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CONTENTS

GENOCIDE IN SYRIA: INTERNATIONAL LEGAL OPTIONS, INTERNATIONAL LEGAL LIMITS, AND THE SERIOUS PROBLEM OF POLITICAL WILL

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I. INTRODUCTION

The Syrian Civil War began in March 2011. Protestors demanded political liberalization and criticized the government of Syrian President Assad, who took power in 2000 after his father's death. The conflict followed an all-too familiar pattern: Peaceful protests were met with repressive government action; the failure of peace negotiations led to civil war; civil war led to credible allegations that war crimes and crimes against humanity had been committed. As in many cases, the conflict has spread, causing extraordinary refugee flows and war to spill across borders, particularly Iraq, Jordan, Lebanon and Turkey. The destabilization of Syria has also made it a hunting ground for the ruthless fighters of the so-called "Islamic State of Iraq and Syria" ("ISIS"), which gained control of territories in Syria in summer 2014, and has attacked villages there.[1] Indeed, attacks have been so ferocious, particularly as directed against ethnic minorities, including Kurds, that on October 12, 2014, *Le Monde* asked whether ISIS' siege of Kobani – a town on the Syria/Turkish border – would be the "Srebenica" of the Syrian conflict,[2] evoking the possibility that genocide could occur in Syria as well.[3]

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[1] *What is Islamic State,* BBC NEWS (Sept. 26, 2014), *available at* http://www.bbc.co.uk/news/world-middle-east-29052144.

[2] Yves-Michel Riols, *Le Sort de Kobané Tétanise la Turquie et la Coalition Anti-Djihadiste*, LE MONDE (Oct. 11, 2014), *available at* http://www.lemonde.fr/international/article/2014/10/11/le-sort-de-kobane-tetanise-la-turquie-et-la-coalition-anti-djihadiste_4504610_3210.html?xtmc=kobane&xtcr=7.

[3] On October 21, 2014, a UN official suggested that the campaign of the ISIS militants against Iraq's Yazidi minority may be attempted genocide. *See Islamic State*

Meanwhile, a peace agreement seems out of reach. Although an American led coalition began airstrikes against ISIS targets after the beheading of two American journalists by the group's affiliates in Iraq, most observers do not expect the strikes to end Syria's civil war.[4] Moreover, human rights groups have objected that ISIS has killed far fewer Syrians than government troops, which have been credibly accused of using chemical weapons, barrel bombs and torture to suppress the Syrian opposition.[5] As death tolls, displacements and mayhem have climbed, the United Nations Security Council has frequently convened. It issued a Presidential Statement on August 3, 2011, following the massacre at Hama, which condemned the Syrian authorities and called for an immediate end to the violence.[6] This unanimity was shattered however, as a total of twelve (12) Resolutions have been proposed, four (4) of which have been vetoed by China and Russia, as follows: October 4, 2011; February 4, 2012; July 19, 2012; and May 22, 2014. The May 22nd Resolution included an attempted referral of the situation in Syria to the International Criminal Court.

Eight Resolutions have been adopted since 2011, including Resolution 2042 endorsing Special Envoy Kofi Annan's six-point plan,[7] Resolution 2043 on implementation of the six-point plan and establishing the United Nations Supervision Mission in Syria,[8] Resolution 2118 on the destruction of Syria's chemical weapons stock,[9] Resolutions 2139, 2165 and 2191 regarding humanitarian relief activities,[10] and most recently on August 15, 2014, Resolution 2170 regarding the ongoing threat from ISIS and the Al Nusrah Front and the "negative impact of their presence, violent extremist ideology and actions on stability Iraq, Syria and the region."[11] Only Resolution 2170 imposed any real sanctions, and those are not addressed to

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Onslaught on Yazidis may be Attempted Genocide, REUTERS (Oct. 21, 2014), *available at* http://in.reuters.com/article/2014/10/21/mideast-crisis-iraq-un-idINKCN0IA2PS20141021

[4] *Syria's Deadlocked War: No Solution*, ECONOMIST (Sept. 27, 2014), *available at* http://www.economist.com/news/briefing/21620217-it-will-take-more-air-strikes-end-conflict-no-solution.

[5] *Id.*

[6] S.C. Pres. Statement 2011/16, U.N. Doc. S/PRST/2011/16 (Aug. 3, 2011).

[7] S. C. Res. 2042, U.N. Doc. S/RES/2042 (Apr. 14, 2012). UNSMIS mandate was renewed on July 20, 2012 for an additional 30 days after the failure of a stronger Resolution was vetoed on July 19, 2012.

[8] S.C. Res. 2043, U.N. Doc. S/RES/2043 (Apr. 21, 2012).

[9] S.C. Res. 2118, U.N. Doc. S/RES/2118 (Sept. 27, 2013).

[10] S.C. Res. 2139, U.N. Doc. S/RES/2139 (Feb. 22, 2014); S.C. RES. 2165, U.N. Doc. S/RES/2165 (July 14, 2014); S.C. Res. 2191, U.N. Doc. S/RES/2191 (Dec. 17, 2014).

[11] S.C. Res. 2170, U.N. Doc. S/RES/2170 (Aug. 15, 2014).

the Assad government, but to six individuals placed on the Al-Qaida Sanctions List.

The Human Rights Council was seized of the Syrian crisis and established an independent commission of inquiry in August 2011.[12] The Commission of Inquiry has issued reports, taken testimony and endeavored to influence the situation, or at least to call attention to the plight of the Syrian people. The four-member commission is chaired by Paulo Sérgio Pinheiro of Brazil, and includes Carla Del Ponte, former chief prosecutor of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR") (Switzerland), Karen AbuZayd (United States) and Vitit Mubahorn (Thailand). The Syrian government has denied the Commission's requests to enter the country.

In June 2014, the Chair of the Commission labeled the Syrian situation as "intolerably serious," with an estimated 6.5 million Syrians internally displaced and 2.9 million registered refugees, making Syria the world's worst humanitarian catastrophe.[13] Experts have calculated the death toll to be in the region of 200,000 persons, mostly civilians,[14] and it is estimated that thousands of detainees are held in overcrowded and unsanitary prisons, and thousands of instances of torture, killings and disappearances have occurred.[15] The United Nations Human Rights Council noted in June that the Syrian authorities and affiliated militias are committing "gross, systematic and widespread violations of human rights and . . . international humanitarian law" including the aerial bombardment of civilian areas, in particular the indiscriminate use of barrel bombs, ballistic missiles, chlorine gas and cluster bombs, and other actions that may amount to war crimes or crimes against humanity,[16] and underscored the obligation of the Syrian

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[12] Human Rights Council Res. 17/1, Rep. of the Human Rights Council, 17th Sess., Aug. 22, 2011, A/HRC/S-17/1 (Aug. 22, 2011) (reporting the "Situation of Human Rights in the Syrian Arab Republic").

[13] Human Rights Council, Oral Update of the Independent Int'l Comm'n of Inquiry on the Syrian Arab Republic, 26th Sess., June 16, 2014, A/HRC/26/CRP.2 (June 16, 2014).

[14] Megan Price, Anita Gohdes & Patrick Ball, *Updated Statistical Analysis of Documentation of Killings in the Syrian Arab Republic, Commissioned by the Office of the UN High Commissioner for Human Rights* 3 (Aug. 2014), *available at* http://www.ohchr.org/Documents/Countries/SY/HRDAGUpdatedReportAug2014.pdf (estimating 191,369 unique records of documented killings between March 2011 and April 2014).

[15] Human Rights Council Res. 26/23, The Continuing Grave Deterioration in the Human Rights and Humanitarian Situation in the Syrian Arab Republic, 26th Sess., June 25, 2014, A/HRC.26/L.4/Rev. 1, pmbl. para. 4 (June 25, 2014).

[16] H.R.C. Res. 26/23, *supra* note 15, at para. 12.

government to protect the Syrian population and ensure that all those responsible for violations of international humanitarian law or violations and abuses of human rights law are held to account, through appropriate fair and independent domestic or international criminal justice mechanisms.[17]

In June the Human Rights Council expressed "grave concern" at the rise of extremism and extremist groups,[18] and in August the Commission of Inquiry noted with alarm the rise of ISIS in Iraq and Syria, with devastating results.[19] In a recent, emotional plea to the Council, the Chair of the Commission stated:

> We have charted the descent of this conflict into the madness where it now resides. . . . We have asked the Security Council to refer this situation to the International Criminal Court. But we have been faced with inaction. This inaction has allowed the warring parties to operate with impunity and nourished the violence that has consumed Syria. Its most recent beneficiary is ISIS.[20]

The Commission has also noted the complicity of governments furnishing weapons to the parties to the conflict, weapons that have been used to target civilians. The latest Resolution of the Security Council takes the view that "some of the violations and abuses committed in Syria may amount to war crimes and crimes against humanity[,]"[21] but is neither taken under Chapter VII, nor includes any sanctions for non-compliance, although it somewhat curiously refers to the obligations of Member States under Article 25 of the Charter to comply with Security Council Decisions.[22] The Resolution

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[17] The Resolution also "[c]ondemns the intentional denial of humanitarian assistance to civilians, from whatever quarter, and in particular the denial of medical assistance and the withdrawal of water and sanitation services to civilian areas, which has recently worsened, noting especially the primary responsibility of the Government of the Syrian Arab Republic in this regard." *Id.* at para. 27.

[18] *Id.* at para. 20.

[19] Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, paras. 16-17, A/HRC/27/60, 27th Session (Aug. 13, 2014).

[20] Paulo Sérgio Pinhero, Chair of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic (Sept. 16, 2014), *available at* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15039&LangID=E.

[21] S.C. Res. 2191, *supra* note 10, at para. 1 (demanding that all parties to the conflict respect international humanitarian and international human rights law).

[22] *Id.* at final pmbl. para. It is unclear what this reference to Article 25 means. It appeared in Resolution 2165, referred to by reference in Resolution 2191, para. 2, and Samantha Power argued at the time that it meant Syria was "obligated to accept and carry out the decisions made by the Security Council in the Resolution," namely, to admit UN humanitarian agencies and their implementing partners to enter Syria and use routes across

bemoans the "impunity" in Syria and stresses the need to "end impunity" for violations and abuses of human rights and international humanitarian law, but proposes no concrete mechanism for doing so. The remainder of this Essay will address the question of impunity in the context of the Syrian situation.

II. THE INTERNATIONAL LEGAL FRAMEWORK APPLICABLE TO STATES IN THE CONFLICT REGION

International law imposes limits on the behavior of the States directly affected by the civil war in Syria. Even without specific treaty obligations imposed upon it, the Syrian government and other States in the region are bound to respect customary international law, including the customary international law of war, international criminal law and international human rights law. This includes, at a minimum, the prohibition against torture, the requirements of proportionality and distinction in war, and, as we have seen, the prohibition against the use of chemical weapons. As one of the founding members of the United Nations, Syria is also bound to respect its Charter obligations, in particular any obligations imposed on it by the Security Council acting under Chapter VII. The Security Council reminded the parties to the conflict of this obligation in its most recent Resolution, as well as recalled their obligation of compliance under Article 25 of the Charter.[23]

In terms of their treaty obligations, it is useful to examine whether States in the region – as well as the Permanent Members of the Security Council – have ratified specific instruments imposing concrete obligations such as cooperation with the International Criminal Court, for example. Without entering into extensive detail, Syria and its neighbors have a mixed record of signing on to human rights treaties, criminal and humanitarian law conventions, and the International Criminal Court Statute.

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conflict lines and border crossings to deliver humanitarian assistance and to establish a monitoring mechanism to confirm the humanitarian nature of the relief consignments. Samantha Power, Explanation of Vote by Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, after a Security Council Vote on a Resolution on Syria (July 14, 2014), *available at* http://usun.state.gov/briefing/statements/229230.htm.

[23] S.C. Res. 2191, *supra* note 10.

All the States in the region have ratified the Geneva Conventions of 1949. All have also ratified the Genocide Convention of 1948.[24] It is perhaps surprising to observe that the Syrian Arab Republic is a party to many international human rights treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), the Convention on the Elimination of all forms of Racial Discrimination ("CERD"), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the Convention on the Rights of the Child ("CRC").[25] Syria signed the Rome Statute for the International Criminal Court in 2000, but never ratified it. (The Syrian government claims that its opposition to the Court was the omission from the Statute of the crime of aggression).[26] It has not adhered to optional protocols providing for human rights monitoring mechanisms.

Turkey, Syria's neighbor to the north, has also ratified many core human rights instruments, although it has not ratified many of the recent weapons conventions and did not sign the Statute of the International Criminal Court. It has received pressure from the European Union to ratify the Rome Statute as part of its bid for accession and has been the focus of intense NGO activity.[27] As a member of the Council of Europe and a party to the European Convention on Human Rights it is subject to the supervisory activity of the European Court of Human Rights.

Iraq, which also shares a long border with Syria, is not an ICC State Party. Indeed, Iraq voted against the adoption of the ICC Statute in Rome,

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[24] The Geneva Academy Rule of Law in Armed Conflicts Project has a very helpful chart showing international treaties adherence for each State. *See generally* GENEVA ACAD., *available at* http://www.geneva-academy.ch/RULAC/internationa_treaties.php. [hereinafter GENEVA ACAD. DATABASE]. A list of parties to the genocide convention is also available on the website of the Office of the High Commissioner for Human Rights, *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en.

[25] *See Syria,* GENEVA ACAD. DATABASE*, supra* note 24, *available at* http://www.geneva-academy.ch/RULAC/international_treaties.php?id_state=211.

[26] *See infra* note 38.

[27] Resolution on EU Support for the ICC: Facing Challenges and Overcoming Difficulties, EUR. PARL. DOC. TA 0507 (2011); Press Release, Coalition for the International Criminal Court, Global Coalition Calls on Turkey to Promptly Accede to the Rome Statute of the ICC (Sept. 4, 2014), *available at* http://www.iccnow.org/documents/CICC_PR_CGJ_Turkey_Sept2014.pdf.

along with China, India, Israel, Qatar, the United States and Yemen.[28] Like the other States in the region, it has joined many other international human rights instruments and international criminal law conventions, but not all. It has ratified the 1997 Anti-Personnel Mine Ban Convention (Landmines Convention) (unlike its neighbors), but has not signed on to the verification mechanisms for the human rights treaties it has ratified.

Lebanon did not sign the ICC Statute and has not acceded to it; it is party to the Genocide Convention and many other core human rights and humanitarian law instruments.

Israel signed the ICC Statute but then attempted to withdraw its signature, following the U.S. attempt to do the same. Israel is a party to many major human rights conventions but has not accepted any of the optional protocols (except on Children in Armed Conflicts) and does not accept the jurisdiction of any of the treaty body committees, thus individual communications cannot be considered. It has entered significant reservations to many of the treaties it has ratified.[29]

Indeed, in the immediate region of the conflict, only Jordan has ratified the International Criminal Court Statute, making it one of two countries in the Middle East and North Africa ("MENA") region to join the Court (along with Tunisia). Djibouti and Comoros have ratified as members of the Arab league. Jordan is a party to the core international human rights treaties but not their optional protocols.

The legal position of the Permanent Five Members of the Security Council (which have the capacity to take or prevent action on Syria), are divergent. France and the United Kingdom are both ICC States Parties, members of the Council of Europe (and therefore subject to the supervision of the European Court of Human Rights), and parties to virtually all the major human rights treaties of the world and the European region. The United States signed the Rome Statute but then attempted to withdraw its

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[28] Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381, 384 n.8 (2000).

[29] *Israel,* GENEVA ACAD. DATABASE, *supra* note 24, *available at* http://www.geneva-academy.ch/RULAC/international_treaties.php?id_state=113. In addition to substantive declarations and reservations, Israel and its Arab neighbors have entered a series of political declarations in which Iraq, Jordan, Lebanon and Syria stated that ratification did not imply recognizing Israel or the establishment of relations with Israel (*e.g.,* Iraq's declaration to the ICCPR and ICESCR), and Israel has responded in its instrument of ratification. *Id.*

signature; it now cooperates with the Court, but has no apparent intent to ratify the Statute.[30] The United States has ratified the ICCPR but not the optional protocol; it has not ratified many other international human rights treaties including the ICESCR, CEDAW, the CRC and humanitarian law conventions such as the Landmines Convention and Protocols I and II Additional to the Geneva Conventions of 1949. It has ratified the Torture Convention and the Genocide Convention.

Russia signed the ICC Statute but there is no evidence of any effort to ratify it. Russia is a member of the Council of Europe and subject to the supervisory jurisdiction of the European Court of Human Rights. China has not signed or ratified and indeed, voted against the Court's establishment at the Rome Diplomatic Conference. China also has not ratified many core human rights treaties including the ICCPR.

This brief survey suggests that, with the exception of Jordan, the States in the conflict region have ratified some, but not all international human rights, criminal law and humanitarian law conventions, and often act without much regard to the treaties they do ratify. They are typically slow to ratify new conventions or accept enforcement obligations attached to treaties that they do ratify. Regarding the International Criminal Court in particular, none of the States in the region have ratified the Rome Statute, again with the exception of Jordan. This is also true of the Permanent Members of the Security Council, with the exception of the United Kingdom and France. Four relevant players – China, Iraq, Israel and the United States – declared their hostility to the International Criminal Court – at least at some time during the past 16 years, if not consistently – by voting against the Rome Statute at its creation.[31] Sadly, it is clear that most of the human rights treaties ratified by Syria, in particular, have not been and are not being respected by the Syrian government. Unfortunately, given the weakness in the enforcement mechanisms of the international human rights system, it is unlikely that any of these conventions will be directly enforced

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[30] Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary General (May 6, 2002), *available at* http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm; Beth Van Schaack, *State Cooperation & the International Criminal Court: A Role for the United States?* (Santa Clara Law Faculty Publications, 2011), *available at* http://digitalcommons.law.scu.edu/facpubs/614/.

[31] And in the case of the United States, working actively to undermine the Court. *See, e.g.,* Leila Sadat, *Summer in Rome, Spring in The Hague, Winter in Washington? U.S. Policy toward the International Criminal Court,* 21 WISC. INT'L L.J. 557 (2003).

against the Assad government – or other states in the region – any time soon.[32]

III. REFERRAL OF THE SYRIAN SITUATION TO THE INTERNATIONAL CRIMINAL COURT?

Under these conditions, what is the prospect of the Syrian situation's referral to the International Criminal Court? Because Syria is not an ICC State Party, the only way for the Syrian situation to come before the Court is the Security Council.[33] However, the Security Council has been unable to achieve consensus. As noted above, the Syrian conflict has been particularly brutal, with extensive violations of the laws of war and the prohibition on crimes against humanity. With rising death tolls and an extraordinary humanitarian crisis ongoing, on May 22, 2014 France, with support from the United States, proposed a Resolution attempting to refer the situation in Syria from March 11, 2011 to the International Criminal Court. It was vetoed by China and Russia and the meeting became heated, with sharp exchanges by the French, Russian, American and Syrian representatives.

Samantha Power, representing the United States stated:

> Today is about accountability for crimes so extensive and so deadly that they have few equals in modern history. Today is about accountability for Syria, but it is also about accountability for the Security Council. It is the Council's responsibility to stop atrocities if we can and, at a minimum, to ensure that the perpetrators of atrocities are held accountable.
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> . . .

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[32] None of the States have accepted compulsory mechanisms for human rights enforcement. Syria has submitted reports to the Human Rights Committee in 1977, 2001, 2005 and 2009. *See Ratification, Reporting & Documentation for Syrian Arab Republic*, UN OHCHR, *available at* http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx. In 2005, the Human Rights Committee welcomed Syria's accession to other international human rights instruments, but noted that Syria had not lifted the 40 year old state of emergency nor established a national human rights institution, and noted its deep concern at continuing reports of torture and cruel, inhuman or degrading treatment or punishment. Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Syrian Arab Republic, U.N. Doc. CCPR/CO/84/SYR, at paras. 8-9 (Aug. 9, 2005).

[33] Rome Statute of the International Criminal Court, arts. 12 & 13, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

> Sadly, because of the decision of the Russian Federation to back the Syrian regime no matter what it does, the Syrian people will not see justice today. They will see crime but not punishment. On 15 April, the members of the Council were briefed on a report that included 55,000 gruesome photos of the emaciated and tortured bodies of dead Syrians whom world-renowned international lawyers concluded had been methodically eliminated by a Government killing machine.
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> The photos were reportedly provided by an individual, alias Caesar, who worked for 13 years as a member of the Syrian military police. When the fighting began, he says that he was instructed to record the images of people starved, beaten, tortured and executed by Syria's security forces. Those photos shock and horrify, even after some of us wondered if there was anything that the regime could do that would still shock. Syrian soldiers had already compelled doctors not to care for the wounded, dragged patients out of hospital beds, laid siege to whole neighbourhoods, cut off access to desperately needed supplies, and carried out chemical weapons attacks and barrel bomb attacks with the full confidence that meaningful action by the Council would be obstructed.[34]
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> . . .
>
> The [Russian and Chinese] vetoes cast today prevent that from happening. Strikingly, those vetoes also protect the monstrous terrorist organizations operating in Syria. Those who would behead civilians and attack religious minorities will not be soon held accountable at the ICC either, for today's vetoes by Russia and China protect not only Al-Assad and his henchmen but also the radical Islamic terrorists who continue a fundamentalist assault on the Syrian people that knows no decency or humanity. Such vetoes have aided impunity not just for Al-Assad but for terrorist groups, as well.[35]

Mr. Churkin, representing the Russian Federation, retorted:

> What justice can one talk about when the overriding policy is aimed at escalating the conflict? The draft resolution rejected today reveals an attempt to use the ICC to further inflame political passions and lay the ultimate groundwork for eventual outside military intervention. It should be noted that the so-called Caesar report (S/2014/244, annex), which was used to build up tension in the run-up to the introduction of the draft resolution, was based on unconfirmed information obtained from unverifiable sources and therefore cannot serve as a platform for taking such a serious decision.

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[34] U.N. SCOR, 69th Sess., 7180th mtg. at 4, U.N. Doc. S/PV.7180 (May 22, 2014), *available at* http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7180.pdf.

[35] *Id.* at 5.

> One cannot ignore the fact that the last time the Security Council referred a case to the International Criminal Court (ICC) — the Libyan dossier, through resolution 1970 (2011) — it did not help resolve the crisis, but instead added fuel to the flames of conflict. After the cessation of hostilities, the ICC did not exactly rise to the occasion, to put it mildly. It did not contribute to a return of normalcy or justice in Libya, and instead evaded the most pressing issues. The deaths of civilians as a result of NATO bombardments was somehow left outside its scope. Our colleagues from NATO countries arrogantly refused to address that issue altogether. They even refuse to apologize, even as they waxed eloquent about shame. They advocate fighting impunity but are themselves practicing a policy of all-permissiveness.
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> The United States frequently indicates the ICC option for others, but is reluctant to accede to the Rome Statute itself. In today's draft resolution, the United States insisted on an exemption for itself and its citizens.[36]

Following the interventions of China and other States, Mr. Araud, representing France, rebuked his Russian counterpart in extraordinarily strong language:

> I had hoped that the tone of my speech would have demonstrated to everyone seated around this table and in the Chamber our determination that the Council not again manifest the same divisions. I wanted my statement to reflect my desire to respect the dignity of the debate — a debate that has to do with the infinite suffering of the Syrian people — and my desire that those who committed crimes be one day held to account for them. I see no other way except to appeal to the International Criminal Court. It was therefore a quite simple intervention. I regret the fact that the representative of the Russian Federation replied with an invective and direct personal attacks. I will refer to four points raised in my Russian colleague's intervention: absurdity, confusion, error and, lastly, effrontery.[37]

Finally, the Syrian Representative took the floor, and after complaining of French aggression and misconduct, outlined Syria's opposition to the proposed referral:

> The Syrian Arab Republic believes in international criminal justice, and was among the States that participated actively in the United Nations Diplomatic Conference in Rome that adopted the Statute of the International Criminal Court and were its first signatories. Syria's view is based on how important it is that justice be comprehensive, transparent and in no way politicized, selective or subject to double standards. Against that backdrop, Syria called for the crime of aggression, as the

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[36] U.N. Doc. S/PV.7180, *supra* note 34, at 13.
[37] *Id.* at 13-14.

> chief of all crimes, to be included in the Court's jurisdiction. That, however, was denied, which is why my country has not ratified the Rome Statute. Today, the Government of the Syrian Arab Republic emphasizes that in order to achieve justice we must have the following.
>
> First, we must hold accountable the Governments of Turkey, Saudi Arabia, Qatar, France, Israel and other States that are openly inciting violence and terrorism, including by funding, arming, sponsoring, training, recruiting and facilitating the entry of thousands of mercenaries and terrorists from various parts of the world into Syria.[38]
>
> . . .
>
> Secondly, there is a lack of accountability for the documented war crimes, crimes against humanity and acts of aggression and occupation committed by the Israeli authorities in the occupied Arab territories, including the occupied Syrian Golan, for over seven decades. Those crimes were committed with the support of some permanent members in the Council that have thus far enabled the Israeli war criminals to escape punishment and have obstructed all initiatives aimed at holding them accountable.
>
> Thirdly, we are concerned about attempts to undermine justice through the immunity that some of the great Powers have arrogated exclusively for themselves. That immunity has helped them escape any accountability for their human rights violations their crimes committed in other Member States, with the aim of implementing colonial agendas and schemes for domination and oppression. Abu Ghraib, Guantanamo, the bombing of the Chinese Embassy in Belgrade, the flooding of Libya with blood, the secret prisons, the use of drones to kill innocent civilians, the practices of mercenary companies, such as Blackwater in Iraq, and others — all these are vivid examples of double standards that have escaped accountability and punishment.[39]

These tendentious interventions were followed by a tit for tat between Messrs. Araud and Churkin. The strong language and aggressive behavior by the Permanent Members of the Security Council is reminiscent of the cold war era – although one would be hard put to find equally disrespectful colloquies even during that period[40] – and signals a dangerous return to the kinds of stalemates the international community experienced prior to the

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[38] U.N. Doc. S/PV.7180, *supra* note 34, at 16.

[39] *Id.* at 17.

[40] The example that comes to mind is Adlai Stevenson's interactions with his Russian counterpart during the Cuban Missile crisis. I am grateful to Feisal al-Istrabadi for the reference. On the Libya and Syrian conflicts generally, see Feisal al-Istrabadi, *The Limits of Legality: Assessing Recent International Interventions in Civil Conflicts in the Middle-East*, 28 MD. J. INT'L L. 129 (2014) (forthcoming).

fall of the Berlin Wall in 1989. It imperils the effectiveness of the United Nations system, and operates as a complete check upon the International Criminal Court as well, which lacks jurisdiction to proceed in the absence of a Security Council Resolution referring the Syrian situation to it.[41]

Although the Russian representative complained of the Libya example, it is notable that when a referral to the International Criminal Court, backed with Security Council enforcement power, was inserted into the conflict early – even before the onset of civil war casualty levels were relatively low compared to other conflicts.[42] As for the ICC intervention itself, the Appeals Chamber has found that under the principle of complementarity, Libya can proceed with the Al-Senussi case, with the understanding that if no actions are taken, the Prosecutor may go back to the Court to reopen the admissibility question.[43] Conversely, the case against Saif al Qaddafi was found to be admissible and his transfer to the ICC required.[44] Although the ICC cannot bring about a peaceful transition to liberal government in Libya – or any country – and Libya continues to struggle with rebuilding its society following the civil war[45] – the Libyan example may suggest that timely – early – intervention might lessen the loss of life that might otherwise occur. Certainly, the conflict has not degraded in the way that the Syrian conflict has.

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[41] Rome Statute of the International Criminal Court, *supra* note 33, art. 12.

[42] An estimated 10,000 to 15,000 persons are estimated to have been killed on both sides of the fighting according to Professor Cherif Bassiouni, who led a U.N. Human Rights Council investigation of the Libyan conflict. *See* Youssef Boudlal, *Up to 15,000 Killed in Libya War: U.N. Rights Expert*, REUTERS (June 9, 2011, 12:59 PM), *available at* http://www.reuters.com/article/2011/06/09/us-libya-un-deaths-idUSTRE7584UY20110609**.**

Although there have been complaints regarding both the ICC referral and the Security Council's authorization of force on the grounds that the Libya situation was simply not serious enough. *See, e.g.,* al-Istrabadi, *supra* note 40, at 138-41. If one takes a victim centered approach, the intervention in Libya may be preferable to the appalling level of non-action in Syria.

[43] Prosecutor v. Saif al-Islam Gaddafi & Abdullah al-Senussi, Case No. ICC-01/11-01/11, Appeal of Mr. Abdullah al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 (July 24, 2014).

[44] Prosecutor v. Saif al-Islam Gaddafi & Abdullah al-Senussi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif al-Islam Gaddafi (May 31, 2013).

[45] *Anarchy looms: Foreign Involvement and Reckless Militias Make a Flammable Cocktail*, ECONOMIST (Aug. 30, 2014), *available at* http://www.economist.com/news/middle-east-and-africa/21614231-foreign-involvement-and-reckless-militias-make-flammable-cocktail-anarchy-looms?zid=304&ah=e5690753dc78ce91909083042ad12e30.

IV. SEVEN IDEAS ABOUT THE WAY FORWARD IN THE SYRIAN SITUATION

In addition to immediately furnishing additional humanitarian assistance and building a framework for peace, there *are* options that can move the situation in Syria forward, particularly as regards the problem of impunity. Some are short term, some medium term, and others may require a longer timeline. A few possibilities are noted below.

First, **all States must be reminded of their existing legal obligations.** Whether imposed by treaties they have ratified or customary international law, the States in the MENA region, and the Permanent Members of the Security Council, have assumed or are subject to a multiplicity of international legal obligations that prohibit the targeting of civilians, the expulsion of civilian populations, and the mistreatment of refugees. The Syrian government has a responsibility to protect all its people from genocide, war crimes, crimes against humanity and ethnic cleansing; and the international community has a responsibility to assist it in doing so, and to use "appropriate diplomatic, humanitarian and other peaceful means" to protect the Syrian population, and to use collective force through the UN Security Council if all else fails.[46]

Second, **continuing efforts should be made to refer the situation in Syria to the International Criminal Court.** The ringing rhetoric of Ambassador Power notwithstanding, it would obviously be much easier for the United States to do so effectively if it could eliminate the allegation of double standards by committing itself fully to the project of international justice.[47] Ambassador Power and other U.S. officials should commit themselves to ICC ratification at the earliest possible opportunity; and even prior to ICC ratification, when the United States supports an ICC referral, the language about immunities and nonpayment of expenses included in the Darfur, Libya and proposed Syria referrals should not be included.[48]

Of course, even if the United States stood with its European allies on ICC ratification, Russia and China could still veto further referrals to the

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[46] G.A. Res. 60/1, ¶ 139, U.N. GAOR, 60th Sess., U.N. Doc. A/Res/60/1, at 30 (Oct. 24, 2005).

[47] Opponents of referral on each of the Security Council debates on Syria refers to U.S. "hypocrisy" in this regard.

[48] The May 22nd Resolution contained two paragraphs providing that for the non-payment of expenses by the United Nations related to the referral, and to the immunity of non-ICC State Party personnel before the Court.

Court or block other action on Syria, although they might be more diplomatically isolated if they did so. Moreover, the ICC Prosecutor cannot proceed on her own initiative under Article 15 of the Rome Statute, because Syria is not a State Party, and the government of President Assad is unlikely to ratify the Statute or submit an Article 12(3) Declaration to the Court. After a change of government or if the opposition government were to be widely recognized by other States, it might be possible for Syria to ratify the ICC Statute and ask the ICC to intervene.

There are significant obstacles to the implementation of this idea, of course, and there is some precedent: former President Morsi of Egypt attempted to do this, and failed, but the Syrian case is rather different. Morsi, it may be recalled, filed an Article 12(3) declaration purporting to accept the ICC's jurisdiction in December 2013.[49] The ICC Prosecutor rejected it in May, stating that Morsi did not have full powers at that time.[50] The Office noted that the UN General Assembly had already accepted the credentials of the Al Sisi government and that Morsi did not have effective control of the country at the time the declaration was made.[51] These would be the obstacles that any effort by the Syrian opposition would need to overcome.

It is worth observing that on December 18, 2014, the General Assembly adopted a resolution encouraging the "Security Council to take appropriate action to ensure accountability, noting the important role that the International Criminal Court can play in this regard."[52] The Resolution was adopted by a vote of 127 in favor, 13 opposed and 48 abstentions,[53] and was

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[49] Press Release, International Criminal Court, The Determination of the Prosecutor on the Communication Received in relation to Egypt (May 8, 2014), *available at* http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1003.aspx.

[50] *Id.*

[51] *Id.*

[52] Situation of Human Rights in the Syrian Arab Republic, G.A. Res. 69/189, U.N. Doc. A/RES/69/189 (Dec. 18, 2014).

[53] The vote is reported in the media but is not yet available in the official UN Records. *See* Press Release, General Assembly, Adopting 68 Texts Recommended by Third Committee, General Assembly Sends Strong Message towards Ending Impunity, Renewing Efforts to Protect Human Rights, U.N. Press Release GA/11604 (Dec. 18, 2014), *available at* http://www.un.org/press/en/2014/ga11604.doc.htm [hereinafter UN Press Release GA/11604]; *see also 2014-2015 UNGA Session: 20 Resolutions Against Israel, 3 on Rest of the World*, UN WATCH (Jan. 22, 2015), *available at* http://blog.unwatch.org/index.php/2015/01/22/2014-at-the-un-20-resolutions-against-israel-3-on-rest-of-the-world/.

somewhat less forceful than the similar Resolution adopted the same day calling for referral of the situation in North Korea to the Court.[54]

Third, the current impasse in the Security Council needs to be addressed. It has been suggested that General Assembly Resolution 377 of November 3, 1950, known as the Uniting for Peace Resolution – could be used. It allows the General Assembly to call an emergency special session where the Security Council is failing to exercise its responsibilities for the maintenance of international peace and security because of a lack of unanimity of the Permanent Members.[55] The United States proposed the Resolution which was adopted by a vote of fifty-two in favor, five against, one abstention, and two non-votes,[56] and has been used several times. Although vetoes by the Soviet Union precipitated the adoptions of Resolution 377, it was first used against France and the United Kingdom, which were blocking the adoption of a resolution on the Suez crisis.[57] The adoption of Resolutions by the General Assembly regarding the possible referral of the Syrian and North Korean situations to the ICC are along these lines; note, however, that they do not purport to be referrals, but clearly are deferential to the responsibility of the Council under the Rome Statute to refer cases to the Court.[58]

Another possibility was alluded to by the Rwandan government in its remarks on May 22, 2014. This would be the adoption of a "Code of Conduct" amongst the Permanent Five ("P5") members of the Security Council by which they would voluntarily refrain from using the veto in situations of genocide, war crimes, ethnic cleansing and crimes against humanity. This could, as the Rwandan government underscored, help rebuild the Council's credibility.[59] Other formulations have been advanced and some authors have even suggested that rather than a voluntary code, the Charter should either be amended or reinterpreted to prevent arbitrary uses of the veto by the P5.[60]

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[54] Situation of Human Rights in the Democratic People's Republic of Korea, G.A. Res. 69/188, A/RES/69/189 (Dec. 18, 2014); *see* UN Press Release GA/11604, *supra* note 53.

[55] G.A. Res. 377 (V), ¶ 1, U.N. Doc. A/Res/377 (V) (Nov. 3, 1950).

[56] U.N. GAOR, 5th Sess., 302d plen. mtg., U.N. Doc. A/PV.302 (Nov. 3, 1950).

[57] S.C. Res. 119, U.N. Doc. S/RES/119 (Oct. 31, 1956).

[58] The drafters explicitly rejected the possibility that the General Assembly might refer cases to the Court during the ICC Statute's negotiation.

[59] U.N. Doc. S/PV.7180, *supra* note 34, at 8.

[60] *See, e.g.*, Yehuda Z. Blum, *Proposals for UN Security Council Reform*, 99 AM. J. INT'L L. 632 (2005).

Fourth, although there is no fora yet in which those responsible for the crimes committed since March 2011 may be tried, there are many groups and governments now documenting atrocities for future trials. It is cold comfort to current victims that someday in the future there might be prosecutions, but having seen how important contemporaneous evidence collection was for future trials – and for psychological purposes – in Chile, in Cambodia, and in other conflicts – this is, at least, something concrete that can be done now. Mapping crime sites, taking victim testimony, even doing whatever forensics are possible under the circumstances can help to prepare future cases. The photos smuggled out by "Caeser" have become the subject of an exhibit at the Holocaust Museum, and have been sent to experts for forensic analysis.[61] It is also possible to imagine the establishment of an ad hoc or mixed tribunal if the ICC cannot act, an effort that Professor David Crane, amongst others, has been spearheading. The *New York Times* recently published a very interesting story on atrocity crime evidence being collected suggesting perhaps future trials might be held in neighboring Iraq.[62]

Fifth, States wishing to move from rhetoric to action regarding the atrocity cascade in Syria must use legal argumentation to much greater effect. The United States, in particular, often asserts vague justifications like self-defense (or defense of others), which may mask acts that are in fact violating the sovereignty of other States, and are unlikely to convince allies of the need for and legality of intervention. It can endeavor to make a clear case for humanitarian intervention, for the Responsibility to Protect, and for Security Council action to be constrained by law. The rhetoric of France and the United States during the debate on the May 22nd Resolution was not supported by sophisticated legal argumentation but was an emotional appeal that proved less than persuasive. Those supporting action in Syria must show those resisting action in Syria why and how international law may support or even require intervention – penning thoughtful and solid justifications for international action – and, conversely, eschewing actions that cannot be solidly justified.

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[61] *Evidence of Atrocities in Syria*, U.S. HOLOCAUST MEM'L MUSEUM, *available at* http://www.ushmm.org/confront-genocide/cases/syria/syria-photo-galleries/evidence; Stav Viv, *Photos from Syria Allegedly Show Torture, Systematic Killing*, NEWSWEEK (Oct. 21, 2014), *available at* http://www.newsweek.com/photos-syria-allegedly-show-torture-systematic-killing-278894.

[62] Marlise Simons, *Investigators in Syria Seek Paper Trails That Could Prove War Crimes,* N.Y. TIMES (Oct. 7, 2014), *available at* http://www.nytimes.com/2014/10/08/world/middleeast/investigators-in-syria-seek-paper-trails-that-could-prove-war-crimes.html.

None of the States involved have yet evoked the Genocide Convention, one of only two treaties that all parties in the region have ratified (the other are the Geneva Conventions of 1949). There is a clear obligation on States to prevent genocide, which is found in the Convention and was upheld by the International Court of Justice in *Bosnia v. Serbia*.[63] Although it has been difficult to argue the case of genocide with respect to crimes committed by government forces, the entry of ISIS into the fray, with its targeting of minority populations, makes this argument easier and more convincing, not only in Syria but in neighboring Iraq. Turkey's initial intransigence with respect to Kobani could have been seen as complicity in ISIS' destruction of that village and its population.

Sixth, while endeavoring to address the situation in Syria, the entire region must be the focus of attention. As noted earlier, the treaty ratification and compliance patterns of the region are weak. There should be a concerted effort to combat extremism not only by using force, but also through soft power. To the extent that religious extremism is fueling conflict, it can be combatted by supporting moderates and promoting economic development. Progress will be easier if other regional players enhance their compliance with international legal norms on human rights. This is true for Iraq and Lebanon; it is equally true for Israel, which tends to see itself as outside the region. Indeed, the failure to arrive at agreed upon borders for Israel and Palestine is like a cancer that invades and poisons the entire region.

There is a deep distrust of international institutions in the Arab world for a variety of reasons. For this reason, perhaps it could be useful to develop a regional human rights system and work hard on improving human rights in all the Arab League countries. While this will not immediately help Syrian victims, it may be important in the long term.

The success of the Inter-American system and the European system are impressive. These regional systems work well because they work more locally. While the African proposal for a regional criminal court in Africa may have emerged as a purely cynical response to the ICC's interventions in Africa, if it *were possible* to create such a court and have it be independent, effective and impartial, it would be a good thing for Africa and for international justice. As we have seen, it is not enough to have

[63] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43 (Feb. 26, 2007).

treaties and even enforcing institutions; the rule of law only works when it is embedded in a legal culture that accepts it. Enhancing this culture in the Middle East is critically important.

Seventh, although military action should not be ruled out, great care must be taken when using force to address atrocity crimes. Certainly, military action now against ISIS cannot assist the Assad government. That could make coalition forces complicit in the commission of the crimes his government is alleged to be committing. Moreover, as my fifth point suggests, the legal justifications for that intervention should be set forth clearly and convincingly, which has not been done.

Perhaps there was a possible right of humanitarian intervention in August 2013 after the chemical weapons attacks which were attributed to government forces; or at least for the imposition of no fly zones or the possible targeting of chemical weapons facilities and delivery systems. Scholars certainly debated the question. Force was averted by a decision to order Syria to destroy its arsenal of chemical weapons, but recently, new sites have been revealed. If Syria is not complying with the Security Council's requirement that it destroy its chemical weapons, there should be debate in the Council as to the consequences of that failure.

States should also be cognizant of their legal obligations under the Genocide Convention to prevent and punish genocide. The initial decisions of the United States and Turkey to watch passively while Kobani fell arguably violated these obligations. The Assad government may be complicit in genocide as well.

V. CONCLUSION

There have been eight Security Council Resolutions adopted regarding the situation in Syria, none of which have been explicitly taken under Chapter VII or called for referral of the situation to the International Criminal Court in spite of the clear threat to international peace and security posed by the conflict. As frustrating as this is, it is important not to use the current impasse as an excuse for future inaction. Peace negotiations will hopefully continue, as well they should. Negotiators however, may be tempted to trade peace for justice during that process, giving those seemingly responsible for the commission of war crimes, crimes against humanity and perhaps genocide, a pass in exchange for a cessation of hostilities. This would be an undesirable result. There is now talk of

President Assad remaining in power, something that was unthinkable a year or two ago, given the ferocity of the conflict. Of course, President Assad may retain his position – as may others in his government or in the opposition – but whatever political solution is devised should be without prejudice to the rights of the international community and the Syrian people to demand accountability for the international crimes committed during the conflict. No amnesty for crimes of the magnitude alleged to have been committed in Syria can or should be accepted, nor is it clear that any amnesty would be lawful, at least outside of Syria. Moreover, amnesty would be unlikely to either resolve the current impasse or prevent the commission of future atrocities. History has shown that impunity typically emboldens individuals perpetrating atrocity crimes; it does not stop them.[64]

[64] *See, e.g.,* Leila Nadya Sadat, *Exile, Amnesty and International Law,* 81 NOTRE DAME L. REV. 955 (2006).

THE MOROCCO TRUTH COMMISSION, BALANCING RELIGION, *REALPOLITIK* AND IDEALISM

Isaac Kfir[*]

INTRODUCTION

Transitional justice is an evolving field of study and practice.[1] It rose out of the judicialization of international relations[2] and the promise to end immunity for those that responsible human rights violations.[3] The need and desire to engage in transitional justice manifests itself through several endogenous and exogenous assumptions that have macro- and micro-elements ranging from addressing the needs of victims to dealing with the general needs of the society to ending impunity.[4] Other elements found in

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[1] *See* Leslie Vinjamuri & Jack Snyder, *Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice*, 7 ANN. REV. POLIT. SCI. 345 (2004).

[2] *See generally* Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998) (examining the way legal scholars use IR theory and empirical studies in their research).

[3] *See*, *e.g.*, U.N. Secretary-General*, The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Rep. of the Secretary-General*, U.N. Doc. S/2004/616 (Aug. 23, 2004); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991) (arguing that state's failure to punish international crimes amounts to a violation of its international customary law obligations); Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHI. J. INT'L L. 1 (2001) (arguing that the surge in judicial proceeding in respect to human rights violators is the product of the hard and dedicated work of a activists determine to seek justice).

[4] *See*, *e.g.*, Monique Crettol & Anne-Marie La Rosa, *The Missing and Transitional Justice: The Right to Know and the Fight against Impunity*, 88 INT'L REV. RED CROSS 355 (2006) (discussing the importance of closure as part of a mourning process); Hunjoon Kima & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 INT'L STUD. Q. 939 (2010) (arguing that human rights prosecutions after transition lead to improvements in human rights protection, and that

transitional justice relate to the promotion of an international human rights regime within society, a sentiment captured by Luis Moreno Ocampo who has pointed to the role that international society played in helping Argentina develop institutions to manage the "horror and tragedy" that the country had experienced during the military dictatorship.[5]

Transitional justice has links to international society,[6] either in promoting security or in advancing responsibility for human security and justice when it comes to people, as opposed to states. Put differently, states that commit gross human rights violations are seen as posing a threat to the maintenance of international peace and security as well as abnegating their responsibility towards their own people by committing atrocities.[7] Ultimately though, transitional justice is best understood as an approach taken by states and/or societies to address a violent past largely through retributive and reconciliatory mechanisms coupled with liberal state

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human rights prosecutions have a deterrence impact beyond the confines of the single country); Geoffrey Robertson, *Ending Impunity: How International Criminal Law Can Put Tyrants on Trial*, 38 CORNELL INT'L L.J. 649 (2005) (using the Milosevic and Hussein trials to emphasize the challenge of ending impunity in history and in international law); M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409 (2000) (noting how *realpolitik* has undermined the pursuit of justice and the ending of impunity in international law); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*, 95 AM. J. INT'L L. 7, 9 (2001) (declaring "The empirical evidence suggests that the ICTY and the ICTR have significantly contributed to peace building in postwar societies, as well as to introducing criminal accountability into the culture of international relations.").

[5] Luis Moreno Ocampo, *Beyond Punishment: Justice in the Wake of Massive Crimes in Argentina*, 52 J. INT'L AFF. 669, 688 (1999); *see also* Edward Newman, *'Transitional Justice': The Impact of Transnational Norms and the UN*, 9 INT'L PEACEKEEPING 31 (2002); Kathryn Sikkink & Carrie Booth Walling, *The Impact of Human Rights Trials in Latin America*, 44 J. PEACE RES. 427 (2007) (arguing through am empirical study the prosecution of former human rights violators does not undermine democracy and may in fact promote it).

[6] Bull argued that such international society, "exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another and share in the working of common institutions." HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 13 (1977).

[7] *See*, *e.g.*, Jon Western & Joshua S. Goldstein, *Humanitarian Intervention Comes of Age-Lessons from Somalia to Libya*, 90 FOREIGN AFF. 48 (2011) (arguing that the Responsibility to Protect (R2P) doctrine is helping to create a more secure world and cementing the norms of a responsibility to protect).

building.[8] The need for transitional justice was recognized by the U.N. Secretary-General when it declared:

> Our experience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.[9]

Transitional justice mechanisms generally manifest themselves through two approaches: retributive justice or reconciliatory justice. When looking at retributive justice, the focus is with prosecutions whereby trials are held for those responsible for gross human rights violations.[10] The trials are limited, as ultimately the number of the perpetrators, coupled with issues of time and cost, ensure that only a limited number of people are likely to face prosecution.[11] The reconciliatory approach tends to call for truth commissions, which are non-judicial bodies aimed at allowing individuals to tell "their stories," create a shared narrative and engage in a form of social healing by recognizing the harm and pain that had been caused.[12]

Nevertheless, the field of transitional justice must come to terms with the infusion of politics and justice, leading to the development of such concepts as "legal justice" and "political justice," with "administrative justice" lying somewhere in the middle.[13] These terms allude to a

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[8] *See generally* RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY (2001).

[9] *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Rep. of the Secretary-General*, *supra* note 3, ¶2.

[10] *See* Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39 (2002).

[11] *See* Patricia M. Wald, *ICTY Judicial Proceedings-An Appraisal from Within*, 2 J. INT'L CRIM. JUST. 466 (2004) (reviewing ICTY proceedings to underscore how difficult international criminal justice is, but also its worthiness)*; see also* Minna Schrag, *Lessons Learned from ICTY Experience*, 2 J. INT'L CRIM. JUST. 427 (2004) (a practitioner reflecting on the ICTY's experiment); David M. Crane, *White Man's Justice: Applying International Justice after Regional Third World Conflicts*, 27 CARDOZO L. REV. 1683, 1683 (2006) (arguing that by narrow the scope of the mandate of the Special Court, "the international community got it right this time around." Crane adds, that the model created in Sierra Leone serves as "an effective model for prosecuting those who commit atrocities in the future, even within the International Criminal Court (ICC) paradigm.").

[12] *See generally* HAYNER, *supra* note 8.

[13] Jon Elster argues that pure legal justice has four key elements to it, which include the adoption of unambiguous laws to limit judicial discretion, an independent and insulated judiciary; unbiased judges and jurors; and, an effective due process. Pure political justice

recognition that societies transitioning out of conflict must often make unpalatable compromises that are quintessentially a balancing between *realpolitik* and idealism. The need for a balanced process stems from the fact that there is a difference between abstract conception of justice and human rights often advocated by external actors and what the society can and will accept or tolerate.[14] Simply, foreign actors, predominately western human rights groups, are often the main proponents of prosecutions for those accused of gross human rights violations, which may mean that they are not fully appreciative of political realities as they are determined to challenge the culture of impunity.[15] Thus, the call for a compromised approach when it comes to societies transitioning out of conflict stems from the fact that the conflict or the violence cause fragmentation, ensuring that there are more stakeholders who have incentives to undermine the peace process.[16] Additionally, the need for compromise is based on the fact that often resources—financial and human—are limited, either because the

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on the other hand refers to a process when the executive serves as judge, jury and prosecutor, which in effect mean that it designates the wrongdoer and decides on the punishment. Administrative justice refers to purges in public administration. JON ELSTER CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE 84-92 (2004).

[14] *See* Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals*, 12 HUM. RTS Q. 1 (1990) (highlighting the dangers of adopting a broad-brush approach and how it can divide the society); s*ee also* Moreno Ocampo, *supra* note 5, at 670 (declaring, "[a]s a prosecutor in the trials of those responsible for state sponsored 'disappearances' and systemic torture, I realized the limits of using the criminal justice system to prosecute gross violations of human rights.").

[15] Victoria Britton for example declares, "The human rights lobby in its air-conditioned offices in the west is vociferous, well-funded and powerful, and its concerns are readily used as ammunition by the right in the US to justify their emasculation of the UN." Victoria Britton, *Unrealistic Humanitarians*, GUARDIAN (Aug. 3, 1999), *available at* http://www.guardian.co.uk/world/1999/aug/04/sierraleone.victoriabrittain. Britton adds that although in the West no one was happy with the Sierra Leone Peace Accord, "…the people of Freetown came out to celebrate on the streets when the agreement was signed." *Id.*; *see also* Edward Neumann & Oliver Richmond, *Peace Building and Spoilers*, 6 CONFLICT, SECURITY & DEVELOPMENT 101 (2006) (showing that imposed or ill-conceived peace processes can propagate the seeds of spoiling the peace); Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission*, 52 J. INT'L AFF. 647 (1999).

[16] Stephen John Stedman's theory of spoilers is particularly apt in this context as Stedman argues that the greatest risk to a peace agreement comes from spoilers—individuals or groups who believe that peace when achieved through negotiation threatens their power, interest or world view leading them to use violence to undermine the peace. Stephen John Stedman, *Spoiler Problems in Peace Process*, 22 INT'L SECURITY 5, 5 (1997); s*ee also* Barnett R. Rubin, *Transitional Justice and Human Rights in Afghanistan*, 79 INT'L AFF. 567 (2003) (arguing for a pragmatic approach for transitional justice in Afghanistan because it is hard to find any powerful Afghan who had not committed a violation of sort, but without whom peace would become harder to achieve).

damage was so severe that the country is bankrupt, has no professionals that can help in the reconstruction, or because there is fear that the old elite would undermine the reconstruction, or because there is no real commitment from the international community to support the reconstruction.[17]

The different approaches to justice emphasize that ending conflict calls for compromise, which at times ameliorates the demand for prosecutions of international crimes.[18] Rosemary Nagy described the situation in the following manner, "[t]ransitional justice seeks to redress wrongdoing but, inevitably, in the face of resource, time and political constraints, this is a selective process. Transitional justice thus involves a delimiting narration of violence and remedy."[19] However, political realities are often such that those who participated in the conflict, and in all probability had been responsible for some violations, remain major stakeholders and excluding them from the process without reigniting the conflict is virtually impossible. Thus, increasingly, transitional justice, especially when viewed as retributive justice, came under criticism for neither ending impunity nor for assisting societies transitioning out of conflict to move beyond the

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[17] *See*, *e.g.*, Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice*, 32 MICH. J. INT'L L. 395 (2011) (assessing whether the Special Court has fulfilled its mandate and promise); Bruce Baker & Eric Scheye, *Access to Justice in a Post-conflict State: Donor-supported Multidimensional Peacekeeping in Southern Sudan*, 16 INT'L PEACEKEEPING 171 (2009) (arguing that when establishing a post-conflict judicial system, it might be more effective and efficient to invest in local judicial system); Rubin, supra note 16 (Rubin had served as one of Lakhdar Brahimi, the Special Representative of the Secretary-General, advisers during the Bonn Accords. Rubin points out that a number of the Afghan representative were determined not to have a transitional justice clause inserted into the Accords as they argued it would besmirch the mujahedeen).

[18] The mandate of the Special Court for Sierra Leone emphasizes that prosecution needs to be restricted only to those that "bear the greatest responsibility." Statute of the Special Court, Sierra Leone, 2002, Art. 1. This needs to be contrasted with the International Criminal Tribunal for the former Yugoslavia, which has "the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 1, U.N. Doc. S/25704 at 36, annex (1993) and U.N. Secretary-General, Rep. Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704/Add.1 (May 3, 1993), adopted by S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

[19] Rosemary Nagy, *Transitional Justice as Global Project: Critical Reflections*, 29 THIRD WORLD Q. 275, 276 (2008).

conflict.[20] The criticism led to a greater focus on reconciliatory mechanisms such as truth commissions.[21] Nevertheless, as Paul Gready and Simon Robins have correctly pointed out, transitional justice has not only led to an industry of praxis, but there is also an increasing recognition that "the performance and impact of transitional justice mechanisms have been at best ambiguous and at times disappointing, critiqued, for example, for treating the symptoms rather than the causes of conflict."[22] Key to the emerging critique of transitional justice is a call to adopt a view of transformative justice, defined as,

> transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level.[23]

Morocco's experience with transitional, reconciliatory justice epitomizes the view that a more effective way for some countries to deal with their turbulent past is by establishing a mechanism that fits what the society in question can tolerate, as opposed to what the international community envisions and demands when it comes to international human rights. In this vein, it is important to review Morocco's experience with transitional justice, because by all indications, Morocco's Equity and Reconciliation Commission (*Instance Équité et Réconciliation*, IER[24]) was the first truth commission in a Muslim majority country.[25] Additionally, it

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[20] *See*, *e.g.*, Gearoid Millar, *Local Evaluation of Justice Through Truth Telling in Sierra Leone: Postwar Needs and Transitional Justice*, 12 HUM. RTS REV. 515 (2011) (finding that the Sierra Leone Truth and Reconciliation Commission not only did not generate a sense of justice but was seen as provocative); Alexander Dukalskis, *Interactions in Transition: How Truth Commissions and Trials Complement or Constrain Each Other*, 13 INT'L STUD. REV. 432 (offering a review of various theories of transitional justice and their limitations).

[21] PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS (2d ed. 2011) [hereinafter HAYNER, TRANSITIONAL JUSTICE].

[22] Paul Gready & Simon Robins, *From Transitional to Transformative Justice: A New Agenda for Practice* 8, INT'L J. TRANSITIONAL JUST. 339, 340 (2014); *see also* David Mendeloff, *Trauma and Vengeance: Assessing the Psychological and Emotional effects of Post-conflict Justice*, 31 HUM RTS Q. 592 (2009) (arguing that there is no empirical evidence that post-conflict justice works).

[23] Gready & Robins, *supra* note 22, at 340.

[24] The literature on the Morocco Equity and Reconciliation either uses the French acronym IER or the English version, ERC.

[25] Rachel Linn, *'Change within Continuity': The Equity and Reconciliation Commission and Political Reform in Morocco*, 16 J.N. AFR. STUD. 1, 1 (2011).

appears that the Moroccan Commission served as a template for other Muslim-majority countries engaged in transitional justice.[26] Put differently, Morocco is increasingly seen as an important case study within the Arab World as pluralism and democracy appear—at least in the post-King Hassan II era—to have established a foothold in the country.[27] This is despite the fact that all political, military, and spiritual authority lies with the monarchy, specifically King Mohammed VI, because even though is Morocco is regarded as a constitutional monarchy, the reality is that the *makhzen* (royal court) controls and directs the state.[28] Additionally, what makes the Moroccan experience with transitional justice so remarkable is that Islam is vibrant and strong in Morocco, especially because of the role that the monarchy plays in promoting Islamic observance and in expressing some tolerance towards political Islamist groups, as a way to manage potential and real dissent.[29] Another reason why Morocco is an important case study in transitional justice studies is that the country appears to have an active and relatively powerful civil society that helps shape policies and programs in addition to political, social, and economic agendas.[30] This feature may also explain the role civil society played in the formation of the Moroccan Truth Commission.[31] Finally, the Moroccan Truth Commission was unique because neither those who committed violations nor those who

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[26] Looking into the issue of reparations following gross human rights violations in Bahrain, Jared Watkins draws on Morocco's experience with transitional justice. Jared L. Watkins, *The Right to Reparations in International Human Rights Law and the Case of Bahrain*, 34 BROOK. J. INT'L L. 559, 581-85 (2009). However, it is also important to emphasis that there has been criticism of the Royal family with accusations that they are incredibly apt at disguising their true intentions. The Moroccan journalist Ahmed Benchemsi has claimed, "when it comes to marketing itself, however spuriously, as a poster child for democratic aspirations, the Moroccan monarchy has longstanding expertise—certainly more than any other regime in the Arab world has ever developed. It comes as no surprise, then, to find that the Kingdom's new constitution may look generally liberal but in fact maintains and even strengthens the forces of absolutism and oligarchy." Ahmed Benchemsi, *Morocco: Outfoxing the Opposition*, 23 J. DEMOCRACY 57, 60 (2012).

[27] Freedom House describes Morocco as being partly free. *Morocco*, FREEDOM HOUSE (2015), *available at* https://freedomhouse.org/country/morocco#.VQxnH6PD99A.

[28] Pierre Hazan, *The Nature of Sanctions: The Case of Morocco's Equity and Reconciliation Commission*, 90 INT'L REV. RED CROSS 399, 403 (2008); Driss Maghraoui, *Constitutional Reforms in Morocco: Between Consensus and Subaltern Politics*, 16 J.N. AFR. STUD. 679, 679 (2011).

[29] *See infra* Section I(A).

[30] Francesco Cavatorta, *Civil Society, Islamism and Democratisation: The Case of Morocco*, 44 J. MOD. AFR. STUD. 203, 211-12 (2006).

[31] Frédéric Vairel, *Morocco: From Mobilizations to Reconciliation?*, 13 MEDITERRANEAN POL. 229, 232-33 (2008).

issued orders appeared before it; therefore, whether justice can be served in a sanction-free transitional justice system is an important question.[32]

The aim of this note is not so much to evaluate whether the Moroccan truth and reconciliation was effective and successful, but rather to describe it and in doing so offer insight into a reconciliation process that was led from above (i.e. the ruling elite). Morocco is an interesting case study because it is far from a democratic state: the Monarchy controls the political system and many other facets of Moroccan society and yet the country experiences intermit street demonstrations.[33] Attention is placed on why Morocco opted to engage in reconciliatory justice mechanism, as it is conceivable that King Mohammed VI could have stopped some of the policies adopted by his father or not have pursued them to the extent that he had. Second, it is also explored as to why the agenda of the reconciliatory process was narrow, allowing one to recognize that in certain communities, such as Morocco, the pursuit of justice cannot be comprehensive as it could create tremendous political upheavals. In pursuing this approach, my purpose is to emphasize that when constructing truth commissions or engaging in transitional justice, it is vital to appreciate that placing too many demands on societies transitioning out of conflict can create unnecessary tensions that may undermine the peace in the pursuit of an abstract justice mechanism.[34]

The note opens by reviewing the transitional justice literature, emphasizing that it amounted to a shift from retributive justice. Interfused within the first section is a review as to the role that religion has played and could play in reconciliatory justice processes. The need to focus on religion stems from the nature of Moroccan society and the connection between the Moroccan Monarchy and religion. The section concludes with a short

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[32] Hazan, *supra* note 28, at 402.

[33] Morocco was effected by the Arab Spring. On July 31, 2011, a day after King Mohammed VI commemorated the 12th anniversary of his accession to the throne, the country saw "thousands of demonstrators from around the country took to the streets, calling for a parliamentary monarchy in which the powers of the head of state would effectively be reduced, and expressing their dissatisfaction with the most recent reforms promoted 'from above'." Irene Fernandez Molina, *The Monarchy vs. the 20 February Movement: Who Holds the Reins of Political Change in Morocco?* 16 MEDITERRANEAN POL. 435, 435 (2011).

[34] *See*, *e.g.*, Kieran McEvoy & Louise Mallinder, *Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy*. 39 J.L. & SOC'Y 410 (2012); OMAR G. ENCARNACION, DEMOCRACY WITHOUT JUSTICE IN SPAIN: THE POLITICS OF FORGETTING (2014) (reviewing why Spain opted not to engage in transitional justice once democracy replaced the Franco dictatorship).

taxonomy of truth commissions aimed at underlying the fact that truth commissions do vary, but also have certain commonalities. The second section reviews the Moroccan Truth Commission. The final section offers some general lessons learned from the Moroccan experience.

I. TRANSITIONAL JUSTICE

The initial focus of post-conflict justice was on retributive justice,[35] with proponents calling for a human rights-centric approach as part of a new approach to international relations.[36] Proponents of transitional justice—whether those advocating for retributive or reconciliatory justice—argue that once a conflict ends, those accused of international crimes and/or those who initiated destructive and devastating conflicts should account for their deeds.[37] In doing so, proponents placed greater emphasis on victims and the need to end the pervasive culture of impunity.[38]

Interfused within transitional justice is the assumption that victims, as individuals and as a group have three basic rights, which the state, somewhat interestingly and at least according to human rights advocates,

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[35] *See generally* ASPEN INST., STATE CRIMES: PUNISHMENT OR PARDON—PAPERS AND REPORTS OF THE CONFERENCE (1989); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449 (1990) (arguing that states are under an obligation to investigate and prosecute those accused of human rights violations).

[36] *See generally* Slaughter, Tulumello & Wood, *supra* note 2, at 367; Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. INT'L L. Rev. 1335 (1999).

[37] The mandate of the International Criminal Court for Yugoslavia highlights this as it calls for the "prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." S.C. Res. 808, ¶ 1, U.N. Doc. S/RES/808 (Feb. 22, 1993). Security Council Resolution 1315 which established the Special Court for Sierra Leone was more limited, as the Council supported the establishment of a court to prosecute those persons "who bear the greatest responsibility." S.C. Res. 1315, ¶ 3, U.N. Doc. S/RES/1315 (Aug. 14, 2000); *see also The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, *supra* note 3.

[38] Writing over a decade ago, Professor Leila Nadya Sadat captured this sentiment by declaring, "One of the primary obstacles to establishing the rule of law has been the culture of impunity that has prevailed to date. Genocidal leaders flout their crimes openly, unconcerned about international reactions, which they suspect will probably range from willful blindness (at best, from their perspective) to diplomatic censure (at worst)." Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 241 (2001).

was obligated to support and promote.[39] The first is the right to know.[40] The right manifested itself individually—the victim or their families have a right to know what had happened to them and why.[41] The right also exists on a collective level, in that the community—the state and possibly the international community as well—needs to know what transpired so that it would not happen again.[42] In other words, a corollary exists to the right to know and that is the right to memorialize, which exists on several levels: it ensures that those who had suffered are not forgotten nor do they remain nameless or faceless. Second, it prevents the perversion of historical facts, as often the victor's determine the narrative. Third, by remembering what has transpired, one hopes to prevent a repetition: hence the mantra "never again." The second right was the right to justice: "there can be no just and lasting reconciliation without effective response to the need for justice."[43] The right to know has two elements: the right for the victim to see—face—their abuser who has to account for their wrongdoing; and, second a right to a remedy.[44] Interfused within this right is the belief that without knowledge of what had transpired there can be no effective forgiveness, as first a victim may want to face their abusers so as to ask why, and in doing so hopefully attain come closure or at least an understanding as to why they suffered the harm that they did. Alternatively, they may also be able to see their abusers express remorse over what they had done. The third right is reparation, which embraces three actions: a right to restitution (restoring the victims to their previous state); a right to compensation (this is an expansive rights that could range from victim receiving compensation for their injuries

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[39] *See generally*, U.N. Comm'n on H.R., *The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (Oct. 2, 1997) (Louis Joinet) [hereinafter Joinet]*; see also* Lutz & Sikkink, *supra* note 3 (emphasizing the role played by human rights activists—advocacy network—in promoting the pursuit of human rights violators).

[40] Joinet, *supra* note 39, ¶ 16.

[41] Joinet, *supra* note 39, ¶¶ 16-17.

[42] *See, e.g.*, Human Rights Council Res. 12/3, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Right to the Truth*, 12th sess., A/HRC/12/L.27 (Sept. 25, 2009). The resolution stresses, "the importance for the international community to endeavour to recognize the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations, to the fullest extent practicable, in particular, the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred." Joinet, *supra* note 39, ¶¶ 16-17.

[43] *Id.* ¶ 16.

[44] *Id.* ¶ 26.

to possible support to pursue legal action for more damages); and, a right to rehabilitation (many victims of human rights abuses need medical care).[45]

Post-conflict justice is closely identified with democratization, as it widely believed that under a democratic system, the rule of law, legitimacy, and accountability are upheld.[46] There is an expectation that a society that claims to be democratic or aspires to adopt a legal system that is fair, just and equal, means that it has to address past wrongs.[47] Thomas Carothers, a leading authority on democracy promotion and democratization, has captured the centrality of the rule to democracy by emphasizing that the relationship that exits between the rule of law and liberal democracy is profound.[48] Carothers asserts that the rule of law makes it possible for people to have established and protected individual rights, which are fundamental to the democratic system.[49] Moreover, the rule of law is central to democracy because it lays out institutions and processes, which is why Carothers declares,

> [w]ithout the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government's many involvements in the economy—regulatory mechanisms, tax systems, customs structures, monetary policy, and the like—would be unfair, inefficient, and opaque.[50]

Over time, the underlying aim of post-conflict justice shifted from punishing perpetrators and promoting democracy to a more convoluted concept. The transformation stemmed from the fact that there was a growing appreciation that the commitment to criminal prosecutions for those accused of committing human rights violations was not possible. This was largely because individuals saw the exorbitant cost associated with ad hoc tribunals as well as domestic prosecutions, not to mention an

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[45] *Id.* ¶¶ 16, 40, 41.

[46] *See generally The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, *supra* note 3.

[47] Ahmad Nader Nadery, writing when he was the Commissioner on Transitional Justice with the Afghanistan Independent Human Rights Commission pointed out that by making deals with warlords and human rights violators and compromising on justice means "the confidence of the people in government institutions will decline and this loss of trust will play into the hands of the Taliban and undermine the democratic changes in Afghanistan." Ahmad Nader Nadery, *Peace or Justice? Transitional Justice in Afghanistan*, 1 INT'L J. TRANSITIONAL JUST. 173, 175 (2007).

[48] Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 96 (1998).

[49] *Id.* at 95-97.

[50] *Id.* at 97.

appreciation as to cumbersome the process of seeking international had become.[51] Second, new voices and ideas entered the field, accentuating and expanding the debate about what constitutes justice and exploring/redefining the relationship between justice and peace.[52] Third, states took independent action to address past wrongs often through expansive peace treaties that provided for the establishment of truth commissions and amnesty legislation that rejected prosecutions.[53] With the new approach and the rising level of criticism levelled at the field, post-conflict justice abandoned its absolutist commitment to justice that centered on prosecutions. Consequently, when it came to justice and accountability, more attention was placed on healing, truth telling, and the mending of fences as a means for society to move past the conflict and violence.[54] Miriam Aukerman summed up this position by writing: "Truth and accountability are essential if traumatized societies are to begin resolving their political, ethnic, racial, and religious conflicts through democratic processes, rather than through torture, rape, and genocide."[55] Therefore, in its latest manifestation, post-conflict justice has come to incorporate justice and accountability, not through prosecutions, but through a more holistic understanding of justice, which explains why it is seen as a "conception of justice associated with periods of political change"[56] indicating the need for

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[51] *See*, *e.g.*, Payam Akhavan, *The Rise, and Fall, and Rise, of International Criminal Justice*, 11 J. INT'L CRIM. JUST. 527 (2013) (emphasizing that the romance that many had towards international justice has faded because of cost, complexity, time spanning and more).

[52] *See*, *e.g.*, Gready & Robins, *supra* note 22, at 339 (arguing for a new agenda to deal with transitional justice studies mainly because the current one is "ambiguous and at times disappointing."); ENCARNACION, *supra* note 34.

[53] *See*, *e.g.*, Kadar Asmal, *Truth, Reconciliation and Justice: The South African Experience in Perspective*, 63 MODERN L. REV. 1 (2000) (arguing that South Africa adopted a third way, balancing prosecutions and *realpolitik*); *Azanian Peoples Organization v. President of the Republic Of South Africa* 1996 (8) BCLR 1015 (CC) (S. Afr.) (Mahomed DP for example recognizes that as unpalatable as amnesties are, they are necessary for peace and also to obtain full disclosure of the wrongs committed by the apartheid state).

[54] *See generally* John Braithwaite, *Setting Standards for Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 563 (2002); Pumla Gobodo-Madikizela, *Remorse, Forgiveness, and Rehumanization: Stories from South Africa*, 42 J. HUMANISTIC PSYCHOL. 7 (2002); Donna Pankhurst, *Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace*, 20 THIRD WORLD Q. 239 (1999).

[55] Aukerman, *supra* note 10, at 47.

[56] Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT'L L.J. 837, 837 (2005); *see* Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991) (emphasizing the importance of taking into consideration political realities in post-conflict

compromise—domestically and internationally—when approaching justice in post-conflict settings. That is, the notion of justice within this conception is reminiscent of Rawls "justice as fairness": justice is a political construct that stems out of a social contract and as part of an agreement between citizens.[57] Under this approach, the need for absolutism diminished, as those involved in the process of transitional justice recognized a need for politicking.[58]

A. Transitional Justice and Religion

The incorporation of reconciliatory methods and techniques into the field of transitional justice—as opposed to simply using a retributive justice mechanism—highlighted a willingness to explore techniques that have a religious orientation. The use of religion, religious organizations, religious imagery, and rituals in facilitating, supporting, and assisting political transition is not new, as it is seen in peace-building and peace-making[59] and conflict resolution[60] as each of the world's four major religions—Hinduism, Buddhism, Christianity, and Islam—has mechanisms that deal with conflict resolution.[61] This is because religion has the ability to speak to a common denominator, both negative and positive. On the positive side, religion can and does emphasize the importance of forgiveness, which is interfused with

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societies); Antonio Cassese, *Reflections of International Criminal Justice*, 61 MOD. L. REV. 1 (1998).

[57] *See* John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985).

[58] *See*, *e.g.*, Moreno Ocampo, *supra* note 5; Nino, *supra* note 56; van Zyl, *supra* note 15.

[59] It is worth noting that as East Germany and Poland transitioned to liberal democracies from communism, church leaders were involved in the roundtable negotiations. Whereas in Hungary some of the independent observers attended the round table negotiations were religious figures. *See* Helga A. Walsh, *Political Transition Process in Central and Eastern Europe*, 26 COMP. POL. 379, 383-84 (1994); Lia Kent, *Local Memory Practices in East Timor: Disrupting Transitional Justice Narratives*, 5 INT'L J. TRANSITIONAL JUST. 434, 434-35 (2011) (recounting how families meet annually at the site of Liquica church massacre and hold Mass).

[60] *See generally* Andrea Bartoli, Lan Bul-Wrzosonska & Andrzej Nowak, *Peace is in Movement: A Dynamical Systems Perspective on the Emergence of Peace in Mozambique*, 16 PEACE & CONFLICT 211 (2010); Luis Benjamim Serapiao, *The Catholic Church and Conflict Resolution in Mozambique's Post Colonial Conflict, 1977-1992*, 46 J. CHURCH & ST. 365 (2004); Drew Christiansen, *Catholic Peacemaking, 1991-2005: The Legacy of John Paul II*, 4 REV. FAITH & INT'L AFF. 21 (2006).

[61] *See, e.g.*, Douglas M. Johnston, *Religion and Conflict Resolution*, 20 FLETCHER F. WORLD AFF. 53 (1996); Christiansen, *supra* note 60.

the concept of atonement,[62] and civic engagement by encouraging the individual to consider the community even at the expense of the self. Thus, in Christian soteriology one can find these concepts are best found in such pronouncements as "Repent, for the Kingdom of Heaven is at hand." (Matthew 3:2); "Be careful. If your brother sins against you, rebuke him. If he repents, forgive him" (Luke 17:3). Mohammed Abu-Nimer and Ilham Nasser point out that first forgiveness in Arab and Islamic studies is an area that is under-researched. However, they also emphasize that:

> [t]here are several basic Arabic terms that relate to the concept of forgiveness: *afw*: pardon or amnesty (releasing from the burden of punishment and restoring honor) [the term appears 35 times in the Qur'an]; *safhu*: turning away from sin, ignoring the wrong [appears 8 times in the Qur'an]; *ghafara*: covering up, erasing sin, remitting absolution [appears 234 times in the Qur'an]; *samah*: ease, generous, allowed other [to act].[63]

Significantly, in Islam where there is no unilateral command to forgive,[64] though repentance has an important role to play, which is why it requires the presence of at least three conditions: first, the crime that had been committed, was committed out of ignorance; second, the offender was shamed by the act; and, after seeking forgiveness, the offender pledges to mend their ways.[65]

An important aspect in religion and transitional justice discourse is the way that religious figures and spirituality in general can reach places that secular actors often cannot, which is why even in non-religious conflicts one sees the employment of religious figures in the transitional justice processes.[66] That is, religion by its nature carries many tools that help facilitate explanations and closure that in turn promote forgiveness and healing because they encourage different explanations as to why things

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[62] *See* Stephen N. Williams, *What Christians Believe About Forgiveness*, 24 STUD. CHRISTIAN ETHICS 147 (2011) (offering a brief survey of what Christians believe about forgiveness and emphasizing the centrality of truth to the process of forgiveness).

[63] Mohammed Abu-Nimer & Ilham Nasser, *Forgiveness in the Arab and Islamic Contexts*, 41 J. RELIGIOUS ETHICS 474, 476 (2013).

[64] Russell Powell, *Forgiveness in Islamic Ethics and Jurisprudence*, 4 BERKELEY J. MID. E. & ISLAMIC L. 17 (2011).

[65] Abu-Nimer & Nasser, *supra* note 63, at 477.

[66] The head of the South African Truth and Reconciliation Commission was Archbishop Desmond Mpilo Tutu. In Sierra Leone, the head of the Truth and Reconciliation Commission was Bishop Joseph Humper. *See* DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS (1999).

happen especially to "good people." Writing soon after the end of the Cold War, Douglas Johnston of the Center for Strategic and International Studies noted "religious figures and spiritually motivated lay persons" seem to be "better equipped to reach people at the individual and group levels" than many political leaders.[67] This is because such individuals appear "better attuned to dealing with basic moral issues" as well as addressing spiritual needs, "at times extending beyond the boundaries of their own faith traditions."[68] Thus, Professor Daniel Philpott is correct when he argues that religion has a key role in transitional justice, specifically in reconciliation, as it facilitates horizontal engagement within political communities and vertical relationship that God forges with humanity. In Philpott's words:

> In Jewish perspectives, reconciliation mirrors God's covenant with Israel, to which God is faithful and willing to restore, even after repeated strayings. Christian theologians root reconciliation in God's own reconciliation with humanity through Jesus Christ. In Islamic writings, reconciliation flows from the mercy of Allah (the greatest of Allah's ninety-nine names), his willingness to forgive the repentant and Quranic injunctions to reconcile. From these sources, a distinctive politics ensues.[69]

Undoubtedly, various issues arise when looking for a religious approach to reconciliation and transitional justice, ranging from a neo-liberal concern over religion and its place in the public space, to the view that forgiveness, which many religions espouse, is insufficient when it comes to international crimes. Evidently, in many liberal, western democracies religious observance is in decline.[70] Such observations may explain why there would be a reluctance to adopt a religious approach to post-conflict justice or a desire to keep religion out of the process. However, in the case of a country such as Morocco, it is important to consider religion because so many Moroccans are practicing Muslim, and the monarchy plays a central role in Islam because the Moroccan King is regarded as a descendent of the

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[67] Douglas M. Johnston, *Religion and Conflict Resolution*, 67 NOTRE DAME L. REV. 1433, 1434 (1992).

[68] *Id.*

[69] Daniel Philpott, *What Religion Brings to the Politics of Transitional Justice*, 61 J. INT'L AFF. 93, 98 (2007); *see also* Jeffrey Haynes, *Conflict, Conflict Resolution and Peace-Building: The Role of Religion in Mozambique, Nigeria and Cambodia*, 47 COMMONWEALTH & COMP. POL. 52 (2009).

[70] *See, e.g.*, *Canada's Changing Religious Landscape*, PEW RES. CENTER (June 17, 2013), *available at* http://www.pewforum.org/2013/06/27/canadas-changing-religious-landscape/; *'Strong' Catholic Identity at a Four-Decade Low in U.S.*, PEW RES. CENTER (Mar. 13, 2013), *available at* http://www.pewforum.org/2013/03/13/strong-catholic-identity-at-a-four-decade-low-in-us/.

Prophet Mohamed and is therefore seen as *amir al-muminin*[71] (Commander of the Faithful).[72] The monarchy is supported by various ceremonies such as the annual sacrifice of a ram by the King during the annual *Id al-Kabir*.[73] These elements add to the power and the influence of the royal household and specifically the *makhzen* system.[74] Accordingly, what one sees in Morocco is advocacy for an Islam that is different from the one practiced in Saudi Arabia for example.[75]

B. Truth Commissions: An Overview

Societies transitioning out of conflict have an inherent desire to end not only the conflict but also the reoccurrence of human rights violations,[76]

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[71] Article 19 of Morocco's 1996 Constitution declares that the King as the "Commander of the Faithful" is the Supreme Representative of the Nation and its symbol of unity. The Article further states that the King "shall be the guarantor of the perpetuation and the continuity of the State. As Defender of the Faith, He shall ensure the respect for the Constitution. He shall be the Protector of the rights and liberties of the citizens, social groups and organisations. The King shall be the guarantor of the independence of the Nation and the territorial integrity of the Kingdom within all its rightfull [sic.] boundaries." CONSTITUTION OF MOROCCO, Apr. 13, 1996, Ch. 2, art. 19, *available at* http://www.al-bab.com/maroc/gov/con96.htm. In the 2011 Constitution, the rights and powers of the monarchy are covered in Title III, they cover such issues as the King being "the Guarantor of the free exercise of beliefs" and "the Guarantor of the Independence of the country and of the territorial integrity of the Kingdom within its authentic frontiers." CONSTITUTION OF MOROCCO, arts. 41, 42 (2011) *available at* http://www.constitutionnet.org/files/morocco_eng.pdf.

[72] This allows the King to assume certain religious rights such as interpreting or reinterpreting Islamic law, as was the case in 2004, when King Mohammad VI claimed the right of *ijtihad* as a way to introduce a new law—the New Family Code—that defined marriage as an equal partnership between spouses and placed equal responsibility for the family on the spouses. Ziba Mir-Hosseini, *How the Door of Ijtihad was Opened and Closed: A Comparative Analysis of Recent Family Law Reforms in Iran and Morocco*, 64 WASH. & LEE L. REV. 1499, 1509 (2007).

[73] Linn, *supra* note 25, at 3.

[74] Abdeslam Maghraoui writes that Moroccan Arabic, *makhzen* means "storehouse" which is a reference to the palace quarters where goods offered to or expropriated by the sultan's representative were stored. Abdeslam Maghraoui, *Political Authority in Crisis: Mohammed VI's Morocco*, 218 MIDDLE E. REP. 12, 17 (2003).

[75] Jennifer Rubin, *Morocco Tackles Radical Islam*, WASH. POST (June 4, 2014), *available at* http://www.washingtonpost.com/blogs/right-turn/wp/2014/06/04/morocco-tackles-radical-islam/; *Morocco Promotes Role as Mediator of Moderate Islam*, AL MONITOR (Mar. 1, 2015), *available at* http://www.al-monitor.com/pulse/security/2015/02/morocco-moderate-islam-sahel-extremism.html#.

[76] For the general advantages that truth commissions offer, see Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth*

which are often a cause of conflict and certainly take place as the conflict evolves, especially in internal conflicts.[77]

The presence of truth commissions indicates two key factors: the existence of broad support to end the culture of impunity that existed during the conflict, and second, an appreciation that the retributive justice model is unrealistic, unlikely, impractical, or unattractive, especially as prosecutions tend to be expensive, cumbersome, and dangerous.[78] Professor Ruti Teitel, an expert on transitional justice, has summed up the disadvantages of prosecution by noting, "[s]elective prosecutions targeting high officials threaten the liberal principle of individual responsibility."[79] Notably though, there is no consensus over the efficacy of truth commission and David Mendeloff for example offers a critique of truth commissions arguing,

> although there is little evidence that truth-telling in general dramatically harms individuals, the notion that formal truth-telling processes satisfy victims' need for justice, ease their emotional and psychological suffering, and dampen their desire for vengeance remains highly dubious.[80]

Truth commissions have four key features. First, they focus on the past and on the conflict, which leads to their second feature, establishing a record that becomes the official narrative of what had transpired during the conflict.[81] Third, truth commissions generally do not concentrate on a specific event but rather on a period during which gross violations had taken place.[82] Therefore, they operate within a specific period. Finally, truth commissions are endowed with some type of authority that allows

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Commissions, 59 LAW & CONTEMP. PROBS. 81 (1996); HAYNER, *supra* note 21; Kim & Sikkink, *supra* note 4; Sikkink & Booth Walling, *supra* note 5.

[77] *See e.g.*, MARY KALDOR, NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA. (2013) (arguing that in the wars of the post-Cold War era, human rights violations are more pervasive because the conflict are about destroying one's enemy, as the wars are largely ethnic, religious, genocidal).

[78] The 1996 trial of Magnus Malan, the former South African defense secretary and 19 other individuals for crimes committed during the Apartheid period offers a good example of the limitations that come with prosecutions, as all of the defendants were acquitted. For an analysis of the case see Howard Varney & Jeremy Sarkin, *Failing to Pierce the Hit Squad Veil: An Analysis of the Malan Trial*, 10 S. AFR. J. CRIM. JUST. 141 (1997).

[79] Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2040-41 (1997).

[80] David Mendeloff, *supra* note 22, at 592-93.

[81] Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 604 (1994) [hereinafter Hayner, *Fifteen Truth Commissions*].

[82] *Id.*

them to conduct their affairs, although they generally lack judicial powers.[83] Priscilla Hayner, a leading scholar on truth commissions, defined these institutions as "bodies set up to investigate a past history of violations of human rights in a particular country—which can include violations by the military or other government forces or by armed opposition forces."[84] Therefore, truth commissions are institutions created on an ad hoc basis, often in the midst of a political transition, to address and respond to the legacy of a terrible past.[85] They are intentionally short-lived existing for a year or two, though their preparatory work may begin before witnesses appear before them.[86] They differ from courts or human rights ombudsmen in terms of their functions and aims: they usually have non-legal power; they cannot subpoena individuals nor punish transgressors.[87] Their nature makes them quite pliable to listen to different narratives and be less judgmental when they hear evidence,[88] whereas their size and shape supposedly cater to different agendas and audiences.[89] Notably, making the Commission non-judicial allowed King Mohammed VI the ability to emphasize that the fundamental purpose behind the process was to promote national unity, leading him to assert,

> [t]his is not an initiative, as some would have it, that will divide Morocco in two. There are no judges and no defendants. We are not in court. We must examine this page of our history without complex or shame. This is the start of the path to better conditions.[90]

Mainstream studies on truth commissions appear to generally ignore the role of religion or religious leaders in the process. However, there is clear evidence that religion has played a role in several truth commissions, impacting their function, structure, make up or agenda, though often in an

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[83] *Id.*; HAYNER, TRANSITIONAL JUSTICE, *supra* note 21, at 14-17.

[84] Hayner, *Fifteen Truth Commissions, supra* note 81, at 600.

[85] HAYNER, TRANSITIONAL JUSTICE, *supra* note 21, at 14-17.

[86] *See*, *e.g.*, Christian Tomuschat, *Clarification Commission in Guatemala*, 23 HUM. RTS. Q. 233 (2001) (reviewing the work and mandate of the Guatemalan Commission for Historical Clarification); Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497 (1994) (recounting his experience at the Commission, how it arrived at the decision to include in its report the names of individuals found to have been responsible for violent acts and highlighting lessons learned).

[87] *See* Asmal, *supra* note 53.

[88] HAYNER, TRANSITIONAL JUSTICE, *supra* note 21, at 19-24.

[89] Priscilla B. Hayner, *International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal*, 59 L. & CONTEMP. PROBS. 173 (1996).

[90] Taken from Hazan, *supra* note 28, at 406.

understated way.[91] A good example is the South African Truth Commission, where Belinda Bozzol highlights the positive presence of religion.[92] Bozzoli noted how an aura of peace was established through a proto-religious setting of the hall in which individuals narrated their stories. In particular, each session began with a prayer led by a religious figure from the community, followed by candle lighting to symbolize the "bringing of the truth."[93] She writes that the hearing in the township of Alexandra took place in a large, well-kept community hall. The four commissioners were located at one end, sitting on an elevated platform. They were facing rows of seating. The tables in the room were covered in immaculate, long white cloths. The room had flowers in addition to the banner and symbol of the South African Truth Commission. Speakers had microphones and translations were available as commissioners and witnesses could speak in their own languages. Ultimately, what Bozzoli seeks to highlight is the sense of order and calmness that prevailed in the hall, which was in stark contrast to what was occurring outside.[94]

II. ESTABLISHING THE MOROCCAN COMMISSION

The establishment of a truth commission in Morocco, the Equity and Reconciliation Commission (ERC), came after decades of political turmoil and government repression that took place during the reign of King Hassan II who died on July 23, 1999. King Hassan II, who ruled Morocco for thirty-eight years was effective in ensuring that what legitimized the Moroccan State was the monarchy, as opposed to for example, a constitution or parliament. In developing this, King Hassan II ensured that the monarchy accrued immense authority.[95] That is, King Hassan in many ways followed in the manner of the founder of the Sa'di dynasty, Ahmad al-Mansur who used the birthday of the Prophet Mohammed to increase his legitimacy by staging huge celebrations to which only the most important

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[91] In the Sierra Leone case for example, the commission was chaired by Bishop Joseph Humper, even though Christians form a minority in the country. Those that appeared before the commission as witnesses had to confirm their name, religion and swear an oath on the appropriate holy book. Tim Kelsall, *Truths, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone*, 27 HUM. RTS. Q. 361, 367 (2005).

[92] *See* Belinda Bozzoli, *Public Ritual and Private Transition: The Truth Commission in Alexandra Township, South Africa, 1996*, 57 AFR. STUD. 167, 170-71 (1998).

[93] Bozzoli, *supra* note 92, at 171.

[94] *Id.* at 170-71.

[95] SUSAN GILSON MILLER, A HISTORY OF MODERN MOROCCO 215-16 (2013).

(strategic allies) citizens of the Kingdom were invited.[96] The ceremonies reemphasized the connection between the Monarchy and the Prophet. King Hassan II's reign however was a brutal one, as the regime not only crushed any form of opposition but it also engaged in systematic co-option, using its authority (and ownership of land) to reward.[97]

The process, in the sense of the need to address the abuses that had taken place, began in the early 1990s when King Hassan II was still on the throne, but it came to its own once the Crown Prince, Mohammed, inherited his father's throne in 1999, becoming King Mohammed VI. King Hassan arguably began the process because he recognized that there were growing disgruntlement with what had transpired and that people were seeking justice. Susan Miller identifies three key events as being responsible for spurring King Hassan II's reforms: 1. The establishment, in Paris in 1984, of the Association for the Defense of Human Rights in Morocco which had ties to Danielle Mitterrand, the wife of the French President, which in turn meant that France would pressure the Moroccan regime about the need for reform; 2. The escape of General Oufkir's children from their desert prison and their story emphasized how brutal the regime was; and 3. The publication of Gilles Perrault's book *Notre ami le roi* (Our Friend the King), which exposed the corruption within the Moroccan monarchy.[98] The King famously declared in 1989 before an international television audience, "If one percent of the human rights violations suggested by Amnesty International were true, I wouldn't get a wink of sleep."[99]

There is no doubt that since his accession to the throne King Mohammed VI has devolved more power from the monarchy to the people, though it does not mean that Morocco is a fully-fledged democracy, as the monarchy and specially the King continue to have enormous power and influence.[100]

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[96] Patricia J. Campbell, *Morocco in Transition: Overcoming the Democratic and Human Rights Legacy of King Hassan II*, 7 AFR. STUD. Q. 38, 38-39 (2003).

[97] *Id.* at 41; Rémy Leveau, *Morocco at the Crossroads*, 2 MEDITERRANEAN POL. 95(1997).

[98] MILLER, *supra* note 95, at 201.

[99] Quoted in Jacques de Barrin, *Royal Privilege and Human Rights*, MANCHESTER GUARDIAN (Dec. 18, 1990), taken from *Morocco: Human Rights at a Crossroads*, 16 HUM. RTS. WATCH 11 (Oct. 2004), *available at* http://www.hrw.org/sites/default/files/reports/morocco1004.pdf.

[100] Ahmed Benchemsi, *Morocco: Outfoxing the Opposition*, 23 J. DEM. 57 (2012) (reviewing the reforms of King Mohammed VI and arguing that essentially these reforms have allowed the monarchy to stymie many of the demands of the opposition, without ceding too much power).

A. Morocco and Transitional Justice

The establishment of the ERC was the result of three key elements: a growing demand for general political, social and economic reform within Moroccan society; an unwillingness to accept the continued abuses that the security establishment was committing against ordinary Moroccans; and, street mobilization that demanded recognition of the *les annes somber* (the dark years).[101]

It seems that under King Mohammed VI, Morocco has gone through many changes not only with respect to transitional justice but also politically, with the King ceding more power to the parliament and civil society organizations.[102] Interestingly, however the process of promoting transitional justice in Morocco began under King Hassan II and not so much by civil society. Thus it was King Hassan II who ordered the Moroccan Advisory Council on Human Rights (CCDH, also known as the Consultative Council on Human Rights, *Conseil Consultatif des Droits de l'Homme*[103]) to provide compensation to victims of human rights violations.[104] King Mohammed VI however formed the Independent

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[101] The period *les annes somber* is also known as the *années de plomb* (Years of Lead), during which many political activists, mostly Marxist–Leninists, disappeared or were imprisoned for expressing dissent.

[102] On July 1, 2011, Moroccan voted for a new constitution that carried elements of separation of power (Art. 1 declares "Morocco is a constitutional, democratic, parliamentary and social Monarchy." Adding "The constitutional regime of the Kingdom is founded on the separation, the balance and the collaboration of the powers, as well as on participative democracy of [the] citizen, and the principles of good governance and of the correlation between the responsibility for and the rendering of account), accountability and inclusiveness (for example under Art 5 of the new constitution Arabic is no longer the official language of the state. There is also a strong focus on human rights within the new constitution. CONSTITUTION OF MOROCCO (2011), *available at* http://www.constitution net.org/files/morocco_eng.pdf; *see also* Mohamed Madani, Driss Maghraoui & Saloua Zerhouni, *The 2011 Moroccan Constitution: A Critical Analysis*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE (2012), *available at* http://www.idea.int/ publications/the_2011_moroccan_constitution/loader.cfm?csModule=security/getfile&pag eid=56782 (offering a critical assessment of the new constitution).

[103] The Consultative Council on Human Rights (CCDH) has been transformed into the National Council on Human Rights (CNDH), which is more independent than the CCDH.

[104] FADOUA LOUDIY, TRANSITIONAL JUSTICE AND HUMAN RIGHTS IN MOROCCO: NEGOTIATING THE YEARS OF LEAD 86 (2014). During King Hassan II's last decade many liberal and human rights initiatives were adopted: creation of the Advisory Council on Human Rights (April 1990); the formation of administrative tribunals; a revision of the Code of Criminal Procedure concerning times for incommunicado detention; and, constitutional reform in 1992. Julie Guillerot et al., *Morocco: Gender and the Transitional Justice Process*, INT'L CENTER FOR TRANSITIONAL JUST., at 6 n.1 (Sept. 2011), *available at*

Arbitration Commission (IIA), placing it within the CCDH. The IIA's purpose was to offer compensation to victims of disappearance and arbitrary detention[105] although what was not clear was the time limitation that was imposed on the Commission, giving it only six months to address the claims of injustices that had occurred over forty years.[106] The Commission received over 5,000 applications for compensation and by 2003, when it officially ceased to function, nearly 4,000 claims had been settled.[107]

The failures of the IIA to address the need for justice encouraged a group of former political prisoners and human rights activists to establish the Moroccan Forum for Truth and Justice (*Forum Vérité et Justice*, FVJ). Reportedly, criticism ranged from the ad hoc nature of the compensation, as some abuses led to compensation but not others; the compensation process was not tied to truth or justice, there was no transparency with respect to the process let alone to the work of the Commission; and applicants had to sign an agreement accepting the Commission's ruling as final.[108] The aim of the FVJ was to advocate for an independent and comprehensive arbitration commission. Consequently, the FVJ worked with the Moroccan Association for Human Rights (*Association Marocain des Droits de l'Homme ou,* AMDH).[109] Notably in 1999, a group of outraged victims "organized a public declaration calling for a formal apology, reparations, criminal procedures against the torturers, and an accounting against all those who had disappeared."[110] Moreover, the inability of many people to make successful applications, caused resentments that led to demands, especially in a time of growing calls for openness, for a more nuanced discussion of harm that was committed.[111] In other words, civil society used the new political environment to compel the monarchy to take a more proactive stance on the *les annes somber* and after a prolong process, the monarchy relented and agreed to establish a commission—the ERC—

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https://www.ictj.org/sites/default/files/ICTJ-Morocco-Gender-Transitional%20Justice-2011-English.pdf.

[105] Veerle Opgenhaffen & Mark Freeman, *Transitional Justice in Morocco: A Progress Report*, INT'L CENTER FOR TRANSITIONAL JUST., at 10 (2005), *available at* http://ictj.org/sites/default/files/ICTJ-Morocco-Progress-Report-2005-English.pdf; *Morocco: Human Rights at a Crossroads*, *supra* note 99, at 12.

[106] LOUDIY, *supra* note 104, at 86-89.

[107] *Morocco: Human Rights at a Crossroads*, *supra* note 99, at 12-13.

[108] *Id.* at 13.

[109] LOUDIY, *supra* note 104, at 86-90.

[110] MILLER, *supra* note 95, at 203.

[111] LOUDIY, *supra* note 104, at 86.

placing the former president of the FVJ, Driss Benzekri, who had served for seventeen years as a political prisoner, as the ERC's president.

B. Morocco's ERC

King Mohammed VI established the ERC on January 7, 2004. The decision to adopt the ERC came because of the inability of the CCDH to reduce 40 years of authoritarianism and gross human rights violations to a list of 112 cases of forced disappearance.[112] Simply, it was evident that Moroccans wanted more than ad hoc compensation, especially as they were hoping and wanting a new society and state, as they were no longer willing to accept the monarchy ruling Morocco as "if he [King Hassan II] were [sic.] running a medieval absolutist state."[113] Thus, King Mohammed VI recognized that if the *makhzen* was to survive it had to adapt to the new political environment, which included addressing what transpired during the *les annes somber*.

A second reason behind the establishment of the ERC was the fact that the State was going to offer compensation. The process of indemnifying victims was structured around Islamic practices by applying the dictum of *la darar wa la dirar* (neither harm nor injustice) and *diyat* (blood money).[114] In other words, what was attempted was to offer individuals and/or their families compensation for harm under the principle of *diyat*,[115] but at the same time, the process also ensured that no one, specifically the monarchy, was forced to take responsibility or was labeled responsible for the harm.

In sum, the ERC existence was pursued within the broad elements of the Islamic concept of forgiveness and repentance, described above. That is, by feigning ignorance of the violations (intimating that the violations occurred without the knowledge of King Hassan II), recognizing that there is a need

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[112] *Morocco: Human Rights at a Crossroads*, *supra* note 96, at 11, 14-15.

[113] Maghraoui, *supra* note 74, at 13. The clearest indication that the ERC was supposed to help shape a new future for Morocco was with the fact that it was empowered to provide not only compensation but to propose social measures to help in assistance and rehabilitation for victims of the *les annes somber*, as well as build public memorials. *Morocco: Human Rights at a Crossroads*, *supra* note 99, at 15.

[114] Susan Slyomovics, *No Buying off the Past: Moroccan Indemnities and the Opposition*, 223 MIDDLE E. REP. 34, 37 (2003).

[115] Sura 4:92 declares, "Never should a Believer Kill a Believer; but (if it so happens) by mistake, (Compensation is due)." ABDULLAH YUSUF ALI, THE MEANING OF THE HOLY QUR'AN 214-15 (1989).

for a process of transitional justice by accepting that the violations had harmed ordinary Moroccans as well as the State, and, promising that such violations would not occur again (by setting up a human rights mechanism to investigate and compensation for violations), the monarchy made it possible to establish the ERC and the process.

C. The Commission

The ERC was inaugurated in January 2004 and it spent its first four months drawing up its statute, plan of action, internal operating mechanism and hiring staff (around 300 people of whom only 163 were women). Notably, the ERC's statute was approved by a royal decree (*dahir*) in April 2004,[116] which helps highlight the connection between the ERC and the monarchy and that without the King, it would have been unlikely that such an institution would have emerged. The mandate of the ERC was fourfold:

> 1. To establish the nature and the scale of the gross human rights abuses that had occurred in the past. Investigations, archives examination, and information gathering from any individual who can shed light on the truth are conducted (Art. 9(1)).[117]
>
> 2. To continue investigations on cases of forced disappearance, to examine facts that have not been made clear with respect to forced disappearances, to reveal the fate of those who have disappeared, and to propose appropriate measures for those cases in which death has been established (Art. 9(2)).[118]
>
> 3. To determine the responsibility of state organs or other parties in the violations (Art. 9(3)).[119]
>
> 4. To compensate for the moral and material losses suffered by the victims and their "legal successors" (Art. 9(4)).[120]

In terms of composition, the ERC had seventeen members: half were members of the Human Rights Advisory Council, and the others came mainly from the civil society, with the five most prominent being Driss Benzekri, Salah El Ouadie, Driss el Yazam, Latifa Jbadba, and Mbarek Bouderka;[121] none of the commissioners came from the religious or Islamist

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[116] Julie Guillerot et al., *supra* note 104, at 18.

[117] *Dahir Approving Statutes of the Equity and Reconciliation Commission,* NAT'L COMM'N FOR TRUTH, EQUITY & RECONCILIATION (Apr. 10, 2004), *available at* http://www.ier.ma/article.php3?id_article=1395 (last visited Feb. 15, 2015).

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] There was one woman on the commission, Latifa Jbabdi, who was a victim of the regime and a founding member of the Moroccan Association for Human Rights (AMDH)

world.[122] This was interesting because the monarchy has always sought to control the religious discourse in Morocco and it may have had concern that giving the ERC a religious voice would create a potential challenger. Nevertheless, after 2003, the political environment in Morocco changed as Morocco experienced Islamic-based terrorism with the May 16, 2003 suicide bombing in Casablanca which had to be balanced with the growing popularity of the Justice and Development Party, an Islamic Party.[123]

The commissioners divided themselves into three working groups: one group worked on investigation, a second on research and remedies, and a third on reparations.[124] The Commission created an archive of over 20,000 personal testimonies, organized in a central database in Rabat.[125] It has held meetings, which included private meetings with individuals described as "the major witnesses," conferences, and seminars that examine Morocco's past and present.[126] Notably, only 120 people appeared at the public hearing, as laid out by the ERC statute though the aim was to ensure that these individuals represented a cross-section of the regions, the period, and the violations, which basically meant that the majority of those appearing before the ERC were victims.[127] The royal cabinet permitted the Commission to broadcast its hearings on national television and radio, which ensured that more people came to know of the Commission and its work, as illiteracy is high in Morocco.[128] With the exception of the first live broadcast, which took place on December 21, 2004 at 8pm on the state channel RTM, the broadcasts generally lasted between 20 and 40 minutes and were not live.[129]

The Commission's agenda, structure, and focus were significantly influenced by its chairman Driss Benzekri, a former political activist

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and president of the Union de l'Action féminine (UAF). Julie Guillerot et al., *supra* note 104, at 17.

[122] Pierre Hazan, *Morocco: Betting on a Truth and Reconciliation Commission,* U.S. INST. PEACE, at 4-6 (July 2006), *available at* http://www.usip.org/files/resources/sr165.pdf [hereinafter Hazan, *Betting on a Truth and Reconciliation Commission*].

[123] Mohammed El-Katiri, *The Institutionalisation of Religious Affairs: Religious Reform in Morocco*, 18 J. N. AFRICAN STUD., 53 (2013) (arguing that since 2004 Moroccan monarchy has sought to control the influence of Islamic radicalism by initiating reforms aimed at underlying how incompatible these doctrines are with Moroccan society).

[124] Julie Guillerot et al., *supra* note 104, at 18.

[125] Opgenhaffen & Freeman, *supra* note 105, at 2.

[126] *Id.*; Julie Guillerot et al., *supra* note 104, at 23.

[127] Julie Guillerot et al., *supra* note 104, at 23-24.

[128] Hazan, *Betting on a Truth and Reconciliation Commission, supra* note 122, at 3.

[129] Vairel, *supra* note 31, at 28.

imprisoned for seventeen years by the government and who became a human rights activist upon his release from prison in 1991. Benzekri writes that he "saw the TRC as a tool to give new impetus to democratization by publicly denouncing past systemic violations of human rights and recommending broad institutional reforms. They believed the domestic system could be reformed from within and wanted to use the TRC as a lever for democratic change."[130] In other words, Benzekri and other detainees were very concerned with restorative justice, which explains their willingness to accept "strategic amnesties" as means to help Morocco develop and progress; this willingness also meant they had to work with the establishment. Ultimately, "[t]hroughout its work, the Commission has aimed to document, preserve, and analyze the roots of the crisis in an attempt to help Morocco come to terms with its past."[131]

The ERC has come under criticism either for not going deep enough in its investigations and/or in helping promote a better human rights culture in Morocco.[132] This problem stems from its mandate, which was restrictive, preventing it from engaging in a deep review of human rights abuse. The Commission's discretionary power of investigation was also a concern in that it would lead to questions over the royal family, specifically King Hassan II, the former monarch, and thus would expose his complicity in the violations, which meant that the Commission recognized that it could not engage in extensive investigations. Accordingly, the Commission could not name perpetrators[133] nor could it compel individuals to testify.[134] Additionally, the Commission was to focus on largely two types of "gross human rights violations": forced disappearance or arbitrary detention.[135]

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[130] Hazan, *Betting on a Truth and Reconciliation Commission, supra* note 122, at 3.

[131] Opgenhaffen & Freeman, *supra* note 105, at 2.

[132] *See Morocco's Truth Commission: Honoring Past Victims During an Uncertain Present,* 17 HUM. RTS. WATCH (Nov. 2005), *available at* http://www.hrw.org/sites/default/files/reports/morocco1105wcover.pdf.

[133] Article 6 declared, "The prerogatives of the Equity and Reconciliation Commission are non-judicial and do not call into question the individual responsibility for the violations. These prerogatives include the inquiry, the investigation, the assessment, the arbitration, and the recommendation." *Dahir Approving Statutes of the Equity and Reconciliation Commission, supra* note 117.

[134] Article 10 calls on the institutions of the state "bring their support to the Commission and provide it with all information and data allowing it to accomplish its missions." But, there is no mention of punishment should an institution or authority (let alone an individual) fail to support the Commission. *Id.*

[135] Article 5, which defines gross human rights violations, first makes it clear that the Commission could either look at forced disappearance or the arbitrary detention and not other types of human rights violations. "Forced disappearance" was defined as "the

These limitations was unsurprising because of the Commission's close affiliation with the CCDH and the monarchy, which meant that certain issues were really not examined.[136] Therefore, although witnesses were able to identify locations and agencies during hearings, they were only able to express what they had endured and not name those who had violated their rights. The witnesses were also entitled to no more than twenty minutes of narration, with no audience participation. Finally, a member of the investigation group would meet with the witnesses prior to their appearance. This in effect meant that witnesses were vetted to ensure that evidence that would embarrass the royal family would not be presented.[137] This is why the issue of compensation was seen as very important, as even though the Commission could not attribute specific responsibility, the reparations and equity for the victim were in some ways construed as assisting victims to go through "moral and medical rehabilitation."[138]

1. Remedies

In 2005, the U.N. General Assembly adopted Resolution 60/147, or the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[139] The process of compensation in Morocco began in 1999 when the CCDH made a formal request to King Hassan II, which he approved, to form a body that could issue compensation to victims of certain human rights abuses that had

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abduction or arrest of one or more persons and their illegal restraint, against their will, in a secret place by unduly depriving them of their freedom through the act of government officials, individuals or groups acting on behalf of the state, or the denial of these acts and the refusal to disclose their fate which deprive them of any legal protection." *Id.* "Arbitrary detention' was defined as, "any illegal restraint or detention not in conformity with the law and occurring in violation of the basic principals of human rights, in particular the individuals' rights to freedom, life and bodily integrity and on the grounds of their political, trade-union, or association activities." *Id.*; *see also* Opgenhaffen & Freeman, *supra* note 105, at 28-29.

[136] Mohamed Ahmed Bennis, *The Equity and Reconciliation Committee and the Transition Process in Morocco*,' ARAB REFORM INITIATIVE (Jan. 15, 2007), *available at* http://www.arabreform.net/spip.php?article398 (last visited Feb. 15, 2015); Luke Wilcox, *Reshaping Civil Society through a Truth Commission: Human Rights in Morocco's Process of Political Reform*, 3 INT'L J. TRANSITIONAL JUST. 49, 58-61 (2009).

[137] Vairel, *supra* note 31, at 238.

[138] *Summary of the Final Report, Kingdom of Morocco Justice and Reconciliation Commission*, NAT'L COMM'N FOR TRUTH JUSTICE & RECONCILIATION, at 6, *available at* http://www.ccdh.org.ma/sites/default/files/documents/rapport_final_mar_eng-3.pdf

[139] G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

occurred in the past.[140] The Independent Arbitration Commission, which King Mohammad VI supported, was charged with determining different levels of compensation for cases of forced disappearance and arbitrary detention that had taken place between 1956 and 1999.[141] Three Supreme Court judges served on the IIA, one of whom served as the President, as well as four members from the CCDH, one representative from the Interior Ministry, and one from the Justice Ministry.[142] The IIA began its work on September 1, 1999, with the deadline for receipt of applications for compensation set at December 31, 1999.[143] Despite this short period, the IIA received over 5,000 applications, with a further 6,000 applications coming after the deadline, which meant these were not investigated.[144] Operating for around four years, the Panel heard testimonies from over 8,000 people.[145] It made 5,488 judgments, with over 3000 being successful; the awards rendered ranged from US$ 600 to US$ 300,000.[146] The ERC developed the IIA model, allowing it to strive to remedy the harm suffered by the victims of the *les annes somber*, which meant that individual could receive compensation for material and moral injury; regularization of legal status; social reinsertion, the pursuit of education/professional training, and regularizing professional, administrative, and financial situations; property restitution; and medical and psychological rehabilitation.[147] Most interestingly when it came to the compensation, the ERC adopted the notion of successors (*ayants-droit*) as opposed to following the Moroccan law of succession, which focuses on the heir.[148] This was an important development because it meant that women could receive compensation as opposed to only male descendants.[149]

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[140] Opgenhaffen & Freeman, *supra* note 105, at 8-10.
[141] *Id.* at 10.
[142] Opgenhaffen & Freeman, *supra* note 105, at 8-10.
[143] *Id.* at 10.
[144] *Id.* at 10-11.
[145] *Id.* at 11.
[146] *Id.* at 10-11.
[147] Julie Guillerot et al., *supra* note 104, at 26.
[148] *Id.* at 28.
[149] It is noteworthy that the reality was often very different as even though Morocco adopted in 2004 a progressive family code and in 2011 a constitution that guarantees gender equality, women remain disadvantaged. One such example is that of Zineb who had lost her father when she was a young girl but who was compelled to share her inheritance with an older half-brother whom she did not know about. *See* Aida Alami, *Gender Inequality in Morocco Continues, Despite Amendments to Family Law*, N.Y. TIMES (Mar. 16, 2014), *available at* http://www.nytimes.com/2014/03/17/world/africa/gender-inequality-in-morocco-continues-despite-amendments-to-family-law.html.

An important feature of the Commission's approach to restorative justice was its commitment to engage and promote communal reparations (*jabar al-darar al-jama'i*), aimed at rehabilitating areas that experienced gross violations through consequent damages that included marginalization and exclusion.[150] The program was launched in 2007 targeting the areas that had experience state violence during King Hassan II's reign or areas that had been marginalized by the regime because they rebelled against the monarchy.[151] Thus, because the "Commission gave equal importance to the issue of restoring dignity, by way of truth seeking, eliminating the aftereffects of violations and preserving memory as an essential component of its reparations approach," it has focused on public memorialization of harm that had been committed.[152] In engaging in this process, the Moroccan authorities have recognized and permitted the transformation of prisons into social centers, gardens, and museums.[153]

In sum, the Commission made some important public discoveries ranging from the thematic to the specific. It, for example, identified places of burial of many individuals who had been classified as "disappeared"; it also recognized people who had died during arbitrary detention, including the locations of these illegal detention facilities.[154] These discoveries led to some compensation, though whether the Commission helped advance human rights in Morocco remains questionable because of the many limits that surrounded the Commission and its work.

CONCLUSION

In sum, although the Moroccan case was not perfect and faced many criticisms,[155] many positive things have also been and could be said about

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[150] *Summary of the Final Report, Kingdom of Morocco Justice and Reconciliation Commission*, *supra* note 138, at 21.

[151] Laura Menin, *Rewriting the World: Gendered Violence, the Political Imagination and Memoirs from the "Years of Lead" in Morocco*, 8 INT'L J. CONFLICT & VIOLENCE 45, 49 (2014).

[152] *Summary of the Final Report, Kingdom of Morocco Justice and Reconciliation Commission*, *supra* note 138, at 21.

[153] Susan Slyomovics, *Fatna El Bouih and the Work of Memory, Gender, and Reparation in Morocco*, 8 J. MIDDLE E. WOMEN'S STUD., 37, 54 (2012).

[154] *See Summary of the Final Report, Kingdom of Morocco Justice and Reconciliation Commission*, *supra* note 138.

[155] *See*, *e.g.*, *Morocco's Truth Commission: Honoring Past Victims During an Uncertain Present*, *supra* note 132; *Morocco: Human Rights at a Crossroads*, *supra* note 99.

it. Most importantly, is the fact that it has been accepted by Moroccans, providing some mechanisms for Moroccans to address *les annes somber*. Second, the Moroccan case demonstrates that a strong, traditional leader can promote a truth mechanism that would investigate certain allegations and encourage debate on the abuses, though one must wonder whether the decision to engage in the process stemmed from a desire to prevent radical political transition.[156] Finally, the Moroccan case highlights the need for compromise. That is, King Mohammed VI realized and appreciated that Morocco could not continue as it did nor that he could simply ignore what occurred. Nevertheless, he also appreciated that structuring the transitional justice process to look to closely at the monarchy would undermine it, and also the security services that are key to the monarchy's survival,[157] which is why the Commission was limited in its mandate. Meanwhile, civil society also respected the fact that a comprehensive investigation was highly unlikely and would probably only occur following a major upheaval, such as a revolution, which it probably did not wish to see, especially at a time of growing Islamic radicalism. Zakia Salime for example writes, "As far as Morocco is concerned, the war on terrorism came as a package. The discourse of the war is interwoven with a discourse celebrating neoliberalism and manipulating the themes of modernity and democracy."[158]

In approaching transitional justice the monarchy used the *makhzen* to coopt potential spoilers by relinquishing certain powers and identities for more spiritual, nationalist and reconciliatory ones. Thus, when the Commission's mandate ended, King Mohammed VI declared before an audience of victims, "'I am sure that the sincere work of reconciliation we have accomplished … is, in fact, a response to the *divine injunction* ''Forgive with a gracious forgiveness''. It is a gracious gesture of collective pardon.'"[159]

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[156] It is noticeable that Morocco although it experienced some street demonstration in 2011 and 2012 largely avoided the Arab Spring. Nicholas Pelham, *How Morocco dodged the Arab Spring*, N.Y. REVIEW BLOG (July 5, 2012), *available at* http://www.nybooks.com/blogs/nyrblog/2012/jul/05/how-morocco-dodged-arab-spring/.

[157] Hazan, *supra* note 28, at 405.

[158] Zakia Salime, *The War on Terrorism: Appropriation and Subversion by Moroccan Women*, 33 SIGNS, 1, 2 (2014).

[159] Taken from Hazan, *supra* note 28, at 406 (emphasis added).

CAN A DICTATOR (STILL) USE CHEMICAL WEAPONS WITH IMPUNITY?

Trevor Hale [*]

ABSTRACT

In using chemical weapons against its own people, Syria's Assad regime violated international law. The actions taken by the United States and the world in response to this atrocity have thus far amounted to a slap on the wrist for President Assad. The United States and the world also failed to act following the last major chemical weapons attack when Saddam Hussein murdered thousand of Kurdish civilians during the conflict with Iran. This paper explores the similarities between those two attacks, the international law principles that were implicated, and the responses to each incident. The only way to avoid repeating the mistakes that were made following Saddam Hussein's use of chemical weapons is to further punish the Assad regime for their actions.

INTRODUCTION

The revelation that the Assad regime targeted civilians with chemical weapons in August of 2013 shocked the world and altered the perception of the Syrian civil war.[1] When an atrocity such as that occurs, the world looks to history in determining the proper response. The last time that a major chemical weapons attack took place was during the Iraq/Iran conflict, when Saddam Hussein used chemical weapons against Iranian forces and the Iraqi Kurdish civilian population.[2]

The United States ("U.S.") was aware that Saddam would use chemical weapons against the Iranian military, and supplied intelligence on Iranian troop movements.[3] Following a series of chemical attacks on civilians, the

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[1] *Government Assessment of the Syrian Government's Use of Chemical Weapons on August 21, 2013*, WHITE HOUSE, OFFICE OF THE PRESS SECRETARY (Aug. 30, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/08/30/government-assessment-syrian-government-s-use-chemical-weapons-august-21.

[2] *Saddam's Iraq, Key Events: Chemical Warfare 1983-1988*, BBC NEWS, *available at* http://news.bbc.co.uk/2/shared/spl/hi/middle_east/02/iraq_events/html/chemical_warfare.stm.

[3] *Finally a Response to "Chemical Ali*," HUM. RTS. WATCH (Oct. 11, 2013), *available at* http://www.hrw.org/news/2013/10/11/dispatches-finally-response-chemical-ali.

U.S. and the international community failed to take any action to punish Saddam or seek justice for the Iraqi Kurds.

Immediately following the chemical attack in Syria, public opinion in the U.S. was against intervention.[4] A "diplomatic option" postponed any military action.[5] While this current option has the noble goal of destroying Syria's chemical weapons stockpile, it does nothing to punish Syrian President Bashar al-Assad. With this compromise, the world is allowing the Assad regime to gain legitimacy that it does not deserve. Unless the world takes further action to punish the Assad regime, we will be failing the Syrian people, as we failed the Kurds during the Iraq/Iran conflict.

I. SADDAM HUSSEIN'S USE OF CHEMICAL WEAPONS AGAINST THE IRAQI KURDS

A. The Iran-Iraq War and the Anfal

In September of 1980, Iraq crossed into Iran, sparking a war that would span eight years and result in massive casualties on both sides.[6] Saddam Hussein believed that with the internal chaos of a recent revolution, a "divided Iran[] and [its] dilapidated armed forces would be unable to put up much of a fight. He was wrong."[7] As Iran began making great strides in Southern Iraq, and Saddam was desperate to reverse the advances of the Iranian forces, he employed his chemical weapons arsenal.[8] A declassified 1983 U.S. State Department memo cites Iraqi state media reports, quoting Saddam as saying "[t]here is a weapon for every battle and we have the weapon that will confront great numbers."[9]

While the use of chemical weapons was an effective tactic against the larger Iranian forces, the Iranians were making great strides in Northern Iraq

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[4] *Public Opinion Runs Against Syrian Airstrikes,* PEW RES. (Sept. 3, 2013), *available at* http://www.people-press.org/2013/09/03/public-opinion-runs-against-syrian-airstrikes/.

[5] *Obama Gives Syria Diplomatic Option to Avoid U.S. Strike*, JAPAN TIMES (Sept. 11, 2013), *available at* http://www.japantimes.co.jp/news/2013/09/11/world/obama-gives-syria-diplomatic-option-to-avoid-u-s-strike/#.UpN2xKVzpuY.

[6] Michael J. Kelly, *The Tricky Nature of Proving Genocide Against Saddam Hussein Before the Iraqi Special Tribunal*, 38 CORNELL INT'L L.J. 983, 990 (2008).

[7] Annie Tracy Samuel, *Attacking Iran: Lessons from the Iran-Iraq War, Belfer Center for Science and International Affairs*, BELFER CTR. FOR SCI. & INT'L AFFAIRS (Dec. 2011), *available at* http://belfercenter.ksg.harvard.edu/publication/21698/attacking_iran.htm.

[8] Kelly, *supra* note 6, at 990.

[9] Memorandum from Jonathan Howe to Secretary of State Eagleburger, *Iraqi Use of Chemical Weapons*, NAT'L SECURITY ARCHIVE (Nov. 21, 1983), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB82/#docs.

by the spring of 1987.[10] Saddam correctly attributed this success to assistance from Iraqi Kurds.[11] As a result, Saddam tasked his cousin Ali Hassan al-Majid, leader of the Ba'ath Party's northern bureau, with "the Kurdish problem."[12] Al-Majid would later be known as "Chemical Ali," after organizing and leading "the Anfal" campaign to exterminate the Iraqi Kurds.[13] This paper will analyze the use of chemical weapons against the Iraqi Kurds, the state of international law at that time, the response of the international community and the involvement of the U.S., as well as the ultimate and lasting response to this atrocity.

B. Who are the Kurds?

The Kurds are a largely Sunni Muslim people who live in a roughly defined area which includes parts of Turkey, Iraq, Iran, Armenia, and Syria.[14] The nation of Kurdistan was erased from the world's maps following World War I, when the Allied powers carved up the Middle East and denied the Kurds a nation-state.[15] There are more than twenty million Kurds in this region.[16] The Kurds have inhabited this mountainous region for thousands of years.[17] Most of Iraqi Kurdistan was in perpetual revolt against Saddam Hussein's regime.[18] Iraqi Kurdish fighters worked together with Iranian forces to attack Iraqi military forces.[19]

C. The Attack on Halabja

As the Anfal included numerous uses of chemical and conventional weapons, the attack on Halabja, Iraq on March 16, 1988 is often cited as the

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[10] Kelly, *supra* note 6, at 990.

[11] *Id.*

[12] *Id.*

[13] *Genocide in Iraq: The Anfal Campaign Against the Kurds*, HUM. RTS. WATCH (1993), *available at* http://www.hrw.org/reports/1993/iraqanfal/.

[14] *Who are the Kurds?*, WASH. POST, *available at* http://www.washingtonpost.com/wp-srv/inatl/daily/feb99/kurdprofile.htm.

[15] *The Kurds Story*, PBS, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/saddam/kurds/.

[16] *Id.*

[17] *Genocide in Iraq: The Anfal Campaign Against the Kurds*, *supra* note 13, at Chapter 1.

[18] Jeffrey Goldberg, *The Great Terror*, NEW YORKER (March 25, 2002), *available at* http://www.newyorker.com/archive/2002/03/25/020325fa_FACT1.

[19] *Id.*

most prominent incident during the campaign.[20] There was an estimated number of civilian casualties ranging from 3,200 to 5,000.[21] Halabja was a bustling commercial Kurdish town with several government offices, and its population swelled from 40,000 to 60,000, as surrounding villagers were displaced by the war.[22]

The March 16, 1988 attack began with conventional artillery shelling by Iraqi forces from the surrounding mountains.[23] In response to air raid sirens, many inhabitants entered primitive air raid shelters near their homes while others entered government shelters.[24] The cold calculations of Al-Majid can be seen in the methodology of the attack. He knew that the conventional artillery attack would drive the people of Halabja underground into their shelters and he also knew that his chemical agents were heavier than air.[25] The underground shelters became gas chambers as Iraqi forces deployed their chemical weapons and the gas seeped into the shelters.[26]

D. The State of International Law at the Time

In 1948, the world declared, in the Universal Declaration of Human Rights, that "[e]veryone has the right to life, liberty and security of person."[27] Moreover, the Geneva Conventions clearly state that a civilian population can never be targeted. Specifically, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Protocol I") states that a civilian population "shall not be the object of attack," unless they take a direct part in hostilities.[28] Taking these into consideration, alone, the attack on Halabja clearly violated international law. However, the world has also declared that some weapons simply inflict so much unnecessary suffering

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[20] *See Saddam's Iraq, Key Events: Chemical Warfare 1983-1988*, BBC NEWS, *available at* http://news.bbc.co.uk/2/shared/spl/hi/middle_east/02/iraq_events/html/chemical_warfare.stm.

[21] *Id.*

[22] *Genocide in Iraq: The Anfal Campaign Against the Kurds*, *supra* note 13, at Chapter 3.

[23] *Id.*

[24] *Id.*

[25] Kelly, *supra* note 6, at 993-94.

[26] *Id.* at 994.

[27] Universal Declaration of Human Rights art. 3, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948).

[28] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Convention Protocol I].

that they should never be used in combat, regardless of who is being targeted.

The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare ("the 1925 Protocol"), prohibits the use of chemical and biological weapons in war.[29] The 1925 Protocol states that chemical weapons have been "justly condemned by the general opinion of the civilized world."[30] Moreover, the 1925 Protocol continues that this prohibition of chemical weapons "shall be universally accepted as a part of International Law, binding alike the conscience and the practices of nations."[31] As the attack on Halabja involved the specific targeting of civilians and the use of chemical weapons, the attack was a clear violation of international law.

E. International Reaction

The words of "Chemical Ali," describing his reaction to an offer of diplomacy from a Kurdish politician in 1987, illustrate how little fear the Iraqi government had that the international community, in the heat of the Cold War, would do anything to stop their use of chemical weapons:

> I said I cannot let your village stay, because I will attack it one day with chemical weapons. Then you and your family will die. You must leave right now. Because I cannot tell you the same day I am going to attack with chemical weapons. I will kill them all with chemical weapons! Who is going to say anything? The international community? Fuck them! The international community, and those who listen to them![32]

It is abundantly clear that this confidence was well founded. The major players in the international community backed Saddam with arms and financing during the war, and they had little standing to attack his actions or those of Ali.[33]

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[29] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare ("1925 Protocol"), June 17, 1925, *available at* http://www.un.org/disarmament/WMD/Bio/1925GenevaProtocol.shtml [hereinafter 1925 Protocol].

[30] *Id*.

[31] *Id.*

[32] Peter Bouckaert, *Finally a Response to "Chemical Ali*," HUM. RTS. WATCH (Oct. 11, 2013), *available at* http://www.hrw.org/news/2013/10/11/dispatches-finally-response-chemical-ali.

[33] Kelly, *supra* note 6, at 994.

A UN Security Council draft resolution from March 30, 1984, illustrated the hesitation to explicitly blame the Iraqi government.[34] The draft resolution "strongly condemned" the use of chemical weapons in the Iran/Iraq conflict, but did not take the more substantial step of identifying the Iraqi government as the culprit.[35] The draft resolution did cite the 1925 Geneva Protocol, and reaffirmed the need to "strictly abide" by its obligations.[36] However, it is clear from its tone that the Security Council had no intention of actually enforcing the Protocol against the Iraqi government.

F. U.S. Involvement and Assistance

The U.S. was aware of Iraq's possession of chemical weapons.[37] Recently declassified CIA documents also made it clear that the U.S. was aware that the Iraqi military was prepared to use chemical weapons against the Iranian military, and actually supplied intelligence about Iranian troop movements, knowing that this intelligence was likely directing Iraq where to deploy their chemical weapons.[38] This was already a violation of the 1925 Geneva Protocol, before the weapons were even directed at civilians.

The Reagan administration made the calculated decision that the use of chemical weapons was allowable, as long as it helped turn the tide of the war in favor of the Iraqis.[39] The CIA also decided that if the chemical attacks came to light, the international community's response could be "managed."[40] Intelligence indicated that Iraqi forces were issued gas masks, Iraqi artillery units were ordered to request chemical weapons resupply, and Iranian forces requested protective gas masks in anticipation of encountering chemical weapons on the battlefield.[41] Intelligence further indicated that the Iranian response to Iraq's chemical weapons use would be

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[34] S.C. Draft Res. (March 30, 1984), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB82/iraq51.pdf.

[35] *Id.*

[36] *Id.*

[37] Memorandum from Jonathan Howe to Secretary of State Eagleburger, *Iraqi Use of Chemical Weapons*, *supra* note 9.

[38] Shane Harris & Matthew M. Aid, *CIA Files Prove America Helped Saddam as He Gassed Iran,* FOREIGN POL'Y (Aug. 26, 2013), *available at* http://foreignpolicy.com/2013/08/26/exclusive-cia-files-prove-america-helped-saddam-as-he-gassed-iran/.

[39] *Id.*

[40] *Id.*

[41] CENTRAL INTELLIGENCE AGENCY, IRAQ-IRAN SITUATION REPORT 27 (Jul. 29, 1982), *available at* http://foreignpolicy.com/2013/08/26/exclusive-cia-files-prove-america-helped-saddam-as-he-gassed-iran/.

"unpredictable," including the possibility of attacking western interests in the region.[42]

G. The World Failed the Kurds and the Recent Aftermath

The failure of any government to take action in response to this grave violation of international law deprived the Iraqi Kurds of the justice they deserved. Following an intentional violation of international law, including the murder of a civilian population, the world looked the other way, failing to honor the lives of the Kurdish civilians that were lost.

In the recent aftermath of the Anfal, Philip Alston, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, issued a statement citing "serious irregularities" in the trial of Saddam Hussein, a politically motivated effort by the Iraqi government to deny any meaningful appeal, and a "humiliating" execution.[43] For his part in the Anfal, "Chemical Ali" was executed on January 25, 2010, after receiving eight death sentences.[44] Finally, in a plainly ironic move, which could only be justified in the political realm, Donald Rumsfeld and the Bush administration cited Saddam's previous use of chemical weapons as one justification for invading Iraq.[45]

II. THE USE OF CHEMICAL WEAPONS IN SYRIA

A. The Civil War and Origins of Syria's Chemical Weapons

The Syrian civil war began as a protest against the regime of dictator Bashar al-Assad in March of 2011.[46] A year and a half later, the International Red Cross declared the conflict to be a civil war.[47] Over 100,000 people have been killed and nearly 2 million have fled the

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[42] *Id.*

[43] Press Release, Tragic Mistakes Made in the Trial and Execution of Saddam Hussein Must Not be Repeated, U.N. Press Release (Jan. 3, 2007).

[44] Nada Bakri, *Hussein Aide 'Chemical' Ali Executed in Iraq*, N.Y. TIMES (Jan. 25, 2010), *available at* http://www.nytimes.com/2010/01/26/world/middleeast/26execute.html?_r=2&.

[45] Glenn Kessler, *History Lesson: When the United States Looked the Other Way on Chemical Weapons*, WASH. POST (Sept. 4, 2013), *available at* http://www.washingtonpost.com/blogs/fact-checker/wp/2013/09/04/history-lesson-when-the-united-states-looked-the-other-way-on-chemical-weapons/.

[46] *Syria's Civil War: Key Fact, Important Players,* CBC NEWS (Nov. 20, 2013), *available at* http://www.cbc.ca/news2/interactives/syria-dashboard/index.html.

[47] *Id.*

country.[48] The Syrian government implicitly confirmed the existence of its chemical weapons stockpile in July of 2012, when it threatened the use of chemical weapons against any foreign military that attempted to intervene in the civil war.[49] The chemical weapons stockpile in Syria was built to counter Israel, and was accumulated as a result of assistance from Middle Eastern, as well as Western, nations.[50]

B. The Chemical Weapons Attack on Damascus

On August 30, 2013, the White House issued a press release stating with "high confidence" that the Syrian government, on August 21, 2013, attacked the city of Damascus with a nerve agent that killed 1,429 people, including at least 426 children.[51] UN investigators detailed their findings after a thorough investigation of the attack site.[52] The investigators recovered several surface-to-surface rockets that were capable of carrying significant chemical weapon payloads.[53] These rockets were analyzed and it was determined that the majority of the rockets or fragments contained Sarin gas.[54] Investigators met with survivors who showed significant symptoms consistent with exposure to Sarin, and blood samples confirmed exposure to the gas as well.[55] The UN report did not directly implicate the Syrian government in the attack.[56] However, as noted above in a report, U.S. intelligence found the Syrian government responsible for the attack.[57]

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[48] *Id.*

[49] Neil MacFarquhar & Eric Schmitt, *Syria Threatens Chemical Attack on Foreign Force*, N.Y. TIMES (Jul. 23, 2012), *available at* http://www.nytimes.com/2012/07/24/world/middleeast/chemical-weapons-wont-be-used-in-rebellion-syria-says.html.

[50] Anthony Deutsch & Khaled Yacoub Oweis, *Syria's Chemical Weapons Program was Built to Counter Isreal*, REUTERS (Aug. 28, 2013), http://www.reuters.com/article/2013/08/28/us-syria-crisis-chemical-idUSBRE97R0GJ20130828.

[51] *Government Assessment of the Syrian Government's Use of Chemical Weapons on August 21, 2013*, *supra* note 1.

[52] UN Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, *Report on Allegations of the Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013* (Sept. 13, 2013), *available at* http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf.

[53] *Id.* ¶ 23.

[54] *Id.*

[55] *Id.* ¶¶ 25-26.

[56] *Id.*

[57] *Government Assessment of the Syrian Government's Use of Chemical Weapons on August 21, 2013*, *supra* note 1.

The White House press release also stated that it was "highly unlikely" that the Syrian opposition was responsible for the attack.[58] Accordingly, the Assad regime struggled to rid the Damascus suburbs of opposition forces that were using them as a staging area to attack government targets in the capital.[59] The press release continues by citing intelligence that Syrian government personnel were preparing to deploy chemical weapons prior to the attack and that rocket launches were detected from areas under government control.[60] Moreover, U.S. Secretary of State John Kerry stated that:

> For five days the Syrian regime refused to allow the U.N. investigators access to the site of the attack that would allegedly exonerate them. Instead, it attacked the area further, shelling it and systematically destroying evidence. That is not the behavior of a government that has nothing to hide.[61]

Intelligence and evidence gathered before and after the attack clearly implicated the Syrian government almost immediately following news of the attack.

This attack, with government forces shelling a civilian population, bears a striking resemblance to the attack on Halabja, detailed above. The intelligence also indicates similar motivations for both attacks. As mentioned above, Saddam Hussein's use of chemical weapons was a response to the Kurdish population assisting Iranian forces.[62] With the attack on Damascus, the Assad regime sought to target opposition forces in the suburbs and also punish the civilian population for assisting those forces.[63] As with the Halabja attack, government forces intentionally targeted a civilian population and used chemical weapons; both of which are *per se* violations of international law.[64]

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[58] *Government Assessment of the Syrian Government's Use of Chemical Weapons on August 21, 2013*, *supra* note 1.

[59] *Id.*

[60] *Id.*

[61] Dana Hughes & Kirit Radia, *Syria's Guilt in Chemical Attack 'Clear to the World,' Kerry Says*, ABC NEWS (April 26, 2013), *available at* http://abcnews.go.com/International/syrias-guilt-chemical-attack-clear-world-kerry/story?id=20072589.

[62] Kelly, *supra* note 6, at 990.

[63] *Government Assessment of the Syrian Government's Use of Chemical Weapons on August 21, 2013*, *supra* note 1.

[64] *See* G.A. Res. 217A (III), *supra* note 27**;** Geneva Convention Protocol I, *supra* note 28.

C. Applicable International Law and Developments

As discussed above, the Universal Declaration of Human Rights[65] and Geneva Convention Protocol I[66] clearly state that a civilian population can never be intentionally targeted. Moreover, the 1925 Protocol sought to prohibit the use of chemical weapons in international conflicts.[67]

The civil war in Syria is not an international conflict, so there are questions regarding the applicability of the laws of armed conflict. Common Article 3 of the Geneva Conventions applies to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."[68] However, Common Article 3 was quite vague, and a more refined definitions was needed.

Entering into force on July 12, 1978, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts ("Protocol II"), extended the essential rules of armed conflict to internal armed conflicts.[69] An "internal armed conflict" is limited to conflicts which take place within the territory of a state party, between that state's armed forces and another armed group under responsible command, that exercises control over a part of the territory that enables them to carry out "sustained and concerted" military operations.[70] Protocol II further specifies that "in all circumstances," the civilian population "shall not be the object of attack" or "acts or threats of violence the primary purpose of which is to spread terror," unless they take direct part in the hostilities.[71]

Though Syria is not a state party to Protocol II,[72] so it cannot be directly applied by its terms, the International Criminal Tribunal for Rwanda ("ICTR") held in the *Akayesu* case that Protocol II is applicable when the

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[65] G.A. Res. 217A (III), *supra* note 27.

[66] Geneva Convention Protocol I, *supra* note 28.

[67] 1925 Protocol, *supra* note 29.

[68] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, Apr. 21-Aug. 12, 1984, Common Article 3(1), 75 UNTS 287 (Aug. 12, 1984).

[69] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),* Art. 1, 1125 UNTS 609 (June 8, 1977).

[70] *Id.*

[71] *Id.* art. 13.

[72] International Committee of the Red Cross (ICRC), *Treaties and State Parties to Such Treaties: Protocol II*, *available at* http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475.

territory involved is not a state party.[73] While the ICTR agreed with the Secretary General that Protocol II as a whole was not customary international law, it did find that Article 4 of Protocol II simply re-affirmed and supplemented the guarantees in Common Article 3.[74] The Tribunal further found that, as Common Article 3 was customary international law, those aspects of Protocol II also constituted customary international law.[75] Therefore, Protocol II is applicable to the conflict in Syria, even though Syria is not a state party.

Developments in international law since Saddam Hussein's use of chemical weapons have reinforced the idea that chemical weapons, and the intentional targeting of civilians, are *per se* violations of international humanitarian law. The most significant international law development regarding chemical weapons is the Chemical Weapons Convention ("CWC"), which was adopted on September 3, 1992 and entered into force on April 29, 1997.[76] Syria had refused to be a state party to the CWC, however, in a recent development, Syria deposited an "instrument of accession" with the UN Secretary General on September 14, 2013.[77] The CWC entered into force with regard to Syria on October 14, 2013.[78]

The CWC prohibits any state party from developing, producing, acquiring, retaining, transferring, or using chemical weapons.[79] The CWC also requires state parties to destroy any chemical weapons that it possess, and also destroy any chemical weapons production facilities.[80] However, Syria was not a party to the CWC when the chemical weapons attack on Damascus occurred. Had Syria been a party, the attack on Damascus would have been a clear violation. The CWC is only relevant now because it gives the international community teeth in preventing any future attack and in destroying Syria's chemical weapons. These enforcement actions are

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[73] Prosecutor v. Akayesu, Case No. ICTR 96-4, Judgement (Sept. 2, 1998), *available at* http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf.

[74] *Id.* ¶¶ 609-610.

[75] *Id.* ¶ 610.

[76] *Chemical Weapons,* UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, *available at* http://www.un.org/disarmament/WMD/Chemical/.

[77] Organization for the Prohibition of Chemical Weapons, Status of Participation in the CWC (Oct. 10, 2013), *available at* http://www.opcw.org/index.php?eID=dam_frontend_push&docID=16815.

[78] *Id.*

[79] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. 1, Apr. 29, 1997, 1974 U.N.T.S 45, 32 I.L.M. 800, *available at* http://www.opcw.org/var/apache/cid1307/htdocs/?eID=dam_frontend_push&docID=6357%3f.

[80] *Id.*

undertaken by the Organization for the Prohibition of Chemical Weapons ("OPCW").[81] Their current mission in Syria will be discussed below.

D. The Lead-up and Initial Reaction

The failure to take action to prevent this atrocity began years before the attack in Damascus. The main culprits in this inaction were Russia and China, through their U.N. Security Council vetoes. On October 4, 2011, Russia and China vetoed a draft resolution that would have condemned the Syrian government's crackdown on (what were then) anti-government protestors.[82] This draft resolution would have condemned the "grave and systematic human rights violations" that were taking place in Syria, would have warned of options that would be considered in response to the Assad regime's continued actions, and detailed possible sanctions.[83] The representative of the Russian Federation stated that his country's emphasis on non-acceptance of military intervention had not been taken into account, warned that the collapse of the Assad regime could destabilize the entire region, and expressed concern that the prior actions in Libya were being considered as a model.[84] The representative from China expressed concern that the resolution did not respect Syria's "sovereignty and territorial integrity."[85] These arguments seem to have been hollow, self-serving excuses for failing to take necessary actions. Pinning arguments on the "stability" of the Middle East, or Syrian "sovereignty," was an absolute disgrace to all that international law represents.[86]

Moreover, on July 19, 2012, Russia and China again vetoed a UN Security Council resolution that would have threatened sanctions against the Assad regime if they did not halt violence against the opposition.[87] U.N. Secretary General Ban Ki-moon stated that he "expected that the Security Council and the international community should have been united to send

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[81] G.A. Res. 55/283, U.N. Doc. A/RES/55/283 (Sept. 24, 2011).

[82] Press Release, Security Council, Security Council Fails to Adopt Draft Resolution Condemning Syria's Crackdown on Anti-Government Protestors, Owing to Veto by Russian Federation, China, U.N. Press Release SC/10403 (Oct. 4, 2011).

[83] *Id*.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] Michelle Nichols, *Russia, China Veto U.N. Security Council Resolution on Syria*, REUTERS (Jul. 19, 2012), *available at* http://www.reuters.com/article/2012/07/19/us-syria-crisis-un-idUSBRE86I0UD20120719.

out a strong and united voice to save human lives."[88] Human Rights Watch has called these vetoes a "betrayal of the Syrian people."[89]

An interesting argument put forward is that, through these vetoes, Russia and China violated their duty under *jus cogens* to prevent war crimes.[90] Rules of *jus cogens* can be defined as being "non-derogable rules of international 'public policy'" and those that are so exceedingly important that "every State has a legal interest therein."[91] As Geneva Convention Common Article 3 lays down "fundamental standards which are applicable at all times and to all states," it meets the criteria of *jus cogens*.[92] A more detailed analysis of this topic is not proper here. It is sufficient to say that Russia and China, by vetoing resolutions that sought to prevent war crime in Syria, were at least not serving the best interests of international law. These vetoes were clearly politically motivated, made without regard to the safety of those civilians who are unable to escape the Syrian conflict, as the country crumbles around them.

The immediate reaction in the U.S. was disturbing, yet somewhat understandable, given the fact that the wars in Iraq and Afghanistan have dragged on far too long. A September 3, 2013 Pew Research poll found that forty eight-percent of Americans opposed U.S. military airstrikes in Syria, with just twenty-nine percent in favor of the strikes.[93] A Reuters/Ipsos poll, released on the same day, found that fifty-six percent of Americans opposed any U.S. intervention, with just nineteen percent supporting military action.[94] A September 6, 2013 Gallup poll found that

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[88] *Id.*

[89] *UN: Russia, China Vetoes Betray Syrian People*, HUM. RTS. WATCH (Feb. 4, 2012), *available at* http://www.hrw.org/news/2012/02/04/un-russia-china-vetoes-betray-syrian-people.

[90] John Heieck, *Emerging Voices: Illegal Vetoes in the Security Council–How Russia and China Breached Their Duty Under Jus Cogens to Prevent War Crimes in Syria*, OPINIO JURIS (Aug. 14, 2013, 9:00 AM), *available at* http://opiniojuris.org/2013/08/14/emerging-voices-illegal-vetoes-in-the-security-council-how-russia-and-china-breached-their-duty-under-jus-cogens-to-prevent-war-crimes-in-syria/.

[91] Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, *in* MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 595, 618 (Lal Chand Vohrah et al. eds., 2003).

[92] *Id.* at 639.

[93] *Public Opinion Runs Against Syrian Airstrikes,* PEW RESEARCH (Sept. 3, 2013), *available at* http://www.people-press.org/2013/09/03/public-opinion-runs-against-syrian-airstrikes/.

[94] *U.S. Public Opposes Syria Intervention as Obama Presses Congress,* REUTERS (Sept. 3, 2013), *available at* http://www.reuters.com/article/2013/09/03/us-syria-crisis-usa-idUSBRE97T0NB20130903.

support for intervention in Syria was lower than support for military action prior to the conflicts in Iraq, Afghanistan, the Persian Gulf, or Kosovo.[95] A New York Times/CBS News poll, conducted on September 10, 2013, found that sixty-six percent of Americans believed that intervention in Syria would lead to long and costly involvement.[96] In a disturbing finding, a Reuters poll from September 9, 2013 revealed that more Americans were opposed to intervention in Syria as greater details of the chemical weapons attack were known than were opposed to it prior.[97]

These polls reveal the distaste that the American public has developed for conflicts, particularly in the Middle East, because they feel that they are not worth the financial and human costs. A phrase that was often used during the debate over U.S. intervention in Syria was a "war weary" America.[98] A recent Harvard University study found that the Iraq and Afghan wars would result in a final cost of between $4-6 trillion dollars to the U.S. economy.[99] This exuberant financial cost, in addition to the ever-present human costs, has resulted in the American people feeling that fighting abroad is not worth the price we have paid unless there is some direct threat to U.S. national security.[100]

It is obvious that these feelings are rationally based; the American people are less and less willing to police the world. "Shining light on the hill" has become so costly, that the American public has had enough. However, these feelings are not sufficient to ignore a clear international law violation. As discussed above, the intentional targeting of a civilian population and the use of chemical weapons are *per se* violations of international law.[101] In a September 11, 2013 address to the nation, President Obama argued that "[i]f we fail to act, the Assad regime will see

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[95] *U.S. Support for Action in Syria is Low vs. Past Conflicts*, GALLUP POLITICS (Sept. 6, 2013), *available at* http://www.gallup.com/poll/164282/support-syria-action-lower-past-conflicts.aspx.

[96] *American Views on Intervention in Syria*, N.Y. TIMES (Sept. 10, 2013), *available at* http://www.nytimes.com/interactive/2013/09/10/world/middleeast/american-views-on-intervention-in-syria.html?_r=1&.

[97] Mark Felsenthal, *Americans' Distaste for Military Strike on Syria is Growing – Reuters/Ipsos Poll*, REUTERS (Sept. 9, 2013, 3:42pm), *available at* http://www.reuters.com/article/2013/09/09/us-syria-crisis-poll-idUSBRE9880YJ20130909.

[98] Erik Ose, *War Weary Public Rejects Attacking Syria*, HUFFINGTON POST (Sept. 12, 2013), *available at* http://www.huffingtonpost.com/erik-ose/war-weary-public-rejects-_b_3906748.html.

[99] Linda J. Bilmes, *The Financial Legacy of Iraq and Afghanistan: How Wartime Spending Decisions Will Constrain Future National Security Budgets* (Harvard Kennedy School, Working Paper No. 13-006, 2013).

[100] Ose, *supra* note 98.

[101] G.A. Res. 217A (III), *supra* note 27**;** Geneva Convention Protocol I, *supra* note 28.

no reason to stop using chemical weapons . . . The purpose of a strike would be to deter Assad from using chemical weapons and make clear to the world we will not tolerate their use."[102] This showdown between taking action to remedy an international wrong, and justifying these actions to the American people, was avoided in favor of a "diplomatic option" that has staved off military action.

E. The "Diplomatic Option"

After three days of Russia/U.S. negotiations, on September 14, 2013, the two nations agreed that the Assad regime must be held accountable for their chemical weapons stockpile.[103] On September 27, 2013, the UN Security Council passed a resolution demanding that the Assad regime reveal the extent of their chemical weapons stockpile and turn them over for destruction.[104] In the Resolution, the members of the Security Council stated that they were deeply outraged by the chemical weapons attack on Damascus, condemned the civilian deaths, and expressly affirmed that the use of chemical weapons constituted a "serious violation of international law."[105] The Security Council further stated that those individuals responsible for the chemical weapons used in Syria needed to be held accountable.[106] An Organisation for the Prohibition of Chemical Weapons ("OPCW") Executive Council Decision, also from September 27, revealed in greater detail exactly how the destruction of Syria's chemical weapons would take place.[107] The OPCW decision noted, as discussed above, that Syria had deposited an instrument of accession to the CWC and was then bound by it.[108] The OPCW decision stated that Syria would complete the elimination of all chemical weapons material and equipment by the first half of 2014, and would need to meet intermediate destruction milestones.[109]

The dismantling of Syria's chemical weapons is an important step towards ensuring that the Assad regime does not have the opportunity to use

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[102] *Obama Gives Syria Diplomatic Option to Avoid U.S. Strike*, JAPAN TIMES (Sept. 11, 2013), *available at* http://www.japantimes.co.jp/news/2013/09/11/world/obama-gives-syria-diplomatic-option-to-avoid-u-s-strike/#.UpN2xKVzpuY.

[103] Warren Strobel & Mariam Karouny, *US., Russia Sgree on Syria Weapons, Obama Says Force Still Option*, REUTERS (Sept. 14, 2013), *available at* http://www.reuters.com/article/2013/09/14/us-syria-crisis-idUSBRE98A15720130914.

[104] S.C. Res. 2118, U.N. Doc. S/RES/11135 (Sept. 27, 2013).

[105] *Id.* ¶ 2.

[106] *Id.* ¶ 15.

[107] *Id.* at Annex I, 5.

[108] *Id.*

[109] S.C. Res. 2118, *supra* note 104, at Annex I, 7.

those weapons against civilians or opposition forces in the future. However, this current plan does nothing to actually punish the Assad regime, beyond simply losing their chemical weapons stockpile. The actions taken in response to the Assad regime's use of chemical weapons amount to, as of now, a slap on the wrist. Moreover, as the Special Coordinator of the OPCW-UN mission in Syria, Sigrid Kaag, stated on November 15, 2013, "substantial work remains to be done, and a number of challenges lie ahead."[110] OPCW inspectors have experienced difficulty reaching certain chemical weapons sites, due to the ongoing civil war.[111] Fault for this cannot be placed solely on the Assad regime, as opposition forces controlled the area around one difficult to access site.[112] In a more recent development, OPCW inspectors have remotely accessed the sites through "sealed cameras" operated by Syrian personnel under the direction of the inspectors.[113] These problems are in addition to the obvious problem that the Assad regime may not have revealed its entire chemical weapons stockpile. Moreover, some amount of the chemical weapons stockpile may have been shipped out of the country prior to inspectors arriving.

The most pressing problem with this "diplomatic option," however, is its effect on public opinion. This plan has given the Assad regime legitimacy in the international community that they do not deserve. They committed a war crime and have now been given the opportunity to remove the spotlight from that attack in Damascus and place it on the OPCW's mission. Russia and China blocked any attempt to stem human rights violations in Syria prior to the Damascus attack.[114] The undeserved legitimacy that the Assad regime received is the only reason that Russia and China allowed this plan to move forward. Moreover, though the OPCW may have deserved the Nobel Peace Prize for the work they have done, this adds to the public misperception that this diplomatic option means "peace" in Syria, and threatens to overshadow the memory of the Syrian civilians

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[110] *Substantial Work Remains to Rid Syria of Chemical Weapons, Says OPCW-UN Mission Chief*, U.N. NEWS CENTRE (Nov. 15, 2013), *available at* http://www.un.org/apps/news/story.asp?NewsID=46501#.UpOdwqVzpuY.

[111] Anthony Deutsch & Dominic Evans, *Chemical Weapons Inspectors Unable to Reach Two Syrian Sites*, REUTERS (Oct. 28, 2013), *available at* http://www.reuters.com/article/2013/10/28/us-syria-crisis-chemical-idUSBRE99R0RA20131028.

[112] *Id.*

[113] Naftali Bendavid, *Inspectors Check Hard-to-Reach Syrian Site Remotely,* THE WALL STREET J. (Nov. 7, 2013), *available at* http://online.wsj.com/news/articles/SB10001424052702303763804579183750157467052#top.

[114] S.C. Res. 2118, *supra* note 104.

who were murdered by the Assad regime.[115] It would have been more fitting to award this prize to the OPCW in 2014 if their mission to destroy chemical weapons in Syria had succeeded and served as a significant step towards peace. The current plan in Syria has not done enough to punish Bashar al-Assad. As Syracuse University College of Law professor David Crane has noted, "[a]ppeasement in the face of tyranny never works" and history "tells us that tyrants only respect power and the use of force."[116] The Assad regime has, as of now, been given a free pass by the international community and has not received any real consequences as a result of the Damascus attack.

III. WHERE DO WE GO FROM HERE?

As argued above, further military action should have been taken against the Assad regime following their use of chemical weapons against their own people. Due to the extensive delay, that action may no longer be an option. Therefore, the question now may be what actions the United States and the international community should take in responding to the evolving conflict and humanitarian disaster in Syria. The world is now searching for an answer.

Going forward, there are several options that the U.S. and the international community have. Among these options are: arming the Syrian opposition, conducting peace negotiations, and establishing some kind of tribunal to try those responsible for atrocities within Syria. These options do not exist in a vacuum; no one policy will end the crisis in Syria. Undoubtedly, a court could not be established until the conflict actually does end. Outlining the arguments put forward by supporters and detractors of these policies allows for a clearer picture of where the world may go from here.

A. Arming the Rebels

One of the most prominent and controversial options is the U.S. providing weapons and support to the Syrian opposition. In September of

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[115] *The Nobel Prize 2013: Organization for the Prohibition of Chemical Weapons,* NOBELPRIZE.ORG, *available at* http://www.nobelprize.org/nobel_prizes/peace/laureates/2013/opcw-facts.html.

[116] David Crane, *A Diplomatic Solution to the Crisis in Syria: Remembering the 1930s*, JURIST (Sept. 24, 2013), *available at* http://jurist.org/forum/2013/09/david-crane-syria-1930s.php.

2013, CIA shipments of American weapons and other military equipment began reaching the Syrian rebels.[117] This aid included light weapons, ammunition, vehicles, advanced communications equipment, and advanced combat medical kits.[118] The equipment did not include shoulder-mounted rockets that could be used to shoot down military or civilian aircraft.[119] The U.S. State Department's senior advisor on assistance to Syria, Mark Ward, speaking about those initial shipments, argued "[t]his doesn't only lead to a more effective force, but it increased its ability to hold coalition groups together."[120] Other proponents of this policy also argue that, beyond creating a stronger opposition to battle Assad regime, arming the rebels allows them to push back Al-Qaeda as well as ensure humanitarian corridors remain open.[121]

An interesting situation that weighs on the side of arming the rebels is the U.S., in many respects, is competing with Al-Qaeda affiliated extremist groups for the hearts and minds of many Syrian civilians.[122] Most notably, the group known as Jabhat al-Nusra ("al-Nusra") is using its resources to gain legitimacy and respect in small Syrian villages.[123] Al-Nusra, the principle jihadi rebel group in Syria with ties to Al-Qaeda, use their ownership of oil refineries and agricultural equipment to provide food, electricity, water, and medical care to many Syrians.[124] A U.S. official, speaking on condition of anonymity to The Washington Post, stated that "[i]f you see new fire trucks or ambulances in places were al-Nusra is trying to win hearts and minds, this might not be a coincidence."[125] The official was referencing non-military aid that the U.S. was providing, but this issue

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[117] Ernesto Londono & Greg Miller, *U. S. Weapons Reaching Syrian Rebels*, WASH. POST (Sept. 11, 2013), *available at* http://www.washingtonpost.com/world/national-security/cia-begins-weapons-delivery-to-syrian-rebels/2013/09/11/9fcf2ed8-1b0c-11e3-a628-7e6dde8f889d_story.html.

[118] *Id.*

[119] Mark Hosenball, *Congress Secretly Approves U.S. Weapons Flow to 'Moderate' Syrian Rebels*, Reuters (Jan. 27, 2014 5:35 PM), *available at* http://www.reuters.com/article/2014/01/27/us-usa-syria-rebels-idUSBREA0Q1S320140127.

[120] Londono & Miller, *supra* note 117.

[121] David Ignatius, *Taking a Long View on Syria and the Sunni-Shiite Divide*, WASH. POST (Feb. 12, 2014), *available at* http://www.washingtonpost.com/opinions/david-ignatius-taking-a-long-view-on-syria-and-the-sunni-shiite-divide/2014/02/12/5d650b10-935e-11e3-84e1-27626c5ef5fb_story.html?wpmk=MK0000203.

[122] Londono & Miller, *supra* note 117.

[123] *Id.*

[124] Ghaith Abdul-Ahad, *Syria's al-Nusra Front – Ruthless, Organized, and Taking Control*, GUARDIAN (Jul. 10, 2013), *available at* http://www.theguardian.com/world/2013/jul/10/syria-al-nusra-front-jihadi.

[125] Londono & Miller, *supra* note 117.

of competing for the hearts and minds of Syrians is a strong argument for keeping a well-armed opposition who can ensure a pathway for this aid.

There are two significant arguments against arming the Syrian opposition. First, it is difficult to determine exactly who these "moderate" rebels are, or whether the weapons may end up in the hands of terrorists. Second, arming one side of an ongoing conflict has, historically, not been sufficient to end the bloodshed.

Those who advocate for providing support to the opposition use the term "moderate," in delineating between those who will receive support, and those who have ties to extremist groups. However, "moderate" is such an ambiguous word, that one thing becomes immediately clear; the moderate rebel is an idealized version of the Syrian opposition. This is not to say that there is not moderate opposition in Syria, but it is obvious that the risk of these weapons falling in the hands of extremists is high.

Notably, Director of National Intelligence, James Clapper, told the Senate Intelligence Committee that Syrian militant groups, including al-Nusra, aspire to attack the U.S.[126] Clapper testified that 26,000 rebel fighters are extremists, and that 7,000 of them are foreigners from some 50 countries, including some in Europe.[127] The fear is that the rebel fighters will train at camps established by groups such as al-Nusra, and then return to their home countries to commit acts of terror.[128]

In a disturbing revelation in the fall of 2013, Al-Aqsa Islamic Brigades, a small armed Sunni rebel faction fighting alongside the Free Syrian Army, posted numerous anti-American photos on its Facebook page.[129] They included images of masked fighters marching away from a burning U.S. Capitol Building, and several images containing the black flag that is associated with Al-Qaeda.[130] This is not indisputable evidence that arming these rebels is entirely dangerous, but it is clear evidence that there is much about these rebels that we do not know.

Beyond the ambiguity regarding whom this policy is actually arming, another strong argument against arming the rebels is simply that arming one side of a conflict is not an effective way to end the conflict. The U.S. must

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[126] Kimberly Dozier, *James Clapper Says Syrian Al-Qaida Group Aspires to Attack U.S.*, HUFFINGTON POST (Jan. 29, 2014, 12:08 PM), *available at* http://www.huffingtonpost.com/2014/01/29/james-clapper-syria-al-qaida_n_4688266.html.

[127] *Id*.

[128] *Id.*

[129] Robert Windrem, *Not One of the 'Bad Guys,' but Syrian Rebel Group Proclaims 'Anti-American' Bent*, NBC News (Sept. 6, 2013, 4:28 PM), *available at* http://www.nbcnews.com/news/investigations/not-one-bad-guys-syrian-rebel-group-proclaims-anti-american-v20348901.

[130] *Id.*

remember that arming insurgencies in Libya, Angola, Central America, and Afghanistan "helped sustain brutal conflicts in those regions for decades."[131] Particularly, "the decision to aid the Afghan mujahideen during the 1980's ended up strengthening radical Islamic forces."[132] Mujahideen alumni later turned up in extremist movement throughout the Middle East.[133] This historical context should frame the decision that the U.S. and the world need to make. The excuse that "the enemy of my enemy is my friend" is a shortsighted excuse that has gained the U.S. enemies around the world, undermining U.S. national security.[134] Arming the enemies of our enemies has not gained the U.S. any friends and, instead, this has created more enemies.[135] Moreover, arming one side of the conflict will do little to end the bloodshed. Arming one side of the conflict may undermine diplomatic opportunities and will inevitably harden the resolve of the Assad regime and the rebels to fight it out to the last moment.[136] Arming one side of the conflict may seem like sound policy, but history and reality must not be forgotten.

B. Peace Negotiations

As argued above, diplomacy alone has not been a sufficient response to the Assad regime's use of chemical weapons. However, regarding the underlying conflict, diplomacy is an important aspect, and may actually be the only way to end the conflict.

Proponents of a diplomatic resolution to the conflict argue that recent events are evidence of the power of diplomacy. When political roadblocks were removed, the U.S. and Russia were able to negotiate an agreement for the destruction of Syria's chemical weapons, within a matter of days.[137] Syria then joined the CWC within the month, and destruction of the

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[131] Michael Shank, *How Arming Syrian Rebels Will Backfire (See Libya, Afghanistan)*, HUFFINGTON POST (Aug. 1, 2013, 11:36 AM), *available at* http://www.huffingtonpost.com/michael-shank/how-arming-syrian-rebels_b_3689592.html.

[132] Ted Carpenter, *The U.S. Should be Wary of Arming Syrian Rebels*, U.S. NEWS (Nov. 1, 2012, 8:00 AM), *available at* http://www.usnews.com/opinion/blogs/world-report/2012/11/01/the-us-should-be-wary-of-arming-syrian-rebels.

[133] *Id.*

[134] Shank, *supra* note 131.

[135] *Id.*

[136] *Id.*

[137] Kate Hudson, *From Iran to Syria: Diplomacy, Not War, Can Bear fruit*, ALJAZEERA (Nov. 19, 2013, 8:55 AM), *available at* http://www.aljazeera.com/indepth/opinion/2013/11/from-iran-syria-diplomacy-not-war-can-bear-fruit-201311165564369831.html.

weapons began.[138] In the realm of diplomacy, those results came at warp speed. A best-case scenario would be if both sides in the conflict could resolve their differences through diplomacy, ending the bloodshed.

However, a second round of peace talks in Geneva have ended with little progress, as the Syrian government and the opposition agreed on an agenda for a third round of talks, but little else.[139] The Syrian government seeks to address terrorism, while the opposition seeks to discuss forming a transitional governing body.[140] The Syrian government's refusal to begin the next talk by addressing either issue has raised suspicion among the opposition that the government is simply delaying and does not wish to discuss the transitional governing body at all.[141] This suspicion may be well founded, as prolonged peace talks obviously benefit the Assad regime. As with the diplomatic option for disposing of chemical weapons, the regime gains legitimacy, simply by being at the table. Of course, simply being at the table is not enough. The Syrian government has not, thus far, shown a willingness to negotiate towards a common goal.

What the Syrian government has shown a willingness to do is to continue killing innocent civilians while these talk are in progress. Louay Safi, of the opposition Syrian National Coalition, stated "[o]ur heart is in pain, our delegation is in pain, that as we speak here searching for a political solution the regime has chosen to bombard towns and cities killing civilians."[142] What real progress could actually come from these peace negotiations, if the Syrian government cannot even be to stop murdering their own people long enough to have productive negotiations.

The U.S. is trying to take a leading role in finding a way for these peace talks to succeed. At the Geneva conference, U.S. Secretary of State, John Kerry, firmly pronounced that President Assad would not be a part of a transitional government.[143] Kerry stated that Assad has lost his legitimacy after an "appalling assault" on his people.[144] Kerry's comments were

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[138] Hudson, *supra* note 137.

[139] Laura Smith-Spark, *Slim Progress Made as Syria Peace Talks Close in Switzerland*, CNN (Feb. 15, 2014, 8:07 AM), *available at* http://www.cnn.com/2014/02/15/world/meast/syria-civil-war/index.html?hpt=hp_t2.

[140] *Id*.

[141] *Id*.

[142] *Id.*

[143] Matthew Lee, *John Kerry: Syrian President Bashar Assad Will Not Be Part of Transitional Government*, HUFFINGTON POST (Jan. 22, 2014, 4:33 AM), *available at* http://www.huffingtonpost.com/2014/01/22/assad-syria-transitional-government_n_4642362.html.

[144] *Id*.

measured, as he noted that the Geneva talks were the beginning of "tough and complicated negotiations."[145]

President Obama acknowledged that the peace negotiations have, thus far, failed to produce any result. The President acknowledged that the Syrian government and the opposition are "far from achieving" a peaceful end to the conflict.[146] He noted that, while these peace negotiations are floundering, the conflict continues to claim the lives of innocent Syrians. These two sides are clearly not willing to give an inch; neither side desires to give up their position. Any diplomatic achievement will be the result of international cooperation. Successful peace negotiations must include all of the major players in the international community. A picture of what a more stable future may look like is: "The United States, Russia, Iran and Saudi Arabia sitting around a table . . . [drafting] . . . a deal that can stop the Syrian nightmare. The Syrian's can't resolve this tragedy without a strong push from above."[147] Negotiations between the two sides is progress, but it will take commitment from the major power in the international community if these talks are to have any lasting impact.

C. A Judicial Body

A third option to be considered is a judicial body that would hold those individuals in Syria, who committed violations of international humanitarian law, accountable. Professor David Crane, former Chief Prosecutor of the Special Court for Sierra Leone ("SCSL"), outlined five options for establishment of a justice mechanism in Syria.[148] In his testimony before the House Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations and the Subcommittee on the Middle East and North Africa, Professor Crane reasoned through the advantages and disadvantages of each option.[149]

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[145] Lee, *supra* note 143.

[146] Anne Gearan, *Diplomacy is failing in Syria, Obama acknowledges*, THE WASH. POST (Feb. 11, 2014), http://www.washingtonpost.com/world/national-security/diplomacy-is-failing-in-syria-obama-acknowledges/2014/02/11/822065e6-935c-11e3-84e1-27626c5ef5fb_story.html.

[147] Ignatius, *supra* note 121.

[148] *Establishing a Syrian War Crimes Tribunal?: Hearing Before the S. Comm. On Africa, Global Health, Global Human Rights, and Int'l Orgs., and the S. Comm. on the Middle East and North Africa*, 113th Cong. (2013) (Statement of Prof. David M. Crane, Former Chief Prosecutor, U.N. Special Court for Sierra Leone) [hereinafter Statement of Prof. David M. Crane]

[149] *Id.*

The first option would be tasking the International Criminal Court ("ICC").[150] Crane noted that the ICC is not the correct forum, as their record is questionable and they can barely handle their current caseload and investigations.[151] A second option would be an ad hoc tribunal created by the U.N., such as those for the Balkans and Rwanda.[152] Crane argued that these tribunals are exceedingly expensive, tasked with unrealistic mandates, and that the creation of a Syrian ad hoc tribunal would not survive a Security Council vote.[153] A third option would be a regional court, modeled after the SCSL, that would be located at or near the site of the crimes in Syria, and would be tasked with prosecuting those who bore the greatest responsibility.[154] Crane argued, in foreshadowing his ultimate conclusion, that Western assistance with any of these options would be viewed with skepticism, and that the creation of the regional court would still need to survive a Security Council vote.[155] The fourth option would be an internationalized domestic court.[156] The fifth, and Crane argues the preferred option, would be having Syrians try Syrians in the domestic court system.[157] Crane argues that this is a viable option once Syria has been stabilized.[158]

Trying the perpetrators of war crimes, on both sides of the conflict in a Syrian court, seems like the most logical option. Give the Syrians a chance to put an ultimate end to this conflict. The legitimacy of a new Syrian government would be bolstered if the Syrian people could see these war criminals being tried by their own court system. Also, as Professor Crane noted, any Western-backed court will be seen as simply another overreach into the domestic affairs of a Middle Eastern country. Let Syrians try Syrians and end this conflict on their terms.

Whatever options the U.S. and the international community decide to pursue, the conflict in Syria rages on. Innocent Syrian civilians are still being murdered by the Assad regime, even while the two sides attempt to negotiate for peace. The horror within Syria is not put on hold while the world decides how dirty they are willing to get their hands. This conflict has raged on far too long, and the world must take action to end the bloodshed,

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[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] Statement of Prof. David M. Crane, *supra note 148.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] Statement of Prof. David M. Crane, *supra note 148.*

and hold accountable those individuals responsible for perpetrating atrocities within Syria.

CONCLUSION

The U.S. and the world failed to protect the rights of the Kurds following the Iraqi military's use of chemical weapons. The current diplomatic option in Syria regarding chemical weapons disposal is a slap on the wrist for President Bashar al-Assad, and threatens to overshadow the atrocity that was committed against the Syrian people. Diplomatic options are important, but the legitimate threat of force is necessary to ensure compliance now and in the future. There are multiple options that the U.S. and international community has in deciding how to best end this conflict. Whether backing the opposition, or negotiating an agreement to end the fighting, the U.S. and the world must act. Additionally, a judicial body must be established to try perpetrators of war crimes within Syria. It is only through justice for the innocent victims of this conflict that the world avoids the same mistakes in made in responding to Saddam Hussein's use of chemical weapons against the Kurds. We must act to uphold the core values of international law and human rights.

THIS CAN'T BE CORRECT . . . RIGHT?!: HOW THE D.C. CIRCUIT COURT OF APPEALS HAS MISINTERPRETED THE SUPREME COURT AND STRIPPED GUANTANAMO DETAINEES OF THEIR WRIT TO HABEAS CORPUS

Ryan Hershkowitz [*]

ABSTRACT

Throughout its history, the United States ("U.S.") has prided itself in providing certain liberties through its Constitution. Amongst the liberties and privileges that the U.S. Constitution aims to protect is freedom from wrongful detainment. Those afforded Constitutional protection may challenge their detainment by petitioning through writ of habeas corpus. This right is absolute except where a detainee may offer the threat of rebellion and invasion.

While it is clear that the Constitution is the law of the land within the fifty states, determining whether the Constitution is binding over one of the many U.S. territories is not so clear. This question has been presented from Guantanamo Bay, a detainment facility for suspected terrorists. Eventually, it was reasoned that the U.S. Constitution governed Guantanamo Bay, and as a result, Guantanamo detainees now had the right to writ of habeas corpus. Despite this newfound liberty, it is much harder for a Guantanamo detainee to challenge his confinement in comparison to a U.S. citizen. It is also much easier for the Government to justify its detainment. But is it not true that the writ of habeas corpus is derived from the same Constitution?

This note will discuss how and why the D.C. Circuit Court of Appeals has prejudiced Guantanamo detainees and why these detainees essentially do not have a full-fledged right to challenge their detainment. The burden of proof that the government must sustain in order to justify detainment at Guantanamo has been lowered by this court, making it nearly impossible to challenge detainment. Furthermore, this note will analyze how the D.C. Circuit Court of Appeals has worked its way around the holdings of the Supreme Court to prejudice Guantanamo detainees and subvert basic notions of legal precedent in a common law legal system.

INTRODUCTION

Few places have played as central of a role in the United States' War on Terror as the Guantanamo Bay detention camp.[1] During the last decade, the U.S. has found itself embroiled in conflict, trying to put an end to terrorism.[2] Thus, the military prison located within the Guantanamo Bay Naval Base in Cuba has become the intersection between the balance of law, security, and human rights.[3]

The U.S. gained possession of Guantanamo Bay in 1903 via a lease agreement with Cuba to use the territory as a prison and naval base.[4] While the U.S. was to exercise complete control of the territory and exercise its jurisdiction during the occupation, Cuba would still have sovereignty over Guantanamo Bay.[5]

With Cuba maintaining its sovereignty over Guantanamo, it was once reasoned that U.S. law, and the U.S. Constitution in particular, would not apply in this territory.[6] In fact, it was not until the U.S. began and then subsequently intensified its efforts in quashing terrorism during its War on Terror that the U.S. Constitution's applicability at Guantanamo Bay came into question.

As the U.S. aimed to deter terrorism and stop those linked to international terrorist groups in the aftermath of the September 11th terror attacks, questions regarding the Constitution's place in Guantanamo arose.[7] The U.S. set up military tribunals to detain suspected terrorists with links to groups such as Al-Qaeda.[8] With an increasing number of detainees at Guantanamo, a growing number of inquiries arose regarding the U.S. right to hold these suspected terrorists captive. Initially, the Detainee Treatment

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[1] *See* Edwin Meese III, *Guantanamo Bay Prison is Necessary*, CNN (Jan. 11, 2012, 2:46 PM), *available at* http://www.cnn.com/2012/01/11/opinion/meese-gitmo/.

[2] *See id.*

[3] *See id.*

[4] Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations, U.S.-Cuba, Feb. 23, 1903, T.S. 418, 6 Bevans 1113, *available at* http://avalon.law.yale.edu/20th_century/dip_cuba002.asp.

[5] *See generally id.*

[6] *Id.*

[7] *The Guantanamo Trials*, HUM. RTS. WATCH, *available at* https://www.hrw.org/features/guantanamo.

[8] *See id.*

Act quashed submitted habeas corpus petitions, but concerns about the treatment afforded to detainees increased with the influx of detainees.[9] Eventually, it would need to be determined whether these detainments were lawful, and whether there was any authority to uphold or defeat this assertion?

The Supreme Court would have to undertake the following inquiry: were Guantanamo detainees afforded the Constitutional protection of to the writ of habeas corpus? The writ of habeas corpus has had its place in U.S. history and jurisprudence since the founding of the original colonies.[10] Directly translating to "you have the body," the writ of habeas corpus is a tool that challenges a prisoner's detainment.[11] Furthermore, the writ has a long-standing tradition stemming from its roots under the British Crown.[12]

The U.S. Constitution affords freedom and relief from unlawful detainment in the Suspension Clause.[13] Thus, it articulates that the right to writ of habeas corpus shall not be suspended except in cases of rebellion and invasion.[14] Guantanamo detainees would soon seem to be afforded this right.

In 2008, Lakhdar Boumediene was held in military detention at Guantanamo Bay.[15] Boumediene's initial unsuccessful challenge to his detainment eventually led to the landmark case *Bush v. Boumediene*, where the U.S. Supreme Court held that the U.S. Constitution was applicable in Guantanamo Bay by reason of its de facto jurisdiction over the territory.[16] The Court reached this conclusion in a similar fashion to precedential cases involving U.S. owned lands administrated by the War Department's Bureau of Insular Affairs, regarding territories acquired in the Spanish-American War.[17] In establishing that the U.S. Constitution would provide protection to Guantanamo detainees, the detainees were also afforded the right to writ of habeas corpus.[18]

With the highest court in the land solidifying Guantanamo detainee rights to writ of habeas corpus, one would presume it would take the

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[9] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136.

[10] *Habeas Corpus*, RUTHERFORD INST., *available at* https://rutherford.org/constitutional_corner/habeas_corpus/.

[11] *Id.*

[12] *Id.*

[13] U.S. CONST. art. I, § 9, cl. 2.

[14] *Id.*

[15] Bush v. Boumediene, 553 U.S. 723, 732 (2008).

[16] *Boumediene*, 553 U.S. at 755.

[17] *Id.* at 756.

[18] *Id.* at 798.

Supreme Court answering the habeas corpus question again, in the negative, to quash this newfound liberty for those held in captivity. However, as Guantanamo detainees challenged their captivity in growing numbers with success following *Boumediene*, the D.C. Circuit Court of Appeals would eventually take steps to subvert the Supreme Court, and effectively end habeas corpus.

I. HOW AL-ADAHI ESSENTIALLY ENDS HABEAS CORPUS REVIEW

As expected, the Supreme Court's holdings in *Boumediene* led to an influx in Guantanamo prisoners challenging the legality of their detainment.[19] The Court called for "meaningful review" of these challenges and the District Courts initially hearing these claims called for a preponderance of the evidence standard as used in other habeas corpus claims.[20] Under this standard of review, the U.S. Government had to sustain its burden in demonstrating that there was a greater than fifty percent chance that the detained prisoner at Guantanamo was in fact part of a terrorist group, such as Al-Qaeda.[21] Accordingly, to justify detainment, the U.S. government was required to provide evidence demonstrating that a detainee challenging his captivity had more than just an attenuated link to a terrorist group.[22]

In 2010, however, detainees' rights to the writ of habeas corpus would be greatly prejudiced by the D.C. Circuit Court of Appeals in *Obama v. Al-Adahi*.[23] Mohammed Al-Adahi, a Yemen national, was captured in Pakistan as the U.S. continued its pursuit of Al-Qaeda operatives in Afghanistan.[24] Al-Adahi eventually challenged his detainment in Guantanamo, and the Federal District Court held that the Government had failed to meet its burden of proving, by a preponderance of the evidence, that Al-Adahi was a member of Al-Qaeda.[25]

However, the Government appealed this decision, and the D.C. Circuit Court of Appeals reversed the District Court by holding that Al-Adahi

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[19] *See generally* Jonathan Hafetz, *Calling The Government to Account: Habeas Corpus in the Aftermath of Boumediene*, 57 WAYNE L. REV. 99 (2011).

[20] *Habeas Corpus*, *supra* note 10.

[21] *Preponderance of the Evidence*, CORNELL UNIV. LEGAL INFO. INST. *available at* http://www.law.cornell.edu/wex/preponderance_of_the_evidence.

[22] *See generally* 553 U.S. 723 (2008).

[23] *See* 613 F.3d 1102 (D.C. Cir. 2010).

[24] *Id.* at 1102-03.

[25] *Id.*

should continue to be detained.[26] This ruling changed the way courts considered evidence the Government produced in attempting to demonstrate terrorist links for future challengers to come.[27] Instead of examining evidence of terroristic links in the aggregate, the Government would now only need to present some evidence or even a single piece of evidence that could meet the burden of proof.[28] Thus, meaningful review of Guantanamo writs of habeas corpus would be no more.

A. The Government Begins to Prevail at a Higher Rate on Habeas Corpus Matters

The meaningful review of habeas corpus challenges called for by the Supreme Court in *Boumediene* gave way to a new regime of judicial deference to government actions. As the D.C. Circuit Court of Appeals articulated a much lower standard for these habeas corpus reviews, the Government would now need very little evidence to demonstrate that a detainee has a link to a terrorist organization. As evidence is no longer examined in the aggregate to justify detainment, the Government often just needs a single piece of evidence linking a detainee to a terrorist group in order to continue its confinement.

These shifts in fact finding and judicial review have had staggering effects on these habeas corpus challenges. After the Supreme Court's decision in *Boumediene* and its subsequent granting of the writ of habeas corpus to Guantanamo detainees, prisoners were actually very successful in challenging their confinement.[29] Guantanamo detainees won fifty-nine percent of their habeas corpus petitions post-*Boumediene* and pre-*Al-Adahi*.[30] A key reason for Guantanamo detainees' success was that the courts were rejecting forty percent of the government's factual allegations.[31] However, this success rate dropped to an extremely low eight percent, with courts only rejecting fourteen percent of the Government's factual allegations once *Al-Adahi* changed the lens in which courts viewed evidence.[32]

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[26] Al-Adahi, 613 F.3d at 1102-03.

[27] *See id.* at 1102.

[28] *See id.*

[29] *See generally* MARK DENBEAUX ET AL., NO HEARING HABEAS: D.C. CIRCUIT RESTRICTS MEANINGFUL REVIEW (2012)

[30] *Id.* at 1.

[31] *Id.* at 1.

[32] *Id.* at 1.

B. Al-Adahi's Prejudicial Effect on Guantanamo Detainees

As seen by the plummeting success rates of Guantanamo detainees' writs of habeas corpus after *Al-Adahi*, it has been virtually impossible to challenge the Government for wrongful detainment. Even in the small number of cases where detainees have been successful with their challenge at the District Court level, the D.C. Circuit Court of Appeals has overturned these favorable rulings.[33] With the lowered burden of proof, courts have held prisoners to be terrorist operatives in situations where the presented evidence seemingly does not demonstrate a terroristic link.[34]

"Some evidence" of affiliation with a terrorist group has often meant that the Government provides practically no evidence of such link.[35] For example, courts have been able to deny habeas corpus petitions because a petitioner has traveled a certain route or been to a certain locale.[36] Furthermore, the Government has been able to justify detainment where petitioners have simply stayed as an overnight guest with a suspected terrorist.[37] In both of these scenarios, these may be the only, singular pieces of evidence that the Government presents in attempting to sustain its burden of proof.[38] However, in the *Al-Adahi* regime, such facts that only present an attenuated link to terroristic activities have been enough to warrant holding such petitioners captive at Guantanamo.

By allowing detainment in these scenarios, Guantanamo's captives have not enjoyed the constitutional privilege to writ of habeas corpus that *Boumediene* granted. Traveling and sleeping overnight hardly seem to amount to acts of rebellion or invasion. Yet, because of *Al-Adahi*, acts such as these can warrant the suspension of writ of habeas corpus at Guantanamo. As such, *Al-Adahi* has greatly eradicated the detainees' ability to challenge confinement that *Boumediene* expressly and explicitly granted.

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[33] DENBAUX ET AL, *supra* note *29*, at 2.
[34] *See id.* at 2.
[35] *See id.* at 2.
[36] *Id.* at 10.
[37] *Id.* at 8.
[38] *See* DENBAUX ET AL, *supra note 29*, at 8.

II. THE UNITED STATES SUPREME COURT HAS LET A CIRCUIT COURT OVERTURN BOUMEDIENE

The D.C. Circuit Court's ruling in *Al-Adahi*, and the proceeding deference by the federal District Courts in adapting the immediately higher court's holding has resulted in ensuing ignorance of the Supreme Court in *Boumediene*. By using the line of insular cases in its reasoning of granting the writ to habeas corpus to Guantanamo detainees and holding that the U.S. had de facto jurisdiction over the base, the Supreme Court in effect asserted the Constitution's place as a document of governance for those at Guantanamo.[39]

Specifically, in allowing for the same constitutional right, the Supreme Court in no way intended for it to be more difficult for these detainees to successfully challenge wrongful detention challenges than their citizen counterparts. Furthermore, the Supreme Court's holding requiring meaningful review of the potential habeas corpus claims indicates its desire to avoid any discrepancy in the significance of the right without an articulated exception.

A. Al-Adahi Incorrectly Eradicates Meaningful Review

It is evident that the *Boumiediene* Court did not intend for the insurmountable route of habeas corpus petitions that *Al-Adahi* created for Guantanamo detainees. Although silent on the specific standard of review required, the U.S. Supreme Court did explicitly call for the need of "meaningful review" of the cause of detention for those in captivity.[40] In fact, in highlighting the importance of the standard of review for the habeas corpus petitions of those detained in Guantanamo, the Court noted that because these prisoners are detained via an executive order instead of the criminal trial process "the need for collateral review is most pressing."[41]

While those detained after a criminal trial have had their fate decided by a neutral fact finder with no interest in the case's outcome, detainees find themselves in captivity due to an executive order not committed to the same independent finding.[42] Given this dynamic, which has placed Guantanamo's detainees into captivity in the first place, the need for habeas

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[39] Bush v. Boumediene, 553 U.S. 723, 726 (2008).
[40] *Boumediene*, 553 U.S. at 783.
[41] *Id.*
[42] *Id.*

corpus review here is actually more urgent than challenges stemming from the criminal justice process.[43]

As such, in announcing the meaningful review standard for Guantanamo petitioners, the Court articulated that the reason and duration of challenged detainment must be looked at through a precise scope of inquiry.[44] The Court also added that not only should Guantanamo detainees possess the right to writ of habeas corpus, but that the writ be effective in challenging detainment.[45] Therefore, given this stated importance, while Guantanamo habeas corpus proceedings need not resemble the formality and procedure of a criminal trial, the courts hearing these claims must "have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain."[46]

With the *Boumediene* Court establishing how crucial meaningful review is given the Executive's vested interest in confinement, the courts, which would soon hear these petitions, proceeded as such.[47] In their roles as the tribunals to initially hear such allegations of wrongful detainment, the District Courts appealable to the D.C. Circuit Court of Appeals, followed suit in heeding the precedent set by *Boumediene*.[48] In an effort to recognize the urgent need for a precise habeas corpus inquiry, the District Courts employed a preponderance of the evidence standard for such petitions.[49]

It was reasoned that *Boumediene* did not require the exactitude or formality of a criminal trial for wrongful detainment proceedings at Guantanamo and accordingly, a beyond a reasonable doubt standard was inappropriate.[50] However, in following *Boumediene* and its language regarding the importance of a Guantanamo detainee's writ, the District Courts nonetheless placed the burden of justifying containment on the government.[51]

With the government burdened in showing that Guantanamo detainees were more likely than not associated with terroristic activities, this standard of review was chosen to address the concern that those in confinement

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[43] *Id.*

[44] *Id.*

[45] *Boumediene*, 553 U.S. at 783.

[46] *Id.*

[47] *See* Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1466 (2011).

[48] *See id.* at 1466.

[49] *See id.* at 1466.

[50] *See* Linda Greenhouse, Op-Ed., *The Mirror of Guantanamo*, N.Y. TIMES (Dec. 11, 2013), *available at* http://mobile.nytimes.com/2013/12/12/opinion/greenhouse-the-mirror-of-guantanamo.html?from=opinion.

[51] *Id.*

would be subject to a process absent an uninterested, independent fact finding body.[52] In fact, those detained resulting from a criminal trial must prove that more likely than not their confinement is unlawful. Shifting the preponderance of the evidence standard to the government appears to be appropriate given *Boumeidiene's* concern for those detained without an independent fact finding body.[53] It appeared that the courts within this district would continue to meaningfully review whether Guantanamo detainees were wrongfully held captive.

However, the D.C. Circuit Court would eventually find it inappropriate for courts to provide meaningful review by requiring the government to determine whether a detainment was unlawful.[54] Furthermore, it would also ignore the highest court in the land while doing so. When Mohammad Al-Adahi appeared before the D.C. Circuit Court of Appeals, as the U.S. government appealed his purported release from detention, not only did this appeals court hold that the petitioner was rightfully detained, but in the process, it empowered the U.S. government to blatantly, and wrongfully, detain future habeas petitioners.[55] While it cited *Boumediene*, the D.C. Circuit Court ignored the case's language regarding meaningful review for detainees who were held captive without the benefit of an uninterested, independent, fact finder.[56]

Instead, the D.C. Circuit Court reconciled its requirement that the government only show some evidence of a link to a terrorist group to justify detention by noting that *Boumediene* held at the very least, Guantanamo detainees should be afforded the same writ of habeas corpus available in English common law.[57] The *Al-Adahi* court interpreted this language to mean that because no preponderance of the evidence standard was available at the time of the Constitution's drafting, such a standard should not now be available to a Guantanamo detainee.[58] Furthermore, the *Al-Adahi* court seemingly ignored the express intent of the *Boumediene* Court in calling for such writ as a minimum level of protection.

Also, in reducing the burden of the government's factual showing for a detainee's confinement and announcing that the preponderance of the evidence standard should no longer be used by the District Courts, *Al-Adahi* noted that the government only needed to present "some evidence" in habeas corpus cases where a deportation or selective service issue was at

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[52] Bush v. Boumediene, 553 U.S. 723, 783 (2008).
[53] *Boumediene*, 553 U.S. at 783.
[54] *See* Al-Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010).
[55] *Al-Adahi*, 613 F.3d at 1102.
[56] *Id.*
[57] *See id.* at 1104.
[58] *See id.*

hand.[59] Again, the D.C. Circuit Court of Appeals conveniently ignored the heightened importance of a Guantanamo detainee's writ to habeas corpus that *Boumediene* set forth. Furthermore, the cases *Al-Adahi* cited which allowed a much lower burden of proof in no way implicated wrongful confinement.[60]

As such, not only did *Al-Adahi* obliterate the "meaningful review" *Boumediene* stood for, but the D.C. Circuit Court of Appeals also ignored major holdings of the case and failed to reconcile this apparent change with what the Supreme Court called for. Therefore, the D.C. Circuit Court of Appeals has created a different burden of proof than *Boumediene* intended, without reconciling the differences in the two cases' holdings. In the process, it has also subverted the highest court in the land.

B. Al-Adahi's Prejudicial Effect on Guantanamo Detainees

In ignoring much of *Boumediene*, *Al-Adahi* has essentially wrongfully overturned this landmark Supreme Court case by refusing to follow its key holdings and creating a habeas corpus standard of review which was clearly not called for. Since *Al-Adahi* eradicated the higher court's protection for these detainees, Guantanamo detainees face roughly a ninety-two percent chance of having their habeas corpus petitions denied as the government merely needs to show "some evidence" of a detainee's link to a terrorist group.[61] Conversely, American citizens or those found guilty after a criminal trial are able to succeed on forty percent of their petitions when on death row.[62] It is apparent that the disparity *Al-Adahi* created was not within the contemplation of the *Boumediene* Court. With such a low success rate, it appears *Al-Adahi* has been successful in effectively ending the writ to habeas corpus at Guantanamo.

By expressly granting such writ, the *Boumediene* Court called for meaningful review of detainment but *Al-Adahi* has ended this. As a lower court, the D.C. Circuit Court of Appeals overturned a higher court's ruling while failing to reconcile the disparate reasoning and holdings it crafted. Therefore, in effectively ending habeas corpus petitions at Guantanamo Bay, and making it virtually impossible to challenge wrongful detainment, the D.C. Circuit Court of Appeals has also failed to recognize basic

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[59] *Al-Adahi*, 613 F.3d at 1104.

[60] *Id.*

[61] DENBEAUX ET AL, *supra* note 29, at 1.

[62] *See* James S. Liebman, Letter to the Editor, *Habeas Corpus Studies*, N.Y. TIMES, (Apr. 1, 1996), *available at* http://www.nytimes.com/1996/04/01/opinion/l-habeas-corpus-studies-064700.html.

common law notions of legal precedent and stare decisis of which the U.S. legal system stands upon.

CONCLUSION

In *Boumediene*, not only did the U.S. Supreme Court grant Guantanamo Bay detainees the writ of habeas corpus, but it also made it clear that there was a unique and special emphasis in ensuring that those confined per executive orders are not wrongfully detained.[63] Without the privilege of having a trial with an independent, disinterested fact finding body, the interest in assuring the absence of wrongful detainment is heightened.[64]

In light of *Boumediene*, habeas petitioners were generally successful as the Government had the burden to prove that more likely than not, a given petitioner was a part of a terrorism group.[65] Each petitioner was afforded meaningful review of his or her claims, and the government had to show detainment was justified as per an executive order.[66]

While not explicitly outlining the burden of proof required in these cases, *Boumediene* did in fact call for "meaningful review" and the District Courts' requirement that the government prove that a given detainee was more likely than not a terrorist seemed to have been in line with this reasoning. However, *Al-Adahi* seemingly created the inverse of what *Boumediene* intended. District Courts can now use attenuated links to justify detainment, and can find petitioners "guilty by guesthouse" when there is only an iota of personal association with a given group.[67] This is an extreme departure from what the District Courts initially carried out from *Boumediene*, and the low success rates of these petitions has been an instrumental end in effectively obliterating the Guantanamo writ to habeas corpus.

Al-Adahi has affected this new Guantanamo habeas jurisprudence without reconciling the apparent incongruence with *Boumediene's* language, and as the District Courts seemingly follow *Al-Adahi* in its totality, the D.C. Circuit Court of Appeals has subverted the highest court in the land. Furthermore, the D.C. Circuit Court of Appeals has ignored the common law notions of stare decisis in which this nation has promulgated throughout its history. *Boumediene* called for "meaningful review" and it

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[63] Bush v. Boumediene, 553 U.S. 723, 783 (2008).
[64] *Id.*
[65] DENBEAUX ET AL, *supra* note 29, at 8.
[66] *Boumediene*, 553 U.S. at 783.
[67] Greenhouse, *supra* note 50.

now appears that there is an absence of this in Guantanamo detainee habeas petitions. With the disparity in petition success created by a lower court, the Supreme Court has a duty to grant certiorari to the next case in which a detainee is found to be a terrorist for certain travels or associations. It is imperative that this is done because there is a whole body of case law that exists that is seemingly incorrect, and the answers on these issues should come from the highest court in the land given the disconnect that has resulted post-*Al-Adahi*.

COMMUNICATION'S TOOLBOX

Hala El Solh *

INTRODUCTION

Since the beginning of human interaction, there have inevitably been conflicts as well as human rights abuses. Every day, millions of people have their human rights violated despite the passage of the Universal Declaration of Human Rights ("UDHR") in 1941.[1] UDHR entitles each and every person with basic rights.[2] One of the largest violations of the UDHR is genocide, or the systematic killing or elimination of a race or a group of people. Genocide has been occurring for thousands of years, ranging from the Maori slaughtering the Moriori in Polynesia, to the Nazis killing millions of Jews during World War II, to the torture and killing in Syria.[3] While these genocides were taking place, most people have looked on with indifference, never seizing the opportunity to stop these atrocities. But, there are people who have a noble heart and defy these horrors. Many people that are indifferent to genocide make the excuse that they are an ordinary person, and that they do not have the means to stand up to monstrous authority. They are terribly mistaken.

Today, more than ever before, the world has accessible tools to stop genocide that "normal and ordinary" people can use with ease. Simply using social media or snapping a picture can make a huge impact on the people being harassed all across the globe. One does not have to be a person devoting all their time to human rights to be a humanitarian. Taking small steps of resistance can go a long way, if one has the right tools. Communication is one of the most powerful and successful toolboxes, including the press, social media, and published photography. These tools are more available and within reach more than ever before.

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[1] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

[2] *Id.*

[3] *See generally* JARED DIAMOND, GUNS, GERMS AND STEEL (1999).

Communication is ultimately the center of society. Even animal societies such as bees and ants have developed a system of communication. It forges relationships, fuels mass movements, and keeps people aware of others across the globe. Every day, billions of people speak and interact with each other, for it is a part of life. Communication through the press has been essential in spreading the word about genocide, not only in modern times, but even as early as the Holocaust. It has been easier to communicate with each other in modern societies more than it has ever been. Modern-day communication has even increased the global playing field when it comes to employment. People use Skype or Facetime to attend meetings and work in places across the globe that they have never visited. Due to technological advancements in communication, people can also speak to others around the world with ease and at little cost, whether they are speaking to family or friends. Modern-day communication has been a huge device in spreading news to all corners of civilization, but most significantly of all, it has spread the word about genocide and mass movements to stop those atrocities. Social media has been another huge contributing factor to standing up to genocide, because it connects people who have common causes and share the same ideas all over the world.

Published photography is another method of communication, using pictures to convey a message to the world. Countless people around the globe have cameras whether on their cell phones, electronic tablets, or digital cameras. Those pictures do not need processing and within seconds can be sent to an opposite corner of the globe and shared with millions of people. Photojournalists and ordinary people are snapping pictures and instantly posting them online to reach millions in no time. In the communication toolbox, the tools of the press, social media, and published photography have been used to stand up to the atrocities of genocide, as seen through the White Rose Movement during the Holocaust, the Arab Spring in Tunisia, and the Caesar Project in Syria.

WHITE ROSE MOVEMENT

The White Rose Movement was created by Hans and Sophie Scholl, students at Munich University.[4] A group of students handed out leaflets against Hitler and the Nazi Regime as well as World War II.[5] As many already know, the Nazis were killing millions of Jews (about six million in total) without mercy. They took the Jews from their homes and moved them to the ghettos. From there, they were sent to concentration camps where they would undergo a humiliating evaluation where Nazis poked and prodded them. The healthy ones would go to concentration camps and perform intense labor with inadequate amounts of food and water. Many died from the horrid conditions. The less healthy ones were sent to death camps. They would be tortured and put in gas chambers that killed them. Not only Jews were killed. Other people were targeted including homosexuals, disabled people, gypsies, Jehovah's witnesses, people that went against the Nazi Regime, as well as countless others. The members of the White Rose Movement risked everything, including their lives, to try to spread the word of the horrible crimes that were being committed.[6] They could have been tried for treason punishable only by death.[7] The members of the White Rose Movement stood up to genocide by using the press. It was a form of nonviolent resistance and standing up for what is right in the midst of chaos and violence. The members used a mass media form to resist against the unjust government and its killing machine. They became symbolically successful. The White Rose Movement symbolized the power of nonviolent resistance as well as the power of mass communication and the press. The movement spread the word of the crimes being committed by the Nazis in an effort to gain opposition. These members became role models for others. Unfortunately, the Gestapo arrested Hans and Sophie Scholl in February 1943.[8] However, their resistance didn't stop there. They

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[4] Karin Lipson, *The Young Germans Who Stood Up to the Nazis*, N.Y. TIMES (Mar. 29, 2013), *available at* http://www.nytimes.com/2013/03/31/nyregion/the-young-germans-who-stood-up-to-the-nazis.html?_r=0.

[5] *Id.*

[6] *See id.*

[7] *The White Rose Movement,* HISTORY LEARNING SITE (Dec. 2011), *available at* http://www.historylearningsite.co.uk/white_rose_movement.htm.

[8] *See* Lipson, *supra* note 5.

whole-heartedly admitted to their "crime" to try to save the rest of the members. They were soon beheaded but remained a symbol of nonviolent resistance and the power of the press.[9] Hans and Sophie Scholl's actions will be transcribed in history forever, due to their noble resistance to genocide through the press.[10]

ARAB SPRING

For many years President Zine al-Abidine Ben Ali ruled Tunisia with an iron fist.[11] He violated human rights such as freedom of speech, religion, and press. Ben Ali's brutal and corrupt government embezzled from the country. Many Tunisians lived in poverty. The Tunisian government rounded up practicing Muslims and opposition leaders to the government and slaughtered them. To add oil to fire, they weren't allowed to protest until Mohammed Bouazizi set himself alight in 2011.[12] This sparked the Tunisian Jasmine Revolution and Arab Spring.[13] Since the internet was mostly censored, Jamel Bettaieb used one of the only uncensored websites: Facebook.[14] Through his blogs on Facebook, he and many others set up demonstrations and protests for democracy in Tunisia against the politically oppressive government.[15] He also posted pictures of the police brutally cracking down on demonstrators that traveled the world like wildfire. As a result, thousands of people protested and Ben Ali was thrown out of power. Free elections took place not long after. Ben Ali was later sentenced to 35 years in jail for theft and illegal possession of jewels and money.[16] Bettaieb

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[9] *See* Lipson, *supra* note 5.

[10] *Id.*

[11] Larry Luxner, *Amid Crisis and Violence, Tunisian Jews Safe but Guarded*, JTA (Jan. 19, 2011, 5:33 AM), *available at* http://www.jta.org/2011/01/19/news-opinion/world/amid-crisis-and-violence-tunisian-jews-safe-but-guarded.

[12] Saad Abedine & Holly Yan, *Tunisian Man Sets Himself on Fire to Protest Unemployment*, CNN (Mar. 12, 2013), *available at* http://www.cnn.com/2013/03/12/world/africa/tunisia-self-immolation/index.html.

[13] *Id.*

[14] Eliza Lefebvre, *Tunisian Activist Urges Teens to Stand up for what is Right*, Buffalo News (Oct. 10, 2013, 12:01 AM), *available at* http://www.buffalonews.com/life-arts/next/tunisian-activist-urges-teens-to-stand-up-for-what-is-right-20131010.

[15] *See id.*

[16] Jo Adetunji, *Ben Ali Sentenced to 35 Years in Jail*, GUARDIAN (June 20, 2011), *available at* www.theguardian.com/world/2011/jun/20/ben-ali-sentenced-35-years-jail.

utilized social media to further fuel the start of the Tunisian Jasmine Revolution and as a result, a new democratic government was elected. This demonstrates the power of communication and what it can ultimately do. The valuable tool of social media was incredibly successful in taking a stand against genocide, and ultimately brought down the oppressors. In Bettaieb's case, resistance changed the lives of many oppressed people, sparked revolutions all over the Middle East and North Africa, and established a democratic government in Tunisia. Social media plays a major role in modern-day resistance and has changed many lives overall.

CAESAR REPORT

The Caesar Report has released astonishing and horrifying photos of Syrian people being massacred and tortured as a result of the Syrian government and its dictator Bashar al Assad.[17] "Caesar" (his real name has not been released for his own safety) sneaked over 55,000 photos out of Syria that document the horrors that the Syrian people suffer through daily.[18] The majority of these tortured Syrians have committed no crime. They just opposed their tyrannical, cruel government and hated that they could not vote Assad out of power.[19] The atrocities are so terrible that David Crane, the founding Chief Prosecutor of the Special Court for Sierra Leone, described as "[t]he photos show crimes the like of which we have not seen since Auschwitz."[20] These photos are spreading everywhere, including to the United Nations and the International Criminal Court.[21] Because of the power of photography and Caesar's will to stand up to genocide, the photos that Caesar has presented provide solid, clear evidence that the Syrian government is indeed committing genocide.[22] Caesar has used the media to spread his message through the photos he snuck out of Syria. Sneaking out thousands of pictures saved on a tiny flash drive is so

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[17] Josh Rogin, *Syrian Defector: Assad Poised to Torture and Murder 150,000 More*, DAILY BEAST (July 31, 2014), *available at* http://www.thedailybeast.com/articles/2014/07/31/syrian-defector-assad-poised-to-torture-and-murder-150-000-more.html.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Rogin, *supra* note 17

much less flagrant than sneaking out a pile of hard copied ones. Therefore, this proves how powerful the tools of media and photography truly are. Caesar's courage and communication tools have motivated the world to take action in Syria and to stop the genocide there. His impact on the world will be imprinted for a great period of time due to his will as well as his publication of the photos that display what is truly happening in Syria at this very moment.[23]

CONCLUSION

These three examples of the resourcefulness of the tools of the press, social media, and published photos depict that standing up to genocide is not as difficult as it seems. Simply supporting a campaign against genocide by "liking" it on Facebook or making a video announcing your support for the victims is enough to make a difference. A majority of people have access to the communication tools used to combat genocide, whether it is a camera, a computer, or a mere pen, so take a stand against genocide. Everyone has the potential to make a difference; it is up to oneself to use this power for good or for evil.

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[23] *See* Rogin, *supra* note 17