colleagues, working hand in hand.

At this point, what I will do, Mr. Chairman, is I will just leave these remarks with this, and I look forward to any questions that you might have. And, again, thank you for this opportunity.

[The prepared statement of Mr. Crane follows:]

Testimony of

David M. Crane[1]

Before the

United States House of Representatives

Subcommittee on Africa, Global Health, Global Human Rights and International Organizations

October 30, 2013

The civil war in Syria has now entered its third year. Started initially by, of all things, children protesting in Daara, the protests blossomed into full scale civil war the following month. A part of the so-called "Arab Spring", the unrest in Syria has now turned ugly. The conflict has become personal and with that the brutality by all sides against combatants and civilians caught up in the melee has intensified. This was no more so than on August 21, 2013 when the regime of President Bashir Assad launched sarin gas projectiles into a suburb of his own capital, Damascus. The results were horrific. Almost 1500 people perished, hundreds of them children. For the third time in 30 or so years chemical weapons were used in the Middle East in violation of international law, clearly a war crime.

Mankind is better than this. Over the past 20 years the international community, in most instances led by the United States, has developed what I call the modern international criminal law system. Through trial and in some cases error, mankind has finally resolved to punish dictators, tyrants, and thugs who murder, rape, maim, and mutilate their own citizens. The two ad-hoc tribunals for Yugoslavia and Rwanda, the hybrid courts to include Sierra Leone and Cambodia have created the proper procedures, evidentiary rules, and the jurisprudence to deal with heads of state who kill and destroy. We have made great strides, but we are only at the beginning of a beginning.

[1] Professor, Syracuse University College of Law. Founding Chief Prosecutor of the international war crimes tribunal in West Africa called the Special Court for Sierra Leone, 2002-2005. Founder of Impunity Watch, www.impunitywatch.com . Co-Founder of the Chautauqua Blueprint, Syrian Accountability Project and the "I am Syria" Campaign, www.iamsyria.org .

As the world's only permanent court, the International Criminal Court, tries to finds its place in this evolution, we have come to realize that the future of modern international criminal law is not with the ICC but with domestic legal systems. This was even contemplated and called for in the Rome statute that created the ICC. It must be noted here that the ICC was designed to be a court of last resort, not one of first instance, therefore it is incumbent on the states-parties themselves to prosecute those who commit war crimes, crimes against humanity, or genocide it they are willing or able to do so.

We can prosecute heads of state for international crimes. The law now provides for this and we have done it once before in the likes of Charles Taylor, the now former President of Liberia a convicted international criminal whom I indicted in March of 2003. So how do we do this in Syria?

Allow me to digress and to brief this committee on efforts to date to build a case against Bashir Al Assad and his henchmen as well as the Syrian Resistance. Shortly after the Syrian unrest evolved into a civil war, Syrians and others began to discuss transitional justice mechanisms to hold accountable the Assad regime and over time, members of the resistance who violated both international and domestic law. Governmental and nongovernmental organizations began work on documenting and cataloging the atrocities committed in Syria. Human rights groups within Syria itself began to report and to feed key data to these organizations. Of note, the Syrian Human Rights Network has been a key source of information and they are to be commended for their dedication and bravery.

It soon became apparent that these organizations were at times working at cross purposes or were unaware of the work of other groups. Data was being collected in multiple systems unknown to the other. In the early days of all this, the Syrian resistance struggled, and still struggles, with a viable organizational structure from which to govern. This hampered human rights organizations who attempted to develop methodologies to assist the resistance in developing a justice mechanism should the conflict end favorably for them. Coordination became essential.

Over time the major organizations came together and meet twice a month to brief one another on their work, discuss areas of mutual support, and highlight upcoming training, conferences, and meetings. The Syrian

Accountability Project of which I founded and now chair, has become an umbrella organization in which all of these efforts are coordinated, pending perhaps the formal creation of a single data entry point.

Not only has an enormous amount of raw open source data and information been collected, the Syrian Accountability Project has taken that data and built a framework by which President Assad and his henchmen along with members of the opposition can be prosecuted openly and fairly either internationally, regionally, or domestically. Now into its third phase the project has mapped the entire civil war, developed a crime base matrix which catalogs most of the incidents chronologically and highlights the violations of the Rome Statute, the Geneva Conventions, as well as domestic Syrian criminal law. There even have been indictments drafted as templates for a future international or domestic prosecutor to consider. We have given the first two phases to the Prosecutor of the ICC, the United Nations, the US Department of State, and the Syrian resistance leadership. The methodology above has worked before as it was that methodology that I developed against a sitting head of state, Charles Taylor, President of Liberia back in 2003.

There are five possibilities for a justice mechanism in Syria. I will take them one at a time and review their strengths and weaknesses. I will then, Mr. Chairman, give you my recommendation and then take questions.

The first mechanism, the International Criminal Court. As the world's permanent international tribunal the so-called ICC was set up in Rome in the late 1990's to prosecute violations of the gravest of crimes. Under the principle of complementarity member states are encouraged to prosecute their own, the ICC being a court of last resort or if and when that member state is unwilling or unable to prosecute. The track record over the first decade of the ICC is spotty and questionable at best. It lacks the capability and the political and diplomatic sophistication to handle such a mandate. Coupled with the challenge of gaining jurisdiction over the atrocities the reality is that the ICC is not just up to the task. It can barely handle its current caseload and investigations.

A second option, an adhoc court created by the United Nations. There have been two adhoc tribunals, one for the Balkans the other for Rwanda. Each approaching their second decade, these tribunals have brought some justice and accountability to the victims of those atrocities, but at a huge

financial cost. Inherently inefficient and hampered by unrealistic mandates, location, and the byzantine personnel rules of the United Nations, adhocs are creatures of the past, politically unacceptable as a viable justice mechanism and model for future prosecutions. As an aside, the creation of such a mechanism would require UN Security Council approval under Chapter 7 of the UN Charter and that is unlikely given the position of Russia on Syria. In the end Russia or even China would veto any resolution creating such an adhoc tribunal.

A third option for justice is a regional court. A possible solution might be a regional court, a hybrid, fashioned along the lines of the Special Court for Sierra Leone where I was its founding Chief Prosecutor. Located at or near the scene of the crimes in Syria, such a model would be a visible mechanism for justice to the victims of the Syrian Civil War. Its mandate would be to prosecute those who bore the greatest responsibility for the war crimes and crimes against humanity perpetrated during that civil war on both sides. The effort could or would be an option backed by the Arab League with Arab jurists supplemented by Syrian jurists. It must be noted, Western assistance in any one of these options would be viewed skeptically in my view. *Arabs trying Arabs, Muslims trying Muslims or Syrians trying Syrians is the preferred option.* It must be noted, this tribunal would require some form of international sanction in the form of a Security Council resolution.

The fourth option is an internationalized domestic court. Similar to a hybrid regional court, an internationalized domestic court would be a Syrian chamber set up exclusively within the Syrian criminal system and supported by international personnel where needed. Again it would be mainly Arab personnel. This court might not need international sanction, but only region sanction.

And finally, a domestic court system. *This is the preferred option.* Let the Syrian people try those who committed violations of Syrian law. They do have the capacity to do this if given the leeway and time to settle into a sustainable piece. Justice and accountability are important, but first Syria needs to transition into a sustainable peace before viable accountability can be achieved, but I must reiterate this can be done.

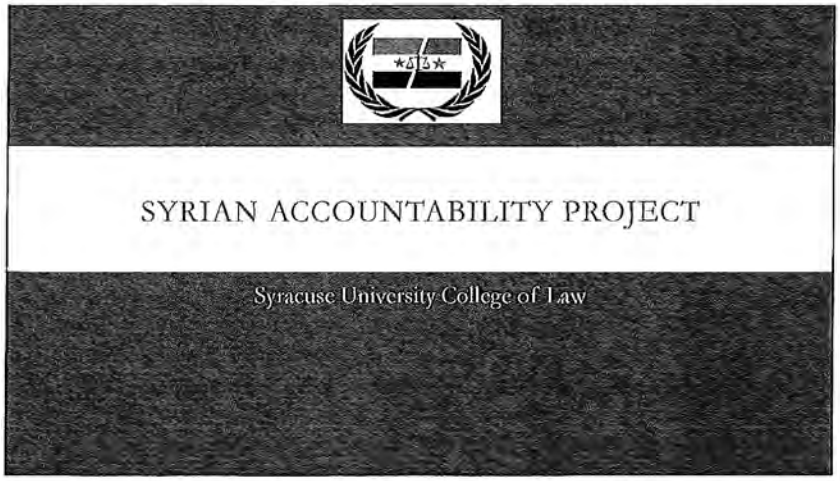
Having been in this business of facing down impunity and tyranny for almost 40 years, and having taken down a sitting head of state under the

rule of law it is my considered opinion that an extraordinary chamber within the Syrian domestic court system is what the international community must support. Again, let the Syrians try Syrians under Syrian law for what Syrians have done to each other. We must ask ourselves, is the justice we seek the justice they want. Modern international criminal law is essentially western justice, a justice that does not take into account unique and important cultural and historical dynamics that only Syrian law can deliver. The other alternatives carry the weight discussed above and could be viable but are overwhelmed by the practical, political, and diplomatic hurdles each presents.

At the end of the day it is for and about the victims. The Syrian people want vengeance, retribution, and justice. We have to consider this and note and respect their views. If they, the people of Syria, the victims, feel justice was not served than getting them to resort to the rule of law in the future rather than the rule of the gun will be difficult and the efforts of this committee, the US, the international community writ large will have been to no avail.

I thank the Chairman for this time and stand ready for your questions.

NOTE THERE IS AN APPENDIX TO THIS TESTIMONY RELATED TO THE SYRIAN ACCOUNTABILITY PROJECT.



What is the Syrian Accountability Project ?

- Started at Syracuse University College of Law in 2011, The Syrian Accountability Project (SAP) is a cooperative effort between activists, Non-Governmental Organizations, students, and other interested parties to document war crimes and crimes against humanity in the context of the Syrian Crisis.
- Now in its third Phase, the project aims to produce impartial, high quality analysis of open source materials and to catalogue that information relative to applicable bodies of law; including the Geneva Conventions, the Rome Statute, and Syrian Penal Law.

Who are SAP's Partners?

- SAP has recently been re-designated as a "special project" under the Umbrella of the Law Journal "Impunity Watch" (IW) at Syracuse University College of Law. This will enable the project to continue as long as necessary, and when it is finished, IW's good stewardship of our documents will ensure that Syracuse retains a strong Conflict Mapping capacity for the future.
- Additionally, as a member of the International Working Group on Syria, SAP works very closely with the organizations listed to the right.

IMPUNITY WATCH

Syrian Center for Political & Strategic Studies

UNITED STATES INSTITUTE OF PEACE

The Day After Project

PILPG

A Global Pro Bono Law Firm

UNITED NATIONS HUMAN RIGHTS

www.ngwj.org NO PEACE WITHOUT JUSTICE

Syria Justice and Accountability Centre

Who are SAP's Clients?

- Since the primary objective of SAP is to help secure justice for the Syrian people by providing date or use by a future justice mechanism for Syria, our clients and consumers are primarily like minded Government and International Organizations.
- SAP has worked closely with the Syrian National Coalition and other activist organizations to ensure that our approach is consistent with distinctly Syrian notions of justice.
- The organizations to the right are our primary clients.

Cour Pénale Internationale

International Criminal Court

DEPARTMENT OF STATE · UNITED STATES OF AMERICA

United Nations

المجلس الوطني السوري

SYRIAN NATIONAL COUNCIL

Objectives of the Syrian Accountability Project

- **Impartial documentation:**

To provide the best open-source picture of the Syrian Conflict available by compiling and analyzing all relevant source material from an impartial stance and presenting data in a way which contributes to the reader's understanding of both daily events and the conflict as a whole.

- **Representational charging:**

To assist a future prosecution team in obtaining justice for the victims of the Syrian Conflict by providing resources that assist in the work of ***representational charging***. While it is impossible to charge every crime that has been committed in a conflict this size, through representational charging we can ensure that each type of offense committed in each region is at least represented proportionally in the ultimate indictments. In so doing, we hope the Syrian people will be left with a sense that, even if every offense could not be charged, justice was still served through the scope of the indictments.

Work Product

- The project organizes its work product in two main documents:
  - Conflict Narrative: Organized by month, date, and region, the Conflict Narrative recounts the situation on the ground in Syria as a series of events. The Conflict Narrative also includes information on key geopolitical developments relative to the major players in the conflict.
  - Crime Base Matrix: Organized relative to applicable statutory law, the Crime Base Matrix catalogues those events which represent violations of the Laws of War and Syrian Penal Law.

Sources for Incident Reports

- SAP has used a variety of sources throughout the project. Most recently we performed an in depth source review guided by our partners at *No Peace Without Justice*, to determine which sources allowed us to present the best picture of daily events on the ground in a way that presents the positions of all sides of the conflict: activists, rebels, and the regime.
- The sources in the figure to the right represent the results of that review. We believe each of them has a unique role to play in assisting us in presenting a complete and impartial picture of the conflict.

لجان التنسيق المحلية
Local Coordination Commitees
VDC
SANA
Syrian Arab News Agency
The Syrian Network for Human Rights
Syrian Observatory For Human Rights

Sources for Geopolitical Developments

- Equally important to understanding the conflict are the positions of Syria's neighbors and the International Community. As such, at the advice of *No Peace Without Justice* we have included several non-western news outlets in our source list.
- The sources to the right were chosen because they are English language news sources which accurately represent the position of Syria's allies and neighbors.
- By relying on these sources, instead of western reproductions, we hope to demonstrate a good faith effort towards understanding the conflict in the terms of those most directly involved.

The Moscow Times
THE DAILY STAR
HA'ARETZ
INTERNATIONAL
Hürriyet

Conflict Narrative

- The formatting of our Conflict Narrative is designed to provide both general and specific information in a way that is easily accessible to the reader.
- It is organized monthly, with a casualty count and Global Summary for each month, which presents the reader with the most consequential events from that time period.
- The Global Summary section primarily relies on data from the Violations Documentation Center in Syria, because they present data based on confirmation from activists on the ground and they distinguish between civilian and non-civilian casualties with a high degree of specificity as to manner of death.

Global Summary: April 2013

According to the Violations Documentation Center in Syria, 1401 people were killed in Syria in the month of April.[1] Of that number, 1127 were regime soldiers[2] and 364 were "martyrs" unaffiliated with the regime.[3] The vast majority of those deaths, 1017[4] on the Regime side and 312[5] "martyrs", were likely civilian killed, since the Violations Documentation Center reports their causes of death as either shooting, shelling or explosions. Additionally, reports say that 145 individuals unaffiliated with the regime were field executed, 170 were subjected to torture, and 13 died from "chemical or toxic gases."[6] Below is a summary of the most severe or consequential incidents from April 2013.

Key Incidents:

Gas and Chemical attacks. Several gas and chemical attacks were reported in the month of April 2013, one in Aleppo on 13 April, allegedly carried out by the Syrian Air Force, killed two and injured others. On 14 April, in the Damascus Suburb of Nashabiyah, 8 Syrians reportedly died due to "chemical shelling." "Chemical Shelling" was also reported in the February and March in Damascus on 18 April.

13 April: Government forces stop Syrian and Iranian supply convoys, originating from the United Arab Emirates, which were being smuggled from Lebanon into Syria near the village of Qalhaya.

15 April: Syrian government troops broke a six month rebel blockade of a vital highway in northern Syria which had confined the army to the Wadi al-Deif and Hamidiyah military bases in Idlib province.

17 April: The Free Syrian Army forces reportedly killed the commander of the Dabaa Military Airport in Homs, during a clash that left 20 members of the Shiblaq brigade and 13 members of Hezbollah dead.

19 April:

1. Shelling destroyed the "Iconic minaret of the Zakaria Mosque" in Damascus.

Conflict Narrative

- Following each monthly section are daily subsections which present the reader with a picture of what sort of incidents have been reported in each Governorate in Syria for each day. These daily sections represent the best understanding we can assemble from both confirmed and unconfirmed reports we have reviewed, and will be the subject of further analysis as the project continues.
- To ensure our reports contain only useful information, we have developed a list of factors to guide us in determining what information to include. Accordingly, any reports detailing highly specific incident locations, unit and commander names, specific weapons used, especially egregious casualty counts or other information that will assist future investigators is automatically included.

April 13

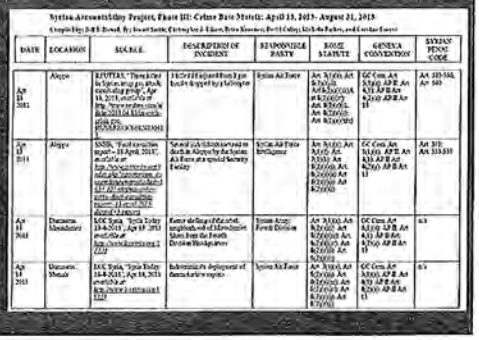
On 13 April 2013 between 101[1] and 106[2] Syrians lost their lives. Best estimates recount that "40 civilians, 49 rebel fighters, 2 defected soldiers, 12 unidentified rebel fighters and at least 20 regular soldiers" were among the dead.[3] Incidents of violence were reported throughout the country and included the following: mortar, poison gas attacks, and artillery and rocket strikes in Aleppo, aerial bombardment in and around Damascus, skirmishes between the Free Syrian Army and regime forces in Homs, fighting between Government and Rebel forces over the base at Wadi Deif in Idlib, and engagements between the Free Syrian Army and the besieged 17th Brigade in ar-Raqqah.[4]

Aleppo

Syria's state run news agency reported "a series of special operations in [the] Aleppo countryside" aimed at "destroying terrorist gatherings the most of Maraqh, al-Alpmaiya, Manasir, Tal Dagrah, Kafr Khasher, al-Mudaiqiqa road, al-Bolma, Hindarat, al-Mansoura and Kwayres."[5] And in the fighting in Aleppo, a woman and two children were killed and 10 people were injured in a gas attack by the Syrian Air Force.[6] Witnesses reported two gas bombs being dropped from an army helicopter and further reported that victims "hallucinated, vomited, had excess saliva and their eyes were burning."[7] Several names of individuals who were allegedly tortured to death in Aleppo by

Crime Base Matrix

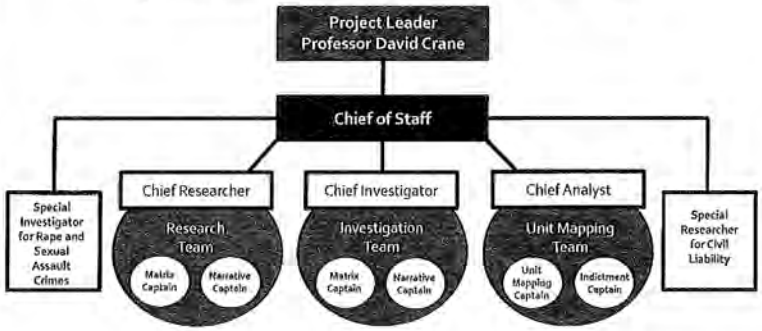
- Our Crime Base Matrix (CBM) serves as the raw material for such indictments as will eventually be drafted against those bearing the greatest responsibility for war crimes and crimes against humanity.
- The data in the CBM is intended to demonstrate the frequency and scale of specific crimes in order to assist with the task of representational charging.
- Rather than an absolute assertion of guilt, the CBM is better understood as a compilation of incidents presented relative to those sections of applicable law which we identified as most likely to apply to those incidents.



Syrian Accountability Project, Phase III: Crime Base Matrix: April 15, 2013- August 31, 2013

DATE	LOCATION	SOURCE	DESCRIPTION OF INCIDENT	RESPONSIBLE PARTY	ROME STATUTE	GENEVA CONVENTION	SYRIAN PENAL CODE
Apr 15 2013	Aleppo	REUTERS, "Dozens killed in Syrian army gas attack, rebels say group", Apr 15, 2013, [illegible]	[illegible]	Syrian Air Force	Art. 8(2)(b) Art. 8(2)(b)(ii) Art. 8(2)(b)(iv) Art. 8(2)(c) Art. 8(2)(c)(i) Art. 8(2)(e)(i) Art. 8(2)(e)(ii)	GC Com. Art. 3(1)(a) AP II Art. 4(1) AP II Art. 4(2)(a) AP II Art. 13	Art. 333-344, Art. 540
Apr 15 2013	Aleppo	SNHR, "Field executions report – 15 April, 2013", [illegible]	Several civilians were killed in Aleppo by the Syrian Air Force at a special factory facility	Syrian Air Force Intelligence	Art. 8(1)(c) Art. 8(2)(c) Art. 8(2)(c)(i) Art. 8(2)(c)(ii) Art. 8(2)(c)(iii) Art. 8(2)(c)(iv) Art. 8(2)(d)	GC Com. Art. 3(1)(a) AP II Art. 4(1) AP II Art. 4(2)(a) AP II Art. 13	Art. 333-344, Art. 333-335
Apr 15 2013	Damascus, Mezzeh	LOC Syria, "Syria Today 15-4-2013", Apr 15, 2013 [illegible]	Rocket attacks of Mezzeh and Qasioun from the Fourth Division Headquarters	Syrian Army: Fourth Division	Art. 8(1)(a) Art. 8(2)(a)(i) Art. 8(2)(a)(ii) Art. 8(2)(a)(iii) Art. 8(2)(b) Art. 8(2)(b)(i)	GC Com. Art. 3(1)(a) AP II Art. 4(1) AP II Art. 4(2)(a) AP II Art. 13	n/a
Apr 15 2013	Damascus, Mezzeh	LOC Syria, "Syria Today 15-4-2013", Apr 15, 2013 [illegible]	Indiscriminate deployment of fragmentation mortar	Syrian Air Force	Art. 8(1)(a) Art. 8(2)(a)(i) Art. 8(2)(a)(ii) Art. 8(2)(a)(iii) Art. 8(2)(b) Art. 8(2)(b)(i)	GC Com. Art. 3(1)(a) AP II Art. 4(1) AP II Art. 4(2)(a) AP II Art. 13	n/a

Organization of the Syrian Accountability Project Phase IV

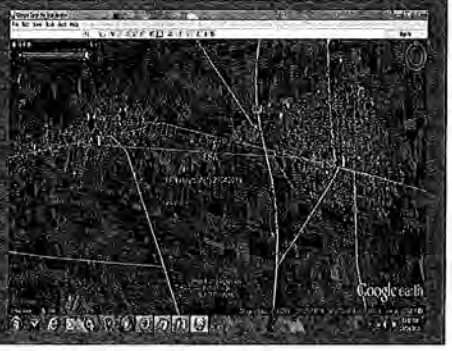


Future Work Product

- **While SAP recently finished its Phase III work product, our project is far from concluded. The following are examples of work product which will be completed in the near future:**
- **Unit Mapping Projection:** Using Google Earth Pro, analysts from SAP's Unit Mapping Team will be plotting incidents from our Conflict Mapping Narrative and relevant source reports from other monitoring groups onto a physical map of Syria with an eye toward establishing the movements of individual armed units throughout Syria. Using this information we will establish those commanders who bear the greatest responsibility for specific crimes.
- **Sample Indictments:** Using the information from the Unit Mapping Projection, we will be drafting sample indictments charging those individuals who bear the greatest responsibility with applicable violations of both International and Syrian Domestic Law where appropriate.
- **Research and Revision:** SAP's research team will be working constantly to improve upon our data and update our Conflict Narrative and Crime Base Matrix as new and better source material becomes available.

Unit Mapping Projection: Flashpoints

- The screenshot to the right is an example of an instance SAP was able to compile using **google earth software** and our Unit Mapping Projection Methodology developed this summer with input from *No Peace Without Justice*.
- Here, SAP investigators were able to identify a **flashpoint** between rebel and regime forces by plotting 4 independently reported incidents from the same day onto a physical map. In so doing, we were able to paint a picture for consumers which was previously unrecognizable through the narrative and matrix alone.
- Using this **flashpoint system**, SAP hopes to be able to connect thousands of independently reported incidents into related chains of events like this one, and in so doing, track the movements of individual armed units across the conflict.



The Big Picture: the Chautauqua Blueprint

- In addition to producing its own deliverables, SAP is proud to support the recently unveiled Chautauqua Blueprint.
- The Chautauqua Blueprint is a Draft Statute prepared by a panel of former international tribunal chief prosecutors, international judges, and leading experts which aims to provide a model for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes. It reflects insights gained from a series of meetings and workshops over the past two years, which brought together Syrian lawyers, jurists, and civil society leaders with international experts to discuss an approach to transitional justice uniquely tailored to Syria.
- Given SAP's efforts to document atrocity in Syria, SAP is naturally supportive of the Chautauqua Blueprint. SAP continues its work in hopes that our data will one day be used in a Syrian Extraordinary Tribunal, like the one proposed in the Chautauqua Blueprint, to prosecute those who bear the greatest responsibility for war crimes and crimes against humanity.

Mr. SMITH. That is great. Thank you so very much for your testimony.

Dr. White.

STATEMENT OF ALAN WHITE, PH.D., PRESIDENT, AW ASSOCIATES (FORMER CHIEF INVESTIGATOR, UNITED NATIONS SPECIAL COURT FOR SIERRA LEONE)

Mr. WHITE. Yes, sir. Chairman Smith, I am honored and pleased to be able to testify before these subcommittees on such a significant issue. I am profoundly aware of the chairman's outstanding global leadership on the protection of human rights. I have experienced the chairman's support firsthand while serving as the chief of investigations for the United Nations-backed Special Court for Sierra Leone.

In large part, the court's success in bringing some of the world's most notorious war criminals to justice, such as former Liberian President Charles Taylor, would not have been possible without your support and other Members of Congress. Former President Taylor's involvement in support of the rebels who committed unspeakable war crimes and crimes against humanity impacted over 1.2 million victims in Sierra Leone and Liberia.

Today we are faced with a similar crisis in Syria as we experienced in Sierra Leone. We have another brutal dictator who is embroiled in civil war and engaged in wide scale and systematic killings of innocent human beings with impunity. It is alleged President Assad has taken evil to the next level by employing the use of chemical weapons, killing thousands of defenseless innocent women and children.

Unfortunately, he is protected by his staunchest ally, Russia, which will undoubtedly block any formal referral from the United Nations Security Council to the International Criminal Court, allowing Assad to escape accountability with no justice for the victims. Most would agree an immediate alternative needs to be aggressively pursued.

To ensure Assad and other perpetrators committing war crimes and crimes against humanity within Syria are held accountable and brought to justice, there must be an independent criminal court created to achieve justice. The establishment of a Syria war crime tribunal proposed in your congressional resolution is a legitimate and a viable solution.

Further, in my judgment, the tribunal must be created immediately with the full support of the U.S. Government and the international community. A Syrian war crimes tribunal could be established as an international hybrid tribunal with international authorities specifically mandated to investigate and prosecute those who bear the greatest responsibility for the commission of war crimes, crimes against humanity, and genocide.

A Syrian war crimes tribunal could be backed by the United Nations similar to the Special Court for Sierra Leone. It would be unwise and dangerous to establish the main tribunal in Syria while the country is engaged in a civil war. However, to expedite operation and minimize costs, the tribunal could be established in The Hague utilizing the current office space of the Special Tribunal for

Lebanon with a regional office set up in a neighboring country to Syria. For example, Turkey would be an example, and Jordan.

As mentioned previously, it is imperative that the tribunal be accountable to the victims and geographically located nearby. We now have years of experience to draw upon, and it is important we benefit from such experience, ensuring this tribunal is set up correctly, staffed properly, and financed definitively.

It is my experience that most of the evidence used by prosecutors in International Criminal Court will be witness testimony. Maintaining a trusted and close professional relationship is essential in making sure witnesses will be available and willing to testify when necessary. Unfortunately, this has been a major problem plaguing the International Criminal Court.

Consequently, it will be absolutely crucial the investigators develop a trusted relationship at the onset to secure the best evidence and witness testimony. I know from my own experience that our physical presence in the region greatly contributed to our success and effectively gathering witness testimony.

Being able to access witnesses and informants regularly unequivocally contributed to the success of the Special Court's prosecutions. The trusted relationship between our witnesses provided them with the necessary confidence to be able to provide courageous testimony on the world stage. Undoubtedly, the strong witness testimony was the bulk of our evidence and contributed significantly to the successful prosecution of all cases. All of our convictions and sentences were upheld by the appeals chamber, which is a testament to the strong evidence presented in court.

Although witness testimony is vital at any trial, it is especially true when prosecuting war crimes and crimes against humanity involving countries engaged in civil war or have emerged from civil war. All too often physical and documentary evidence may have been destroyed during the war, so witness testimony is weighted heavily.

Many of the witnesses will be victims, and a great deal of them will have been traumatized by the atrocities committed. For example, rape is often a tool of war, and many victims are reluctant to talk about what happened, particularly with strangers.

War crimes investigations are routinely complex by their very nature and require a unique skill set to be able to conduct such investigations. It can take months for investigators to be able to develop a trusted relationship with a victim as well as witnesses. In many cases, witnesses will tell you stories if they have witnessed a crime personally, yet they are only passing on a story they heard from a family member or friend. This is particularly true in developing countries where tribes and clans living in villages are present and oral history is a tradition and common day practice.

Thus, it will require an investigator who is skilled and experienced in conducting such investigations to be able to get the facts in a timely manner. Inexperienced investigators may take statements later deemed to be inaccurate because the witnesses did not actually observe any atrocity being committed, which can create unnecessary exculpatory issues.

This is a major reason that investigators need to be located in the country or in the region for sheer logistical purposes. The in-

vestigators will be continuously conducting investigations, gathering facts and evidence. There will always be a need to conduct routine followup interviews on a regular basis.

The key elements of proof in war crimes involve determining who was involved, was there a plan, was it wide scale and systematic, military structure, chain of command, weapons involved, command responsibility, as well as identified crime-based events.

Conducting war crimes investigations is one of the most challenging, if not the most, and demanding type of investigation within the international criminal justice system, requiring the most highly skilled, competent, and talented criminal investigator. In my judgment, war crimes investigators must be experienced criminal investigators. I would recommend 10 to 15 years' experience, international, they be of high moral character, good judgment, well educated, preferably a graduate degree, overseas experience, multilingual, excellent interpersonal skills, witness protection training, confidential informant training, and war crimes investigation training and/or experience.

In my own experience, I met regularly with witnesses from Liberia and Ivory Coast, and during my tenure both countries were engaged in civil war. Being situated nearby, my staff and I were able to meet with witnesses regularly, allowing us to develop a trusted relationship and execute our duties in a timely manner.

For example, some witnesses had vital inside information, yet reticent to cooperate for fear of being identified and/or suspected of being a witness, which would undoubtedly pose an immediate danger to themselves or family members. Without a trusted relationship, it is extremely difficult, if not impossible, to convince witnesses in a war-torn region to come forward and become a witness unless they have complete trust and faith in you being able to provide for their safety and well being.

In those instances where witnesses' testimony was deemed vital for prosecution, you must be able to act immediately and decisively to demonstrate to the witness you can deliver on any assurances provided. Otherwise, investigators' credibility could be questioned and the operational effectiveness could be marginalized.

Personally, I faced many exigent circumstances which required immediate action and a need to make command decisions. Being in a region and equipped with appropriate resources allowed me to deal with very challenging and dangerous matters. For example, one of my key witnesses was a former commanding general of the Liberian Armed Forces and as in Accra, Ghana, at a military medical facility receiving treatment for torture injuries inflicted by Chucky Taylor, the son of former President of Liberia, Charles Taylor, and is currently serving a 97-year sentence in U.S. prison for torturing my witness.

The injuries were life-threatening and so severe the general's wife pleaded with Taylor to allow her husband to go to Ghana for treatment. In return, she offered herself and family as human collateral as a guarantee her husband would return. At the time, Taylor knew of the Special Court's existence and was very paranoid about anyone who could be a potential witness for the court leaving Liberia.

While undergoing treatment in Ghana, I made contact with the general and received vital evidence about Taylor and the rebel groups he supported in Sierra Leone. After vetting this information, a decision was made that he would be a major witness for prosecution and he needed to be relocated out of the region. Without an established witness protection program in place, I coordinated with the U.S. Department of State, sought the support to allow me to relocate the general and his family to the United States under the significant public benefit program.

The U.S. was the only place I could relocate the general without fear of Charles Taylor being able to physically harm him or his family. With my operational contacts in the region, I was able to smuggle the wife and eight children, one by one, to Accra, Ghana and then on to the U.S. with the assistance of the U.S. Embassy and the International Migration Office.

While this was ongoing, Taylor had sent some of his henchmen to Accra looking for the general. And once he learned he was no longer at the military hospital, they started canvassing the U.N. Liberian refugee camps in Accra as well as the entire city. The day we left Accra they learned the whereabouts of the hotel where the general was staying and we narrowly escaped their pursuit and went to the U.S. Embassy.

Taylor's henchmen later showed up that same night at Accra International Airport and located us in the lounge while we were waiting to board. They attempted to breach security and were held at bay by the local airport authorities at the request of the U.S. Immigration and Naturalization Service agent who was armed and intervened while we boarded the aircraft.

Meanwhile, the general's wife and children had been smuggled out of Liberia and were en route to Ghana. Due to the safety concerns for the general, we departed Ghana, flew to Amsterdam, and then on to the United States without incident. The family was later reunited 1 month later in the United States safe and sound.

The moral of this story is quite simple. If I had not been in a region and had contacts in place, I could not have been able to carry out this mission and a key witness could have been killed as well as his family. Currently, due to funding and staffing issues the ICC has been unable to establish a full-time presence in many of the countries where they are actively engaged. As a result, they are experiencing serious witness issues involving their willingness to testify.

The lack of a trusted relationship will have a major impact on any investigation and subsequent prosecution. This reinforces the need to establish a Syrian war crimes tribunal singularly focused and accountable to the victims of Syria and located closest to the people. Clearly, the witnesses associated with having any knowledge of war crimes being committed in Syria will undoubtedly have trust issues and an obvious reluctance to reporting information to anyone outside their family, their tribe, their clan and/or their village.

Consequently, developing a trusted relationship from the immediate onset, in my opinion, is the most crucial stage of any investigation, especially a war crimes investigation. Therefore, it is absolutely vital an investigator be regularly and personally engaged to

nurture the trust with the witness. Otherwise, it will dissipate and have a major impact on the investigation and related prosecution.

There isn't a robust witness management and witness protection program in place. The risk of a witness being killed, seriously injured, or physically threatened can occur. And if it does, it will undoubtedly have a chilling effect on any investigation and prosecution.

The recent reports of ICC witnesses being killed, bribed, and threatened in regards to the ongoing trial of Kenya's Deputy President, as well as the impending trial of Kenya's President, highlight this very issue.

We had over 600 witnesses at the Special Court. And although not all of them were deemed necessary to testify, many did and did so credibly, which accounted for the convictions attained. Although witness protection is the responsibility of the Registrar, we felt strongly that the Office of the Prosecutor must have the capacity to carry out our mission.

As a result, with the concurrence of the Registrar, we created our own witness management unit to manage the witnesses of the Office of the Prosecutor. Based on our experience, the witness management and protection responsibility should rest with the Office of the Prosecutor and not the Registrar.

This must be taken into consideration when creating this tribunal. This is a major flaw and impacts investigations and prosecutions and certainly needs to be addressed if a Syrian war crimes tribunal is created. Witness testimony and vital information will dry up quickly if this very important phase of the criminal justice process is not implemented properly at the onset.

Finally, I would like to address the accountability of a court to the victims and not merely to the international community. The ICC is also plagued with being viewed as a political instrument and not as a system of justice for victims. The recent investigations in the Ivory Coast, which has led to the prosecution of three members of the former government, including the former President, his wife, and former Minister of Sports, are being viewed as politically motivated and not balanced.

Members of the current administration, including the current Speaker of the Parliament, have been documented by the United Nations and numerous human rights organizations as perpetrators of war crimes, yet no one has been prosecuted. It is important that all warring factions be aggressively investigated and prosecuted. Otherwise, the lack of balanced prosecution can undermine the peace and reconciliation process.

It must be kept in mind the rule of law and Ivory Coast must be built on restorative and retributive justice, and the best way to achieve these goals is through local accountability. Towards that end, specifically and singularly mandated hybrids, such as the Syrian war crimes tribunal, with international authorities conducting its affairs under international law responsible to the victims, is the best way forward.

In conclusion, I believe the subcommittee's influence, support, and persistence can lead to the creation of a Syrian war crimes tribunal, which will ultimately lead to the prosecution of those involved committing war crimes and crimes against humanity.

By bringing Charles Taylor, the former President of Liberia to justice, we have demonstrated that no one is above the law. Now we all need the political will to support and do the just and noble thing.

I want to thank you again, Mr. Chairman, and other distinguished Members of Congress, for allowing me the opportunity to share my thoughts and experiences in pursuit of a successful outcome for the victims of the Syrian Civil War.

[The prepared statement of Mr. White follows:]

Testimony of Dr. Alan W. White
President, AW Associates, LLC
House Committee on Foreign Affairs
Subcommittee on Africa, Global Human Rights, Global Health and International Organizations
"Establishing a Syrian War Crimes Tribunal?"
October 30, 2013

Chairman Smith, Ranking Member Bass, and distinguished Committee Members, I am honored and pleased to be able to testify before this committee on such a significant issue. I am profoundly aware of the Chairman's outstanding global leadership on the protection of human rights. I have experienced the Chairman's support first-hand while serving as the Chief of Investigations for the United Nations Backed Special Court for Sierra Leone. In large part, the Court's success in bringing some of the world's most notorious war criminals to justice, such as former Liberian President Charles Taylor, would not have been possible without your support as well as other members of Congress. Former President Taylor's involvement and support of the rebels, who committed unspeakable war crimes and crimes against humanity, impacted over 1.2 million victims in Sierra Leone and Liberia.

Today we are faced with a similar crisis in Syria as we experienced in Sierra Leone. We have another brutal dictator who is embroiled in a civil war and engaged in wide-scale and systematic killings of innocent human beings with impunity. It is alleged President Assad has taken evil to the next level by employing the use of chemical weapons, killing thousands of defenseless innocent women and children. Unfortunately, he is protected by his staunchest ally, Russia, which will undoubtedly block any formal referral from the United Nations Security Council to the International Criminal Court, allowing Assad to escape accountability with no justice for the victims. Most would agree, an immediate alternative needs to be aggressively pursued.

To ensure Assad and other perpetrators committing war crimes and crimes against humanity within Syria are held accountable and brought to justice, there must be an independent criminal court created to achieve justice. The establishment of a Syrian War Crimes Tribunal, proposed in your Congressional

Resolution, is a legitimate and viable solution. Further, in my judgment, the tribunal must be created immediately with the full support of the US government and the international community.

A Syrian War Crimes Tribunal could be established as a hybrid tribunal with international authorities specifically mandated to investigate and prosecute those who bear the greatest responsibility for the commission of war crimes, crimes against humanity, and genocide. The Syrian War Crimes Tribunal could be backed by the United Nations similar to the Special Court for Sierra Leone. It would be unwise and dangerous to establish the main tribunal in Syria while the country is engaged in a civil war. However, to expedite operations and minimize costs the tribunal could be established in The Hague, utilizing the current office space of the Special Tribunal for Lebanon with a regional office set up in a neighboring country to Syria. As mentioned previously, it is imperative that the tribunal be accountable to the victims and geographically located nearby. We now have years of experience to draw upon and it important we benefit from such experience ensuring this is tribunal is set up correctly, staffed properly, and financed definitively.

It is my experience that most of the evidence used by prosecutors in an international criminal court will be witness testimony. Maintaining trusted and close professional relationship is essential in making sure witnesses will be available and willing to testify when necessary. Unfortunately, this has been a major problem plaguing the International Criminal Court. Consequently, it will be absolutely crucial the investigators develop a trusted relationship at the onset to secure the best evidence and witness testimony. I know from my own experience that our physical presence in the region greatly contributed to our success in effectively gathering witness testimony. Being able to access witnesses and informants regularly unequivocally contributed to the success of the Special Court's prosecutions. The trusted relationship with our witnesses provided them with the necessary confidence to be able to provide courageous testimony on the world stage. Undoubtedly the strong witness testimony was the bulk of our evidence and contributed significantly to the successful prosecution of all cases. All of the convictions and sentences were upheld by the Appeals Chambers which is a testament to the strong evidence presented in court.

Although witness testimony is vital at any trial it is especially true when prosecuting war crimes and crimes against humanity involving country's engaged in civil war or have emerged from civil war. All too often physical and documentary evidence may have been destroyed during the war so witness testimony is weighted heavily. Many of the witnesses will be victims and a great deal of them will have been traumatized by the atrocities committed. For example, rape is often a tool of war and many victims are reluctant to talk about what happened particularly with strangers. War crimes investigations are routinely complex by their very nature and require a unique skill set to be able conduct such investigations.

It can take months for investigators to be able develop a trusted relationship with a victim as well witnesses. In many cases witnesses will tell you a story as if they had witnessed the crime personally, yet they are only passing on a story they heard from a family member or friend. This is particularly true in developing countries where tribes and clans living in villages are present and oral history is a tradition and a common day practice. Thus, it will require an investigator who is skilled and experienced in conducting such investigations to be able to get the facts in a timely manner. Inexperienced investigators may take statements later deemed to be inaccurate because the witness did not actually observe an atrocity being committed which can create unnecessary exculpatory issues. This is another major reason that investigators need to be located either in the country or in the region for shear logistical purposes. The investigators will be continuously conducting investigations, gathering facts and evidence. There will always be a need to conduct routine follow up interviews on a regular basis. The key elements of proof in war crimes cases involve determining who was involved; was there a plan; was it wide-scale and systematic; military structure; chain of command; weapons involved; command responsibility, as well as identifying crime based events.

Conducting war crimes investigation is one of the most challenging, if not the most difficult and demanding type of investigation within the international criminal justice system requiring the most highly skilled, competent and talented criminal investigator. In my judgment, war crimes investigators must

be experienced criminal investigators (10-15 years) with international experience, high moral character, good judgment, well educated (Graduate degree preferred), overseas experience, multi-lingual, excellent interpersonal skills, witness protection training, confidential informant training, and war crimes investigations training and/or experience.

In my own experience I met regularly with witnesses from Liberia and Ivory Coast and during my tenure both countries were engaged in civil war. Being situated nearby my staff and I were able to meet with witnesses regularly allowing us to develop a trusted relationship and execute our duties in a timely manner. For example, some witnesses had vital inside information, yet reticent to cooperate for fear of being identified and/or suspected of being a witness which would undoubtedly pose an immediate danger to themselves or family members. Without a trusted relationship it is extremely difficult, if not impossible to convince witnesses in a war torn region to come forward and become a witness unless they have complete trust and faith in you being able to provide for their safety and well-being.

In those instances where the witness testimony was deemed vital for prosecution you must be able to act immediately and decisively to demonstrate to the witness you can deliver on any assurances provided. Otherwise the investigators credibility could be questioned and the operational effectiveness could be marginalized. Personally, I faced many exigent circumstances which required immediate action and a need to make command decisions. Being in the region and equipped with the appropriate resources allowed me to deal with very challenging and dangerous matters. For example, one of my key witnesses was the former Commanding General of the Liberian Armed Forces and was in Accra, Ghana at the military medical facility receiving treatment for torture injuries inflicted by Chucky Taylor, the son of former President of Liberia Charles Taylor and currently serving a 97 year sentence in a US Prison for torturing my witness. The injuries were life threatening and so severe the General's wife pleaded with Taylor to allow her husband to go to Ghana for treatment and in return she offered herself and family as human collateral as a guarantee her husband would return. At the time, Taylor knew of the Special Courts existence and was very paranoid

about anyone who could be a potential witness for the court leaving Liberia. While undergoing treatment in Ghana I made contact with the General and received vital evidence against Taylor and the rebel groups he supported in Sierra Leone. After vetting this information a decision was made that he would be a major witness for the prosecution and he needed to be relocated out of the region. Without an established witness protection program in place I coordinated with the US Department of State and sought their support to allow me to relocate the General and his family to the United States under the Significant Public Benefit Program. The US was the only place I could relocate the General without fear of Charles Taylor being able to physically harm him or his family.

With my operational contacts in the region I was able to smuggle the wife and eight children one by one to Accra, Ghana and then onto the US with the assistance of the US Embassy and the International Migration Office. While this was ongoing Taylor had sent some of his henchman to Accra looking for the General and once they learned he was no longer at the military hospital they started canvassing the UN Liberian Refugee camps in Accra as well as the city. The day we left Accra they learned the whereabouts of the hotel where the General was staying and we narrowly escaped their pursuit and went to the US Embassy. Taylor's henchman later showed up that same night at the Accra International Airport and located us in the lounge area while waiting to board. They attempted to breach security and were held at bay by the local airport authorities at the request of a US Immigration and Naturalization Service Agent, who was armed and intervened while we boarded the aircraft. Meanwhile the General's wife and children had been smuggled out of Liberia and were enroute to Ghana. Due to safety concerns for the General, we departed Ghana, flew to Amsterdam and then onto the United States without incident. The family was later reunited safely one month later in the United States safe and sound. The moral to this story is quite simple, if I had not been in the region and had contacts in place I could not have been able to carry out this mission and key witness and his family likely killed.

Currently, due to funding and staffing issues the ICC has been unable to establish a full-time presence in many of the country's where they are actively engaged. As a result, they are experiencing serious witness issues involving their willingness to testify. The lack of a trusted relationship will have a major impact on any investigation and subsequent prosecution. This reinforces the need to establish a Syrian War Crimes Tribunal singularly focused and accountable to the victims of Syria and located closest to the people.

Clearly, the witnesses associated with having any knowledge of war crimes being committed in Syria will undoubtedly have trust issues and an obvious reluctance to reporting information to anyone outside of their family, their tribe, their clan and and/or their village. Consequently, developing a trusted relationship from the immediate onset is in my opinion the most crucial stage of any investigation, especially a war crimes investigation. Therefore, it is absolutely vital an investigator be regularly and personally engaged to nurture the trust with the witness, otherwise it will dissipate and have a major impact on the investigation and related prosecution. If there isn't a robust witness management and witness protection program in place the risk of a witness being killed, seriously injured, or physically threatened can occur and if it does it will undoubtedly have a chilling effect on any investigation and prosecution.

The recent reports of ICC witnesses being killed, bribed, and threatened in regards to the ongoing trial of the Kenya Deputy President as well as the impending trial of the Kenya President highlight this very issue. We had over 600 witnesses at the Special Court and although not all of them were deemed necessary to testify, many did and did so credibly which accounted for the convictions attained. Although witness protection is the responsibility of the Registrar, we felt strongly that the Office of the Prosecutor must have this capacity to effectively carry out our mission. As a result, with the concurrence of the Registrar we created our own Witness Management Unit to manage all the witnesses of the Office of the Prosecutor. Based on our experience the Witness Management and Protection responsibility should rest with

the Office of the Prosecutor and not the Registrar. This must be taken into consideration when creating this tribunal.

This is a major flaw and impacts investigations and prosecutions and certainly needs to be addressed if a Syrian War Crimes Tribunal is created. Witness testimony and vital information will dry up quickly if this very important phase of the criminal justice process is not implemented properly at the onset.

Finally, I would like to address the accountability of a court to the victims and not merely to the international community. The ICC is also plagued with being viewed as a political instrument and not as a system of justice for the victims. The recent investigations in the Ivory Coast which have led only to the prosecution of three members of the former government, including the former President, his wife, and former Minister of Sports are being viewed as politically motivated and not balanced. Members of the current administration, including the current Speaker of the Parliament have been documented by the United Nations and numerous human rights organizations as perpetrators of war crimes, yet no one has been prosecuted. It is important that all warring factions be aggressively investigated and prosecuted; otherwise the lack of a balanced prosecution can undermine the peace and reconciliation process. It must be kept in mind the rule of law in the Ivory Coast must be built on restorative and retributive justice and the best way to achieve these goals is through local accountability. Towards that end a specifically and singularly mandated hybrid tribunal, such as the Syria War Crimes Tribunal with international authorities conducting it affairs under international law responsible to the victims is the best way forward.

In conclusion, I believe this Subcommittee's influence, support, and persistence can lead to the creation of a Syrian War Crimes Tribunal which will ultimately lead to the prosecution of those involved in committing war crimes and crimes against humanity. By bringing Charles Taylor, former President of Liberia to justice we've demonstrated that no one is above the law. Now all we need to political will to support this just and noble cause.

I want to thank you again Mr. Chairman and other distinguished Members of Congress for allowing me the opportunity to share my thoughts and experiences in pursuit of a successful outcome for the victims of the Syrian civil war.

SYRIAN WAR CRIMES TRIBUNAL

THE HAGUE, THE NETHERLAND

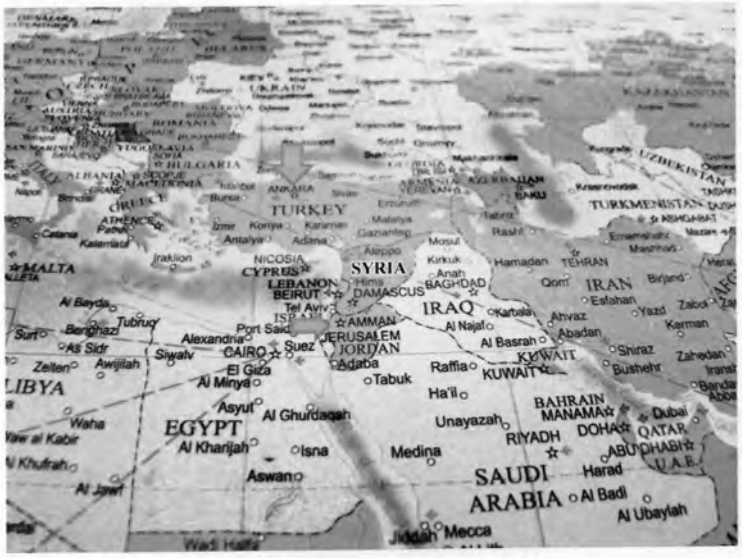
Recommended Court Location

Special Tribunal for Lebanon – Hybrid Jurisdiction

- Office of the Prosecutor
- Office of the Register
- Trial Chambers

SYRIAN WAR CRIMES TRIBUNAL

REGIONAL OFFICE



Original Location:

Office of Investigations:

- Amman, Jordan – Distance to Damascus, Syria – 102 miles
- Ankara, Turkey – Distance to Aleppo, Syria – 145 miles

Mr. SMITH. Dr. White, thank you. Thank you for that very extensive testimony, and with a particular focus on the importance of the witnesses and all things related to. Thank you.

Secretary Rademaker.

STATEMENT OF THE HONORABLE STEPHEN G. RADEMAKER, NATIONAL SECURITY PROJECT ADVISOR, BIPARTISAN POLICY CENTER

Mr. RADEMAKER. Thank you, Mr. Chairman. Thank you for having me here today. And, Chairman Chabot, nice to see you as well.

I have prepared remarks, which I will not read to you. I will summarize a few of the key points and try and emphasize what I think are the most important issues before us.

I am here today to testify in support of your resolution, Chairman Smith, and I should say that fact would probably come as a surprise to many of my friends, because I have a long record of criticizing war crimes tribunals of all stripes. And I spent the better part of my testimony offering additional criticisms of most of the war crimes tribunals that have gone before us.

The only exception in my prepared testimony to that is the Sierra Leone tribunal, or Special Court for Sierra Leone, where I actually have some positive things to say about the work that they have done. But I am critical of all of the others, but I come down differently on your proposal for a number of reasons, which I discuss toward the back end of my prepared statement.

Maybe I will summarize the reasons why I think unlike the previous cases the idea that you are proposing with respect to Syria is actually a good idea. First, I think a lot of times war crimes tribunals are established because the international community is frustrated, and they can't think of anything else to do.

And so as Professor Rabkin I thought very eloquently stated in his testimony, you know, in the absence of any sort of meaningful or serious policy, the U.N. decides to dispatch lawyers to address the problem and then pats itself on the back thinking that they have done something useful to address the problem.

There was some dialogue between you and Professor Rabkin about the Yugoslavia tribunal, and I personally am critical of the Yugoslavia tribunal, not because I think it has failed to bring war criminals to justice. I am critical of it because I think it is a historical matter. It was a very unfortunate compromise, in 1993, between essentially the Government of the United States and the governments in Europe, which had peacekeepers in Bosnia.

And at that point there was a fairly significant disagreement between the United States and the European governments about what to do in Bosnia. It was clear that the international efforts were failing and the war was spiraling out of control, casualties were increasing.

The key issue at that time was the arms embargo on Bosnia, which you referred to. The United States was proposing, and Members of Congress like yourself were offering legislation, to end the arms embargo on Bosnia, which would have leveled the playing field. Europeans didn't want to do that. They had peacekeepers in Bosnia.

And so the compromise that was worked out was, let us not do anything except send in lawyers. And my personal belief is that that delayed by about 2½ years serious measures that did eventually solve the conflict in Bosnia. And those serious measures were taken once your arms embargo legislation passed both the House and the Senate by veto-proof margins. That is when President Clinton decided, "Okay, I need a new policy," and he immediately commenced NATO bombardment of Serbian positions in Bosnia. And that led, within a matter of months, to the Dayton Peace Accords and the peace arrangement that is still in place in the Balkans to this day.

My personal belief is that could have happened sooner, but for the delay that was brought about as a result of the decision to create a war crimes tribunal. And so I don't actually fault the tribunal for its work, but I do fault the decision to create it, because I think that decision was taken to avoid taking harder decisions that governments didn't want to take at that time.

But the point I make about your idea is I think in the case of Syria—and I hate to say this, I wish it weren't true—but I think unlike in Yugoslavia in 1993 and 1994 there are no other serious steps that the international community is going to be able to take. You know, it is clear that the Security Council is not going to even impose sanctions on the Assad regime due to the position taken by the Governments of Russia and China.

I think the United States is not going to be prepared to act unilaterally, as it threatened to do in the Balkans. The most recent diplomatic arrangement between the United States and Russia with respect to chemical weapons I think guarantees that in fact the U.S. policy is no longer even to overthrow or change the Assad regime.

I mean, the Assad regime is now the diplomatic partner of the United States and Russia in trying to dispose of chemical weapons. And serious efforts to overthrow the government while we are working with it I think will not work. And I am not sure the Obama administration has yet recognized that, but that is where U.S. policy is headed.

And I think unlike in the Balkans in the 1990s when Members of Congress like yourself were providing leadership on the issue, it is very clear from the debate that we had 2 months ago here in Congress about whether to authorize the use of force by President Obama in Syria, Congress is not going to be pushing for more forceful action in Syria.

So in the absence of any prospect of more meaningful action by the international community, I think this is not a case like Yugoslavia where establishing a war crimes tribunal can serve as a pretext for not taking action that could otherwise be taken, because no other action is going to be taken, in my opinion.

Second, I think this is a conflict where there are bad actors on all sides. That is increasingly apparent. And I think investigations by an ad hoc tribunal and eventual prosecutions could delegitimize not just the Assad government but also those radical elements who, on the pretext of trying to free their country, are actually carrying out another, more radical agenda in their country.

And today those groups are receiving outside assistance from some governments and individuals, and I think it might be harder for that assistance to continue in the face of international condemnation in the form of action by an ad hoc criminal tribunal against them.

And then, the third reason I can support your idea is because it is not the International Criminal Court that you are proposing. You are proposing to establish an ad hoc tribunal. And I want to speak particularly to this issue of the International Criminal Court because I do believe, as has already been pointed out, should the idea of acting against war criminals in Syria gain traction, we will certainly hear from the Europeans and others that the only possible way to do that is through the established international mechanism for handling these sorts of things, the International Criminal Court.

And, Mr. Chairman, I want to state more emphatically with regard to this than anything else, the worst possible thing the international community could do in Syria is to deploy the International Criminal Court to go after war criminals in that country. We should do absolutely nothing before we do that, because it will—actually, I will read one paragraph from my prepared remarks because I think this articulates my objection to the International Criminal Court's potential involvement more clearly than I can do it off the cuff.

The ICC is an extremely blunt instrument. It is not an instrument of diplomacy, but, rather, an instrument of justice. By design, it exalts justice over all other objectives. This is the meaning and intention of Article 16 of the Rome Statute, which provides that once the court has taken up a case it can never permanently be divested of jurisdiction to proceed with it, and not even the U.N. Security Council can defer the investigation or prosecution of the case for more than 1 year.

Of course, Article 16 permits the Security Council to renew such deferrals once a year for so long as it may wish to do so. But the message of this provision to potential defendants is crystal clear. Once the ICC prosecutor has begun to pursue you, no power on earth can ever permanently rid you of him.

So my concern is that should the international community decide to turn on ICC jurisdiction with respect to Syria, the message to President Assad is he is either going to end up dead or in prison. Those are his two choices. And I think the international community needs to decide what it wants in Syria. If what it wants is justice, it wants to bring Assad to justice, it wants to bring his henchmen to justice, it wants to bring leaders of the al-Nusra rebel groups to justice, the ICC is the appropriate instrument.

But if what we want to do is end the war, if we want to promote a democratic transition and try to bring to power a government led by someone else other than President Assad, sending in the ICC is the worst possible way to achieve that objective, because if we want President Assad to give up power, you can imagine the conversation.

The diplomats who speak to him are going to have to say—they are going to have to make it attractive to him to give up power. And it will not be attractive to him to say, "Give up power and

then we are going to send you to prison." We have to offer him carrots if we want him to give up power. Threatening and promising him that he is going to prison will lead him to dig in. It will ensure that he never gives up power, that he ends up like Ghadafi. Why did Ghadafi stay in Libya and fight to the death? Unlike in Tunisia where the dictator gave up and went into exile, unlike in Egypt where Mubarak gave up and went into internal exile.

In Libya, Ghadafi stayed and fought to the death. Now, maybe that had to do with the character of Ghadafi, but there was another element. The U.N. Security Council had conferred jurisdiction on the ICC to investigate war crimes in Libya, and it was crystal clear that Colonel Ghadafi was going to be the number one defendant before the International Criminal Court.

The international community said to Ghadafi, "No, no, you don't have Mubarak's option. You can't retire peacefully. We are coming after you." And so he stayed and fought to the death. If that is what we want in Syria, we want this civil war to go on until somebody, you know, corners Assad in a street and shoots him, you know, the way to get to that objective is to bring in the International Criminal Court because they will pursue him relentlessly, they will guarantee that he does not go peacefully.

But I submit though that may be from a purist point of view that you want a pursuit of justice above all other objectives, that might be the right way to go. I think there are more important values, more important objectives for the international community, most importantly saving human lives of the Syrian people. And for that reason, I think we need to avoid solutions which will perpetuate the conflict.

We need to look, instead, for solutions that will make it possible to expeditiously end the conflict. And I think an ad hoc tribunal, which is not subject to Article 16 of the Rome Statute, an ad hoc tribunal which could be turned off by Security Council action, should there be a diplomatic settlement acceptable to all sides, that would make sense. That would be a useful diplomatic tool. The ICC is the antithesis of a useful diplomatic tool in the case of Syria.

So I will end my testimony with those observations, and I look forward to your questions.

[The prepared statement of Mr. Rademaker follows:]

STATEMENT OF STEPHEN G. RADEMAKER
National Security Project Advisor, Bipartisan Policy Center
Principal, The Podesta Group

"Establishing a Syrian War Crimes Tribunal?"
Committee on Foreign Affairs
Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations
Subcommittee on the Middle East and North Africa
U.S. House of Representatives
October 30, 2013

Chairman Smith, Chairman Ros-Lehtinen, Ranking Member Bass, Ranking Member Deutch, Members of the Committee, I appreciate the invitation to appear before you today to discuss Chairman Smith's resolution, H. Con. Res. 51, calling for the establishment of an ad hoc war crimes tribunal for Syria, as well as the broader issue of accountability for the horrific human rights violations we have witnessed in Syria over the past two and a half years.

While I am not ordinarily a supporter of war crimes tribunals, Chairman Smith, I am pleased to say that I support your resolution. I support your resolution not only because of the unique circumstances that exist today in Syria, but also because you have carefully drafted it to call for the establishment of an ad hoc tribunal, rather than referral of Syria to the International Criminal Court (ICC), as some others have proposed. Permit me to emphasize at the outset of my testimony that I would oppose conferring jurisdiction on the ICC to investigate and prosecute war crimes, crimes against humanity, and genocide in Syria. This is because I believe that, due to fatal defects in the Rome Statute creating the ICC, such a referral would risk perpetuating the conflict in Syria rather than help curtail it.

I was the Republican Chief Counsel of this Committee when the first war crimes tribunals were created in 1993 and1994, for the Former Yugoslavia and for Rwanda, respectively. And I was Chief Counsel throughout the negotiation, signature, and entry into force of the Rome Statute, as well as when the UN Special Court for Sierra Leone was created. I was responsible for Committee oversight of all of these efforts, and that experience has made me a skeptic of war crimes tribunals generally.

Based on what I have observed, I would say that while such tribunals often seem like a convenient answer to the human rights tragedy of the moment, they are usually the wrong answer. I will illustrate my reasons for saying this by reviewing the history of some of the most pertinent cases.

Former Yugoslavia and Rwanda Tribunals

The first ad hoc tribunal was created in 1993 to deal with the conflicts in the Former Yugoslavia. It was created at a time when international efforts to contain the deadly conflict in Bosnia were clearly failing A UN peacekeeping force, composed largely of units from countries in Western Europe, had been deployed in Bosnia, and over time it became as much a hostage to the contending forces as a stabilizing element. Many in Congress, including you, Chairman Smith, recognized that a more robust policy was required to resolve the conflict, and to that end, you were one of the original co-sponsors of legislation introduced that year to end US participation in the one-sided UN arms embargo on Bosnia. This was something that would have leveled the playing field and given the beleaguered Bosnians a fighting chance against Slobodan Milosevic's well-armed Yugoslav National Army.

The Europeans adamantly opposed this idea, however, because they had boots on the ground and worried that more weapons in Bosnia might increase the risk to their peacekeepers. But, of course, they were equally opposed to changing the rules of engagement governing their peacekeepers, or deploying more of them, so the conflict was intensifying and the international community looked increasingly feckless.

In August 1995, following the massacre at Srebrenica and other infamous acts of genocide, your legislation passed the House and Senate by veto-proof margins. As a result, President Clinton realized he needed a new policy, so he commenced a NATO-commanded bombing campaign in Bosnia that led within a matter of months to the Dayton Accords and the peace settlement that remains in effect in that country to the present day.

But in 1993, all of this was for the future. In 1993, a bitter argument was taking place between the United States and the Europeans about what to do in Bosnia. There was no consensus on what to do, except everyone realized that something needed to be done. In that context, the idea of establishing a war crimes tribunal emerged as a low-risk, least common denominator that both the United States and Europe could embrace.

Maybe we can't agree on allowing the victims to buy the arms they need for self-defense, or sending more peacekeepers to protect them, the thinking went, but at least we can demonstrate our concern by sending lawyers. Not to Bosnia, of course, but to The Hague, where they can draw up indictments and bring the perpetrators of atrocities to justice after the fact. And who knows, maybe the creation of such a mechanism will actually deter the commission of additional atrocities. The existence of the Yugoslavia Tribunal did not seem to have that effect two years later at Srebrenica, or in 1999, when Milosevic and his army began gearing up another genocide in Kosovo, but these failures are not my main objection to the Yugoslavia Tribunal.

My main objection to the Tribunal is that its creation in 1993 provided cover for the international community to avoid taking more meaningful action that might actually have saved lives in Bosnia. Two years were wasted while the Tribunal sought to establish itself, and tens of

thousands of additional Bosnian lives were lost before the international community finally acted decisively to end the conflict. In this sense, I believe that creating the Tribunal inadvertently prolonged the Bosnian conflict and raised the cost in human lives.

The story with the Rwandan war crimes tribunal is only slightly different. It was not created as an alternative to taking meaningful action, as in the case of Yugoslavia. Rather, it was created in 1994 out of a sense of collective guilt over the failure to take meaningful action to stop the Rwandan genocide. By the time the Tribunal was established, 800,000 Rwandans had already perished, so the principal objective was not to prevent more killing, but to establish responsibility for killings that had already taken place.

In practice, however, an ad hoc UN tribunal was ill-suited for this mission. Over the past twenty years, the Rwanda Tribunal has spent almost $2 billion to try to bring to justice fewer than 100 of the most culpable perpetrators of war crimes in Rwanda. Meanwhile the Government of Rwanda has been essentially on its own in trying to deal with the approximately 125,000 other suspected participants in the genocide. The resources made available by the international community to assist Rwanda in processing these cases have been a pittance compared to what was spent on the UN tribunal.

Worse still, a two-tiered system of justice emerged that, among other things, convinced the government of Rwanda that the UN was really on the side of the organizers of the genocide. If you were one of the 125,000 lower-level participants in the genocide, you languished in an overcrowded Rwandan prison and ate to the extent family members brought you food or you were able to earn money, waiting for the hopelessly understaffed Rwandan judicial system to figure out a way to process your case. But if you were one of the fewer than 100 high-level organizers of the genocide, you were held in a modern prison and afforded UN-funded defense counsel and private investigators—in some cases friends or relatives from Rwanda who you could get on the Tribunal's payroll—while your case wended its way through the Tribunal's trial and appeals system. Further, until 2007, defendants in the Rwandan system potentially faced the death penalty, while the higher-level defendants prosecuted before the Tribunal faced a maximum penalty of life in prison.

Justice would have been better served in Rwanda had the international community not acted on its sense of shame and guilt to create the Rwanda Tribunal, but rather had devoted a fraction of the resources ultimately devoted to the Tribunal to develop local capacity to hold perpetrators responsible for the genocide.

The UN appears to have drawn a similar conclusion from the Rwanda experience. It has created no new ad hoc international criminal tribunals since 1994. Instead, when confronted with situations where there is a need for criminal accountability, it has opted for mixed tribunals that combine international and local elements. This has been done in Sierra Leone, Lebanon, Cambodia and East Timor. Of these, the Special Court for Sierra Leone has been the most

successful. This approach is clearly preferable to the Former Yugoslavia and Rwanda Tribunals. The limitation, of course, is that this approach can only work when the country in question is ruled by a government willing to cooperate in the pursuit of justice.

International Criminal Court

With regard to the ICC, I will not comment on how the Court has managed to deal with cases arising in countries that have accepted the Court's jurisdiction. Syria, of course, is not one of those countries, so the only way the ICC will be able to exercise jurisdiction there is if the UN Security Council refers the Syrian conflict to the ICC in accordance with Article 13 of the Rome Statute. The Security Council has done this twice before—in Sudan with respect to Darfur in 2005, and in Libya in 2011. In both of these cases, I believe the Security Council referral was a mistake that reduced prospects for negotiated peace settlements and arguably prolonged and intensified the conflicts.

The situation in Sudan in 2005 was in many respects similar to the Former Yugoslavia in 1993. The international community was frustrated with its inability to end a pattern of gross violations of human rights, but unwilling or unable to take more meaningful action to end the conflict, so once again it decided to send lawyers to sort out the mess. It was hoped that doing this would increase the pressure on the government of President Omar al-Bashir to negotiate an end to the conflict in Darfur and create a dynamic that would reduce the loss of life in that region. In this it backfired, however.

The ICC is an extremely blunt instrument. It is not an instrument of diplomacy, but rather an instrument of justice. By design, it exalts justice over all other objectives. This is the meaning and intention of Article 16 of the Rome Statute, which provides that once the Court has taken up a case, it can never permanently be divested of jurisdiction to proceed with it, and not even the UN Security Council can defer the investigation or prosecution of the case for more than one year. Of course, Article 16 permits the Security Council to renew such deferrals once a year for so long as it may wish to do so, but the message of this provision to potential defendants is crystal clear: once the ICC prosecutor has begun to pursue you, no power on Earth can ever permanently rid you of him.

In Sudan, the most immediate consequence of the Security Council's decision to confer jurisdiction on the ICC was to encourage President al-Bashir to drag his feet on efforts to deploy a UN peacekeeping force to Darfur. Government spokesmen explained at the time that they were not doing this out of principled opposition to UN peacekeepers—they had agreed just months earlier to the deployment of a UN peacekeeping force in South Sudan—but rather out of fear that, following the referral of Sudan to the ICC, such a force might eventually seek to enforce ICC arrest warrants against government officials.

A few years later, when the ICC prosecutor first requested an arrest warrant for President al-Bashir, the government curtailed humanitarian relief activities in Darfur and scaled back its

diplomatic cooperation. Former Bush Administration Special Envoy for Sudan Andrew Natsios commented at the time "The regime will now avoid any compromise or anything that would weaken their already weakened position because if they are forced from office they face trials before the ICC."

Two years later, the ICC issued a second arrest warrant for President al-Bashir, and President Obama's Special Envoy for Sudan, Scott Gration, offered similar criticism. The ICC action "will make my mission more difficult and challenging," Gration complained. President al-Bashir is, of course, still in power despite being twice indicted by the ICC, and the conflict in Darfur continues to fester. Regrettably, as illustrated by the comments above, the ICC's involvement has undermined rather than supported efforts by American and other diplomats to bring peace to the region.

The Security Council's referral of Libya to the ICC was even more short-sighted. The Council acted in February 2011 as momentum in the Libyan civil war appeared to be shifting from the rebels to the government of Col. Muammar Gaddafi. The Council acted out of a clear desire to shift the momentum back in favor of the rebels and expedite Gaddafi's removal from power. The effect of the referral, however, was the opposite of what was intended.

In the neighboring countries of Tunisia and Egypt, the Arab Spring forced longtime rulers to reluctantly give up power and go into either foreign or internal exile. As a result, neither country descended into civil war. That would have been the preferred outcome in Libya as well. By injecting the ICC into the mix, however, the Security Council effectively removed this option for Libya. The message to Col. Gaddafi was clear: unlike President Ben Ali of Tunisia and President Mubarak of Egypt, he would not be allowed to retire peacefully into exile. Should he give up power, the ICC would be on his heels, and no diplomatic settlement was possible that could guarantee him against eventual imprisonment by the ICC. At best, consistent with Article 16 of the Rome Statute, he could be given a one-year respite by the UN Security Council. There could be no assurance, however, that the respite would be extended for a second year after he gave up power, much less once a year every year for the rest of his life.

As a result, Col. Gaddafi made what was probably a rational decision for a dictator in such a situation: he decided to hold his ground and fight to the death with his opponents. And die he did, but not before thousands of other Libyans died as well. Whether some of these other lives could have been spared had Col. Gaddafi not been denied the option of peaceful exile will never be known. But certainly the ICC referral made no positive contribution to mitigating the intensity and duration of the conflict.

The Conflict in Syria

At this point, Chairman Smith, you are probably wondering how it is that I can support your resolution if I am so critical regarding these other cases. The answer is that there are several unique features to the Syrian conflict that lead me to believe that the creation of an ad

hoc war crimes tribunal for that country could make a positive contribution to international peace and security.

First, we face a humanitarian catastrophe in Syria, and we have a moral obligation to try to address it.

Second, this is not a case like Bosnia in the early 1990s or Darfur eight years ago, where there are alternative measures that realistically could be adopted to address that humanitarian catastrophe. For starters, it is clear that Russia and China will use their veto at the UN Security Council to block even mild measures such as international sanctions on the Syrian government, much less UN authorization to deploy peacekeepers or use armed force to end the bloodshed.

Nor is the United States going to take any sort of unilateral action of the type it was prepared to take in the Former Yugoslavia. The Obama Administration is no longer in the business of seriously working to remove Bashar al-Assad's regime from power. Instead, following the agreement with Russia to destroy Syria's chemical weapons, the Assad regime is now the Obama Administration's partner in that destruction effort. The Administration's rhetoric may not have caught up with the reality of its policy, but over time the Administration will realize that one consequence of the deal with Russia is that it has to quietly set aside its professed policy of forcing President Assad from power.

In further contrast to Bosnia and Darfur, the U.S. Congress is not going to push for a more robust U.S. policy. This was the lesson of the abortive debate two months ago over whether to authorize President Obama to conduct airstrikes in response to President Assad's use of chemical weapons against his own people. So for all these reasons, the civil war in Syria appears likely to go on for a long time with no relief in sight.

Third, there are in fact villains on both sides of the conflict. The Assad government's culpability is evident. But increasingly we see evidence of atrocities perpetrated by radical elements among the rebels, including the al-Nusra Front and the Islamic State of Iraq and the Levant. An ad hoc war crimes tribunal could seek to establish accountability for crimes committed on both sides.

Some will claim that the existence of such a mechanism will discourage more atrocities. I would like to believe this is true, but I see little evidence the Yugoslavia Tribunal had that effect in the Balkans. Surprisingly, determined perpetrators of genocide and other war crimes seem not to worry too much about the long-term consequences of their actions.

I do believe, however, that the establishment of accountability could perform the useful function of further delegitimizing both the Assad regime and those among the rebels who are committing crimes under the guise of fighting for their country's freedom. This in turn could make it more difficult for governments and other donors outside of Syria to continue to support the government and radical rebel elements. Because an ad hoc tribunal could pursue war crimes

perpetrators on all sides of the conflict, it is not hopeless to believe that Russia and China might ultimately agree at the Security Council to establish such a tribunal. A long shot, to be sure, but not hopeless.

Fourth, it is possible to construct an ad hoc tribunal that will reinforce diplomatic efforts to remove President Assad from power. Most importantly, pressure to refer Syria to the ICC must be resisted, because the most immediate consequence of such a referral would be to ensure that President Assad will never voluntarily relinquish power. A properly constructed ad hoc tribunal would not close the door to a bargain with the Assad regime that potentially could end the conflict, thereby saving tens or hundreds of thousands of Syrian lives.

I would, of course, prefer a mixed tribunal of the kind that has functioned effectively in Sierra Leone to an ad hoc tribunal like those created for the Former Yugoslavia and Rwanda. But so long as the Assad regime remains in power, there is no government in Syria with which the international community could work to establish such a mixed tribunal.

For all these reasons, Chairman Smith, I support your initiative to create an ad hoc tribunal for Syria. We should get into this with our eyes wide open, however. If such a tribunal is created, it will be expensive to operate, have limited capacity, and work painfully slowly. The tribunals in the Former Yugoslavia and Rwanda have both been operating for about 20 years, and recently have been costing well in excess of $100 million each per year. The lifetime cost of each of these tribunals will be in the neighborhood of $2 billion. And when they finally conclude their work, the Rwanda Tribunal will have handled fewer than 100 cases arising from a genocide in which 800,000 were killed—mostly by people wielding machetes—and the Yugoslavia Tribunal will have handled fewer than 200 cases.

Ideally, if a new democratic government comes to power in Syria, the costs can be minimized by referring cases back to Syria, or to a mixed tribunal along the lines of the Special Court for Sierra Leone that is set up with the support of that new government. As in the Former Yugoslavia and Rwanda, if most perpetrators are to be brought to justice, Syria is where it will have to happen in any event; no international tribunal will have the capacity to handle any but the most egregious cases arising from a conflict in which over 100,000 people have already been killed.

With these observations, I will conclude my remarks and invite questions.

Mr. SMITH. Thank you very much, Secretary Rademaker, for that explanation. And, again, your full statement will be made a part of the record.

I would like to ask, Mr. Dicker, if you would proceed.

STATEMENT OF MR. RICHARD DICKER, DIRECTOR, INTERNATIONAL JUSTICE PROGRAM, HUMAN RIGHTS WATCH

Mr. DICKER. I am grateful to the subcommittees for inviting me to testify. And, Mr. Chair, I want to thank you for convening this important hearing.

My organization, Human Rights Watch, has conducted extensive research in Syria over the last 2½ years. We have issued, by my count, 11 in-depth reports documenting horrific human rights crimes. We have conducted 10 in-country field missions to document and support our findings, and my comments today are based on that experience and the experience of reviewing justice mechanisms over the last 20 years.

Let me start by saying that criminal prosecutions of the crimes perpetrated in this conflict would present challenges for any court system. And certainly as has been remarked, justice is not a panacea to all the problems that are besetting Syria today. Trials can only be but one part of a larger package, sir, to bring some healing and accountability to the situation.

It is, therefore, essential, I believe, to think strategically in overcoming what are quite steep hurdles. And this requires, I believe, making use of a range of judicial and non-judicial tools at both the international and national level in a mutually reinforcing spiral that avoids pitting one against the other.

Given the exigencies that we see, we believe a three-pronged approach sequenced in time offers the best possibilities for justice, and I will walk through those. But I want to say with respect, Mr. Chairman, I do take some exception to a single-minded focus on an ad hoc tribunal. Normally, in these type situations the starting point would be with the national courts and strengthening those as the first line of protection for civilians at risk.

I think we all know at this table, and in this room, that in the near term any reliance on Syrian courts, even post-conflict, is unrealistic. And while strengthening a revitalized Syrian judiciary is an essential goal, it is a long-term one.

My point here, sir, is that the need for credible national justice is clear, but the path to achieving it, frankly, is a long one. I think, given that, we want to draw your attention to the need for the establishment of a specialized judicial mechanism embedded in a reconstituted Syrian justice system with the active participation of international experts. We believe over time that could work to strengthen domestic capacity.

And, sir, I would suggest the War Crimes Chamber in the state court of Bosnia offers important lessons in this regard. This will not be easy in Syria. But if done correctly, it would help bridge—build a bridge to the ordinary Syrian courts through joint training and experience-sharing to bolster the capacity there.

Now, on this difficult terrain, we believe the International Criminal Court has a crucial role to play in prosecuting those most responsible and being a reference point for the special mechanism

and evolving national courts already mentioned. The ICC would look at all sides to the conflict and have potential positive spillover effect on future national proceedings as happened in fact in the former Yugoslavia and Rwanda.

In spite of that positive impact, I think it is important to acknowledge that, given the ICC's daunting mandate, the lack of sufficiently robust state support and some policy missteps over its first 10 years, there has been a shortfall in ICC practice. Fortunately, the new leadership team at the court I believe is cognizant of these problems and attempting to take those challenges in hand.

Now, we know that the ICC could only obtain jurisdiction through a Security Council referral. Is it impossible because of Russia's implacable opposition to date to think that such referral could occur? We have seen, as the situation on the ground in Syria has changed, changes in Russia's position on chemical weapons and humanitarian access to populations in need.

I argue it would be a major mistake to preclude the possibility of Russian support for a referral. I would also add, unfortunately, the U.S. administration has allowed Russia much more space by failing to itself, from Washington and New York, come out strongly in favor of an ICC referral.

In conclusion, I think that the U.S. Government support for an ICC investigation as one mechanism would encourage close allies on the Security Council and raise pressure on the Russian Federation to change its obstructive stance. I believe with respect, Mr. Chairman, the solution most likely to provide justice is not a standalone tribunal for Syria, because this comes with significant practical obstacles.

Reference has been made to the delays in creating and standing up a complex institution from scratch. And I believe that such delay would remove any potential deterrent effect that could be achieved by formally investigating crimes in Syria now. An ad hoc tribunal would be more costly than using an existing mechanism, and at the end of the day what would its source of legitimacy be, both for the people of Syria and internationally?

We recommend, in conclusion, that the administration continue supporting documentation efforts, including the preservation of evidence. This could be vital to future prosecutions. We believe the administration should consider the kind of Sarajevo-type chamber as playing an essential role, and that the U.S. should stand up and support an ICC referral instead of demurring behind concerns that Russia or China would veto any Security Council referral.

And we think, lastly, strategy should be formulated with a specialized mechanism and ICC investigation very much in mind.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Dicker follows:]

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Human Rights Watch

House Committee on Foreign Affairs
Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations
Subcommittee on the Middle East and North Africa

October 30, 2013
"Establishing a Syrian War Crimes Tribunal?"

Testimony to Subcommittee

October 30, 2013

I. Introduction

I am grateful to the Joint Subcommittee for inviting me to testify today, and thank both Chairman Chris Smith, Madame Chairman Ileana Ros-Lehtinen, and members of the subcommittees for holding this hearing to discuss the important issue of justice and accountability in Syria – a topic which does not often get enough time in the public domain but which is so critical.

My organization, Human Rights Watch, has issued eleven in-depth reports on horrific human rights crimes committed in Syria over the last two and half years. My colleagues have conducted over ten field missions interviewing hundreds of victims of and witnesses to these abuses. Most recently, we documented massacres by armed insurgents on a series of Alawite villages near the city of Latakia.

As you know, serious violations of international human rights and humanitarian law have been committed on a vast scale in Syria. Human Rights Watch has concluded that government forces have committed crimes against humanity and war crimes and has repeatedly called for an end to abuses. As you may know, the Syrian government continues to conduct indiscriminate air and artillery strikes on residential areas, and to arbitrarily detain, torture, and extra-judicially execute civilians and combatants. In August, hundreds of civilians, including many children, were killed in a chemical weapons attack on areas near Damascus. A United Nations investigation determined that the nerve agent Sarin was used. While the Syrian government denies responsibility, a Human Rights Watch report, based on independent analysis and documentation, found that available evidence strongly suggests that government forces were responsible for the attack.

Human Rights Watch has also documented and condemned serious abuses amounting to war crimes, including the indiscriminate use of car bombs, kidnapping, torture, and extrajudicial executions by some opposition groups. Foreign fighters and groups linked to Al Qaeda have been among the worst perpetrators of these abuses. In one operation documented by Human Rights Watch in the Latakia countryside of Syria in August, evidence strongly suggests that the abuses committed by some armed groups taking part in that particular military operation rise to the level of crimes against humanity. Some armed opposition groups fighting in Syria are also using children for combat and other military purposes.

One fundamental track toward accountability for these extensive and grave violations involves the credible investigation and prosecution of those individuals responsible in a court of law. Criminal justice can yield short and long-term benefits. Importantly, the fair prosecution of persons for serious crimes under international law may assist in restoring dignity to victims by acknowledging their suffering. It also acts an expression of condemnation and outrage at the commission of these violations and ensures that the perpetrators are duly punished. Moreover, by providing means of redress for victims, criminal justice may deter future violations and build respect for, and confidence in, the rule of law. The failure to hold those responsible for the most serious international crimes to account, on the other hand, can fuel future abuses.

Yet, criminal prosecutions of the crimes perpetrated during the Syrian conflict present challenges for any court system. It is therefore essential to be objective and clear-eyed about the difficulties in achieving the desired results in a situation as polarized as Syria is and will be.

Beyond the practical difficulties posed by the scale of the violations, including the collection and preservation of evidence, delivering meaningful justice in a manner that upholds the principles of impartiality and independence will also prove a daunting task. In most cases, it will also be difficult to ensure that investigations and prosecutions resonate with the concerns of victims and affected communities, be they in Aleppo or Latakia. In other locales, pursuing justice may turn out to be deeply unpopular, including among segments of the population who

believe that those who committed serious crimes were justified in doing so, or because those implicated in abuses retain positions of authority or are close to those in power. It is this complex landscape that frames the pursuit of criminal justice for grave abuses from the outset.

One must therefore think objectively and strategically in overcoming the obstacles that exist in addressing the crimes committed. This will require a comprehensive, long-term vision that makes use of a range of judicial and non-judicial tools at both the international and national level in a mutually re-enforcing fashion, and in a way which avoids pitting one measure against others.

With respect to achieving credible criminal justice for the crimes committed, Human Rights Watch believes that the most effective path to accountability should include prosecutions by Syrian courts, the contribution of a specialized 'bridging' mechanism embedded in the Syrian justice system, and the involvement of the International Criminal Court (ICC), acting as a critical reference point for the domestic system.

II. National Courts

Normally the starting place would be with the national courts because these should be the first line of protection and justice for victims. Indeed, prosecutions by domestic courts are necessary to achieve fuller accountability. I submit that this is unlikely to happen in the short-term in Syria. Critically, the political will to permit the independent and impartial investigation and prosecution of the serious crimes committed in the past two and half years is absent. The domestic justice system lacks independence from political control and security forces are shielded by law from prosecution. This means that pursuing sensitive cases, which may implicate governmental policies or actors, is impossible in the current political landscape.

Moreover, beyond the acute hurdles that exist with respect to the political will to realize credible and effective justice, several steps will also need to be taken to develop the capacity of the domestic justice system to address these crimes. Cases involving grave crimes such as war crimes and crimes against humanity tend to be extremely complex to investigate, prove, defend

against, and adjudicate. Extensive evidence and scores of witnesses are usually involved. Prosecuting individuals who may have ordered the crime rather than personally having committed it or are responsible as a matter of command responsibility is also difficult – international experience shows that identifying these individuals and proving links between acts on the ground and orders or acquiescence from above requires extensive prosecutorial and judicial experience. Even the most sophisticated legal systems—which mainly deal with ordinary crimes—may lack the capacity to effectively address serious crimes committed on a large scale. At the same time, stark deficiencies will exist in the Syrian justice system which will aggravate these challenges, including a shortage of personnel, a lack of training in addressing serious criminal cases, concerns about the bias of national judges and prosecutors, limited court infrastructure, outdated rules of procedure, corruption, and limited case management.

So while the need for credible national justice is clear, the path to achieve it is by no means straightforward or within reach. Even where there is political will to see perpetrators from one side held to account, the local justice sector will be in disarray. As such, reforms and external assistance will be needed to equip the Syrian judicial system, over the long run, to carry out credible and independent domestic proceedings which are meaningful to the local population, including, for example, putting measures in place to ensure: (i) the independence of judges and prosecutors; (ii) the full protection of witnesses, lawyers, and judicial personnel; (iii) as well as the ability of investigators to gather evidence. Financial and diplomatic support for such future efforts could assist in bolstering national capacity to handle these violations, but this will all take a lot of time.

III. Specialized Mechanism Embedded in the National Justice System

While this long-term judicial construction work is underway, the creation of a dedicated and specialized judicial mechanism embedded in the national justice system with the active participation of international investigators, prosecutors and judges could work to narrow the impunity gap. If appropriately structured, such a mechanism could, in time, strengthen the

capacity of the national justice system to handle grave international crimes. The War Crimes Chamber in Bosnia and Herzegovina's State Court and the Special Department for War Crimes in the Prosecutor's Office offer important lessons for policymakers and donors in this regard.

This will not be easy in Syria, but if done right, this would help to build "bridges" with the ordinary Syrian courts through sharing training, knowledge, and experience to bolster the capacity of the entire Syrian justice system.

The involvement of internationals with experience in trying complex cases carries a number of crucial benefits. Beyond enhancing the short and long-term capacity of professionals and institutions in Syria to conduct fair and effective war crimes trials, the presence of impartial international staff could also help insulate the mechanism from political interference and strengthen its perceived and actual independence. Lastly, presence of international staff may bolster victims and witnesses' willingness to give testimony, as well as witness protection. The internationals can be phased out over time, according to certain benchmarks, as the local judicial authorities gain experience, establish their legitimacy, and assert their independence.

It cannot be stressed enough though that without the necessary political commitment to fair and impartial trials at the outset, it will not be possible to legitimately pursue broader national prosecutions, let alone establish a meaningful "bridge building" mechanism.

IV. The Role of the International Criminal Court (ICC)

On this difficult terrain, we believe that the International Criminal Court (ICC) has a crucial role to play as a "reference point" for the national system. If possible, the court's involvement in the course of the *ongoing* conflict in Syria would send a clear message to all parties that grave crimes will not be tolerated and carry serious consequences. In the short-term, it would therefore put those in senior positions, no matter their political allegiance, on notice that they could be held responsible for crimes they order or commit, or for crimes they fail to prevent or punish – whatever the outcome of the conflict. This credible threat of prosecution may help stem further abuses. In addition, the record from other conflicts, such as those in the Balkans,

also confirms that criminal indictments of senior political, military, and rebel leaders while conflicts are ongoing can actually strengthen peace efforts by delegitimizing and marginalizing those who stand in the way of resolving the conflict.

Over a longer term, there are indications that it could have a potentially positive "spillover" or catalytic effect on future national proceedings. There is basis in practice for this trend. In particular, the *ad hoc* tribunals for the former Yugoslavia and Rwanda played a beneficial role in this regard. For example, the desire to have cases transferred from the international *ad hoc* tribunals propelled both Rwanda and the countries of the former Yugoslavia to engage in serious domestic legal reform in order to meet the tribunals' standards to have cases transferred to their national courts. This wish to try cases handled by the *ad hoc* tribunals also propelled some of these countries to create specialized judicial chambers and prosecutorial mechanisms to address atrocity crimes.

In many countries where the International Criminal Court is carrying out an investigation, steps have been taken—at least nominally—to start domestic proceedings. Even in countries where ICC investigations are being considered but have not been opened, efforts have been made to hold perpetrators to account that otherwise may not have occurred in order to keep the cases in national courts.

Yet, in spite of the positive impact the ICC could have in Syria, it is important to acknowledge that given its daunting mandate, the lack of sufficiently robust state support afforded the institution to date, and some performance failings over its first ten years, there have been shortcomings in the court's practice. With investigations in eight country situations, the court is overextended and Syria would pose the steepest challenge yet to the institution.

Meaningful justice delivered by the ICC will mean investigations regardless of the affiliation of the perpetrator and trials on charges reflecting the underlying patterns of ICC crimes committed in a situation. A robust approach will also mean, where possible, presence in the field and engagement with affected communities in order to inform ICC policy decisions, to

ensure that justice is not only done but seen to be done through public information and outreach activities, and to facilitate witness protection, fair trial rights, and the right to victim participation afforded under the Rome Statute. Practically speaking, the need for robust engagement means that an ICC intervention will be resource-intensive.

For the court to be able to implement its mandate, including by taking on important but politically unpopular cases, securing arrests, and guarding its independence, the ICC will need increased international political commitment—whether at meetings of its states parties, in strategic forums such as the UN Security Council and regional organizations, or in bilateral contacts—and the implementation of that political commitment in practice. Additional resources would likely be needed, including resources to support additional investigations and cases in Syria. Court officials and staff will also need to heighten their efforts to ensure that the ICC can meet its full potential. Indeed, the effective implementation of its mandate in practice will not be possible without the steadfast support and commitment on the part of a number of actors.

For now, the ICC cannot prosecute grave abuses committed in Syria since it is not a member state of the Rome Statute, the treaty that established the ICC. Unless the Syrian government ratifies the treaty or accepts the jurisdiction of the court through a declaration, the ICC could only obtain jurisdiction if the UN Security Council refers the situation there to the court. The Security Council, with what is called an "ICC referral," could give the court jurisdiction stretching back to the day the Rome Statute entered into force, on July 1, 2002. The ICC would have jurisdiction to investigate war crimes, crimes against humanity, or genocide committed by *all* sides to this conflict, whether by government forces, opposition fighters, or other militias.

We have seen, as the situation on the ground shifts in Syria, changes in Russia's position on chemical weapons and humanitarian access to populations in need inside Syria. It would be a mistake to preclude circumstances where Russia would not block a referral. This will require active US government support. Frankly, the administration could do a lot more to make its views

known. Such support will encourage its closest allies on the Council and raise pressure on the Russian Federation to change its obstructive stance. It will also underscore the administration's commitment to impartial justice.

V. Recommendations and Conclusion

In sum, given the exigencies, we believe this three-pronged approach, sequenced in time between the prongs, offers the best possibilities for justice in an extremely difficult situation. After considering the situation on the ground and the most relevant experience from other country situations, I believe, with all respect, that the solution most likely to provide justice is not a stand-alone *ad hoc* tribunal for Syria. Establishing a separate, *ad hoc* entity to prosecute crimes in Syria comes with significant practical obstacles.

There are delays inherent in creating another highly complex institution from scratch, as was done with the International Criminal Tribunals for Rwanda and the Former Yugoslavia or the Special Court for Sierra Leone. Defining the legal framework, finding appropriate facilities, recruiting competent personnel and ensuring cooperation of states represent considerable challenges, require time and are likely to be more costly than if a permanent institution is tasked with investigation and prosecution. The delay involved in creating such an entity from the ground up would remove any potential deterrent effect that could be achieved by examining crimes in Syria now, as abuses persist. Another key concern relates to the current security situation in Syria, which precludes the presence of such an *ad hoc* entity. It is also unrealistic to assume that Syria would support the establishment of such an institution, let alone fully respect its independence.

Funding is also an issue of concern for mixed or hybrid judicial entities where financial contributions by states are not compulsory (as is the case for the Special Court for Sierra Leone and the Extraordinary Chamber of the Courts in Cambodia). Financial constraints drastically undermine the ability to effectively and independently provide justice for victims. The example of the Cambodian model also shows that internationalized structures which are integrated in the

national justice system can be exposed to a *considerable risk of undue influencing* which impedes the impartial delivery of justice.

It is noteworthy that the UN Commission of Inquiry on Syria, in its February 2013 report, concluded that the ICC is the most appropriate judicial institution for the fight against impunity in Syria and enumerated a series of reasons why an *ad hoc* entity would not present a viable option to adequately ensure accountability for crimes committed in Syria.

With the foregoing in mind, there are some concrete steps that could be taken to signal greater support for justice in Syria. Human Rights Watch would like to suggest:

First, the administration has already started supporting documentation efforts, including the preservation of potential evidence. This process will continue to be very important going forward and could be vital to future domestic and international accountability processes. Congress should support these efforts.

Second, the US government should make clear its position on the ICC instead of demurring behind concerns that Russia and/or China would veto any Security Council resolution which aimed to refer the situation in Syria to the ICC. While I recognize the ICC is often considered a lightning rod of sorts for many in this body, there is simply no reason to reject the idea out of pocket. There are now 64 countries supporting such a referral, including six Security Council members, so the administration would be smart to at least begin talking about how the court can play a constructive role. In this connection, the administration's overall justice strategy on Syria should take the ICC into account. Congress is well placed to press the administration on this point and I hope these subcommittees will consider doing so.

Thank you.

Mr. SMITH. Thank you very much, Mr. Dicker, for your testimony.

Chairman, would you like to—Chairman Chabot I think——

Mr. CHABOT. Thank you, Mr. Chairman.

Mr. SMITH [continuing]. You said you had to——

Mr. CHABOT. I do have a flight to catch, so I will try to be relatively brief. Just a couple of questions. This week international news sources have been highlighting President Assad's forces laying siege to suburbs near Damascus, and the resulting starvation of women and children.

How do you determine how far up and how far down you go? For example, the soldiers say at the checkpoints that are blocking people from coming in, do they go to the court? Who do you—and I will just ask one of you, if you want to take that on. How is that determination made?

Mr. CRANE. Well, thank you for that question, Mr. Chairman. I think it goes to really the challenge that one has when one is trying to seek justice for victims of any atrocity anywhere. It also depends on the mandate of the court itself.

For example, if it was a local Syrian court, then they would be looking at all of the perpetrators and to include the privates, the sergeants, what have you, whatever that particular perpetrator may be. As you go up the various options, which I highlighted to the subcommittees, then it just depends on the mandate.

The Special Court for Sierra Leone's mandate was prosecute those who bear the greatest responsibility, those who created the conditions—aided, abetted, and caused—these horror stories. So we, in West Africa, did not go after the foot soldier. We went after the leaders, very much like Nuremberg where we went after the top 23 so to speak.

So it varies. Everybody is culpable. The challenge that we have here is we really can't prosecute everyone. It is almost impossible—one, is to find out exactly who pulled the triggers, what have you, but it is just politically not sustainable to prosecute all of the individuals who commit these horrific crimes.

Mr. CHABOT. Okay. Thank you.

Mr. CRANE. So, therefore, justice will be done, but I am not sure that we would go all the way down to the individual private at that particular time.

Mr. CHABOT. Thank you. Mr. Rademaker, let me go to you next. You had made a reference, and I would just like to kind of maybe put it in the form of a question. The current administration had in effect called for Assad to step aside early on, and then Assad used his chemical weapons against his own people. And now we are working with the Russians and with Assad, and you don't hear too much anymore about, "Well, he has got to go." Now we are working with the guy.

What message does that send to other rogue leaders across the globe who do nasty things sometimes to their own people? Sometimes if they do horrific things, maybe they are going to end up getting rewarded for it. Is that a message we don't necessarily want to send, but maybe it was sent in this case?

Mr. RADEMAKER. Yes. Chairman Chabot, regrettably, I think the suggestion of your question is correct. It will be interesting to see

how historians look back on this current—the last few months of what happened in Syria and how they explain or interpret the sequence of events.

But I worry that the historical judgment will be that President Assad very cleverly decided to use chemical weapons against his civilian population, killed about 1,500 people, and the consequence of that was that he was able to remain in power, that he pivoted and he focused the attention of the international community on the existence of his chemical weapons, he volunteered to get rid of them, but as a practical matter the price of his cooperation in getting rid of those chemical weapons had to be that he would remain in power.

I don't think that the Obama administration today would concede that their policy on the question of the outcome they would like to see in Syria has changed. I suspect they would still say, "No, no, we want to bring about the removal of President Assad and his replacement by a democratic government." But as we and the Russians work with that very government to dismantle these chemical weapons over a long period of time, and, you know, you heard my resume, I used to be in charge of chemical weapons dismantlement for the State Department, you know, we are still dismantling our chemical weapons here in the United States.

It is phenomenally costly, phenomenally time-consuming, and I don't know what the latest estimates are for Syria, but I would say multiply by two or three whatever people are saying because that is—in the real world that is how long it will take. And so this is a process that will play out over a long period of time, and I do think the de facto change in policy has been disconcerting.

I mean, there have been a lot of stories recently about how upset the Saudis are, because they thought America was going in one direction and now it seems to be going in a different direction, both respect to Syria and also potentially with respect to Iran. And it is really an astonishing turn of events that we have witnessed.

Mr. CHABOT. Thank you. Mr. Chairman, if I have time for one more question.

Mr. SMITH. Of course. Please.

Mr. CHABOT. Okay. Thank you. Maybe I will address this to the other two panel members who I didn't ask yet. So there has been some media attention recently to Syrian snipers targeting pregnant women for sport, apparently. Is there evidence? Could you cite previous examples where either a criminal court has been set up and it actually does modify the behavior of people on the ground? You know, if I do this, I may be prosecuted for this? So the people do perhaps not carry out atrocities that they might otherwise have carried out? Is there something you can tell us along those lines, either one or both?

Thank you.

Mr. DICKER. Thank you. What comes to mind is, first and foremost, the handling or recruitment of child soldiers in Eastern Congo, Congressman. After the indictment issued or charges issued against a Congolese warlord by the International Criminal Court, our researchers in eastern Congo reported a release of large numbers of child soldiers forcibly recruited in many instances into armed militias, precisely because of that charge against one of

their own who was now in the dock at the International Criminal Court. That is one example.

I want to be careful in not overstating, however, the deterrent effect of justice because, let us be frank, it is new and it is fragile. But I think part of the value of early—"early," 2½ years after the start of the conflict—but quick action through a referral to the ICC is it will put those most responsible on notice that they could face criminal charges. I think that stigmatization would be very helpful.

Mr. CHABOT. Thank you. Mr. White, did you want to add anything to that?

Mr. WHITE. Yes, just real quickly. From my own personal experience, not only as a Federal agent but certainly serving in West Africa where we had some of the worst atrocities that you could ever imagine occur, clearly accountability will address the impunity issue. If you do not think that you will be held accountable, you will continue to perpetrate these crimes.

I know many of the rebels that I personally interviewed, and some of which became insiders, had committed serious atrocities, from determining whether a pregnant lady, for fun, had a boy or a girl, they would take a 5,000 leone bet between the two rebels. "Is it a boy, or is it a girl? I will bet you 5,000 leones it is a boy." And they would determine that by taking a machete and slicing open a pregnant woman and taking the unborn child and determining whether or not it was a boy or girl and then discarding it as a piece of rubbish.

I would submit to you that things have changed in Sierra Leone, and holding them accountable, just like we did Charles Taylor, that is the way to do it, because once they know that they are not above the law and you do hold them accountable, no matter where you are, that is why I support the singularly focused tribunal. You get laser-focused on those that are committing the crimes. You hold them accountable, and you tell them that you are not going to be able to do this with impunity anymore.

I think we did it. Things are calm in Sierra Leone. I don't kid myself that it won't come back. But that is how you do it. And I know from talking to these rebels personally they were scared to death of being prosecuted. Once we landed and we showed up, and they knew that they were going to be held accountable, things started to change. That is what I submit to you.

Mr. CHABOT. Thank you. And I would like to thank Chairman Smith for offering this legislation. I would like to commend him for that.

And I yield back.

Mr. SMITH. Thank you very much, Chairman Chabot.

Just a couple of questions to start off with. Mr. Crane, in looking—and I did read extensively your Syrian Accountability Project—one of the questions that I still have, who else is doing something that might be parallel to what you are doing? Because I know you have many stakeholders and many people who are part of this effort.

And I am wondering, for purposes of prosecution, how legally actionable is the evidence that is currently being collected? You know, as you cite a time and place when people were butchered or

where mass rape occurred, you know, Dr. White focused extensively on the centrality of the witness.

And I remember when we were debating the Yugoslav war crimes tribunal here. We had—as a matter of fact, one of the studies, the Shell study, suggested that we were losing and almost like the dew in the early morning as the sun came out. We were actually losing witnesses—forgetfulness, some were dying, some were deciding "I have had enough of this, I am so traumatized." So time is of the essence to benignly capture the witness, so that he or she or they can bear witness to the atrocities in a meaningful way.

So I am wondering how much of that information/witness files are we assembling that potentially could be turned over to prosecutors with all of the protections of a witness protection effort underway?

Mr. CRANE. Thank you for the question, Mr. Chairman. First, it is important to note that there are good-hearted people around the world trying to seek justice for the people of Syria. And they are doing it in many important ways. The Syrian Accountability Project is an attempt to take almost terabytes of information that is being gathered by these organizations and be a bridge between that information.

Some of it is credible; some of it is not. A lot of it is not. And build a bridge between this information and creating a mechanism, a cornerstone, by which a local prosecutor, a regional prosecutor, or an international prosecutor can then build a case-ready case against these individuals who commit war crimes and crimes against humanity.

So that is our purpose. It is, to my knowledge, the only effort, but backed by a lot of good people. And I am honored to be representing all of them, to include students from Syracuse University College of Law who were here today who are working diligently pro bono also to assist.

But, again, we are approaching this practically. Again, with Dr. White and myself and many others from around the world, we are looking at these from a practical point of view, not an academic exercise. Can this case be proven? Can we prosecute, regardless of what the forum may be? And the answer is yes, it can be done, and it will be done.

Justice must happen for the people of Syria. How that characterizes itself goes the panoply from the ICC, a variation of that, all the way down to a local court. Your resolution I think is important in that it lists the central item of that resolution, and that is justice for the people of Syria. And I applaud these subcommittees and you, Mr. Chairman, for bringing the attention of the American people to this, and that is justice for the people of Syria.

But at the end of the day, this case can be tried in an appropriate forum so that justice can be done openly and fairly. And the Syrian Accountability Project is just an effort, not the effort, but an effort to assist that prosecutor in that justice mechanism.

Mr. SMITH. Dr. White, did you want to comment?

Mr. WHITE. No, I don't really having anything to contribute.

Mr. SMITH. If I could ask you, Dr. White, then, in your comments, your testimony, you really went into great length about how important it is for the prosecutors, for the court, to establish a

trust relationship with the victims. You also point out, and I know that, at least from witnesses that I have met with, as a matter of fact, I chaired a number of hearings. One of our witnesses brought women with her who had been raped in Bosnia, and that was Bianca Jagger.

And when I met with the women, the trauma and the emotional just pain and suffering and agony that they conveyed was just—it was numbing. And then they were then being called upon to be part of a prosecution, in the case of at least one of those women, you know, very, very difficult. And I am wondering, over time, particularly as, God willing, healing sets in with someone who has been so traumatized, to relive it, all the more reason why the sooner the better.

Delay is denial, because, again, important witnesses who may have been hurt themselves or observed it are less likely to come forward. I think the longer this clock plays out—Professor Rabkin said that it is out of the question to launch while Assad is in power.

I think if we follow that, and I think Secretary Rademaker's point about the disingenuousness of standing up the Yugoslav court, I remember contemporaneously as well it was like there was a cynical side to that, but there was also many of us who just wanted it to work and to work, you know, robustly and to hold the bad actors to account. But in lieu of doing nothing, that was their default.

So the question is, if you could really elaborate a little bit further—and anyone who would like to take it—on the importance of the witness. And, again, looking at your suggestions, Mr. Crane, you said the domestic option is probably—it is the preferred option, but of course that has a built-in delay because there is no peace, sustainable peace, as you point out in order for all of that to happen.

And you talked about the third option, a regional court, with Arabs trying Arabs, Muslims trying Muslims, and Syrians trying Syrians, as a preferred option rather than the Westerners. Of course there could be a support capacity there, you know, to help stand this thing up and as well as financial.

But if you could talk about witnesses even further, because I don't think that sense of urgency is understood in Europe, the United States, that—like to do a warning. These witnesses will go away.

Mr. WHITE. Well, you are absolutely right, and that is why in my written testimony I strongly encourage this. I know there is a lot of debate as to how this should be set up, whether it is the ICC, should it be a separate standalone, should it be domestic, I would just make the point today that whatever forum is pursued it must be done immediately, because these witnesses will dry up, not only for fear of being harmed but some will be killed.

And also, if they don't feel that you are there—and this is why it took us months and almost years to be able to extract the trust in the witnesses. And if you are not there, they are not going to come forward because they have to be fearful that they will lose their life and life of other family members.

So the sense of urgency, if you do want to collect the evidence, which I mentioned is principally witness testimony, it needs to be done in a very short order.

Mr. CRANE. I would support that statement. That is one of the reasons why this international effort, the Syrian Accountability Project, is putting in place on the shelf quickly so that when it is time, when it makes sense, we can move forward quickly. In any criminal situation, you do have to preserve evidence. You may need to make sure that witnesses are protected and that witnesses are alive for the future court.

So I think that it is important for these subcommittees to understand that is why we have the Syrian Accountability Project, and the Chautauqua Blueprint, copies of which these subcommittees have, which is a statutory framework to create any options that we have been talking about this afternoon, to include the contemplation that perhaps the ICC prosecuting those who bear the greatest responsibility, but the statute itself also contemplates the prosecution of the next 100.

So there is a combination there, but I can assure you that appropriate expediency is in the back of our mind. We want to have this. It has never been done before, quite like this. We usually wait, then we react, then we decide. What we are trying to do here is to have something in place so that when the appropriate political solution is finished then the international community, the local and regional groups, are ready to in fact put in place an appropriate justice mechanism.

Mr. SMITH. Well, I think all of us are greatly indebted to the work that you are doing to get this in place, so we don't wait until after the fact. So thank you, and of course all of you are bringing your extensive experience to bear on trying to find solutions, and the subcommittees deeply appreciate that.

One of the things that Professor Rabkin said that I was hoping to ask him about was that the work of the tribunals is not well received. I was in Vukovar a month before it fell with Congressman Frank Wolf. And the "Vukovar Three" were eventually held to account at the tribunal. The atrocities that were committed were horrible.

Well, I, along with Mr. Wolf, have met with a number of people who were victims, and they couldn't have been happier with the outcome that finally somebody was held to account. And the same goes for Mladic and certainly Milosevic, who died. I mean, it seems to me that the snapshot of, well, somebody might be unhappy, well, the news media that was pro-government and pro-Serbia and pro-Milosevic might not be happy.

And the disinformation and the propaganda, you know, it takes a while to wean people away from that. But, you know, it seems to me that well received ought to be seen in a larger timeframe as well, because when you hold these people to account, future generations as well as the victims, do feel a sense of justice has prevailed.

And I wonder if any of you have any comment on that, because I was struck by that. And whether or not, David Crane and Dr. White, you experienced that yourselves. I mean, I know that you had a tremendous rapport with the people. I remember talking to you contemporaneously. You went out and held town meetings and

talked to people to explain the process, very often at grave risk to your own security, but you did it anyway. And so as explained, it seems to me that potential hurdle could be overcome as well.

Yes?

Mr. DICKER. Mr. Chairman, if I may start this ball rolling, two thoughts here. One I think there is a need to push these international and internationalized mechanisms to recognize their responsibility in making what happens in the courtroom accessible to the communities most affected by the crimes. And that is the challenge for all of these institutions, all the more so, because they render justice in highly divisive, polarized situations, as you were suggesting.

And I think it is important to remember, while we often and should cite the Nuremberg precedent, it wasn't as if those trials the following day seemed to bring the German people to confront the crimes committed in their name. This takes a while for these lessons, for this confronting who did what for what reasons, to really seep down.

And I think we have got to allow a bit of a timeframe and not impose on it snap judgments. I think that is very important.

Mr. SMITH. Yes, Mr. Crane.

Mr. CRANE. I have got two examples of why and how justice for people who are victims of horrors that are almost undescribable in any forum, victims of atrocity. But when I unsealed the indictment against sitting President Charles Taylor in June 2003, it created a beginning, a political dialogue, as well as a legal process that at the end of this, over a period of 2 years, even though there was a lot of diplomatic and political angst, it laid a foundation by which the Liberian people could elect for the first time, freely and without fear, a President, a female President, the first female President in the history of Africa, and it allowed Liberia to move forward with that new election.

The indictment of Charles Taylor created that political, legal, practical condition by which Liberia possibly may have a new future. That is a specific and direct result of an international tribunal seeking justice. So that indictment created that possibility. But for that indictment, it would not have happened.

I also want to underscore, and I have said this probably too many times in this hearing, and I do appreciate this time, but let me just give you a small vignette that brings it home. Yes, I did walk the countryside. In fact, Richard Dicker and I and Al White also walked the countryside together, listening to the people of Sierra Leone tell us what took place.

I was in Makeni, the headquarters of the infamous Revolutionary United Front, Forday Sankoh's group, and Samuel Bockarie, the Mosquito, because he liked to drink the blood of his victims. And I was giving a town hall meeting in a school for the disabled, many of them disabled by the RUF themselves, blinded, maimed, mutilated. And I was—as is my custom, I stood in the middle of the group as opposed to at a high table. I wanted to let them know that I am listening to them at their level.

And a young man stood up. He was deafened by the RUF intentionally, and he was also maimed. He looked me dead in the eye and he said, "I killed people. I am sorry. I didn't mean it." And he

fell into my arms weeping. And as he wept, I looked over and another young woman stood up, about 20 years old, holding her child. She was missing a vast portion of her face, and through cracked lips clearly looked me in the eye as well, her only remaining eye, and said, "Seek justice for us."

So this is why we do this. Regardless of comments by individuals, this is why we do it. It is for the victims. It is for the voiceless who cannot speak for themselves. So this is an honorable thing to do.

And modern international criminal law is not perfect. It is two steps forward, one step back. But it needs to be supported in whatever capacity it is so the voiceless currently in Syria can have some sense that life can go on under the rule of law.

Mr. SMITH. Yes, Dr. White.

Mr. WHITE. I just want to add one quick comment. I think right now we could build on the recent example of Charles Taylor as a former sitting head of state. With his conviction in April 2012, in his recent appeals that was upheld—11 counts and a 50-year conviction. Right now we have credibility that we can bring people to justice and hold them accountable.

And just one quick story that I will not forget, as David pointed out. We were out in the countryside, not only Sierra Leone but Liberia, and when Charles Taylor left Liberia on August 11, 2003, he looked the people in the eye and said, "God willing, I will be back." That sent a shiver down the spine of people not only in Liberia but Sierra Leone, and they were fearful he was never coming back. And my witnesses repeatedly would call me and say, "Doc, Papay cannot come back." I said, "I promise you Papay will not be coming back."

And when we were at The Hague during—his recent appeals verdict was read. We were in the chambers. I had a number of witnesses call me from Sierra Leone and Liberia, and for the first time in their lives, at least in modern times, the last 10, 15 years, they could breathe a sigh of relief because they said, "Doc, you said he is not coming back. Now I can go to sleep tonight, because I know he is not coming back." That is about as powerful as you can get, that you know you can't get everybody, but you need to hold these people accountable and it needs to happen quickly.

We have learned a lot of lessons. This doesn't have to take a long time to get done. However it turns out, it needs to get started, and it needs to get started now.

Thank you.

Mr. SMITH. So would that add additional merit to Secretary Rademaker's argument that Article 16 of the Rome Statute makes it less likely that a guy like Charles Taylor could, on the interim basis, go to Nigeria and then be apprehended to The Hague under the Sierra Leone Special Court and then prosecuted?

Is the ICC that rigid? I mean, one of the additional points—and maybe, Secretary Rademaker, you might want to further elaborate on this—and why I believe that the Russians—and I could be wrong, but why I believe the Russians are less likely to obstruct the creation of such a court is that it holds all sides to account.

And we know the al-Qaeda operatives and many of the Syrian rebels are doing horrific things. And, you know, when you are getting tortured you don't say, "Hey, are you a leftist or a rightist? Or

anybody in between?" You know that it hurts and, sadly, often leads to your demise.

So does that lend credibility to why the ICC might not be the suitable means for this to go forward?

Mr. RADEMAKER. I think the answer to that question is yes. We have talked about a number of historical situations here. I think a key distinction between the situation in Syria today and, for example, the one in Sierra Leone when you gentlemen began your work was Charles Taylor was no longer in power.

In Syria, President Assad is still in power, and that creates a fundamentally different dynamic. And if the desire is to bring him and perpetrators of gross violations of human rights under him to justice, it is a much more challenging situation than if these individuals have already given up power.

And I believe that from a purely humanitarian point of view the number one priority is to persuade them—well, to bring about a change, so that they leave power and are replaced by hopefully more democratic, more tolerant officials. And that to me has to be the primary objective, and we are going to achieve that through the use of diplomatic tools.

And so I think the first question is, of the various options that we are looking at, how effective would they be as diplomatic tools? And they all—all of the options suffer from some of the same problems. You know, most of them that we have talked about would require Security Council approval, or they would require a change in government, so that the domestic judicial system could function, for example.

But as we look at those tools and evaluate their potential usefulness diplomatically, I submit that the most useful one diplomatically for bringing about a political transition in Syria is the ad hoc tribunal. The potential use of the International Criminal Court will backfire as a diplomatic tool. It will guarantee and I mean that literally, it will guarantee that Assad will not leave peacefully, because you can imagine the conversation.

Diplomats go to him and say, "You know, we think it is time for you to go. Will you please leave?" And his first question will be, "What will become of me once I leave? You have sicced the International Criminal Court on me. Can you make that go away?"

And I know what the answer to that question is. The answer to that question will be, "We can make it go away for 1 year. The Security Council will adopt a resolution. We guarantee you the Security Council will adopt a resolution that defers the investigation of your case by the International Criminal Court for 1 year."

And you can imagine President Assad's followup question will be, "Well, that is very good. What will happen at the end of that year? I am interested because we are talking about my life and my freedom." And the answer is—I mean, if we are leaning far forward, the answer will be, "Well, we guarantee to use our best efforts a year from now to persuade a majority of the members of the Security Council, including all five of the permanent members, to extend that deferral by another year."

And he will say, "Can you guarantee that they will extend that deferral for another year?" And the answer will be, "Well, no, we

can't guarantee that, but we promise to work really hard to try and achieve that."

And then he will say, "And what happens a year later? You are going to work really hard a year later." You know, he would have to be really stupid to buy the notion that he is going to escape International Criminal Court prosecution, that for the rest of his life, once a year, the United National Security Council is going to adopt a resolution deferring by yet another year the ICC prosecution of his case.

And you can imagine all kinds of problems. You know, one permanent member can object, and that is it. You know, a veto would restore ICC jurisdiction. So someone in his case will never buy the notion that the ICC can be called off, and that to me is a fatal flaw in the design of the Rome Statute and of the International Criminal Court. It makes the International Criminal Court, the most useful, the most dangerous tool, the most counterproductive tool we could possibly deploy in the current situation.

An ad hoc tribunal could be constructed differently. It is not subject to Article 16 of the Rome Statute, and so it could be designed such that as part of a diplomatic settlement where Assad agrees to give up and retire peacefully, the case is withdrawn, the prosecutor stood down.

I submit that ending the Civil War in Syria is more important than sending the people who have committed horrible war crimes up until now to jail, especially when we understand that no international institution, no international mechanism, is ever going to hold more than 100 or 200 of these individuals accountable. The vast majority will either escape justice—the vast majority of people who have committed these kinds of offenses in Syria will either escape justice entirely or, if they are held accountable, it will be through the courts of Syria under a different government, because in the—you know, the Yugoslavia tribunal has handled fewer than 200 cases, the Rwanda tribunal fewer than 100.

Eight hundred thousand people died in Rwanda, and most of them died because they were hacked to death by people wielding machetes. I mean, I can assure you that more than 100 people were wielding machetes to kill 800,000 people in Rwanda. But the Rwanda tribunal, because of capacity constraints, has only been able to look at fewer than 100 cases.

So, you know, it is a frustrating situation, but, you know, the answer the Europeans are going to give us on this problem is it has got to be the ICC. And I think that is a prescription for prolonging the conflict in Syria, which is—would be a disastrous—it is a cure that would be far worse than the disease.

Mr. DICKER. If I may, because I think Secretary Rademaker puts some very important issues on the table that really do need to be addressed—the interface, if you will, between justice and peace. The imperative behind this hearing is trying to bring some redress for those who have suffered horrifically in Syria.

I think we make a misstep if reflexively we pit justice and peace against one another. Certainly, we want both. We want an end to the killing and blood fit in Syria. There is no question of that. I think it is how we manage those two objectives, and manage them

smartly, without throwing justice under the bus, and I believe that it can be done.

I think a good example of that, two good examples, though one with individuals in power, was the Dayton negotiations wherein Slobodan Milosevic attended, Radovan Karadzic. Ratko Mladic did not attend because, as you know, they were indictees. That peace negotiation went forward.

And the second example to cite is the one that David Crane is most familiar with, the talks on Charles Taylor's departure from power that were taking place in Accra when the prosecutor unsealed his arrest warrant or indictment against Charles Taylor. I think it is possible to manage these two carefully, smartly, not just throw one against the other. So I would take some exception, of course, to what Secretary Rademaker said.

Lastly, I would fear for any tribunal that had indicted Bashar al-Assad to withdraw the indictment because a peace settlement had been achieved. Let us go back to the victims in Aleppo or Daraa. What will be the response and the confidence in justice if, as a result of a political settlement, a prosecutor says, "Hey, forget it. Here is your get out of jail free card." I think we can do better than that.

Thank you.

Mr. SMITH. Mr. Connolly.

Mr. CONNOLLY. Thank you, Mr. Chairman, and thank you for holding this hearing. Fascinating discussion.

I guess I want to pick up on what Secretary Rademaker was getting at, which I think is efficacy. And efficacy is, of course, determined by the goal. If the goal is defined as let us end the bloodshed in Syria, then it seems to me that Secretary Rademaker has a point that even if we have to hold our nose with respect to the status of Bashar al-Assad, the greater good is served by the ending of bloodshed and the succession of a government that tries to be inclusive.

The problem with that is it avoids closure, which Dr. White and Dr. Crane were both—or Professor Crane were both talking about, how important that was in your own experience both in Sierra Leone and in Liberia.

We have models of closure. Some are violent. The Ceausescus were apprehended fleeing Romania and were summarily executed. Ghadafi was captured and summarily executed. Saddam Hussein was captured by U.S. troops, interrogated, handed over to the Iraqi authorities, I guess tried, and executed, in a process, however we might do such a process.

All of those examples do not escape the attention of Mr. Assad, presumably. And it seems to me the choice for him is at least, you know, he has three options he has got to look at. One is the Ghadafi choice, in terms of how it ends. And if that is what you fear, if that is what you really think is the threat you face, then you double down on your military option to try to avoid that fate.

If you think that there is another option, that you are facing unpalatable options, then maybe either the ICC or an ad hoc tribunal is a better option, because at least you continue to breathe.

The third, which you suggest, Secretary Rademaker, which I think unlikely but it could happen, is you get a get out of jail card

pass through the Security Council or some mechanism similar to that.

If those are your three options, Secretary Rademaker, at some point if there is a deterioration in the military situation in Syria, doesn't Assad have to look at one of those three options even though none of them are very palatable?

Mr. RADEMAKER. Well, I think there was a very important "if" embedded there in the questions you just asked. I think today President Assad is looking at a fourth option. He is looking at fighting and winning.

Mr. CONNOLLY. Right.

Mr. RADEMAKER. And, you know, if he starts to lose and it becomes——

Mr. CONNOLLY. Yes.

Mr. RADEMAKER [continuing]. That he will lose——

Mr. CONNOLLY. Excuse me. I predicated my question with "if the situation deteriorates militarily."

Mr. RADEMAKER. Right. Okay. Well, I am pointing out that that is a hypothetical situation because——

Mr. CONNOLLY. I understand.

Mr. RADEMAKER [continuing]. By all accounts today the military balance is sort of tipped in his direction. And, you know, I don't think Ghadafi's plan initially was to be hunted down and killed in the street. I think he thought he could fight to the end and, he believed, prevail. And I think there is no reason today for President Assad to think that he is losing. I think there is a lot of evidence that suggests at the moment he is doing just fine.

And so, you know, we can all pick our analogies here, so let me throw one out. You know, yes, these are unpalatable choices, and letting, you know, justice go unrequited is unpalatable, especially to the victims. But these kinds of choices get made every day, including in our own legal system.

And, you know, plea bargaining—I am sure we have some former prosecutors here in the room—I mean, plea bargains happen in our system all the time, sometimes for purely legal reasons, sometimes for other reasons.

I noticed in the news this morning there were protests in Israel today because Prime Minister Netanyahu is releasing, I think, 40 Palestinians convicted of horrific crimes against the Israelis. Why is he releasing these people, you know, long before their criminal sentences have been served? Well, I mean, I think the reason he is releasing them is because Secretary of State John Kerry broke his arm to release them, because he wants to energize the peace process and get the Palestinians engaged in negotiations with Israel.

That was the judgment of the Obama administration, to strongly lean on the Government of Israel to release terrorists, convicted terrorists, from Israeli prison because that would yield a benefit, they believed, in a diplomatic process that they think is very important. And Netanyahu capitulated in the face of that pressure from the Obama administration.

Now, was the Obama administration wrong? Was Netanyahu wrong? I think if you adhere to the line that Mr. Dicker just put forward, yes, they were wrong, because there are victims protesting

in Israel today that the perpetrators of horrific crimes against their family members are being let go. But the policy of the United States is to favor that, because we see more important issues at stake.

Now, you know, so that is the analogy I put forward for us to think about. You know, don't condemn my idea unless you are prepared to condemn what Secretary Kerry has foisted on Prime Minister Netanyahu.

Mr. CONNOLLY. Yes. I don't think anyone was condemning your idea. I think we were trying to explore it.

Mr. RADEMAKER. Okay.

Mr. CONNOLLY. Professor Crane, Dr. White, what about that? You were making the case that—rather forcefully that there is a real deterrent effect just with the threat of prosecution, and even more strongly so once in fact the indictment is handed down.

Secretary Rademaker suggests the opposite, that actually it could force Assad to figure he has no other escape route other than doubling down to the military situation, and actually, you know, perpetrating even more violence and crime against humanity in Syria. What about that, that it could have the unintended effect of actually worsening a situation rather than the deterrent effect you described? And let us stick to Assad and Syria for a minute.

Mr. CRANE. Certainly. These aren't cookie-cutter approaches and concepts that we are offering these subcommittees. The Secretary is correct in that there has to be a political, as well as a judicial, as well as a diplomatic mechanism by which the horror that is going on in Syria ends.

We had a civil war going on in Liberia when Charles Taylor—when I unsealed the indictment and Charles Taylor was removed. The political solution at the time, even though we were ready to actually receive him, to prosecute him, was to move him off into another location for a couple of years. I can see potentially, and it is just the potential, that that happen, that he be removed, he agree to leave, and that he be removed and a diplomatic and political solution for Syria happens.

But over time perhaps a legal solution is also worked out, and that is what happened with Charles Taylor. He was handed over, but it is a political decision. The bright red thread of all of this, Congressman Connolly—and, by the way, you used to be my Congressman in northern Virginia. I moved to North Carolina. My apologies, but——

Mr. CONNOLLY. Lord Almighty.

Mr. CRANE. But, you know, the bottom line, the bright red thread of all of this is politics. We have a procedure, this jurisprudence, the experience to prosecute Assad and anybody else that commits these atrocities. But it won't be a legal decision that happens related to it, however this manifests itself, which could be anything in between. It will be a political decision to end this.

Mr. CONNOLLY. But, Professor Crane, if I may—and I want to hear Dr. White's response as well—but Secretary Rademaker makes a point that has to be addressed. But what if, despite the best of intentions and the need for closure from victims, by taking this action we worsen the situation and we actually have him dig in his heels, especially in a situation where, as the Secretary points

out, militarily he seems at the moment to actually be on the upswing.

Mr. CRANE. Well, one is that I am not advocating that we have a court now, create a court, indict the individual either through the ICC, what have you. I think we have to have a political solution, a cease-fire, and a stabilization of the situation. And I think that is important.

But there also has to be justice. It is——

Mr. CONNOLLY. But what is his motivation to do that, if he is prevailing on the battlefield, and he knows what awaits him from a cease fire and a negotiated settlement, is, you know, prosecution in some kind of international court of justice, whether ad hoc or the ICC, and an unpleasant fate upon conviction?

Mr. CRANE. Well, that is a great question, because the bottom line is that very well could happen. There are several scenarios, from a peaceful settlement all the way to what I call the armageddon scenario where he goes down like Hitler trying to yield his—put Syria in flames and everybody—everything in between.

We might wake up tomorrow morning, Congressman, and find out that he is in Russia or Iran, he has quietly left. That is another scenario. This is kaleidoscopic. You know, the "what ifs" can certainly be argued against any kind of justice. At the end of the day, there is going to have to be some justice, whether it is Assad or his henchmen or those who perpetrate the crimes. At the end of the day, the international community may say, "Well, it won't be Assad, at least for now; it may be others."

It is really going to be, at the end of the day, not a legal one, but a political one. And I am certainly not advocating that we start a justice process now. I do think there has to be, whatever that may be, a type of political settlement. But what we are doing is just, should the decision be made that justice be done, in whatever capacity that is, greatest responsibility, everybody else. Then, we have that capability.

I know I didn't answer your question, because I don't really have an answer to be honest with you.

Mr. CONNOLLY. Dr. White.

Mr. WHITE. Certainly, there will be some political input to this. But I think—and one of them will be case by case, but I would still argue, as a former Federal agent, that we never ran away from justice. And plea bargains, as he rightly states, comes in many different forms.

But had we not indicted Charles Taylor and unsealed it, he would not have left. Okay? And, look, we have got al-Bashir, we have all of these other people, that is where we have a credibility issue right now. And I will just be candid: That is one of the issues facing the ICC right now is not bringing people like this to justice.

At least if it is singularly targeted, singularly focused, and you are dealing with the victims, up there you are in The Hague, you are not really talking to the people, so the victims get lost. But there is two other things you can do. I think justice still needs to be pursued.

I can tell you right now, many people wanted us to drop the indictment of Charles Taylor and this man held firm. Okay? We just

did not cave in to that. We did the right thing for the people, and it all worked out.

But there is another process that we can go through for the victims, and we had it in Sierra Leone and they had it in South Africa, and that was the Truth and Reconciliation Commission. It is not perfect, but it does allow the victims to come forward, face their perpetrators, and have their day in a public court which is another mechanism when these atrocities occur.

So you have retributive justice and restorative justice. So those are the two mechanisms that need to be thought through, and they are very different. They are very complex. But you can't let these people escape justice for just the fear of not being—"Okay. If I agree to this, I am not going to get prosecuted." That should be after the fact, that should be part of any sentence or any—perhaps in the process along the way taken into consideration.

But I would never remove the vehicle of justice along the way. So restorative and retributive justice are the keys.

Mr. CONNOLLY. Secretary Rademaker, you look like you want to respond.

Mr. RADEMAKER. Not so much a response as just an additional point that I think might be useful for everyone. Dr. White just referred to the situation in Sudan where President al-Bashir is under ICC indictment. He has been indicted since I think 2008, so he was indicted 5 years ago for the first time. He was indicted on a second count in 2010, so he has been indicted twice.

And I would submit that one of the reasons he is still there is because of the ICC indictment, that he, like Ghadafi, like potentially President Assad in Syria, if he were to be indicated by the ICC, he has been denied the option of a graceful exit, which is the option that President Mubarak was able to avail himself of in Egypt, and former President Ben Ali of Tunisia, he was able to go into exile, but——

Mr. CONNOLLY. Idi Amin.

Mr. RADEMAKER. Idi Amin, who was still living in Saudi Arabia. But what I wanted to do was read two quotes, which I think are informative, because with the Darfur crisis we have had a series of United States special envoys whose job it has been to solve the Darfur crisis and hopefully bring about a political transition in Khartoum and the replacement of the al-Bashir government.

And so in the Bush administration one of the special envoys was Andrew Natsios, former USAID Administrator. At the time of the first ICC indictment of President al-Bashir, Andrew Natsios said the following: "The regime will now avoid any compromise or anything that would weaken their already weakened position," because if they are forced from office they face trials before the ICC.

So that was after the first indictment. Two years later we had had a change in administration, we had a new Special Envoy, Scott Gration, President Obama's special envoy. At the time of the second indictment, Scott Gration said the following about the ICC action, "that it will"—and I am quoting—"will make my mission more difficult and challenging."

I mean, these are the diplomats vested with responsibility by the President of the United States to try and solve, through diplomatic means, the Darfur crisis. One is a Republican; one is a Democrat.

They agree on one thing—the ICC and its criminal indictment of a sitting President in Khartoum, with whom they were supposed to be negotiating to solve a humanitarian crisis, the ICC action made their work much more difficult, if not impossible.

And I would submit that to the extent anyone in Europe or elsewhere, or if Human Rights Watch wants to encourage us to bring in the International Criminal Court, they ought to listen to what some of the diplomats who experienced a similar move in a similar crisis a few years ago had to say about the upshot of ICC involvement.

Mr. CONNOLLY. And, finally, Mr. Dicker and then, Mr. Chairman, I am done. Thank you so much.

Mr. DICKER. Well, again, these are such fundamental points and so important to exchange ideas on. And, Congressman, I thank you for focusing on this theme.

I would say, one, we are at the start or early stages of a new era, if you will, and that is the potential liability of sitting heads of state or other senior officials for mass slaughter of civilians, the use of rape as a weapon of war, forced displacement of populations, et cetera. So this is a new development.

And I think the Secretary is absolutely accurate in his comment that, yes, it makes the work of diplomats more difficult. There is no question about that. But as law evolves, the challenges become greater for not only diplomats but officeholders. And I think that is a positive thing, because it is a better world where genocide is proscribed as a criminal act. Point one.

I think, again, we need to manage these tensions, and the Secretary has underscored the tensions, and they can exist, but we need to manage these tensions smartly. And my own reflections on the Darfur situation was when the arrest warrant was issued in 2009, there was quite a backlash that it would collapse the Comprehensive Peace Agreement in Sudan, that Bashir would pull out. No such thing happened.

I think we have got to be more thoughtful and careful-thinking and not just projecting reflexively, if you will, the worst-case scenario, though certainly I think we do need to take it into account, but really work our way around it. And I think that is essential not only to the furtherance of law but to the needs and aspirations of victims.

Thank you.

Mr. CONNOLLY. I would just say, in conclusion, I think all of you have made great points, and one is torn. I refer to the word I began with, which is efficacy. What is it we are seeking to accomplish? We have to, it seems to me, be on our guard about only making a point, even a moral point. Not that it is invalid, but while people are being killed that is an indulgence I am not sure they can afford. Maybe we can.

And the removal of Assad presumably is part of our goal. Who replaces him is a very problematic question. So as we use this tool, hopefully judiciously, I think Secretary Rademaker's caution is well taken, which is we must be careful that it not be counterproductive despite our good intentions, and the result being that we actually inflict even more harm on the people of Syria.

So we don't face easy choices here with this tool. We have examples where it worked. We also have examples where it led—well, in Sudan someone indicted not once, but twice, is still very much in power, entrenched, and arguably, according to our own diplomats, because we employed the tool, perhaps prematurely, perhaps too crudely, perhaps because it is too rigid. I don't know. But at least so far the story of Sudan counters our good experience in Liberia; it didn't work.

So what will work in Syria? And what is it we wish to achieve? Bringing Assad to justice as the only goal is obviously not satisfying. It can't be our only goal. I wish it were that simple. And so working through this thicket is going to be no easy task, but thank you all very much for your thoughts. Very, very enlightening.

Thank you, Mr. Chairman, for holding this hearing.

Mr. SMITH. Thank you very much, Mr. Connolly.

I just have one or two final questions. And you have been very generous with your time, and I deeply—we deeply appreciate it. Mr. Crane, in your testimony you pointed out that the ICC has a track record over the first decade that it is spotty, it is questionable, it lacks the capacity and political and diplomatic sophistication to handle such a mandate, coupled with the challenge of gaining jurisdiction over the atrocities.

The reality is that the ICC is just not up to the task. It can barely handle the current caseload and investigations. You also point out, and I would just note parenthetically, that Greg Sipkins and I, from September 22nd to the 24th, were in Jos in Nigeria and observing firsthand the atrocities committed by Boko Haram.

And we were advised—I did not know that before I went there—that the ICC is looking into the possibility of indicting or initiating investigations into some of the Boko Haram individuals, but they are talking about just less than the number of fingers on my right hand. And that was in July, and nothing has happened yet. Time is going on.

I would also note parenthetically as well that unless the Web site has been updated, there were 18 prosecutions, one conviction of an individual in the Democratic Republic of the Congo, yes, a number of indictments that are very significant, but very, very high-level people like President Bashir and others, Joseph Kony, but very little in terms of anything to show for it.

And I would also note you make a point, and I think it is an excellent point, about Arabs trying Arabs, Muslims trying Muslims, Syrians trying Syrians, as a preferred option. The effort could or would be supported—they are talking about the regional court—by the Arab League and Arab jurists supplemented by Syrian jurists.

If you look at the ICC list of judges, it is Kenya, France, Philippines, Mali, Nigeria, Argentina, Czech Republic, Dominican Republic, Germany, Finland, Botswana, United Kingdom, Japan, South Korea, Brazil, Italy, Bulgaria, Latvia, and Belgium. I don't see any Arabs among the lists of judges, making those who would sit less likely potentially to be acceptable.

So I wonder if you just might want to touch on that. Again, this capacity idea, Mr. Dicker points out that there could be delays in costs with an ad hoc or presumably with a regional as well. But it seems to me that the costs, if there is a will, far outweigh the

ongoing humanitarian debacle and crisis we are facing with all of those IDPs and refugees, not to mention the horrific spilling of blood.

So if money is an object, I mean, that would be absurd in my opinion. Delays—I mean, we have learned from the Special Court, from the ad hocs, we have—you know, if we can't apply quickly a lessons learned, shame on us. But it seems to be there is a lack of political will. By default, I would respectfully submit the commission on inquiry on Syria in February 2013 says, "Yes, go with the ICC."

But I think there is a better option, and I know you—and I deeply respect your view—disagree. But, again, Mr. Crane, if you could speak to that issue. I mean, look at those judges. None of them are Arabs. And, again, you did talk about the lack of capability on the part of the ICC.

Mr. CRANE. Well, I think, just to address the immediate question about Arab judges, unfortunately, even though we have I believe 125 nations who have ascribed to the Rome Statute, very few, if any at all, that I recall—Richard, you can correct me, but I don't know of any Arab state that actually has signed on to the Rome Statute. It is a vast blank in the world related to the Rome paradigm.

Be that as it may, then a judge, an Arab judge to put it euphemistically, would not necessarily be on that. Just like you wouldn't see an American or a Russian or a Chinese judge on the ICC is because they are not members of the state's party. And the Rome Statute contemplates that you must be a member of the state party that signed on to the Rome Statute to be in those capacities.

So that is still problematic in the sense of we don't have the important cultural gifts that the Muslim world, the Islamic world, brings to any table. And that would be problematic should the ICC have this referred to them.

In the general sense, that is my statement. I stand by that statement. I am a disappointed and concerned supporter of the ICC. I have seen it begin, I have worked with it, I want to see it succeed, and they have their challenges. And so I am also a pragmatist, because, again, I don't look at it as the ICC, or a hybrid, or an ad hoc.

I go back to what I have said throughout this afternoon and on the record for years. It is for and about the victims. And whatever mechanism that allows justice for the victims of any atrocity, then I am for that, whatever you want to call it, frankly.

So the ICC exists. It is part of a major international scheme signed onto by 125 countries. It is there. So my point is is that we have to support that concept, try to make it better, try to make it more efficient, seek justice for victims of atrocity in other ways as well. It is not the default. In fact, we tend to forget this at this table and elsewhere, the ICC is a court of last resort.

It was never designed to be always in the front row, always leading something. And I think that they have made a mistake about that, and that is my concern. That is really—they are always looking for something to be involved in, and in reality they should be waiting for something to be referred to them that is appropriate, the gravest of crimes.

The principle of complementarity is important. State's party should prosecute their own, or other parties, and we should be working on building the capacity of nations to prosecute their own, and that is why I think honestly, and with merit, that a Syrian type of court, internationalized or a pure domestic, in my mind bolsters the idea of the principle of complementarity. Let those who have been victims use their justice mechanism and criminal system to seek justice, or, if they can't or are unwilling or unable, then it be referred to the appropriate court such as International Criminal Court.

Mr. SMITH. Comments? If you could maybe for the record, because I am sure—maybe you have it readily at your hands—what the possible cost would be of a regional court or an ad hoc court. Do you have any sense of what the order of magnitude and cost would be?

Mr. CRANE. Well, let us just look at it anecdotally.

Mr. SMITH. Sure.

Mr. CRANE. The Special Court for Sierra Leone in general costs $25 million to $30 million a year. At first, when Dr. White and I first stepped off the airplane with three suitcases and our political assistant, which was the Special Court for Sierra Leone, on 7 August 2002, we were pretty cheap. But that first year was about $10 million. So we were averaging, give or take, $35 million.

It is my understanding that the ad hoc tribunals cost on the average of $150 million each per year, and you can multiply that by essentially 20 years and you can see the cost of that. The International Criminal Court's budget—Richard, correct me if I am wrong—but I believe it is around $150 million a year. So that is just a general balance of what these would cost just based on what the previous courts cost.

Mr. SMITH. Any final words? If not, I would like——

Mr. DICKER. If I may, Mr. Chairman.

Mr. SMITH. Of course.

Mr. DICKER. Just to say I think that we are strong supporters of the international court. We are not apologists for it either. And by that I mean certainly there have been problems. I think the court needs more political and diplomatic support, and it certainly will need that in handling a Syria referral. I think it is part of the evolving international justice system.

And looking down the road, unfortunately, with a simple standalone ad hoc tribunal, you are not likely, in the way that one would hope, to maximally strengthen what is a new and albeit fledgling struggling system. And I would say, sir, that I think that is argument for this government in supporting the emergence of this system.

Mr. SMITH. With respect, one of the takeaways that I had from the Sierra Leone court was it left physical plant structures, prosecutors who knew, investigators who learned from the best of the best, and with a country coming out of the terrible agony that Syria will have to emerge from it seems to me leaving behind, through a regional court or an ad hoc tribunal, that kind of capacity, you know, is far to be preferred to an ICC action that would occur at The Hague and would be largely separate from a domestic capacity consequence leaving behind. Am I right on that?

Mr. CRANE. Well, certainly, the advantages of the hybrid international tribunal in Sierra Leone, the Special Court for Sierra Leone, did allow us to be present at the location. It is the challenge of the various other tribunals; they are not at the crime scene. So certainly the innate training that goes with incorporating local prosecutors and investigators and police, and what have you, goes along with that.

So, yes, there clearly is a legacy left, and at many levels the ability of the people of West Africa and specifically Sierra Leone, to have the capacity to manage complex investigations in case it is there. It is obvious, if you have a court at the crime scene, like Nuremberg, like Special Court for Sierra Leone, the people see that justice and, of course, the legacy aspect of it is obvious.

Mr. SMITH. Thank you so very much, gentlemen, for your extraordinary testimony. It is of supreme assistance to these subcommittees, and we will proceed forward with this, and I thank you for it.

Hearing adjourned.

[Whereupon, at 4:48 p.m., the subcommittees were adjourned.]

APPENDIX

Material Submitted for the Record

JOINT SUBCOMMITTEE HEARING NOTICE
COMMITTEE ON FOREIGN AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515-6128

Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations
Christopher H. Smith (R-NJ), Chairman

Subcommittee on the Middle East and North Africa
Ileana Ros-Lehtinen (R-FL), Chairman

October 25, 2013

TO: MEMBERS OF THE COMMITTEE ON FOREIGN AFFAIRS

You are respectfully requested to attend an OPEN hearing of the Committee on Foreign Affairs, to be held jointly by the Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations and the Subcommittee on the Middle East and North Africa in Room 2172 of the Rayburn House Office Building (and available live on the Committee website at www.foreignaffairs.house.gov):

DATE: Wednesday, October 30, 2013

TIME: 1:30 p.m.

SUBJECT: Establishing a Syrian War Crimes Tribunal?

WITNESSES:

Mr. David M. Crane
Professor of Practice
Syracuse University College of Law
(Former Chief Prosecutor, United Nations Special Court for Sierra Leone)

Alan White, Ph.D.
President
AW Associates
(Former Chief Investigator, United Nations Special Court for Sierra Leone)

The Honorable Jeremy Rabkin
Professor of Law
George Mason University School of Law

The Honorable Stephen G. Rademaker
National Security Project Advisor
Bipartisan Policy Center

Mr. Richard Dicker
Director, International Justice Program
Human Rights Watch

By Direction of the Chairman

The Committee on Foreign Affairs seeks to make its facilities accessible to persons with disabilities. If you are in need of special accommodations, please call 202/225-5021 at least four business days in advance of the event, whenever practicable. Questions with regard to special accommodations in general (including availability of Committee materials in alternative formats and assistive listening devices) may be directed to the Committee.

COMMITTEE ON FOREIGN AFFAIRS

MINUTES OF SUBCOMMITTEE ON *Africa, Global Health, Global Human Rights, and International Organizations; the Middle East and North Africa* HEARING

Day *Wednesday* Date *October 30, 2013* Room *2172 Rayburn HOB*

Starting Time *1:30 p.m.* Ending Time *4:48 p.m.*

Recesses [1] (*2:04* to *2:50*) (____ to ____) (____ to ____) (____ to ____) (____ to ____) (____ to ____)

Presiding Member(s)

Rep. Chris Smith

Check all of the following that apply:

Open Session [✓]
Executive (closed) Session [ ]
Televised [✓]

Electronically Recorded (taped) [✓]
Stenographic Record [✓]

TITLE OF HEARING:

Establishing a Syrian War Crimes Tribunal?

SUBCOMMITTEE MEMBERS PRESENT:

Ros-Lehtinen, Meadows, Yoho, Bass, Kennedy, DeSantis, Chabot, Frankel, Schneider, Connolly

NON-SUBCOMMITTEE MEMBERS PRESENT: *(Mark with an * if they are not members of full committee.)*

HEARING WITNESSES: Same as meeting notice attached? Yes [✓] No [ ]
(If "no", please list below and include title, agency, department, or organization.)

STATEMENTS FOR THE RECORD: *(List any statements submitted for the record.)*

Prepared statement from Rep. Mark Meadows
Prepared statement from Michael Newton

TIME SCHEDULED TO RECONVENE _____
or
TIME ADJOURNED *4:48 p.m.*

Gregory B. Simpkins
Subcommittee Staff Director

PREPARED STATEMENT OF THE HONORABLE MARK MEADOWS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Thank you, Madam Chairman Ros-Lehtinen and Chairman Smith, for calling this hearing.

We are here today on a matter of fundamental importance: to evaluate the need for an international tribunal to address the serious war crimes and crimes against humanity in Syria. With a Civil War lasting over two years and countless lives lost, it is time that we hold both the Syrian government and members of the opposition accountable for the atrocities they've committed.

The Assad regime's heinous acts include widespread use of Sarin, a toxic chemical recognized as a Weapon of Mass Destruction, which can induce convulsions, paralyses, and even death.

Equally as troubling is the growing number of extremist jihadists that have joined the ranks of opposition fighters in Syria – many of whom have boasted of their ties to al Qaeda – and are believed to have committed suicide bombings, beheadings, and similar acts of terror against civilians.

While not every organization within the opposition is part of these brutal acts, the growing instability is only creating a magnet for extremists and is leaving thousands of civilians without access to basic necessities.

The Administration cannot continue to ignore the dire crisis and simply hope that things improve. It is critical that the United States look at ways to end the violence and ensure that those responsible for the atrocities in Syria are brought to justice. If we fail to bring these people to justice, we will send a signal across the globe that such violence is tolerable. I will not stand for this.

That is why I am encouraged to find that my colleagues on both sides of the aisle are as eager as I to take substantive steps in addressing these war criminals. I look forward to their testimony and the input of my colleagues.

MATERIAL SUBMITTED FOR THE RECORD BY THE HONORABLE CHRISTOPHER H. SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY, AND CHAIRMAN, SUBCOMMITTEE ON AFRICA, GLOBAL HEALTH, GLOBAL HUMAN RIGHTS, AND INTERNATIONAL ORGANIZATIONS

Statement by Michael A. Newton[1]
Professor of the Practice of Law, Vanderbilt University Law School
House Committee on Foreign Affairs, Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations and Subcommittee on Middle East and North Africa

"Establishing a War Crimes Tribunal for Syria"
October 30, 2013

I have been asked to comment on the political difficulties that affect the establishment and operation of a possible tribunal created to adjudicate the crimes currently being committed during the civil war inside Syria. I firmly believe that actions that could properly be charged and prosecuted as war crimes and/or crimes against humanity were underway inside Syria long before the chemical weapons attack at Ghouta on August 21, 2013. Widespread violations of the laws and customs of war as well as legally cognizable crimes against humanity have continued unabated. To paraphrase the late Librarian of Congress, Daniel Boorstin, trying to plan for a future war crimes tribunal without being keenly aware of the past processes would be like planting cut flowers. The political context for the constitutive documents of a newly created criminal process in Syria may well be the most important indicator of its long term success or failure.

The essence of any credible judicial process is that war crimes tribunals are established and exist within a political context. The political will to establish a tribunal is vital in the modern era of interconnected legal regimes. Sustained political will is necessary to fund its various components and judicial processes, such as *inter alia*, support for ongoing investigations (via technical experts and tactical safety to move freely in the field), facilitate the transfer of suspects, funnel admissible evidence to either Prosecution or Defense teams (even if that evidence is primarily useful only for the purposes of generating lead and background information), establish and maintain court security, transport witnesses and/or victims as needed, conduct extended forensics analysis of crime scenes, fund any reparations within the mandate of the tribunal, and/or a host of other reasons.

Before addressing the realities inherent in creating a new process in Syria, let me be clear regarding three preliminary points that should frame our understanding of the larger process

[1] http://law.vanderbilt.edu/bio/michael-newton

of seeking justice for the victims of crimes committed during the war inside Syria. In the first place, there is very little likelihood of a successful and legitimate war crimes tribunal absent a sea change in domestic politics within Syria. Authentic justice is not achieved on the wings of vengeance or in pursuit of a politicized vendetta. The judicial functions inherent in adjudicating war crimes must be independent and impartial in order to have any colorable claim of legitimacy. Judgments must in the end be grounded firmly in regularized law and procedures that are manifestly founded on fundamental fairness and equality of arms between the Office of the Prosecutor and the rights of the defendant. That is why the official policy of Syria must align itself with the goals of the accountability mechanism. Phrased another way, even if there existed a strong political will to create and to fund an international or internationalized tribunal inside Syria, a completely credible and effective justice system cannot be superimposed onto a recalcitrant regime.

Secondly, by extension, there must be an equality of process applicable to perpetrators charged from all sides of the conflict. This modern understanding is reflected in the structure of the international Criminal Court, by which States Party cannot simply refer political opponents to the Court or extend jurisdiction only over crimes alleged against an adversary during an armed conflict. For example, once the International Criminal Court is properly investigating offenses based on the predicate finding that there is a "reasonable basis to believe that crimes within the jurisdiction of the court have been committed," the entire situation comes within its purview. The Office of the Prosecutor and the judiciary of any tribunal created for the crimes committed in the context of the conflict in Syria must serve in accordance with regularized and apolitical procedures. Charges must be based on available evidence and prosecutorial preferences and decisions must be made on law and procedure rather than party, ethnic identity, or the nature of the allegations.[2] Judges should not serve in the shadow of political overseers. Though the overarching political context is necessary for the creation and operation of a tribunal, the actual operation of that punitive body should operate against all persons within its jurisdiction without being infected by the larger political context.

[2] This is one reason why the modern practice requires disclosure to the defense "as soon as practicable" of evidence "in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence." Rome Statute of the International Criminal Court (July 17, 1998), art. 67(2), U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90, *entered into force* July 1, 2002, *reprinted in* 37 I.L.M. 999.

As a final preliminary consideration, it is important to remember that any criminal process in a period of societal transition out of full scale civil war involves a mosaic of occasionally overlapping purposes and newly created processes. Sustainable peace in Syria may rely on the development of authoritative local actors capable of administering justice/reconciliation grounded in sociological legitimacy. Formalized investigations and prosecutions are a profoundly important dimension of the larger effort to restore the rule of law. The optimal balance between formalized prosecutions, reintegration of particular perpetrators into affected communities, truth-telling processes at the local level among friends and neighbors or at the national level in intricate bureaucratic structures, and some combination of forgiveness, apology, and reparations is itself most complex. The fundamental nature of the social contract between the individual and the state is in flux, just as the nature of the relationship between Syria and a newly created tribunal will evolve. The relationship between these various elements of a sustainable peace are Syrian choices in the end. The creation of a tribunal on the ground will inevitably occur against the backdrop of some combination of these alternative transitional justice processes. The political process for establishing a justice mechanism would ideally incorporate a comprehensive vision to these various dimensions so that there is a holistic sense of the pathway to a better future.

To reiterate, the political agreements needed to establish and sustain a tribunal will provide the necessary underpinnings of its legal authorities, the right to apprehend suspects, and to fund its operations. By way of illustration, Judge Kirsch, former President of the International Criminal Court, has pointed out that "[t]he ICC is founded on two pillars. The Court is the judicial pillar. The operational pillar belongs to States."[3] The political agreements needed to establish a tribunal in Syria will determine its ability to perform its core tasks and will determine its connectivity to the larger process of restoring a civil order based on respect for human dignity and the restoration of a rights based approach to the rule of law.

I will now discuss the range of political considerations in roughly descending order. The most difficult, and foreseeably controversial, approach would be to rely upon the Chapter VII authority of the Security Council to refer the Syrian situation to the International Criminal Court (ICC) under Article 13(b) of the Rome Statute. There is some possibility in the future

[3] Philippe Kirsch, President of the ICC, "Current Challenges to International Criminal Justice—ICC ten years after adoption of the Rome Statute," remarks made at Seminar Organized by the Finnish Institute for International Affairs in cooperation with the Ministry of Foreign Affairs, June 12, 2008.

that the government of a reconstituted Syria would fully accede to the Rome Statute and affirmatively convey jurisdiction over crimes committed on its territory or by its nationals to the ICC. Absent the consent of the sovereign state, Security Council action would require the affirmative consent of all five of the permanent members of the Security Council. In his September 17, 2013 statement to the United Nations General Assembly, the Secretary General stopped well short of giving his full throated endorsement to this approach, saying in part that "There must be a robust effort to bring perpetrators to justice for the serious international crimes that have been committed since the beginning by all parties to the conflict. The High Commissioner for Human Rights has repeatedly called for a Security Council referral of the situation in Syria to the International Criminal Court. And as has been done in other societies that have experienced civil war or political upheaval, truth commissions and other processes aimed at promoting reconciliation and post-crisis reckoning will have an important role to play at an appropriate moment."[4] Absent a full scale diplomatic push with a variety of concrete incentives, it is difficult to envision agreement among the P-5 for the referral of a Syrian situation to the International Criminal Court. As the world has learned from previous referrals under Article 13(b), a Security Council Resolution is not a panacea in any event.

A Security Council referral of the Syria situation would require ongoing diplomacy to provide security in the midst of the conflict to investigators and forensics teams. Failure to provide for full diplomatic protections for Court investigators would mean that they would only able to secure evidence from outside Syria. Furthermore, the intervention of a treaty-based western court mandated by the Security Council would almost certainly be perceived as illegitimate in the eyes of the Syrian citizenry. From the perspective of victims and community leaders, the external interference of the ICC is in itself a controversial and complex aspect of 'justice'. The experience of the Court's first decade reveals beyond any doubt that its institutional role will be hotly debated by families, communities, and victims most affected by conflicts. Even if the United States could overcome the predictable opposition of other P-5 members within the Security Council, a referral to the ICC could very well end up in a stalemate analogous to the situation inside Sudan. For the time being, approaches to transitional justice matters that flow from western capitals and seek to supply

[4] *See* <http://www.un.org/sg/statements/index.asp?nid=7090>

the 'solution' to the complex pattern of criminality on the ground would not be well received in any quarter in Syria, so it is not hard to imagine that an ICC referral would create the perception of progress while actually effecting little change on the ground.

In contrast to an ICC referral over Syria as a non-State Party, the formation of an *ad hoc* or hybrid court would require a great deal more orchestration in terms of the actual mechanics of establishing a court, hiring personnel, energizing investigations, and becoming functional. Every *ad hoc* or hybrid tribunal to date has been a *sui generis* construct that originated from a unique confluence of political factors paired with opportunistic diplomatic timing. While this might well be slower than simply adopting the structure and established processes of the ICC, a newly formed *ad hoc* or hybrid tribunal could be opposed by capitals both for reasons of cost and political preference. An *ad hoc* or hybrid tribunal would also have to navigate the competing expectations of states that support the maturation of the ICC and those who would advocate robust domestic systems as the first priority. It is likely that some states would oppose creation of an *ad hoc* or hybrid model for Syria on the grounds that the previous efforts largely predated the ICC, and many states could envision a newly created hybrid model as a reversion to these 'old' models likely to undermine the ICC in the long term. On the other hand, a regionally centered *ad hoc* or hybrid tribunal could become the fulcrum for garnering the support of regional states. Regional states could play an important role in such a process through funding, security arrangements, possible provision of judges, and expert linguists that can aid in translating evidence and testimony for dissemination to a watching world audience. Any *ad hoc* or hybrid tribunal would require a firm baseline of funding along with clearly articulated roles and responsibilities. While any movement towards accountability risks raising expectations, there is also a possibility that political actors begin to feel frustrated at what they perceive as wasted time and political space. The formation of an *ad hoc* or hybrid tribunal would represent a path-breaking development in the region. Experience with other tribunals suggests that stressing the importance of building a credible and effective process should take precedence over pushing for quick results.

The modern trend in many capitals is for the incorporation of international legal principles and practices into domestic penal codes. The consequent application by domestic courts would comport with the aspirations of the drafters of the ICC who intended that domestic states should have the primary role in enforcing international law whilst the ICC functions as

a court of last resort based on the necessities of a particular case.[5] Syrian legal professionals strongly seek a made-in-Syria solution to which foreign involvement is limited – at most – to behind-the-scenes advisors; indeed, this is one of the few areas of agreement between what might be termed supporters of existing penal-law instruments and those who are on record as supporting greater influences for Islamic law in the Syrian legal system. The fact that a purely domestic solution would be generated in the midst of a larger political dialogue inside Syria and in consultation with other states could permit a more holistic approach that would create an integrated array of mechanisms and approaches inside Syria. At a minimum, a domestic tribunal should incorporate international jurisprudence as well as the substantive principles from international criminal law. If Syrian penal law provides the core around which a larger system of criminal responsibility is built, then a domestic approach might well be more attuned to the evolving needs and expectations of the victims and communities most affected by the current conflict.

A domestic process inside Syria would likely be less understandable to westerners, and of course would confront the perception that justice could be manipulated to serve domestic political goals. There would also likely be policy disputes between those inside Syria that support capital punishment and other nations that firmly oppose any process capable of dispensing capital sentences. On the other hand, domestic officials would likely be more capable of using the trial processes as a highly visible way of undermining damaging social narratives that complicate efforts to achieve lasting peace within Syria. For instance, it is held widely in popular pro-opposition circles that the governing regime is a uniformly Alawite structure which exists to persecute Sunni Muslims. In reality, the facts would suggest that the regime is a power-political, multi-ethnic oligarchy which is prepared to move aggressively against any and all opposition, irrespective of its origin. This point might be illustrated by a domestic tribunal informed with a robust local investigative capacity that targets, as warranted by sufficient credible evidence, non-Alawite regime adherents whilst proving the victimization of persons identified with sectarian groupings other than (or in addition to) Sunni Islam. Equally, regime claims that the armed opposition is a homogeneous collection of Sunni extremists determined to destroy physically the Alawite communities of

[5] Michael A. Newton, *The Quest for Constructive Complementarity*, *in* THE ICC AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 304 (Carsten Stahn & Mohammed El Zeidy eds., Cambridge University Press 2011), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1585402>.

Syria might be challenged through the investigation and prosecution, where the evidence warrants, of non-Sunni opposition fighters who have perpetrated crimes against (amongst others) non-Alawites. Domestic officials might well be best placed to conduct prosecutions that strengthen the larger political processes in an effort to achieve sustainable peace within Syria.

One aspect of the political effort to establish a tribunal for Syria that spans each of the possible structural solutions is that any effective and credible judicial process must rely upon a robust investigative capacity. At the moment, such an independent investigative capacity based on the best practices for securing and cataloguing information related to crimes on the ground is found in the Syrian Commission for Justice and Accountability (SCJA). The independent collection and collation of potentially admissible evidence could easily evolve into the Syrian-national war-crimes investigations and prosecutions unit or be folded into an internationalized effort under the right political circumstances. SCJA is a Syrian organization, and in that sense represents precisely the kind of effort that should be supported and funded by any state interested in the establishment of a tribunal when the political circumstances are opportune. The SCJA is an independent organization led by Syrians for the benefit of Syria. The Commission is an apolitical body without allegiance to the Government of Syria or to political-opposition bodies such as the Syrian Opposition Coalition. The work of the SCJA is driven above all by considerations of Syrian penal law and the international laws and customs of war along with the body of law related to crimes against humanity.

At the same time, the legal context within Syria is challenged by ongoing expectations of the civilian population because the onset of civil war does not automatically mean the suspension of property disputes, contract disputes, and the whole range of disputes with which the justice system routinely is forced to cope. Following large refugee outflows, many communities are looted not only by state actors and formalized non-state rebel groups – but also by bandits or criminals from within the community. A war crimes tribunal for Syria will be established in the context of other legal problems that require adjudication, and which may be seen in the eyes of the affected communities as requiring immediate action. A political accommodation that serves these more mundane but pressing matters may well be able to leverage greater degrees of political support among the population most directly affected by the rampant crimes being committed within Syria.

Establishment of an effective prosecutorial mechanism for responding to war crimes and crimes against humanity is critical to the future of Syria and to regional stability in the longer term. The ultimate success of any political effort to create such a tribunal will depend on the integration of five planning factors in my view. There is no inalterable template for success, but the long term success and legitimacy of a tribunal depends to a large degree on implementation of these five factors within the political dialogue and the foundational agreements that pave the way for the pursuit of justice:

1. Any transitional justice mechanism must be attuned to the Syrian context for its operations in order to be accepted by the populace. This may require some participation by Syrian judges, lawyers, investigators and others who are vetted, trained, and capable of providing justice under *current* Syrian law – as well as relevant international law.

2. Any transitional justice mechanism would ideally be conducted largely in Arabic and have some level of regional acceptance. This could allow for the integration into the transitional justice mechanism of judges, lawyers, investigators, and others from within the region who can serve as a bridge to the affected communities and victims to increase understanding of the justice process and maximize its acceptance and legitimacy.

3. Any transitional justice mechanism must be fluid and responsive. This necessitates small teams that would be capable of deploying to pockets of stability where the jurisdiction of the mechanism has been accepted as authoritative by the local community. The fluid nature of the current conflict and the risk that the government will not accept such a transitional justice mechanism necessitates a high level of community support along with rapid response time by the group.

4. Tribunal judgments may need to be enforced and accepted by the affected communities. The overarching imperative for a newly established justice mechanism is the enforcement of the adjudication and punishment of perpetrators according to law. Such enforcement is frequently assumed, but in Syria, absent the participation of the regime, the communities themselves may necessarily be responsible for providing the enforcement of any adjudication administered by any transitional justice mechanism unless other states agree to do so pursuant to a political agreement. Community-level enforcement of the adjudications will require extensive political coordination and ongoing support structures.

5. The very goal of a tribunal should be to punish key perpetrators, but also to reinforce movement towards a sustainable peace on the ground. The political process of establishing, supporting, and funding such a tribunal must be carefully considered and calibrated to enhance efforts to achieve lasting peace.