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BLUEPRINT FOR A STATUTE FOR A SYRIAN EXTRAORDINARY TRIBUNAL TO PROSECUTE WAR CRIMES

*Prepared by
The Public International Law & Policy Group
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THE CHAUTAUQUA BLUEPRINT FOR A STATUTE FOR A SYRIAN EXTRAORDINARY TRIBUNAL TO PROSECUTE ATROCITY CRIMES

On August 27, 2013, several Chief Prosecutors of the various international criminal tribunals, convened at the Chautauqua Institution, called for accountability for atrocity crimes committed in Syria.

In furtherance of the Seventh Chautauqua Declaration, this “blueprint” or “discussion draft” for a “Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes” has been prepared by a group of international experts as a starting point to help inform continuing discussions on an accountability mechanism that is fair and effective under the distinct circumstances of Syria. It reflects insights gained from a series of meetings and workshops over the past two years led by the Public International Law & Policy Group, including several meetings organized by the Syrian Justice and Accountability Centre, which brought together Syrian lawyers, jurists, and civil society leaders with international experts to discuss transitional justice in Syria. It also reflects comments received from a drafting committee whose members include several former international tribunal chief prosecutors, international tribunal judges, and leading practitioners and academic experts in the field of international criminal law.

Over the course of the several meetings in the United States and Turkey, participants discussed the structure, mandate and functioning of a potential future extraordinary tribunal to prosecute atrocity crimes in Syria, based on international and global best practices. There was strong sentiment that the Tribunal should be domestic, but with international elements. The participants identified characteristics of the Syrian domestic criminal justice system that could be integrated into the structure and procedure of an extraordinary tribunal to ensure that such a justice mechanism is uniquely tailored to Syria.

The purpose of a Syrian Extraordinary Tribunal would be to prosecute those most responsible for atrocity crimes committed in Syria by all sides of the conflict when the political situation permits, presumably following a change in government. It would be complementary to the ordinary criminal and military courts of Syria, which would prosecute lower level perpetrators, and to an international tribunal if one were to be established or given jurisdiction to prosecute the highest level perpetrators. Several of the provisions are in brackets with alternative proposals, followed by commentary in the footnotes and an annexed report explaining the context and advantages and disadvantages of the bracketed alternatives.

The expert drafting committee believes the time is ripe for this discussion draft. It can help the Syrian opposition demonstrate its commitment to the rule of law, ensure that accountability plays an appropriate role in peace negotiations, put Syrian officials and military commanders on all sides on notice of potential criminal liability, and lay the groundwork for justice rather than revenge in the immediate aftermath of transition.

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DRAFT STATUTE FOR A SYRIAN [EXTRAORDINARY][SPECIAL] TRIBUNAL TO PROSECUTE ATROCITY CRIMES¹

SECTION ONE ESTABLISHMENT, ORGANIZATION AND COMPETENCE OF THE TRIBUNAL

PART ONE Establishment and Competence of the Tribunal

Article 1

- a) A Tribunal is hereby established and shall be known as the **[Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes] [Syrian Special Tribunal to Prosecute Atrocity Crimes]** (hereinafter “the Tribunal”).²
- b) The competencies of the Tribunal and of the bodies complementing its work shall be according to the provisions of this Statute.
- c) The Tribunal will bring to trial those
- [most responsible]³**
 - [who bear the greatest responsibility]⁴**

¹“Statute” means Tribunal charter, rather than a law establishing the Tribunal. This Statute could be approved by a decree by the transitional government, or by enacting a transitional justice law. Timing will be an important consideration in the transitional phase and the government will have an interest in implementing transitional justice as soon as possible to facilitate post-conflict healing and transition.

² The word “Extraordinary” may be better than “Special” because of sensitivities related to the establishment of “special courts” under the Assad government. On the other hand, those who are familiar with the mixed record and criticisms of the “Extraordinary Chambers in the Courts of Cambodia” have suggested avoiding the word “Extraordinary” in the name of the Syrian Tribunal. “Atrocity crimes” are those international crimes recognized in the Statute of the International Criminal Court, namely war crimes, crimes against humanity, and genocide.

³ Pursuant to the jurisprudence of the SCSL and ECCC, “those most responsible” would probably include about 100 high-level defendants. “Those who bear the greatest responsibility” may be a slightly higher threshold, focusing on about 50 of the highest-level defendants.

⁴A new Syrian government may also choose to accept the jurisdiction of the International Criminal Court (ICC) over the situation arising in Syria after March 15,

for the crimes and serious violations of international humanitarian law and custom, and international conventions recognized by Syria as set forth in this Statute.

Article 2

The Tribunal shall be fully independent from the existing courts, though it is authorized to utilize the Syrian constabulary.

Article 3

The Tribunal shall have its seat in Damascus **[and may conduct proceedings elsewhere in Syria]**.

PART TWO Organization of the Tribunal

Article 4

The Tribunal shall consist of the following organs:

1. The judiciary, consisting of the following:
 - i. **[One or more trial chambers;]**
[Three or more trial chambers;]⁵
 - ii. A Cassation Chamber, which shall have the jurisdiction to review decisions of the Trial Chambers, headed by the Tribunal's President; and
 - iii. A panel of Investigative Judges, headed by a Chief Investigative Judge.
2. A Prosecutions Office headed by a Chief Prosecutor;
3. A Defense Office, headed by the Head of the Defense Office;
4. An Office of Victims' Counsel;
5. A Registry, which shall be responsible for the Tribunal's administrative, public outreach, and security services, headed by the Registrar.

Article 5 - The Trial Chambers

- a) The Trial Chambers shall be composed of

2011, in which case the ICC could exercise jurisdiction over individuals accused of war crimes, crimes against humanity and genocide in cases in which domestic courts are unable or unwilling to prosecute, such as if high level accused perpetrators are present in a third country which is not willing to extradite him to Syria for prosecution. The ICC traditionally takes jurisdiction over only a handful of highest-level defendants, so there would still be a need for the Syria Tribunal to prosecute the next level of culpable civilian and military leaders.

⁵ It is hard to predict in advance precisely what will be needed regarding the number of trial chambers. Some of the experts have opined that it will be much easier to undertake and support a single trial chamber. Each trial would likely involve a dozen defendants charged with related crimes.

[independent judges].

[independent judges and one reserve judge per chamber].⁶

b) Each Trial Chamber shall be an Extraordinary Chamber composed of three professional judges.

c)[Of the three judges two (including the President of the Trial Chamber) shall be Syrian and one shall be a foreign judge].

[All of the judges in the Trial Chambers shall be Syrian]⁷

d) The Court shall permit foreign judges as international observers.

e) The president shall appoint one or more legal advisers who may be non-Syrians to assist the Trial Chamber judges.

Article 6 - The Cassation Chamber

a) The Cassation Chamber shall serve as both appellate chamber and court of final instance. It shall also serve as the Cassation Commission in relation to administrative matters set forth in this Statute.

b) The Cassation Chamber shall be composed of five members.⁸

b)[Three of the five Cassation Chamber Judges (including the President) shall be Syrian and two shall be foreign judges].

[All of the judges in the Cassation Chambers shall be Syrian]⁹

c) No member of any Trial Chamber can simultaneously be a member of the Cassation Chamber or a Tribunal Investigative Judge.

⁶ Ever since presiding Judge Richard May died in the middle of the ICTY's Milosevic Trial, some of the international criminal tribunals have adopted the practice of having a reserve judge sit with the other judges in case one of them is removed, becomes too ill to participate, or dies during the trial proceedings. This ensures that the trial can continue on with a full bench without the delay of appointing a replacement judge.

⁷ Participants at the working group meetings expressed a preference for a judiciary comprised solely of Syrian judges, though some were open to the idea of having a foreign judge on each panel. The benefit of having a foreign judge on each panel is that it would guard against impropriety and enhance the appearance of fairness. Working alongside their domestic counterparts, international judges would greatly contribute to the administration of justice, offering a broader perspective on international criminal law and thus ensuring credibility for the new court. International judges can provide a significant skill-set, as they can offer experience in complex international criminal matters.

⁸ The existing Cassation Court in Syria is made up of 5 judges, as is the Appeals Chambers of each of the international criminal tribunals.

⁹ Participants at the working group meeting expressed a preference for a judiciary comprised solely of Syrian judges. Others felt that if foreign judges were used, they should be from Arab nations or should at least have Arabic language fluency as Arabic would be the official language of the Tribunal.

PART THREE
Appointment and termination of Judges and Prosecutors

Article 7 - Appointment of Judges and Prosecutors

a) Judges and prosecutors shall have high moral character, a spirit of impartiality and integrity, **[fluency in the Arabic language,]**¹⁰ and experience, particularly in criminal law.

b) Judges and prosecutors shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source.

c) The Tribunal's Syrian judges and Public Prosecutors shall be nominated by a Judicial Council. The Judicial Council shall be comprised of **[nine]** members **[elected from among the judges and public prosecutors in Syria] [elected from among the members of the Syrian bar]** and shall be under the supervision of the Cassation Commission.¹¹

d) **[The Tribunal's Judges and Prosecutors shall be appointed from among the currently practicing judges and prosecutors in Syria.]**¹²

[The Tribunal's Judges and Prosecutors shall be appointed from among the members of the Syrian bar.]

[e)The Judicial Council shall nominate all international judges to the Tribunal from a list of names recommended by the [UN Secretary-General][Secretary-General of the Arab League].¹³

Article 8 - End of Term

a) The term of service of a judge, prosecutor, or other officer of the Tribunal shall be terminated only pursuant to the provisions of this Article for one of the following reasons:

1. If he is convicted of a felony that is not a political felony nor an accusation fabricated against him;
2. If he presents false or misleading information about his credentials;
3. If he fails to perform his duties without a legitimate reason; or
4. If he requests to end his service with the Tribunal.

¹⁰ If foreign judges are used, it may be necessary to allow non Arabic speaking judges to participate, but this will require that all proceedings be simultaneously interpreted into a language the judge speaks fluently.

¹¹ Use of a "Judicial Council" is intended to help insulate the selection of the Tribunal's judges and prosecutors from political interference. One of the experts opined that political pressure will be pervasive with or without such a selection mechanism.

¹² Some participants and participating experts voiced concern about whether there is a sufficient pool of qualified, unbiased judges in the existing Syrian judiciary. The second option would therefore open the pool to practicing Syrian attorneys.

¹³ If the Tribunal includes international judges, there will need to be a mechanism for obtaining names of qualified international judges. Nominations could be made by the UN Secretary-General or the Secretary-General of the Arab League.

c) Decisions regarding termination of a judge, prosecutor, or officer of the Tribunal shall be made by a vote of at least four members of the Cassation Commission. If the situation involves a member of the Cassation Commission, that person shall not participate in the termination proceedings and the decision shall be made by a vote of at least three members of the Cassation Chamber.

PART FOUR Presidency of the Tribunal

Article 9

a) The President of the Tribunal shall:

1. Chair the proceedings of the Cassation Commission.
2. Name the **[presiding and alternate]** judges of the Trial Chambers.
3. Name substitute judges to the Trial Chambers in case of absence.
4. Appoint, upon a majority vote of the Cassation Commission, the Tribunal's Registrar, Chief Prosecutor, Head of the Defense Office], **and head Victims' Counsel.]**¹⁴

b) The President of the Tribunal shall have the right to appoint foreign experts in international and criminal law to assist the Investigative Judges, Trial Chambers, and the Cassation Chamber.¹⁵

PART FIVE Investigative Judges of the Tribunal¹⁶

Article 10

a) The Tribunal's Investigative Judges shall undertake the investigation of those accused of crimes stipulated in this Statute.

b) A sufficient number of Investigative Judges shall be appointed.

c) The Investigative Judges shall choose the Chief Investigative Judge and his deputy from amongst them.

d) The Chief Investigative Judge shall refer cases to Tribunal investigative judges individually.

e) Each of the Investigative Judges' Offices shall be composed of a Judge for investigation and qualified staff as may be required for the work of an investigative judge.

¹⁴ As explained below, though some international tribunals employ Victim's Counsel, the experts recommend against the appointment of Victim's Counsel for this tribunal.

¹⁵ Involving international experts in this role may help to improve the capacity of the Investigative Judges, Trial Chamber, and the Cassation Chamber, and enhance the appearance of fairness.

¹⁶ The Syrian domestic criminal system utilizes investigative judges.

- f) Each Investigative Judge shall have the right to gather evidence from whatever source he deems appropriate and to question all relevant parties directly.
- g) Each Investigative Judge shall act independently as a separate entity from the Tribunal. He shall not be under nor receive requests or orders from any Government Departments, or from any other party.
- h) The decisions of the Investigative Judge can be appealed in cassation before the Cassation Commission within **[fifteen days]** after the notification or deemed notification of the decision in accordance with the Statute.
- i) [The Chief Investigative Judge, with the consent of the President of the Tribunal, may appoint foreign nationals to assist the Investigative Judges with respect to cases covered by this Statute.]**

SECTION TWO

OTHER DEPARTMENTS OF THE TRIBUNAL

PART ONE

Prosecutions Office

Article 11

- a) The Prosecutions Office shall be responsible for the prosecution of persons responsible for crimes within the jurisdiction of the Tribunal.
- b) Each Public Prosecutor shall act with complete independence and is considered as a separate entity from the Tribunal. He shall not be under nor receive instructions from any government department or from any other party.
- c) A sufficient number of Public Prosecutors shall be appointed.
- d) The President of the Tribunal shall select a Chief Prosecutor and a Deputy from among the Public Prosecutors.
- e) Each office of a Public Prosecutor shall be composed of a Prosecutor and other qualified staff.
- f) The Chief Prosecutor shall assign individual cases to a Prosecutor to try in court.
- g) The Chief Public Prosecutor, in consultation with the President of the Tribunal, shall have the right to appoint foreign nationals to act as experts assisting the prosecutors concerning the preparation and prosecution of cases covered by this Statute. Foreign advisors shall be persons of high moral character and integrity. It would be preferable that such foreign experts have worked in a prosecutorial capacity in his or her respective country or in an international war crimes tribunal.

PART TWO

Defense Office

Article 12

- a) [Every defendant shall be represented by defense counsel, either retained or appointed, and may not advocate on his own behalf in front of the Tribunal.]**

[Every defendant shall have the right to self-representation or to be represented by defense counsel, either retained or appointed.]¹⁷

b) The Defense Office shall protect the rights of the defense, provide support and assistance to defense counsel and to the persons entitled to legal assistance, including, where appropriate, legal research, collection of evidence and advice, and appearing before the Chamber in respect of specific issues.

c) The President of the Tribunal shall appoint an independent Head of the Defense Office, who shall be responsible for the appointment of the Office staff and the drawing up of a list of Public Defenders for defendants that do not retain their own counsel at their own expense.

d) A sufficient number of Public Defenders shall be appointed.

e) The Head of the Defense Office, in consultation with the President of the Tribunal, shall have the right to appoint foreign nationals to act as experts assisting the Defense Office concerning the preparation and trial of cases covered by this Statute. Foreign advisors shall be persons of high moral character and integrity. It would be preferable that such foreign experts have worked in a prosecutorial or defense capacity in his or her respective country or in an International War Crimes Tribunal.

[PART THREE Victims' Counsel

Article 13

The purpose of the Victims' Counsel is to:

[participate in criminal proceedings against those responsible for crimes within the jurisdiction of the Tribunal by supporting the prosecution; and]

assist Victims in seeking [reparations]/[damages]/[collective and moral reparations], as provided in the Rules of Procedure.]¹⁸

¹⁷ Requiring that the defendant be represented by counsel may reduce the opportunity for grandstanding and disruptive conduct on the part of the accused, as in the Milosevic trial, for example. Although Article 14 of the Covenant on Civil and Political Rights provides that there is a right to be represented by counsel or to represent one-self, many countries in the world require defendants in serious and complex cases to be represented by counsel, and this has not been viewed as inconsistent with the ICCPR. The international tribunals permit self-representation as a conditional right, and appoint stand-by counsel to step in when the right is abused or when the defendant's health disrupts the trial.

¹⁸ This entire Article is in brackets because the Statutes of the ICTY, ICTR, and SCSL do not provide for a "Victims' Counsel," while the Statutes of the ECCC, STL, and ICC do. Further, the role of Victims' Counsel has been evolving in those international tribunals, as the tribunals seek to balance the rights of the victims and the need for an orderly, efficient, and fair trial. The trend has been to curtail the role of Victims'

PART FOUR
Registry

Article 14 – Structure and Responsibilities

a) The Tribunal shall have

**[an international Registrar and a Syrian Deputy Registrar]
[a Syrian Registrar and an international Deputy Registrar]
[a Syrian Registrar and Deputy Registrar]¹⁹**

selected by the President, with the concurrence of a majority of the Cassation Commission.

b) The Registrar and its staff shall be responsible for the administration and servicing of the Tribunal, including providing, in consultation with the Office of the Prosecutor, measures to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses.

Article 15 - Tribunal’s Budget

a) The expenses and salaries of the Tribunal shall be as follows:

Counsel, especially in cases where there are thousands of victims. Allowing victims and their counsel to participate in trials may present a myriad of logistical and legal challenges for this new court. This is particularly true in an extremely volatile and dangerous environment as exists, and will continue to exist, in Syria. The focus for the new court should be on ensuring that victims have a meaningful and constructive way to address the court in the post-trial stage of the proceedings and obtain restitution when feasible. Further, defendants will potentially be deprived of the right to an expeditious trial when victims participate. The cases heard by the new court will be extraordinarily complex, necessitating lengthy trials. Victim participation lengthens the trials even further, often presenting repetitious questioning of witnesses and additional filings for the court to address and decide upon, and for the defense to spend time refuting. Regarding equality of arms, victim participation and the ability of victims “to lead and challenge evidence” can create procedural disadvantage for the defense. When victims have the ability to lead evidence, allocation of the burden of proof becomes murky and defendants have a greater burden to contend with all of the additional information presented against them by victim participants. Although Syria has civil party participation in its courts, for the reasons stated above, the experts believe that a different approach may be more desirable for this Tribunal.

¹⁹ The options of having either an international Registrar or an international Deputy Registrar are intended to bolster the independence of the Registry and inject international expertise.

[1. The expenses and salaries of the Tribunal, including Judges, Prosecutors, Defense Counsel, [Victims’ Counsel], and Staff shall be borne by Arab States with whom long-term financing agreements have been negotiated].

[1. The expenses and salaries of the Tribunal, including Judges, Prosecutors, Defense Counsel, [Victims’ Counsel], and Staff shall be borne 50 percent from international donors and 50 percent from the Syrian government.]²⁰

[1. The expenses and salaries of the Tribunal, including Judges, Prosecutors, Defense Counsel, [Victims’ Counsel] and Staff shall be borne by the Syrian national budget. The Tribunal may receive additional assistance for their expenses from [other voluntary funds contributed by foreign governments, international institutions, non-governmental organizations, and other persons wishing to provide financial assistance to the Tribunal.

2. The expenses of any international **[advisers]/[judges]** shall be borne by **[voluntary funds contributed by foreign governments, international institutions, non-governmental organizations, and other persons wishing to assist the proceedings].**

4. [The defense counsel may receive fees for representing an indigent defendant as determined by the Registrar.]²¹

b) The Tribunal’s Registrar shall have control over allocation and disbursement of the Tribunal’s funds, subject to an annual budget approved by **[an Oversight Board made up of an international chair and representatives from the Syrian Bar, Parliament, and Civil Society] [the Tribunal’s Cassation Commission.]²²**

²⁰ This option is modeled upon the funding provision of the Special Tribunal for Lebanon.

²¹ Other Tribunals do not provide funding for retained counsel where the Defendant has sufficient money to pay for the defense. Where the Defendant is “indigent” (i.e., lacks sufficient funds for his defense), a Public Defender and two assistants would be appointed to represent the defendant, paid for by the Tribunal. A general review of the defendant’s financial means should be sufficient to ensure that the accused has met the basic requirements for being classified as indigent. Thus, in the interest of justice there should be a presumption of indigence unless there is compelling evidence to suggest otherwise. This approach would mirror jurisdictions where legal aid is an automatic entitlement in criminal cases. Based on the experience of international and mixed courts, Syria should ensure significant flexibility in determining how a defendant’s indigence should be calculated. This will be important since the vast majority of defendants will likely be indigent. The Tribunal will also be able to decide how best to structure the legal support teams for defendants.

²² International experts have advocated for an oversight committee to ensure that the people of Syria are comfortable that justice is being served without concern of corruption/back room deals/political pressure. It may also help if the Registrar is an

Article 16 - Public Outreach and Information Unit

- a) Within the Registry, the Tribunal shall have a Public Outreach and Information Unit to provide information on the Tribunal itself, its jurisdiction, functions and powers.
- b) The Public Outreach Unit would also inform and explain the Tribunal's proceedings and its decisions as cases proceed.
- c) The Public Outreach and Information Unit will have a Director, who will be selected by the Registrar of the Tribunal. The Director of the Public Outreach and Information Unit shall select a Spokesperson, who will act as the Tribunal's liaison with the media and the public.²³

SECTION THREE JURISDICTION AND CRIMES

PART ONE

Article 17 - Jurisdiction of the Tribunal

- a) The Tribunal shall have personal jurisdiction over

[any individuals accused of atrocity crimes within Syria.]²⁴

[any individuals who bear the greatest responsibility for atrocity crimes within Syria.]²⁵

international with registry experience. The point for an international registrar and neutral oversight board is to instill a confidence with the people of Syria and to outside donors that the effort is above board and that monies are being spent efficiently and with accountability. To ensure complete neutrality, the Chairman of the oversight committee could be an international appointed by the UN Secretary General with the concurrence of the Syrians.

²³ Such a liaison may help to ensure a consistent “face” for the Tribunal and a uniform message concerning its proceedings and judgments.

²⁴ This option would enable the Tribunal to prosecute non-Syrians who either acted in Syria or whose actions abroad had an effect in Syria. While some participants favored this option, others felt that it could have a devastating impact on neighboring countries – Lebanon being the most fragile. They also pointed out that prosecution of non-Syrians in this particular conflict will be seen political.

²⁵ The wording of the jurisdiction of the Tribunal can have serious practical implications for the proceedings before it. For example, the Statute for the Extraordinary Chambers in the Courts of Cambodia (ECCC) gave the ECCC jurisdiction over “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia....” The ECCC interpreted its

[any Syrian nationals or residents of Syria accused of atrocity crimes within Syria]²⁶

[any Syrian nationals or residents of Syria who bear the greatest responsibility for atrocity crimes within Syria]²⁷

(b) the Tribunal shall have subject matter jurisdiction over atrocity crimes, defined as the crime of genocide, crimes against humanity, and war crimes **[as well as the following crimes under Syrian law: [list].]**²⁸

(c) The Tribunal shall have temporal jurisdiction for atrocity crimes committed in Syria

[since March 15, 2011]

[since 1970, including in particular incidents of special concern such as the February 1980 Tamdor Prison Massacre, the February 1982 massacre at Hamma, and the civil war that began in March 2011.]²⁹

(d) In interpreting the crimes within its jurisdiction, theories of liability, evidentiary matters, and standards for sentencing, the Tribunal may have resort to existing international jurisprudence.

PART TWO Definitions of Crimes³⁰

jurisdiction in a restrictive manner. The limitation can be for the prosecutor's discretion by mentioning it only in Article 1(c). By placing it here it would become a jurisdictional element for the judges to determine.

²⁶ This option confines the Tribunal's jurisdiction to Syrian nationals or residents, and paired with Article 1(c) would place the "greatest responsibility" determination within the Prosecutor's discretion.

²⁷ This option also confines the Tribunal's jurisdiction to Syrian nationals or residents but would require the judges to determine that the defendant met the "greatest responsibility" threshold.

²⁸ While the Statutes of some Tribunals include serious domestic crimes (including corruption and wasting natural resources) as well as international crimes, the participants in the workshops favored limiting the Tribunal's subject matter jurisdiction to international crimes.

²⁹ Most of the participants in the workshops favored limiting the Tribunal's temporal jurisdiction to crimes committed since March 15, 2011. Some felt that 1980s atrocities should also be covered, while others felt that it would be extremely difficult to prosecute those older cases. The experts on the Drafting Committee strongly felt that the temporal jurisdiction should begin with the neutral date of March 15, 2011, and that the Statute avoid naming situations, as that may be seen as injecting bias.

Article 18 - The Crime of Genocide³¹

a) For the purposes of this Statute and in accordance with the Convention on the Prevention and Punishment of the Crime of Genocide, dated September 9, 1948, which Syria acceded to on June 25, 1955, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

1. killing members of the group;
2. causing serious bodily or mental harm to members of the group;
3. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
4. imposing measures intended to prevent births within the group; and
5. forcibly transferring children of the group to another group.

b) The following acts shall be punishable:

1. genocide;
2. conspiracy to commit genocide;
3. direct and public incitement to commit genocide;
4. attempt to commit genocide; and
5. complicity in genocide.

Article 19 - Crimes against Humanity

a) For the purposes of this Statute, “crimes against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

1. Murder;
2. Extermination;

³⁰ The crimes in this Statute are defined as they are in the Rome Statute establishing the International Criminal Court. The crimes in the Rome Statute are further defined in an instrument known as the “Elements of Crimes,” on which the Syrian Delegation joined consensus in Rome. According to Article 15 of the International Covenant on Civil and Political Rights, a treaty that Syria has ratified, international crimes are lawfully punishable even where there is no domestic law criminalizing them at the time of their commission. International crimes, including those defined in the Rome Statute, are not subject to the prohibition on ex post facto application of criminal law.

³¹ There has been little to suggest that genocide has been committed during the Syrian conflict, but workshop participants felt it was important to include the crime so as not to pre-judge the characterization of crimes and to serve a deterrent function.

3. Enslavement;
4. Deportation or forcible transfer of population;
5. Imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law;
6. Torture;
7. Rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity;
8. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Tribunal;
9. Enforced disappearance of persons; and
10. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

b) For the purposes of paragraph a):

1. "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in the above paragraph against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack;
2. "Extermination" includes the intentional infliction of conditions of life, such as the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
3. "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
4. "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
5. "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to lawful sanctions;
6. "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity; and
7. "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, the State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with

the intention of removing them from the protection of the law for a prolonged period of time.

Article 20 - War Crimes³²

a) For the purposes of this Statute, “war crimes” means: Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

1. Willful killing;
2. Torture or inhuman treatment, including biological experiments;
3. Willfully causing great suffering, or serious injury to body or health;
4. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
5. Willfully denying the right of a fair trial to a prisoner of war or other protected person;
6. Compelling a prisoner of war or other protected person to serve in the forces of a hostile power;
7. Unlawful confinement;
8. Unlawful deportation or transfer; and
9. Taking of hostages.

b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

1. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
2. Intentionally directing attacks against civilians objects, that is, objects which are not military objectives;
3. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission in accordance with the Charter of the United Nations or in a humanitarian assistance mission, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
4. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects which

³² Although the ICRC has currently characterized the Syrian conflict as non-international, this provision includes both war crimes committed in international armed conflict and war crimes committed in internal armed conflict.

would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

5. Intentionally launching an attack in the knowledge that such attack will cause widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

6. Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

7. Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;

8. Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

9. The transfer, directly or indirectly, by the Government of Syria or any of its instrumentalities of parts of its own civilian population into any territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

10. Intentionally directing attacks against buildings that are dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

11. Subjecting persons of another nation to physical mutilation or to medical or scientific experiments of any kind that are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

12. Killing or wounding treacherously individuals belonging to the hostile nation or army;

13. Declaring that no quarter will be given;

14. Destroying or seizing the property of an adverse party unless such destruction or seizure be imperatively demanded by the necessities of war;

15. Declaring abolished, suspended or inadmissible in a court of law, or otherwise depriving, the rights and actions of the nationals of the adverse party;

16. Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

17. Pillaging a town or place, even when taken by assault;

18. Employing poison or poisoned weapons;

19. Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

20. Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
21. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
22. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity;
23. Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
24. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
25. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under international law; and
26. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

c) In the case of an armed conflict, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

1. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
2. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
3. Taking of hostages; and
4. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

d) Serious violations of the laws and customs of war applicable in armed conflict not of an international character, within the established framework of international law, namely, any of the following acts:

1. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
2. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

3. Intentionally directing attacks against personnel, installations, material, units, or vehicles involved in a peacekeeping mission in accordance with the Charter of the United Nations or in a humanitarian assistance mission, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
4. Intentionally directing attacks against buildings that are dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
5. Pillaging a town or place, even when taken by assault;
6. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity;
7. Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
8. Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
9. Killing or wounding treacherously a combatant adversary;
10. Declaring that no quarter will be given;
11. Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind that are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; and
12. Destroying or seizing the property of an adversary, unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

SECTION FOUR

GENERAL PRINCIPALS OF CRIMINAL LAW

PART ONE

Criminal Responsibility

Article 21 - Individual Criminal Responsibility

- a) A person who commits a crime within the jurisdiction of this Tribunal shall be individually responsible and liable for punishment in accordance with this Statute.
- b) In accordance with this Statute a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Tribunal if that person:

1. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether this person is criminally responsible or not;
 2. Orders, solicits or induces the commission of such a crime, which in fact occurs or is attempted;
 3. Aids, abets or otherwise assists in the commission or attempted commission of such a crime, including providing the means for its commission;³³
 4. In any other way that contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution must be intentional and must either:
 - (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, and where such activity or purpose involves the commission of a crime within the jurisdiction of the Tribunal; or
 - (ii) have knowledge of the intention of the group to commit the crime;
 5. In respect to the crime of genocide, directly and publicly incites others to commit genocide;
 6. Attempts to commit such a crime by commencing to execute an action with the intent to commit such crime, but the crime did not occur because of circumstances independent of the person's intentions. However, it is considered a pardonable excuse if a person exerts effort that otherwise prevents the execution or completion of the crime. He shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
- c) In addition to other grounds of criminal responsibility under this Statute, a military commander or civilian superior shall be criminally responsible for crimes within the jurisdiction of the Tribunal committed by subordinates under his or her effective authority/command and control, where (1) the commander or superior either knew or, owing to the circumstances at the time, should have known that the subordinates were committing or about to commit such crimes; and (ii) the forces commander or superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to competent authorities for investigation and prosecution.
- d) The official position of any accused person, whether as president, prime minister, member of the cabinet, command, government, or military shall not relieve such person of criminal responsibility nor mitigate punishment. Notwithstanding any prior decree or

³³ This provision is worded slightly differently from the provision in the Statutes of the International Tribunals, which provide: "For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission." This revision avoids the problem that has surfaced in recent ICTY cases, that have interpreted "for the purpose of facilitating the commission of such a crime" as a substantial restriction.

law, no person is entitled to any immunity to avert responsibility for the crimes stipulated in this Statute.

Article 22 - Grounds for excluding criminal responsibility

a) A person shall not be criminally responsible if, at the time of that person's conduct:

1. The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
2. The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Tribunal;
3. The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
4. The conduct which is alleged to constitute a crime within the jurisdiction of the Tribunal has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
 - (i) Made by other persons; or
 - (ii) Constituted by other circumstances beyond that person's control.
5. The Tribunal shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

PART TWO
Legal Burden of Proof

Article 23

a) The legal burden of proof that will be applied by the Tribunal will be “beyond a reasonable doubt.”³⁴

³⁴ This provision is intended to address the criticism that the burden of proof to the satisfaction of the court or proof to a moral certainty used in many inquisitorial systems is less rigorous than the burden of proof beyond a reasonable doubt that is used in all international criminal tribunals. While the Syrian domestic criminal procedure is an inquisitorial one, a burden of proof that is unambiguously that of beyond a reasonable

SECTION SEVEN

RULES OF PROCEDURE AND EVIDENCE

Article 24

a) [The Tribunal shall apply the Rules of Procedure stipulated in the attached annex.]

[The President of the Tribunal, with the concurrence of a majority of the Tribunal's Investigative, Trial Chamber, and Cassation Chamber judges, shall promulgate the rules of Procedure for the Tribunal. In doing so, the President shall be guided by best practices of international, hybrid, and internationalized tribunals and the need for efficient and fair administration of justice.]³⁵

b) Proposals for amendment of the Rules may be made by a Judge, the Chief Prosecutor, the Head of the Defense Office, or the Registrar. The President of the Tribunal, with the concurrence of a two-thirds majority of the Tribunal's Investigative, Trial Chamber, and Cassation Chamber judges, shall adopt amendments to the Rules of Procedure for the Tribunal. An amendment shall, unless otherwise indicated, enter into force immediately. The Registrar shall publish the amendment by appropriate means.

SECTION EIGHT

TRIAL PROCEEDINGS

Article 25

The Tribunal shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses.

Article 26 - Trials in Absentia³⁶

doubt will help avoid criticisms, such as those faced by the Iraqi Tribunal. *See e.g.* AMNESTY INTERNATIONAL, *Iraqi Special Tribunal - Fair Trials Not Guaranteed* (2005), available at <http://www.amnesty.org/en/library/asset/MDE14/007/2005/en/b2d097a5-d4fa-11dd-8a23-d58a49c0d652/mde140072005en.html>.

³⁵ The Rules of Procedure can either be adopted by the Tribunal itself, or appended to the Tribunal's Statute. Several of the participating experts favored including draft rules with the Statute, arguing that it would add substantial delay to delegate that responsibility to the judges after they have been appointed.

³⁶ This provision is modeled on that contained in the Statute of the Special Tribunal for Lebanon. Since there is a high likelihood that high-level regime leaders will flee the country, trials in absentia may be necessary to bring some measure of justice. This section makes clear that the Tribunal reserves the right to prosecute perpetrators whose surrender to the custody of the Tribunal has been blocked by another state in violation of applicable legal obligations.

1. The Tribunal may conduct trial proceedings in the absence of the accused, if he or she:
 - (a) has expressly and in writing waived his or her right to be present;
 - (b) has not been handed over to the Tribunal by the State authorities concerned;
 - (c) has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges against him or her.

2. When hearings are conducted in the absence of the accused, the Tribunal shall ensure that:
 - (a) the accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality;
 - (b) the accused has designated a defense counsel of his or her own choosing or, if the accused cannot afford counsel, by a Public Defender;
 - (c) whenever the accused refuses or fails to appoint a defense counsel, a Public Defender is assigned by the Defense Office of the Tribunal with a view to ensuring full representation of the interests and rights of the accused.

3. In case of conviction in absentia, the accused, if he or she had not designated a defense counsel of his or her choosing, shall have the right to be retried in his or her presence before the Extraordinary Tribunal, unless he or she accepts the judgment.

SECTION NINE

RIGHTS OF THE ACCUSED

Article 27

- a) All persons shall be equal before the Tribunal.
- b) The accused is presumed innocent until proven guilty before the Tribunal in accordance with this Statute.
- c) The accused shall be entitled to a public hearing pursuant to the provisions of this Statute and the Rules made hereunder.
- d) In the determination of any charge against the accused pursuant to this Statute, the accused shall be entitled to a fair hearing conducted impartially and to the following minimum guarantees:

1. To be informed promptly of the detail, nature, cause and content of the charge against him;
2. To have adequate time and facilities to prepare his defense and to communicate freely with counsel of his own choosing in confidence, provided they are members of the Syrian bar.
3. To be tried without undue delay;
4. To be tried in his presence, and procure legal counsel of his choosing. If the defendant cannot afford legal counsel, he will be appointed a Public Defender.
5. Through his counsel to call defense witnesses and the right to examine said witnesses and prosecution witnesses and to present evidence that enforces his defense pursuant to this Statute; and
6. Not to be compelled to testify against himself or to confess guilt, and to remain silent, without such silence being a consideration in the determination of guilt or innocence.

e) The accused must be represented by legal counsel who are members of the Syrian Bar and may not represent himself or herself before the Tribunal.³⁷

f) Trials shall be public and open to representatives of foreign States, of the media and of national and international nongovernment organizations unless in exceptional circumstances the Tribunal decides to close the proceedings for good cause in accordance with existing procedures in force where publicity would prejudice the interests of justice.

g) The Tribunal shall provide for the protection of victims and witnesses. Such protection measures shall include, but not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

SECTION TEN

PENALTIES

Article 28

a) The penalties that shall be imposed by the Tribunal shall be **[imprisonment]/[imprisonment or death]**.³⁸

³⁷ This provision is similar to that of the Iraqi High Tribunal. Other Tribunals allow defendants to represent themselves, but this has led to disruptions, delays, and incitement to violence.

³⁸ The death penalty is one of the most contentious issues. While Syrian participants at the workshops have overwhelmingly favored the inclusion of capital punishment for this Tribunal, international experts have opined during the meetings that the death penalty will mean that the Tribunal will not be able to obtain assistance from the EU and UN, will lead to persistent criticism from human rights organizations, and will prevent countries from extraditing accused persons back to Syria.

b) The penalty for any crimes in this Statute shall be determined by the Trial Chamber taking into account such factors as the gravity of the crime, the individual circumstances of the convicted person and relevant international and foreign precedents.

[c) In addition to imprisonment, the Trial Chamber may order the confiscation and forfeiture of personal property, money, and real property acquired unlawfully or by criminal conduct [without prejudice to the rights of bona fide third parties.]

SECTION TWELVE ENFORCEMENT OF SENTENCES

Article 29

a) Imprisonment shall be served in prisons in Syria that meet international standards.

b) No authority, including the President, may grant a pardon or mitigate the punishment issued by the Tribunal.

**ANNEX:
DISCUSSION OF QUESTIONS RELATED TO AN EXTRAORDINARY
TRIBUNAL FOR SYRIAN ATROCITY CRIMES**

This Annex summarizes the discussion of 22 issues covered during PILPG-led meetings that brought together Syrian lawyers, jurists, and civil society leaders with international experts to discuss transitional justice in Syria when the political situation permits, presumably following a change in government or leadership. This summary provides further context to the pros and cons of the various options that are set forth in the Draft Tribunal Statute, and covers other issues that may be addressed in the Tribunal's Rules.

1. Should a special tribunal for atrocity crimes be separate and independent from the Syrian court system or a special chamber that is part of the Syrian courts?

The large majority of participants favored a separate tribunal given the lack of faith in the fairness and independence of the existing Syrian courts. For the same reasons, the participants felt the Tribunal should have its own Appeal Chamber (in Syria this is known as a "Cassation Chamber") rather than send appeals to the existing Syrian Courts of Appeal.

2. Is there sensitivity to the name selected for the special tribunal?

Many of the international tribunals use the word "Special" in their title (eg, Special Court for Sierra Leone, Special Tribunal for Lebanon). Some participants pointed out that calling a Syrian Tribunal a "Special Tribunal" might be a bad idea since the regime used "Special Courts" to punish political crimes and enemies of the regime. The term "Extraordinary Tribunal" (as used in Cambodia) was viewed as preferable for this reason. Other participants said that the name selected wouldn't make much difference, and that in Arabic "Special" and "Extraordinary" would likely be translated using the same Arabic word.

3. Where should the Tribunal be located?

Nearly all of the participants felt strongly that the Tribunal should be located in Syria. There was debate about whether it should sit only in Damascus or also elsewhere in Syria.

4. What should be the subject matter jurisdiction of the Tribunal?

The Tribunal could be given jurisdiction over atrocity crimes (war crimes, genocide, crimes against humanity -- including arbitrary detention and mistreatment of prisoners) and/or domestic crimes (murder, corruption, wasting natural resources, the crime of revocation of the Kurds citizenship, etc). The large majority of

participants favored confining the Tribunal's jurisdiction to international crimes because too many people committed the domestic crimes (without authorization from above) for those crimes to be the object of a special Tribunal. Interestingly, some of the participants felt it was important for the Tribunal to be able to prosecute genocide, believing that genocides had been committed in Syria even after the specific definition of the crime was explained to them. Finally, there was discussion of the international crimes exception to the "no crime, no punishment" principle (enshrined in Article 15 of the ICCPR), which provides that international crimes can be prosecuted in domestic courts even if the country did not criminalize such crimes at the time they were committed. This is an important principle for Syria because the Assad Regime ratified the Geneva Conventions and Genocide Convention, but did not domesticate those Conventions by enacting domestic laws.

5. What should be the personal jurisdiction of the Tribunal?

The Tribunal would be either a complement or an alternative to the establishment of an international tribunal or referral of the situation to the International Criminal Court. The participants agreed that the Tribunal should not prosecute all perpetrators, but only the leaders and most heinous offenders. Lower level offenders would be prosecuted by ordinary domestic courts. Other Tribunals such as the Special Court for Sierra Leone and the Cambodian Tribunal limit personal jurisdiction to "Those most responsible" or "Those with greatest responsibility." The former would be about 100 high ranking figures. The latter would be a smaller group, perhaps 50. There was also discussion about whether the gravity threshold for personal jurisdiction should be for the prosecutor to determine in his discretion or for the court to decide, meaning it is an issue that the defense could raise. There was recognition that the Tribunal should be able to prosecute the most serious offenders on all sides of the conflict, not just the Assad Regime. Finally, there was a discussion about how to ensure that the immunities issued by the Assad Regime (including for members of the military) do not apply to the Tribunal. In this regard, it may be necessary for the Tribunal Statute to be passed as a law, not just an Executive Decree.

6. What should be the temporal jurisdiction of the Tribunal?

All participants agreed that the Tribunal should be able to prosecute atrocity crimes since March 15, 2011 (that is, the start of the civil war). Some participants felt that particularly heinous crimes committed during the 1980s should also be prosecutable, while others felt that it would be extremely challenging to do so given the difficulties of proof for crimes committed thirty years in the past.

7. What should the structure of the Tribunal look like?

The participants stressed that the Tribunal should look like something that Syrians are familiar with. There would need to be Investigative judges, three-person trial chambers, and 5-person appeals chambers. The participants discussed the need to

have alternate judges for lengthy trials to ensure that the trial does not have to be terminated if something happens to a judge. Although Syrian courts have pre-trial chambers, many participants felt that would not be necessary for the Special Tribunal. If the Tribunal were to have three Trial Chambers (9 judges and 3 alternate judges), one Appeal Chamber (five judges and one alternate judge), and five investigative judges, that would mean a total of 23 judges would be needed at a minimum.

8. Should there be international judges?

The participants recognized that having one international judge on each trial and the appeals chamber would enhance the appearance of fairness and could increase the quality of the judicial opinions, but there was no consensus that the Statute should require international judges. Some participants felt that the same outcome could be ensured by having international advisers to each chamber.

9. How should judges be selected?

The participants suggested several mechanisms to enhance the fairness and independence of the judges, such as having the Syrian Bar select them, having a Committee of elders select them, or creating a Judicial Council to select them. The participants opined that Judges who served on the regime's Special Tribunals should not be permitted to apply for a position on this Tribunal, but simply being a judge during the Assad Regime should not disqualify a person.

10. How should judges be replaced?

The greatest criticism of the Iraqi High Tribunal was with respect to a provision that allowed the President of the country to replace a judge for any reason at any time. The President ended up replacing both trial chamber and appeals chamber judges in the middle of the Saddam trial in a way that made it look like the trial was not independent or fair. The participants discussed mechanisms for ensuring that judge removal and replacement does not undermine the Tribunal's independence, including having the decision made by a super-majority of the Cassation Chamber.

11. Should there be dissenting opinions?

Although international tribunals follow the practice of issuing dissenting opinions, that is not done in Syrian courts. Some of the participants felt that it would be better to follow the Syrian practice on this matter, so as not to raise questions about the soundness of the trial chamber judgments. Others felt that dissenting opinions at the Trial Chamber level are useful to framing issues for appeal.

12. What should be the relation between the Tribunal and Truth Commissions?

The participants did not believe people who confess before a Truth Commission should have amnesty or other immunity from prosecution by the Special Tribunal. However, several participants felt that a person's confession before a Truth Commission should not be able to be used as evidence against that person before the Tribunal.

13. What should Victim Participation and Compensation look like?

Like other civil law countries, Syria has a tradition of having "parties civil" (victim's counsel) participate in criminal judicial proceedings as sort of a second prosecutor. Some of the international tribunals (the Cambodia Tribunal, the Lebanon Tribunal, and the ICC) also employ Victims Counsel for this purpose. But these tribunals have struggled with conflicts between Victims Participation and efficient trials in cases where the numbers of victims are in the thousands. Some participants favored a limited form of Victims Participation for the Tribunal. Other participants felt that there should be a separate mechanism for victim reparations outside of the Tribunal, and therefore there would be less need for Victim Participation at the Tribunal.

14. Should the Tribunal allow Trials in Absentia?

The Nuremberg Tribunal allowed trials in absentia. The Yugoslavia Tribunal employed a "Rule 61" proceeding which was like a trial in absentia. The ICC requires the presence of the accused for a case to commence. The Lebanon Tribunal allows trials in absentia. Many of the participants felt that, since there was a likelihood that some of the worst perpetrators would escape to other countries, that the Tribunal should be able to try them in absentia. Consistent with Syrian law, if the person was later brought to custody in Syria, he would be entitled to a new trial.

15. Should the Tribunal allow self-representation?

The several international tribunals allow defendants to represent themselves if they wish to do so, unless such self-representation becomes "persistently disruptive." The Iraqi High Tribunal permitted Saddam and the other defendants to act as co-counsel to their retained lawyers, asking questions during cross examination of witnesses. This is also the practice in ordinary Syrian courts. Many countries do not permit defendants in serious criminal cases to represent themselves, and instead require that they either use retained counsel or public defenders. There was a lengthy discussion about how self-representation can wreck the trial. A suggestion that some favored was that all defendants be represented by Syrian lawyers at all times, and that the defendants not be permitted to cross-examine witnesses themselves, except through written questions posed to the judges.

16. Should the Tribunal allow lawyers from outside Syria?

Saddam Hussein and his co-defendants were represented by a team of celebrity defense counsel, including several former Attorney Generals and Ministers of Justice from several countries. Unfortunately, these high profile defense counsels were not particularly good trial attorneys and had an agenda other than obtaining an acquittal based on the evidence. The participants felt that only Syrian-certified lawyers should be allowed to appear before the Tribunal. In addition, the participants agreed that there should be a Defense Office, from which public defenders would be appointed to represent defendants that can't afford or do not elect to retain their own counsel. Following the model of the international tribunals, there should also be stand-by public defenders, ready to step in if retained counsel boycotts the trial or is removed for misconduct.

17. How should the Rules of Procedure be written?

The Yugoslavia Tribunal judges wrote the Rules of Procedure for the Tribunal after they were selected. The Rwanda Tribunal and the Special Court for Sierra Leone largely used the Yugoslavia Tribunal Rules with some modifications approved by the judges. The ICC Elements of Crimes and Rules of Procedure were drafted by the Assembly of State Parties rather than the Court's judges. The participants felt that the Special Tribunal would need its own Rules, separate from those of the ordinary Syrian courts, and that such rules should reflect international best practices to the extent practicable, but should also be designed with an expeditious trial in mind. There was no consensus as to whether the judges should be entrusted with drafting the Rules or whether the Rules should be appended to the Statute of the Tribunal. As a sub issue, the participants pointed out that like Lebanon, the Syrian system recognizes a type of co-perpetrator liability similar to Joint Criminal Enterprise liability, which is employed by the ICTY, ICTR, ECCC, and SCSL. As another sub issue, the participants said that the Prosecutor should be able to appeal an acquittal, and that the appeal should not be limited to errors of law. There was debate about whether the Cassation Chamber would in the event of a successful appeal by either the prosecutor or defense issue a revised judgment or be required to remand the case for further proceedings by the Trial Chamber.

18. What burden of proof should the Tribunal employ?

Like most civil law countries, the Syrian courts employ a standard of proof in criminal trials that translates into "proof to the satisfaction of the judges" or "proof to a moral certainty." Human rights NGOs criticized the Iraqi High Tribunal for not explicitly employing the standard of proof employed in common law countries and the international tribunals, namely "proof beyond a reasonable doubt." The participants opined that in effect the two standards are the same, and that it would not be a problem using the words "beyond reasonable doubt" in the Tribunal's Statute or Rules.

19. Should there be a death penalty?

This was one of the most contentious issues of the meetings and workshops. The participants recognized, based on the Iraqi High Tribunal experience, that insisting on the death penalty would mean that the UN, European countries, and others would refuse to assist and/or fund the Tribunal, and that human rights organizations would be highly critical of the Tribunal if it employed the death penalty. On the other hand, many of the participants believed that the Syrian people would insist that high level offenders of atrocity crimes should be subject to the death penalty.

20. Should the Tribunal televise its trials?

There was debate about whether the Tribunal should televise trials gavel to gavel or rather release trial highlights edited by the Tribunal's Outreach Office. All of the international tribunals utilize gavel-to-gavel television (and internet) coverage, with a twenty minute delay to protect witness identities from being made public. The participants felt the Syrian people would want to see as much of the proceedings as possible, but they recognized that gavel-to-gavel TV coverage can encourage trial participants to act inappropriately. There was no consensus on this issue. The participants did all agree that there should be a Public Outreach Unit and Tribunal Spokesperson to explain the rulings on a day to day basis to the viewing public.

21. How can trial participants be kept safe?

One of the biggest problems in the Saddam trial was that three defense counsel and several witnesses were assassinated during the trial. The participants agreed that security measures must be in place to ensure the safety of witnesses, defense counsel, prosecutors, and judges. At the same time, they felt that the trial should be public, and that judges' identities should not be hidden.

22. How should the Tribunal be funded?

The participants recognized that if the government controls all its funding, the Tribunal will not be able to be independent. One proposal to ensure the Tribunal's independence is for funding to come 50 percent from the Syria government and 50 percent from international donors. Another approach would be to have the expenses and salaries of the Tribunal come from the Syrian government, while the Tribunal could receive additional assistance from voluntary funds contributed by foreign governments and entities wishing to assist the proceedings. Yet another proposal was for the Tribunal to receive funds for its Syrian judges, prosecutors, officers and staff from the Syrian government, while foreign sources provided funds for international advisers and judges. It was also proposed that the Tribunal's Registrar should have control over allocation and disbursement of the Tribunal's funds, subject to an annual budget approved by either an Oversight Board (chaired by an international appointed by the Secretary-General of the UN with the concurrence of the Syrian government) or the Tribunal's Cassation Chamber.

