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

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

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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.

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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 this option 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." 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

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

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 which the justice system routinely is forced to cope with. 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.