

**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 and 1994, 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.