



2015

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Recommended Citation

Paul J. Zwier, *Social Media and Conflict Mapping in Syria: Implications for Peacemaking, International Criminal Prosecutions and for TRC Processes*, 30 *Emory Int'l L. Rev.* 169 (2015).
Available at: <https://scholarlycommons.law.emory.edu/eilr/vol30/iss2/2>

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SOCIAL MEDIA AND CONFLICT MAPPING IN SYRIA: IMPLICATIONS FOR PEACEMAKING, INTERNATIONAL CRIMINAL PROSECUTIONS AND FOR TRC PROCESSES

*Paul J. Zwier**

ABSTRACT

Early 2015 evidenced the first signs that Syria may soon be facing a transition from its present form of government into a new transitional government following the end of its civil war. Ideally, the transitional period will provide Syria with a secure and principled basis for governing until a full constitutional process can be employed and will also start the process of Syria's taking steps forward toward healing and reconciliation between the parties. Toward the later end, the transitional period will require Syrian peacemakers to select among options for how to best deal with past atrocities committed by the parties in pursuit of their war aims. This Article reviews five of these options and argues that Syrians should adopt a mix of formal judicial proceedings for those it does not grant amnesty to in order to get a peace agreement, and an informal yet principled mediation process during a transitional period for disputes that arise from the actions of rebel group activities. These later disputes should be followed by a process with a hybrid court for those who do not gain adequate resolution of their disputes through the informal mediation process.

This Article also argues that the incorporation and strategic use of social media postings by Syrians into conflict mapping projects presents important possibilities for providing the proof needed for assessing an individual's criminal responsibility and a way for Syria to make a meaningful trade between seeking justice for past criminal wrongdoing and providing reconciliation between parties at an informal local level. Even if no peace transition is actually constituted in Syria, this Article should be useful in providing an analysis of transitional options for similar countries in the Middle East in a process of transitioning from a dictatorship to a democratic form of government.

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INTRODUCTION

Early 2015 evidenced the first signs that Syria may soon be facing a transition from its present form of government into a new transitional government following the end of its civil war.¹ Ideally, the transitional period will need to provide Syria with a secure and principled basis for governing until a full constitutional process can be employed to bring about a new constitution and elections for a new government. It will also start the process of Syria's taking steps forward toward healing and reconciliation between the parties. Toward the later end, the transition period will require Syrian peacemakers to select among the options for how to best deal with past atrocities committed by the parties in pursuit of their war aims. There are five options to consider: (1) design a transitional process that removes the current leadership of the military and security forces; (2) make little or no provisions for dealing with past war crimes on either side; (3) seek the jurisdiction of the International Criminal Court (ICC) to deal with past atrocities; (4) rely on the process of a Truth and Reconciliation Commission (TRC) to manage past disputes; or (5) rely on its national legal structures to prosecute individuals for the commission of their war crimes. The incorporation of social media postings by Syrians into conflict mapping projects presents important possibilities for support of the fifth option. It may provide a way for Syria to make a meaningful trade between seeking justice for past criminal wrongdoing and providing reconciliation between parties at an informal local level.

Part I will review each of these options and argue that Syrians should adopt a mix of formal judicial proceedings for those it does not grant amnesty to in order to get a peace agreement, and an informal yet principled mediation process during a transitional period for disputes that arise from the actions of rebel group activities. These later disputes should be followed by a process

¹ See generally Anne Barnard, *U.N. Envoy Says Assad is Crucial to Defusing Conflict in Syria*, N.Y. TIMES (Feb. 13, 2015), <http://www.nytimes.com/2015/02/14/world/middleeast/un-envoy-to-syria-says-assad-is-crucial-to-hopes-to-end-war.html>. The U.N. has once again started the process of reviving peace talks, which started in Geneva in 2011 and resulted in a second round of talks in 2014. See *id.* The United States has also seemed to drop its demand that Assad leave office, perhaps making more room for a negotiated solution to end the conflict. See Anne Barnard & Somini Sengupta, *U.S. Signals Shift on How to End Syrian Civil War*, N.Y. TIMES (Jan. 19, 2015), http://www.nytimes.com/2015/01/20/world/middleeast/us-support-for-syria-peace-plans-demonstrates-shift-in-priorities.html?_r=0. There are also reports, denied by the Russians, that they may abandon their support for the Assad government in exchange for Saudi reduction in oil production. Mark Mazzetti, Eric Schmitt & David D. Kirkpatrick, *Saudi Oil is Seen as Lever to Pry Russian Support from Syria's Assad*, N.Y. TIMES (Feb. 3, 2015), <http://www.nytimes.com/2015/02/04/world/middleeast/saudi-arabia-is-said-to-use-oil-to-lure-russia-away-from-syrias-assad.html>.

with a hybrid court for those who do not gain adequate resolution of their disputes through the informal mediation process. This option will best deal with the lessons learned in other Middle Eastern post-conflict transitions, and, while presenting some risks, will also best provide for the need for peace at the local level under a transition period that is relatively easy to execute, has a low cost, and avoids the glare of publicity. Applying both a pragmatic and yet principled criteria (peace first, low cost, easy to execute) will best guide Syria as it seeks the stability needed to grow the peace process into its next stage of development.

In Part II, this Article will argue that recent developments in the use of social media (with special emphasis on YouTube videos posted on Facebook and Twitter, and attached to emails) and the ability of various international monitoring groups, including the United Nations (U.N.), to map the conflict in Syria will greatly assist the efficacy of the fifth option by not only providing the proof needed for assessing an individual's criminal responsibility, but also by making possible a more meaningful informal mediation process. Strategic use by the U.N. and its partners of these conflict mapping capabilities presents new potentials for realistic reconciliation between individual victims and those who have committed criminal atrocities. Even if no peace transition is actually constituted in Syria, this Article should be useful in providing an analysis of transitional options in similar countries in the Middle East that are also in a process of transitioning from a dictatorship to a democratic form of government.

I. OPTIONS FOR POLITICAL TRANSITION IN SYRIA

Much of what will end up dictating the final choice of which political option the Syrians end up choosing will be the result of the conditions for the final ending of hostilities. For example, if the parties themselves meet and reach a settlement, without interference from the international community or regional powerbrokers, the political transition will likely look much different than one brokered by either the Russians, or in turn one brokered by the U.N. Still, it is important to understand the merits of each option so that the parties can be aware of the risks and tradeoffs that are made under each option. After disposing of the first three options rather quickly, this Article will explore in more depth the other two options that are available if the international community, and the U.N. in particular, becomes the broker of the eventual peace agreement between the Syrian government and the opposition groups. Where the U.N. becomes involved, the dilemmas between making peace and

setting up the conditions for transitional justice are more acute. The U.N. as an institution has to weigh the future deterrent impact on rogue states if it brokers a peace with impunity for past atrocities. It will help explain why the fifth option will likely be the option that emerges where the U.N. is involved in the peace process.

A. What to Do with the Syrian Military and Security Forces During the Transitional Period—Removing vs. Ignoring

Syrian decision-makers will be informed by recent events in Iraq, as well as the ongoing efforts in transitional governance processes taking place in Egypt, Libya, and Tunisia. Regardless of the power sharing or power transition mechanisms the Syrians eventually employ during their transitional period, they will face the question of how to best ensure the long-term stability of the country without repeating the mistakes of transitions brought about by power-sharing arrangements with the military. In other words, Syria will need to figure out how it will avoid creating the circumstances that now threaten the stability of governance structures in Iraq, Egypt, and Libya, if indeed Syrians choose to eventually use a democratic form of government.

Iraq, Egypt, Libya, and Tunisia present a wide spectrum of how to best set up a transition process after a conflict and regime change. At one end of the spectrum is Iraq, which allegedly tried to clean house by removing much of Saddam Hussein's military from the Iraqi military at the end of the war.² Some have made the argument that how the Iraqis dealt with Saddam Hussein's military and security forces in the aftermath of the Iraqi war has led to the instability the Iraqis now face.³ A number of former Sunni/Hussein military leaders are now involved in the Islamic State of Iraq and Syria, more commonly known as ISIS, having been summarily initially dismissed by the

² See Ben Hubbard & Eric Schmitt, *Military Skill and Terrorist Technique Fuel Success of ISIS*, N.Y. TIMES (Aug. 27, 2014), <http://www.nytimes.com/2014/08/28/world/middleeast/army-know-how-seen-as-factor-in-isis-successes.html>. The article goes on to report what it has learned from conflict mapping of the war in Iraq and Syria. "According to a map of the group developed by Mr. Alhashimi, the Iraqi expert, Mr. Baghdadi has 25 deputies across Iraq and Syria. About one-third were military officers during Mr. Hussein's rule, and nearly all were imprisoned by American forces." *Id.*

³ Samia Nakhoul, *Saddam's Former Army is the Secret to ISIS Success*, BUS. INSIDER (June 16, 2015), <http://www.businessinsider.com/r-saddams-former-army-is-secret-of-baghdadis-success-2015-6>. "The sectarian approach of Prime Minister Nouri al Maliki drove the Sunni minority in Iraq to support any group that could reverse its increasing marginalization, which led to Sunni tribal support of the Islamic State." RICHARD BARRETT, SOUFAN GROUP, THE ISLAMIC STATE 5 (2014), <http://soufangroup.com/wp-content/uploads/2014/10/TSG-The-Islamic-State-Nov14.pdf>.

Coalition government.⁴ Former Iraqi Prime Minister Nouri al-Maliki's sectarian and authoritarian policies isolated Sunnis from Iraqi politics, leading former military leaders, who Maliki removed from the Iraqi military, to support the insurgency.⁵ Many now criticize the Iraqi government (and the U.S.) for not paying adequate attention to what should be done with the over ninety thousand mostly-Sunni military personnel during the post-conflict transition.⁶ Some of the Sunni tribal leaders, who had past Iraqi military experience, were thereafter formed into a group called "the Awakening" to help the United States and Iraqi governments fight Al-Qaeda.⁷ The Awakening forces were paid, trained, and given weapons by the United States.⁸ Thereafter, some of these Sunnis left the Awakening and eventually joined ISIS when they felt snubbed and excluded by Maliki's Shi'a government.⁹ The lesson from the Iraqi experience for peacemaking in Syria may be that the Syrians should not take steps to exclude or remove or separately treat all of Assad's military and security forces, and instead consider how to integrate members of opposition military groups into the Syrian army or they will potentially form a potent force for instability going forward.

On the other end of the spectrum are the transitional structures used by Egypt, Libya, and Tunisia in the aftermath of their recent revolutions. In Egypt, the Muslim Brotherhood negotiated with Egypt's Supreme Military Council after many in the military had grown tired of Hosni Mubarak and granted it immunity for any role it played in past atrocities.¹⁰ Having granted

⁴ See Hubbard & Schmitt, *supra* note 2 (discussing that several of Saddam Hussein's former officers serve as top military leaders for Abu Bakr al-Baghdadi); Mark Thompson, *How Disbanding the Iraqi Army Fueled ISIS*, TIME (May 28, 2015), <http://time.com/3900753/isis-iraq-syria-army-united-states-military/>.

⁵ See Marc Lynch, *How Can the U.S. Help Maliki When Maliki's the Problem?*, WASH. POST: MONKEY CAGE (June 12, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/06/12/iraq-trapped-between-isis-and-maliki/>.

⁶ See Timothy Williams & Duraid Adnan, *Sunnis in Iraq Allied with U.S. Rejoin Rebels*, N.Y. TIMES (Oct. 16, 2010), http://www.nytimes.com/2010/10/17/world/middleeast/17awakening.html?pagewanted=all&_r=0.

⁷ See *id.*; Zachary Laub & Jonathan Masters, *The Islamic State*, COUNCIL FOREIGN REL., <http://www.cfr.org/iraq/islamic-state/p14811> (last updated May 18, 2015).

⁸ Williams & Adnan, *supra* note 6.

⁹ See *id.*; see also Jonathan Broder, *Iraq's ISIS Fight Could Be a Second Awakening*, NEWSWEEK (Jan. 27, 2015), <http://www.newsweek.com/2015/02/06/awakening-part-ii-301906.html>. Most recently, there are reports that some of these same Awakening members are willing to now support the efforts against ISIS by forming a new group called the Awakening II. *Id.*; Laub & Masters, *supra* note 7.

¹⁰ See David D. Kirkpatrick, *In Egypt, Signs of Accord Between Military Council and Islamists*, N.Y. TIMES (Jan. 22, 2012), <http://www.nytimes.com/2012/01/23/world/middleeast/signs-of-accord-between-egyptian-military-and-muslim-brotherhood-on-new-charter.html?pagewanted=all>.

amnesty, it did nothing to remove the military from reasserting power. After a brief period of a Muslim Brotherhood-led government, the Egyptian Military stepped in and took back control of the country.¹¹ The Military Council has, once again, taken control of the country, and has recently taken a series of steps that suggest its desires to put stability ahead of democracy.¹² The lesson appears to be that without sufficient guarantees that the military leadership will not reassert itself, Syria will run the risk that the Assad military will return to power.

B. Make No Provision for Dealing with Military or Security Leadership

In the case of Libya and Tunisia, no provision was made as to how past military leadership was to fare during the transitional period. Gaddafi's military was destroyed, making it impossible to restore order during the interim period.¹³ The Libyan failure to try to resurrect or reform a new military may have created the sources of instability that have returned the various tribal groups to violence.¹⁴ On the other hand, in Tunisia, not making express accommodations with the military seems to have worked out quite well.¹⁵ In Tunisia, the existing military tacitly agreed to submit to the decisions of its "Constituent Assembly" and confined itself to taking actions against jihadists and gasoline traffickers.¹⁶ In the Tunisian case, the transitional period only provided for a legislative body to rule on any issues that arose during the transitional period, and its peace agreement never dealt explicitly with past criminal actions by the government.

Some look to Tunisia for an example of an Islamic State that has resisted the forces of radicalism and has continued to hold together as a secular democracy that is committed to religious freedom under the auspices of a secular Constitution. Again, there are important differences between Syria and

¹¹ See Daria Solovieva, *Egypt's Military Takes Control over Muslim Brotherhood, Supporters*, WASH. TIMES (Aug. 18, 2013), <http://www.washingtontimes.com/news/2013/aug/18/egypts-military-takes-control-over-muslim-brotherh/#ixzz3XUCpoFbQ>.

¹² See *id.*

¹³ See Simon Tisdall, *Muammar Gaddafi's Violent Death Leaves Libya at a Crossroads*, GUARDIAN (Oct. 20, 2011), <http://www.theguardian.com/commentisfree/2011/oct/20/gaddafi-death-leaves-libya-crossroads>.

¹⁴ See *NATO Chief Admits Efforts to Stabilize Post-Gaddafi Libya Failed*, RT NEWS (May 14, 2015), <http://www.rt.com/news/258741-nato-admits-libya-fail/>.

¹⁵ Souhail Belhadj, *Tunisia: An Exemplary Political Transition?* (Sept. 10, 2014) (unpublished manuscript) (on file with the Norwegian Peacebuilding Resource Center).

¹⁶ *Id.*

Tunisia that must be factored into Syria's case. In Tunisia's case, its transitional period was supported by a strong labor movement, capable of shutting down the government if the unions did not like the radical direction of some of its more extreme actors.¹⁷ Ironically, it was also supported by a tradition of a more conservative use of military power in the hands of its previously ruling dictator, Zine El Abidine Ben Ali.¹⁸ Tunisia's military and security services did not have the same tradition, capacity, and reputation for dealing ruthlessly and violently against its citizens.¹⁹ The Syrians might wonder, then, whether the situation in Tunisia is likely to be predictive of the results of the transitional structures used by the Tunisians, or whether the mostly Alawite security forces would act more like the Egyptian military should the leadership in a transition period start to take a turn against them. Without a strong labor influence or other social political movement to counteract the Syrian military's involvement, the risks of not dealing directly with the military leaders are likely to later derail the transition period.

C. The War Crimes of Assad's Military and Security Forces and the International Criminal Court

Should the transitional plan for Syria include an appeal to the ICC, as in Liberia and Kenya, in the wake of conflicts there? The transitional government that might be negotiated in Syria could include a power-sharing agreement that might contain provisions that commit the country to a number of U.N. resolutions.²⁰ In the case of Liberia, these resolutions included an agreement

¹⁷ *Id.*; Sarah Chayes, *How a Leftist Labor Union Helped Force Tunisia's Political Settlement*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Mar. 27, 2014), <http://carnegiendowment.org/2014/03/27/how-leftist-labor-union-helped-force-tunisia-s-political-settlement>.

¹⁸ See generally LANDRY SIGNE & REMY SMIDA, STAN. CTR. ON DEMOCRACY, DEV., AND THE RULE OF LAW, *THE ARMY'S DECISION TO REPRESS: A TURNING POINT IN TUNISIA'S REGIME CHANGE* (Apr. 2014), http://cddrl.fsi.stanford.edu/sites/default/files/Landry_Final.pdf.

¹⁹ See *id.* at 6–7; James Fromson, *Tunisia's Transition*, INT'L INST. STRATEGIC STUD. (Feb. 27, 2014), <http://www.iiss.org/en/iiss%20voices/blogsections/iiss-voices-2014-b4d9/february-72f2/tunisia-transition-d9e8> (discussing the neutrality of Tunisia's military).

²⁰ See Associated Press, *Syria's Assad Vows to Comply with UN Resolution*, CBC NEWS (Sept. 29, 2013), <http://www.cbc.ca/news/world/syria-s-assad-vows-to-comply-with-un-resolution-1.1872522>. Discussion of this option in the present historical context may seem somewhat naïve. Why would Assad agree to submit to U.N. resolutions when he has not been defeated? On the other hand, Assad did agree to submit to chemical weapons inspections when political pressure was applied. He also has denied that he has done anything wrong, and that charges that he has used chemical weapons or barrel bombs have been trumped up by the West. Perhaps implicit in that denial is a logical trap—that if you have not done anything wrong, why not submit to the U.N. resolutions and the ICC's jurisdiction? Still, great pressure would likely have to be brought to bear on Assad and to get him to agree to submit to the ICC. As discussed below, Assad will likely have to be given some sort

that past and potential ongoing human rights violations would be submitted during the transitional period to the ICC.²¹ The Comprehensive Peace Agreement (CPA) also included a provision that membership in opposition military groups would not exclude those members from taking part in the political process.²²

The capacity of an international criminal court (first the International Tribunal for the former Yugoslavia (ICTY), then the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for Sierra Leone, and now the ICC) to successfully prosecute past heads of state is mixed. By 2003, the time of Liberia's CPA, the ICTY had prosecuted a number of government leaders who engaged in war crimes under the Rome Statute, including Slobodan Milošević, and so Liberian peacemakers had precedent to expect an international prosecution of Charles Taylor.²³ After getting Kenya to turn over Taylor to the ICC, the ICC secured the conviction of Taylor, but did not successfully bring to judgment any other leader in the military leadership in Liberia.²⁴ The ICC has since issued warrants for the arrest of Omar Hassan Ahmad Al Bashir of Sudan²⁵ and Uhuru Kenyatta of Kenya.²⁶ This time, the ICC failed to produce convictions of the Presidents, though it spurred on successful Kenyan prosecutions of less prominent political and military figures.²⁷ The ICC has announced it will no longer

of amnesty. The question remains, then, how many others in the leadership of the government would have to be given amnesty, or how many of them might be forced to submit to the ICC. See generally JUDITH S. YAPHE, NAT'L DEF. U. CTR FOR STRATEGIC RES., INST. FOR NAT'L STRATEGIC STUDIES, NEXT STEPS IN SYRIA (Dec. 2013), http://cco.ndu.edu/Portals/96/Documents/prism/prism_4-syria/Next_Steps_in_Syria.pdf.

²¹ See S.C. Res. 1970, ¶¶ 4–8 (Feb. 26, 2011).

²² *Powersharing Transition Government: Accra Peace Agreement*, U. NOTRE DAME KROC INST. FOR INT'L PEACE STUDIES, <http://peaceaccords.nd.edu/provision/powersharing-transitional-government-accra-peace-agreement> (last visited Nov. 5, 2015); Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties, Aug. 18, 2013, http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/liberia_08182003.pdf.

²³ See Marlise Simons, *Ex-President of Liberia Aided War Crimes, Court Rules*, N.Y. TIMES (Apr. 26, 2012), <http://www.nytimes.com/2012/04/27/world/africa/charles-taylor-liberia-sierra-leone-war-crimes-court-verdict.html>.

²⁴ See Fred van der Kraaij, *Will Charles Taylor End up Being Africa's Only Former President Convicted of War Crimes?*, LIBERIAN PERSPECTIVES (Sept. 29, 2013), <http://blog.liberiapastandpresent.org/?p=590>.

²⁵ Rep. of the Int'l Criminal Court at its Seventh Session, Report on the Activities of the Court, ICC-ASP/7/25 (Nov. 14–22, 2008), http://www.icc-cpi.int/iccdocs/asp_docs/ASP7/ICC-ASP-7-25%20English.pdf.

²⁶ LIONEL NICHOLS, *THE INTERNATIONAL CRIMINAL COURT AND THE END OF IMPUNITY IN KENYA* 82 (Springer Int'l Publishing 2015).

²⁷ *Id.* at 250.

prosecute Uhuru Kenyatta and Omar Bashir because of a lack of cooperation from the international community.²⁸ Still, the ICC remains a major force in potentially bringing to justice at least some of the country's leadership for its promulgation of war crimes against its civilian population. What will be necessary in order to make this happen is either for the Security Council to back the ICC's efforts, or for the Syrians themselves to decide to submit to the jurisdiction of the court.

Since the backing of Russia is unlikely,²⁹ the issue is whether the Syrian opposition forces can get the Assad government to agree to a transitional government without at least giving amnesty to some of its leaders. The ICC lacks jurisdiction over Syria, which is not a signatory to the Rome Statute, absent the transitional government making a request for its help (like in the cases of Liberia and Kenya).³⁰

The situation for Syrian peacemakers will be made all the more difficult because they will face enormous resistance to giving Assad these assurances. Such resistance will come from victims and the families of victims of Assad's government's war crimes. In addition, resistance will come from some members of the international community who will likely not be willing to support the Syrian transitional period if it appears that the Assad government will be granted impunity for any of its past war crimes. The situation in Kenya is telling. Following the U.N.-negotiated power-sharing arrangement between Mwai Kibaki and Raila Odinga following the 2007 post-election violence between the two's supporters, the parties had agreed to submit to the ICC's jurisdiction for any violation of the Rome Statute.³¹ One who was allegedly engaged in a violation of the Rome Statute was Kenya's later-elected President, Uhuru Kenyatta. Support for Kenyatta's government has been a long

²⁸ *Id.* at 126, 250. See Adam Taylor, *Even at the International Criminal Court, Some Will Always be Above the Law*, WASH. POST (Dec. 5, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/12/05/even-at-the-international-criminal-court-some-will-always-be-above-the-law/>; Sommini Sengupta, *Omar al-Bashir Case Shows International Criminal Court's Limitations*, N.Y. TIMES (June 15, 2015), <http://www.nytimes.com/2015/06/16/world/africa/sudan-bashir-international-criminal-court.html>.

²⁹ Russia has vetoed other resolutions aimed at Syria. Rick Gladstone, *Friction at the U.N. as Russia and China Veto Another Resolution on Syria Sanctions*, N.Y. TIMES (July 19, 2012), http://www.nytimes.com/2012/07/20/world/middleeast/russia-and-china-veto-un-sanctions-against-syria.html?_r=0.

³⁰ As of September 2015, Syria has not ratified the Rome Statute. Miriam Morfino, *Kenyatta Case at the ICC: Three Options Available for the ICC Judges*, AM. NON-GOVERNMENTAL ORG. COALITION FOR INT'L CRIM. CT. (Oct. 20, 2014), <http://amicc.blogspot.com/2014/10/kenyatta-case-at-icc-three-options.html>.

³¹ NICHOLS, *supra* note 26, at 85.

time in coming because of his indictment, and that support continues to be tepid, despite the ICC dropping its case against him.³²

The legal case against Assad seems strong, should the ICC be granted jurisdiction. Assad has now been at war with his own citizens since 2010. He, or individuals in his government, are likely responsible for a number of war crimes and, at a minimum, have much explaining to do. The United Nations High Commissioner for Refugees (UNHCR) reports that close to half of the Syrian population (10.8 million out of a country of close to 22 million), has been directly affected by violence since the start of the civil war.³³ Over six million people have been internally displaced.³⁴ Additionally, 3.8 million Syrians have already registered as refugees in the UNHCR.³⁵ The organization Syrian Observatory for Human Rights reports that over 200,000 Syrians have died in the conflict as of January 1, 2015, 17,790 of whom were civilians and over 3,000 of whom were children.³⁶ Over one million Syrians have been wounded.³⁷

³² Morfino, *supra* note 30.

³³ 2015 UNHCR Country Operations Profile—Syrian Arab Republic, UNHCR, <http://www.unhcr.org/pages/49e486a76.html> (last visited Sept. 20, 2015).

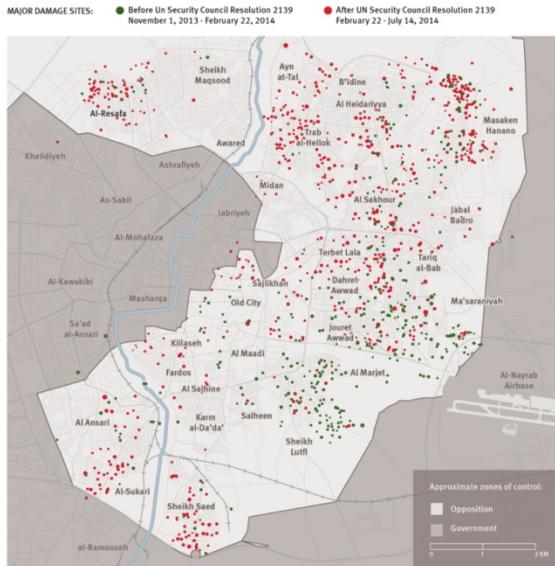
³⁴ *Id.*

³⁵ *Id.*

³⁶ Rick Gladstone & Mohammad Ghannam, *Syria Deaths Hit New High in 2014, Observer Group Says*, N.Y. TIMES (Jan. 1, 2015), http://www.nytimes.com/2015/01/02/world/middleeast/syrian-civil-war-2014-deadliest-so-far.html?_r=0.

³⁷ *Id.*

SYRIAN GOVERNMENT BOMBARDMENT OF OPPOSITION-HELD DISTRICTS IN ALEPPO



Syrian Government Bombardment of Opposition-Held Districts in Aleppo³⁸

In addition, the Assad government faces allegations for the use of chemical weapons against its citizens, and also in its use of barrel bombs,³⁹ which are said to kill indiscriminately, and therefore violate standards of humanitarian law. There is also substantial evidence that members of the Syrian security forces have engaged in torture, unlawful detention, and murder.⁴⁰ As we will see, the evidence for these acts includes the use of publically available social media postings;⁴¹ most damning is the evidence gained from YouTube videos. For Syrians now concerned with how to make peace but not create impunity to the Syrian regime for these past acts, the exchange is difficult—which is more important, to make peace or secure justice for past victims? They may be looking for a different process that will provide sufficient guarantees to some

³⁸ *Syrian Government Bombardment of Opposition-Held Districts in Aleppo*, HUM. RTS. WATCH (July 30, 2014), <https://www.hrw.org/video-photos/image/2014/07/30/syrian-government-bombardment-opposition-held-districts-aleppo>.

³⁹ *Syria: Barrage of Barrel Bombs*, HUM. RTS. WATCH (July 30, 2014), <http://www.hrw.org/news/2014/07/30/syria-barrage-barrel-bombs> (containing maps with documented evidence of barrel bombs).

⁴⁰ *Syria: Political Detainees Tortured, Killed*, HUM. RTS. WATCH (Oct. 3, 2013), <http://www.hrw.org/news/2013/10/03/syria-political-detainees-tortured-killed>.

⁴¹ See *infra* Part II.

of the top leadership to end the conflict, but still hold out the possibility of a process that will at least shed light on what had been done by the government, and why it used forces against its own citizens.

One possibility would be to turn to the process used by South Africa in its transition away from an apartheid government. There, the transition period included the use of a Truth and Reconciliation Commission (TRC).⁴² The South African TRC, therefore, bears a hard look to determine whether its use might be appropriate for Syrians.

D. A Truth and Reconciliation Commission

In between the extremes described above (cleaning house and negotiating immunity, or effectively giving the military a pass by not taking any action against them), some have argued instead for the transitional structures used by South Africa.⁴³ In South Africa, the military was not given immunity for past war crimes, but South African opposition groups, led by Nelson Mandela, agreed to give up on a formal criminal prosecution if the South African government agreed to submit to a Truth and Reconciliation process to deal with past criminal acts.⁴⁴ The TRC agreement provided for the possibility of amnesty if an individual came forward and told the truth about what happened.⁴⁵ South Africa is often held out as the most successful transition between apartheid and democracy as it was able to maintain its military power structures, and yet its military eventually succumbed to the authority of its President, Nelson Mandela.⁴⁶ South Africa's transitional period was orchestrated through the legal vehicle of an interim constitution, which set up a

⁴² Note that the ICC did not exist at the time of the South African transition. While an international war crimes tribunal was a theoretical possibility, South Africa decided to take control of its own process for dealing with the past.

⁴³ NEL MARAIS & JO DAVIES, DECONSTRUCTING THE CONDITIONS THAT ENABLED SOUTH AFRICA'S TRANSITION TO POWER-SHARING 1 (2014) ("This paper has been prepared for the Norwegian Peacebuilding Resource Centre, The Carter Center and Swisspeace for a seminar of 'The Syria Transition Options project of The Carter Center.'"). See also Padraig O'Malley, *Record of Understanding 26 September 1992*, O'MALLEY ARCHIVES (Sept. 26, 1992), <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02046/05lv02092/06lv02096.htm>.

⁴⁴ See Desmond Tutu, *Truth and Reconciliation Commission, South Africa (TRC)*, ENCYC. BRITANNICA (Jan. 3, 2014), <http://www.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa>.

⁴⁵ See Jay A. Vora & Erika Vora, *The Effectiveness of South Africa's Truth & Reconciliation Commission: Perceptions of Xhosa, Afrikaner, and English South Africans*, 34 J. BLACK STUD. 301, 302, 305–06 (2004).

⁴⁶ *Id.* at 301–07.

five-year period of power sharing, but then led to the adoption of a new constitutional democracy when F.W. de Klerk resigned in the third year of the transitional period and Mandela formed his majority government. The South African military stood behind Mandela and submitted to his executive authority even though de Klerk resigned.⁴⁷ Some attribute the success of this period to South Africa's immediate use of its TRC.⁴⁸ They attribute to the TRC the impetus for at least delaying somewhat the African National Congress (ANC) and its desire for revenge, and led instead to a gradual reconciliation that is still working itself out in South Africa's law and politics.⁴⁹ Could such a transition be worked out in Syria between the Assad government and the rebel groups?

1. Potential Difficulties with a TRC in Syria

International advisors caution Syria on being too quick to hold up the relatively successful transitions to democracy that occurred in South Africa because of the substantial historical and political differences between Syria and the South African situation.⁵⁰ Syrians might worry that there were a number of additional factors that led to the success of the transitional period. First, the courage of de Klerk to initially seek out Mandela as a bargaining partner is now missing in actions of the Assad government leadership. Second, the South African situation is different from Syria's because of Mandela's moral standing, from which he could make the claim for himself and other victims, that South Africa needed peace more than justice. Again, who among the Syrian opposition has the standing of Nelson Mandela? Third, Desmond Tutu and the church played a significant role in arguing for an end to apartheid. Finally, South Africa was uniquely left alone during its transition period, and the regional powers in the Middle East are unlikely to follow suit. In the case of Syria, there are a number of regional players with various stakes in the different groups vying for power. The Iranians are said to have too much to lose should Assad fall, as they support the Shia groups and their offshoot, the

⁴⁷ MARAIS & DAVIES, *supra* note 43, at 8–9.

⁴⁸ See generally INDEP. BOARD INQUIRY (IBI), REPORT FOR SEPTEMBER-OCTOBER 1994 (1994), http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AG2543/AG2543-2-2-44-01-jpeg.pdf.

⁴⁹ MARAIS & DAVIES, *supra* note 43, at 27.

⁵⁰ Vora & Vora, *supra* note 45, at 303–04, 320. See also Mark N. Katz, *Syria: Prospects for Transition from Minority to Majority Rule*, E-INT'L REL. (June 16, 2012), <http://e-ir.info/2012/06/16/syria-prospects-for-transition-from-minority-to-majority-rule/>.

Alawis,⁵¹ while the Saudis support Sunni Salafists,⁵² and the Turks and Qataris support the Muslim Brotherhood.⁵³ Without Russian and U.S. involvement, there is fear that a removal of Assad will result in a power vacuum and all the tragedy, which will most likely follow, brought about by the situation created by a failed state.⁵⁴

In any event, what seemed essential to what South Africa achieved was a trade that was made during the peace process between seeking justice against those who had orchestrated apartheid and doing what was necessary to make peace work for a transition to an integrated society. As Desmond Tutu famously once said, what South Africa needed was “the truth, more than justice.”⁵⁵ His intent was evidenced in his leadership in the writing of the South African Truth and Reconciliation Preamble.⁵⁶ Importantly, the South African TRC was expressly provided for in the enactment of the new South African Constitution.⁵⁷ As a result, the TRC avoided the legal trap that otherwise exists when TRCs are created independent of the nation’s founding documents: that any later prosecutions arising from the TRCs processes are extra-legal because the TRC has no jurisdiction.

The question will be whether the Assad regime will ever agree to a transitional period that uses a TRC. On the one hand, it is hard for any rational

⁵¹ Nathan Gonzalez, *Solving the Sunni-Shia Conflict Begins with Tehran*, DIPLOMAT (May 23, 2014), <http://thediplomat.com/2014/05/solving-the-sunni-shia-conflict-begins-with-tehran/>.

⁵² Ed Husain, *ISIS Atrocities Started With Saudi Support for Salafi Hate*, N.Y. TIMES (Aug. 22, 2014), http://www.nytimes.com/2014/08/23/opinion/isis-atrocities-started-with-saudi-support-for-salafi-hate.html?_r=0 (“Al Qaeda, the Islamic State in Iraq and Syria, Boko Haram, the Shabab and others are all violent Sunni Salafi groupings. For five decades, Saudi Arabia has been the official sponsor of Sunni Salafism across the globe.”).

⁵³ Ryan Mauro, *Call in Congress to Sanction Turkey, Qatar for Terror Support*, CLARION PROJECT (Dec. 11, 2014), <http://www.clarionproject.org/analysis/members-congress-sanction-turkey-qatar-terror-support>. See also *Qatar Emir Support for Muslim Brotherhood is a “Duty,”* MIDDLE E. MONITOR (Dec. 13, 2013, 3:54 PM), <https://www.middleeastmonitor.com/news/middle-east/9000-qatar-emir-support-for-muslim-brotherhood-is-a-qdutyq>.

⁵⁴ Chase Carter, *The Case for Assad*, NAT’L INT. (June 20, 2014), <http://nationalinterest.org/feature/the-case-assad-10708>.

⁵⁵ Archbishop Desmond Tutu, Address to the South African Press Club (Oct. 21, 1997). See generally ALEX BORAINÉ, *A COUNTRY UNMASKED: INSIDE SOUTH AFRICA’S TRUTH AND RECONCILIATION COMMISSION* (2000); Alex Boraine, *Truth and Reconciliation Commission in South Africa Amnesties: The Price of Peace, in RETRIBUTION AND REPATRIATION IN THE TRANSITION TO DEMOCRACY* 299–316 (John Elster ed., Cambridge U. Press 2006).

⁵⁶ See Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.) (amended 1997).

⁵⁷ For a textual analysis of the constitution, see generally HEINZ KLUG, *THE CONSTITUTION OF SOUTH AFRICA, A CONTEXTUAL ANALYSIS* (2010).

actor to admit that it is unwilling to face a Truth and Reconciliation process. After all, to refuse such a process implicates that the actors themselves realize that their explanations or confessions are not likely to be met with a sympathetic response. Their refusal might mean that they know their violent acts against civilians to fight terrorists will only take them so far when the consequences of their actions impacted so many innocent civilians and was applied so indiscriminately as to violate all notions of proportionality and just war theory. Either they should feel like they can explain their justifications for the use of force (they were ordered to take their actions by superiors who have since been granted amnesty, or were so overcome by fear and concern for themselves and their loved ones that they hated to do what they did, and now ask for forgiveness), or they will likely have to admit that their acts were raw exercises of power that disregarded the dignity of the Syrian population, and put their own needs ahead of the needs of innocent Syrians.

The dilemma Tutu poses between “truth” and “justice” is one that TRCs have struggled with ever since South Africa. Some have sought justice following the TRC processes, claiming that individuals did not speak the truth, or that they did not do so with remorse, and so it was still the purview of the TRC to recommend subsequent prosecutions.⁵⁸ Some even sought to use statements by expatriates, given in confidence, as the grounds for future prosecutions of individuals for war crimes.⁵⁹

2. *Difficulties with TRCs in Liberia, Rwanda, and Kenya*

Yet, despite the apparent success of South Africa’s TRC, subsequent TRC processes in Liberia, Rwanda, and Kenya have floundered.⁶⁰ The ability of prosecutors in these countries to be able to bring evidence against these defendants has been compromised by the passage of time, the difficulty of getting witnesses to step forward and testify, and failures of capacity in the courts.⁶¹ In other words the dilemma postulated by Desmond Tutu, that truth will be sacrificed for justice, seems to continue to be real because the ability to get justice has been compromised by the atrocities themselves. The dilemma

⁵⁸ Rosalind Raddatz, *Tempering Great Expectations: Peacebuilding and Transitional Justice in Liberia*, in *TRANSITIONAL JUSTICE AND PEACEBUILDING ON THE GROUND: VICTIMS AND EX-COMBATANTS* 178, 186 (Chandra Lekha Sriram et al. eds., 2013).

⁵⁹ *Id.* at 181–88.

⁶⁰ *Id.*

⁶¹ *Id.*

seems to be based in part on the belief that producing evidence of war crimes is a very difficult and time-consuming process that is likely to produce little in the way of what would constitute admissible evidence in a court of law.⁶² The tough trade between truth and justice thus seems required by the very nature of the atrocities: that those in power will be able to avoid accountability for what they did, either because there are so few survivors, or because those surviving will not be willing or able to come forward to give evidence for what was done to them.

Still, the example of South Africa suggests that where the pressures for peace take precedent (such pressures could come from Russia and/or Iran—the question then becoming would Russia or Iran be willing to grant Assad asylum?), then those left behind may rather face a TRC process with the promise of amnesty, than the ICC or some existing Syrian court structure that will likely be run by opposition judges. Without such pressures, the Syrian regime will likely insist on some arrangement like that granted to the Egyptian Supreme Military Council, agreeing only to sit on the sidelines and have the right to become involved again should it feel threatened, or for the “good of the Syrians generally.” One option might be to require that the military leadership submit to some specially designed hybrid military tribunal if they are interested in seeking to continue in their leadership positions. That way each individual Syrian would have to decide for themselves whether their continued exercise of power would be able to withstand the scrutiny of a judicial process.

If one assumes a working Supreme Constitutional Court or Supreme Court of general jurisdiction sufficiently independent of the executive branch, might such a body serve as the arbiter of past or ongoing acts against the state and its citizens?⁶³

The 1973 Constitution followed a coup by Assad’s father, who potentially controlled a drafting process leading to the guarantees of a Ba’ath (Alawite) controlled nomination process for Presidency⁶⁴ and broad emergency powers⁶⁵

⁶² *Id.* at 186.

⁶³ Choosing this option has the potential of keeping the ICC at bay, under principles of complementarity.

⁶⁴ According to the Constitution, the President of the Republic is elected for seven years according to the Christian calendar, beginning at the date of the expiration of the term of the incumbent President. CONSTITUTION OF SYRIA Mar. 13, 1973. See Phil Sands, *Syria’s New Constitution Has Not Weakened Baath Party’s Grip on Power*, NATIONAL (May 1, 2012), <http://www.thenational.ae/news/world/middle-east/syrias-new-constitution-has-not-weakened-baath-partys-grip-on-power#full>.

provisions, which his son followed during a discussion for a new Constitution in 2012.

Each Constitution presents significant challenges for the transition period. At a substantive level there is the debate between a parliamentary system described in the 1950 Constitution and the stronger presidential style governance structure described in the 1973 and 2012 Constitutions.⁶⁶ The Constitution of 1950 was replaced, so unless agreed to by the parties, it is later subject to challenge by anyone who was not a party to the agreement.⁶⁷

The 2012 Constitution builds on the 1973 Constitution, which provides for the president to exercise emergency powers, disband the legislature, and overrule the judiciary should the president determine that it is necessary for the security of Syria.⁶⁸ On the other hand, the 2012 Constitution with amendments might be more palatable to Assad and therefore is something he might agree to during a transition period until the end of a third term (he was elected in 2000, 2007, and again in 2014). The 2012 Constitution could be amended to allow a president to only serve three terms, and provide that the term runs from 2014 to 2021, or for another six years. This would allow Assad to be President for the transition period. Other amendments might include forbidding the president from declaring emergency powers, submission to the decisions of the legislature, and the ruling of an independent Supreme Court. If the president would be granted immunity during the transitional period, and his power checked by a time limit that he would stay in power, and agree to share power in the executive structure, Assad might find this an acceptable face-saving trade-off for peace. The question would be whether Assad would also agree that others in his regime would have to subject themselves to the workings of the Constitutional Courts. Would (or could) Assad open the possibility that security and/or military leaders would have to answer to war crimes committed against civilians? He might trade his continuation in power for the jurisdiction of the court over these other decision makers. If it is true that he did not know that his military leaders were committing war crimes, he might be willing to

⁶⁵ CARSTEN WIELAND, *SYRIA: A DECADE OF LOST CHANCES: REPRESSION AND REVOLUTION FROM DAMASCUS SPRING TO ARAB SPRING 2008–09* (2012). Wieland surmises that Assad's failure to accept democratic reforms and his use of emergency powers is best explained by his feeling of isolation due to accusations of his role in the assassination of Lebanon's Prime Minister Hariri in February of 2012. *Id.*

⁶⁶ See SYRIAN CTR. FOR POLITICAL & STRATEGIC STUDIES, *THE SYRIAN EXPERT HOUSE, SYRIA TRANSITION ROADMAP* 57, 60 (2013).

⁶⁷ See *id.* at 61.

⁶⁸ WIELAND, *supra* note 65, at 208–09.

make the trade.⁶⁹ If he did know, he is likely to refuse such a trade-off because some will most likely offer evidence against Assad to explain why they did what they did. Assuming some agreement to put independent members of the Syrian community on that court, there is at least a theoretical possibility that such a court could proceed against these actors and bring them to justice.⁷⁰

Still, use of the existing legal frameworks presents significant challenges. Who will sit on such courts? Will these courts have the capacity to try these individuals for past crimes? In answer to the latter question, new developments in modern evidence gathering techniques suggest that with some minor support from the international community, the capacity of the Syrians to try individuals subjected to the jurisdiction of Syrian courts is not only possible, but likely to produce both due process for the accused and the evidence necessary to convict those who committed such atrocities.⁷¹ There are significant risks to the continued peace during the transitional peace process if these national and/or regional courts refused to prosecute either Assad or his regime leadership, or prosecute but in the end find no evidence of wrongdoing.

E. Interim Governing Constitution Providing for Both a Formal Structure for Dealing with Interpretations of the Interim Constitution, and Informal Mediation Processes Backed by a Hybrid Criminal Process—The Best Option Where the U.N. is Involved

An interim period that removed the executive power from the president and put it into the hands of a “Supreme Legislative Council” might comply with the terms of the Geneva II communiqué,⁷² and provide a period in which Syria

⁶⁹ *60 Minutes: Syrian President Bashar al-Assad* (CBS television broadcast Mar. 29, 2015), <http://www.cbsnews.com/news/syria-president-bashar-al-assad-60-minutes-charlie-rose/>. Assad repeats a twisted logic that he can’t be committing war crimes (use of chemical weapons including most recently chlorine gas and barrel bombs) against Syrians because they continue to support him. How he knows they continue to support him is met with his assertions that they do.

⁷⁰ Eugenio Bulygin, *Criminal Prosecutions of Human Rights Violations*, YALE L. SCH. SEMINARIO EN LATINOAMÉRICA DE TEORÍA CONSTITUCIONAL Y POLÍTICA (2001), http://www.law.yale.edu/documents/pdf/Bulygin_Criminal_Prosecutions_of_Human_Rights_Violations.pdf (discussing the transitions from dictatorship to democracy in Argentina, Chile, and Greece; Argentinian prosecution of military juntas for past atrocities in the 1970s and 80s suggests that a country’s internal judicial procedures, even if ad hoc, can often be adequate to the task).

⁷¹ See Alex Schank, *Sectarianism and Transitional Justice in Syria: Resisting International Trials*, 45 GEO. J. INT’L L. 557, 571 (2014).

⁷² See *Final Communiqué*, ACTION GROUP FOR SYRIA (June 30, 2012), <http://www.un.org/News/dh/infocus/Syria/FinalCommuniqueActionGroupforSyria.pdf>.

could transition into a new Constitutional governance structure, selected by the Syrian people, like that done in 1950. A constituent assembly of some sort could be organized and divisive issues such as whether the government will be based on a parliamentary system or provide for an independently elected president can be postponed until it has had a chance to deliberate on the issues and reach a consensus. South Africa, again, sets a good example of this option. In 1994 the opposition party, led by Mandela and the government, represented by de Klerk, agreed on thirty-two fundamental principles that would apply during the transition and, importantly, to the new constitution that would follow free elections.⁷³ In South Africa's case, these provisions were brought into force by "interim" amendments to the existing constitution.⁷⁴ These arrangements included the requirement of a new Constitutional Court that would examine any reformulated constitution for compliance with these principles.⁷⁵ The new Constitutional Court would then be bound by the thirty-two fundamental principles as constituting a higher law in order to ensure that a democratic, non-racial secular government could not be usurped through a majoritarian legislative enactment.⁷⁶

An Interim Governing Constitution is "imposed" unilaterally by the parties to the peace agreement.⁷⁷ Its legal authority might come in the form of an "amendment" to the existing Constitution to provide for the interim Constitution.⁷⁸ Accompanying the Interim Constitution should be agreements for the additional safeguarding of human rights and fundamental freedoms, an independent "judiciary" body, and a neutral political environment in which the national dialogue would take place.⁷⁹ Provisions for a democratic electoral process might be part of this stage of the process with support for multiparty

⁷³ MARAIS & DAVIES, *supra* note 43, at 8–9.

⁷⁴ Mac Maharaj, *The ANC and South Africa's Negotiated Transition to Democracy and Peace*, in RESISTANCE/LIBERATION MOVEMENTS AND TRANSITIONS TO POLITICS 26–29 (Veronique Dudouet & David Bloomfield eds., 2008).

⁷⁵ Brice Dickson, *Protecting Human Rights Through a Constitutional Court: The Case of South Africa*, 66 FORDHAM L. REV. 531, 539–40 (1997).

⁷⁶ LAURA SEGAL & SHARON CORT, ONE LAW, ONE NATION: THE MAKING OF THE SOUTH AFRICA CONSTITUTION 119–33 (2011).

⁷⁷ See generally THE CARTER CENTER, SYRIA: OPTIONS FOR A POLITICAL TRANSITION (2014), http://www.cartercenter.org/resources/pdfs/peace/conflict_resolution/syria-conflict/Options-for-Political-Transition-in-Syria-Aug-2014-en.pdf.

⁷⁸ *Id.* at 12, 14.

⁷⁹ *Id.* at 25.

elections.⁸⁰ The agreement should also set out a timeframe for the transitional period, with benchmarks.⁸¹

Following its post-election violence in 2007, Kenya enacted a similar arrangement. The parties agreed to a “power-sharing” agreement, with an expansion of powers to the Prime Minister, along with increased numbers of cabinet posts, but instead of establishing its own Constitutional Court in the interim, referred matters of post-election violence to the ICC.⁸²

Vital to the success of these interim arrangements are the establishment of oversight mechanisms and a separation of powers structure in order to protect against a strong leader returning to power. It also protects against a minority sect that once is in power would seek to override the majority/minority rights of other sects or religious groups.⁸³ At a minimum, some provision in the agreement should rule out the use of “emergency” powers by the Executive (or Supreme Military Council) during the interim period. Zimbabwe is an example of a cautionary tale in this regard. Following its crisis in 2008, it adopted an interim agreement on the model of Kenya but without a sufficient mechanism for oversight during the interim period.⁸⁴ The President had reluctantly signed the agreement, and thereafter he did not abide by its terms and principles.⁸⁵ To provide against this possibility, interim arrangements might include the establishment of a Transitional National Assembly and a Transitional Judicial Council, together providing the checks and balances over the Transitional Governing Body.

⁸⁰ *Id.* at 15.

⁸¹ *Id.*

⁸² *Text of Power-Sharing Agreement in Kenya*, REUTERS (Feb. 28, 2008), <http://www.reuters.com/article/2008/02/28/us-kenya-crisis-text-idUSL2822580120080228>. Similar arrangements were used in Papua New Guinea in the Bougainville Peace Process. See Bougainville Peace Process art. 1, Apr. 9, 2002, http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/bougain_20010830.pdf. Similar arrangements were also used in Yemen in 2012, but the Yemen interim period has not proved successful, as the tribal differences have grown violent, leading to resignation of the President of the interim government. Leela Jacinto, *How a 'peace deal' Plunged Yemen Deeper into Chaos*, FR. 24 (Jan. 23, 2015), <http://www.france24.com/en/20150122-yemen-houthi-peace-deal-president-resigns-shiite/>.

⁸³ For example, during the South Africa transitional period, de Klerk agreed to a structure that bound the military to the President and created a Constitutional Court that would provide the independent interpretation of the South Africa Constitution, including its enforcement of minority rights. Dickson, *supra* note 75, at 532.

⁸⁴ Alexander Noyes, *Securing Reform? Power Sharing and Civil-Security Relations in Kenya and Zimbabwe*, 13 AFR. STUD. Q., Winter 2013, at 39.

⁸⁵ *Id.* at 34.

How these oversight bodies might be constituted is worth a close look. For example, one option for Syria is to use transitional oversight bodies like those used in Cambodia⁸⁶ and provided for in the Dayton Peace Accords.⁸⁷ Of course, these transitional bodies were imposed by the international community after there had been a forced regime change.⁸⁸ Still, the various regional powers might demand a new power-sharing arrangement to end the conflict, and Syrians themselves could turn to the international community for help. Each peace agreement (Cambodia and Dayton) included representation from the international community, from the U.N. Special Representative of the Secretary-General, in the case of Cambodia, or a “high representative” from the international community, in the case of Dayton.⁸⁹ These served as “guarantors” of the peace agreement.⁹⁰ A further recent example of the role that the U.N. can play in investigating and providing proof for war crimes comes in its investigation into Assad and Hezbollah. The U.N. tried five Hezbollah members, in absentia, for their killing of former Prime Minister Rafik Hariri of Lebanon and twenty-one others.⁹¹

⁸⁶ See *Cambodia*, INT’L CT. FOR TRANSITIONAL J., <https://www.ictj.org/our-work/regions-and-countries/cambodia> (last visited Aug. 17, 2015).

⁸⁷ See Peace Implementation Conference for the Bosnian General Framework Agreement: Conclusions of the London Meeting, 35 I.L.M. 223 (1996); Elizabeth M. Bruch, *Hybrid Courts: Examining Hybridity Through a Post-Colonial Lens*, 28 B.U. INT’L L.J. 1, 10 (2010).

The Human Rights Chamber was created under Annex 6 of the Dayton Peace Agreement to “assist the Parties in honouring their obligations” to secure the highest level of international human rights protection for the people of Bosnia. More broadly, it was conceived as an intentionally hybrid court with the teleology of achieving Europeanized protection of human rights and the rule of law in the specific context of post-war Bosnia.

Id.

⁸⁸ *Id.* at 8; see also David Cohen, “Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future, 43 STAN. J. INT’L L. 1, 1 (2007) (evaluating hybrid tribunals in East Timor, Sierra Leone, and Cambodia).

⁸⁹ Final Act of the Paris Conference on Cambodia, sec. 2, art. 2, U.N. Doc. A/46/608 (Oct. 30, 1991); Dayton Peace Agreement, Geneva Annex, Framework Agreement for Peace in Bosnia and Herzegovina art. 8, § 3(d), Nov. 30, 1995, UN Doc. A/50/79C.

⁹⁰ *Id.*

⁹¹ Agreement Between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, U.N.-Leb., Jan. 29, 2007, 2461 U.N.T.S. 280, U.N. Doc. S/RES/1757 (May 30, 2007); Ronan Bergman, *The Hezbollah Connection*, N.Y. TIMES MAG. (Feb. 15, 2015), http://www.nytimes.com/2015/02/15/magazine/the-hezbollah-connection.html?_r=0. A human rights organization called Witness works to train journalists to gather evidence that could later be used in criminal prosecutions in areas like Rio, and in other conflicts around the world. The article also described the work by two engineers from the Medical College of Wisconsin, Brian Laning and Bonnie Freudinger, who recently won a USAID grant to work on the International Evidence Locker, a free smartphone app. Photos collected on the app are automatically location,

Of course, President Assad may have significant objections to giving up this kind of power during the interim period. Still, the principles for governance during the interim period might provide sufficient guarantees for the safety and security of the President himself. In addition, the agreement should make clear that the oversight body and membership would be neutral yet principled, ensuring that no side uses force or violence to bring about its goals. In other words, the principal purpose of the oversight committee would be to provide a forum for the mediation of disputes between the parties by (1) insisting on the non-violent and peaceful resolution of disputes, occurring out of the public glare, and (2) moving the parties along to the end of the transition period when democratic processes and a new constitution can take over. In addition, one option that might be used during the interim is a TRC-like process that is designed for the resolution of disputes involving the leadership of the military and security forces. This might provide enough “truth” about what was done by the military during the civil war to help the country move past the war and start to take constructive actions toward a peaceful future.

Whatever the dispute resolution system chosen by the Syrians for disputes between the Syrian leadership and military leadership, there yet remains to be determined what dispute resolution systems during the interim period should be employed at the local levels. What will be the processes that will deal with Syrians who engaged on behalf of opposition groups, or DASH, or ISIS, and remain in Syria? In addition, the interim period will need to provide a system for handling disputes that will arise between those who stayed and those who left during the civil war, and to hold accountable any who engage in violence during the interim period.

Syrians who committed atrocities on behalf of opposition groups or who engaged in murder, extortion, and kidnapping for criminal gain may remain in these communities post-conflict. The capacity of Syrian courts to handle these disputes will likely need to wait until after a new constitution has been enacted and judges can be appointed. In the meantime Syria may choose to empower and support its local assemblies, Shari’a courts, councils, and governing bodies in handling disputes that occur in those communities. Civil service organizations should ready an effort to train and support these local bodies in

date, and time-stamped, encrypted and securely sent to two separate protected servers. They can also be submitted anonymously. Matthew Shaer, *The Media Doesn't Care What Happens Here: Can Amateur Journalism Bring Justice to Rio's Favelas?*, N.Y. TIMES MAG. (Feb. 22, 2015), <http://www.nytimes.com/2015/02/22/magazine/the-media-doesnt-care-what-happens-here.html>.

mediated solutions, if possible, to the acts committed during the war. One option is to use Rwanda-style Abunzi proceedings that use community standards for determining the facts, use sanctions that emphasize compensation over retribution, use community rituals that may produce meaningful truth telling, and open the possibility of victim forgiveness.⁹²

Syria might adopt a dispute resolution process similar to that used in Iraq in the aftermath of the war removing Saddam Hussein to deal with real property disputes that arose between those who stayed and those who left during the war.⁹³ A United States Agency for International Development (USAID)-backed U.N. Commission called the Committee for the Resolution of Real Property Disputes (CRRPD) was set up to mediate such disputes.⁹⁴ The Commission trained Iraqis to mediate these disputes with a goal of keeping the parties from resorting to violence.⁹⁵ The program has since been integrated into Iraqi governance structures as the Iraqi Real Property Commission.⁹⁶ It gives the right to compensation from the Iraqi government to anyone displaced by a returning Iraqi.⁹⁷ By all reports it has resolved most of the real property disputes without the parties ever resorting to violence.⁹⁸

Finally, the interim period might also provide for a back-up dispute resolution system, should the informal processes not provide adequate resolution of disputes on a local level. A hybrid body might be employed for cases that need the oversight of an appellate review process. This second “backup” judicial body could operate like the old circuit courts, where it travels from place to place to place to hold proceedings on the most egregious cases. The body could be made up of Syrian judges, supported by international prosecutors and defense counsel, ready to step in should the dispute not be

⁹² See *Abunzi*, REPUBLIC RWANDA MINISTRY JUST., <http://www.minijust.gov.rw/services/abunzi> (last visited Aug. 26, 2015).

⁹³ Statute of the Commission for the Resolution of Real Property Disputes No. 2 of 2006 (Iraq), http://www.globalprotectioncluster.org/_assets/files/field_protection_clusters/Iraq/files/Iraq_PC_Statute_Commission_Property_Resolution_2006_EN.pdf.

⁹⁴ *Id.*

⁹⁵ Peter Van der Auweraert, Senior Legal Officer, Reparations Programmes Unit, Int’l Org. for Migration, Presentation at U.S. Dep’t of State Symposium on Post Conflict Restitution: Property Restitution in Iraq (Sept. 6-7, 2007), <http://2001-2009.state.gov/documents/organization/98032.pdf>.

⁹⁶ Statute of the Commission for the Resolution of Real Property Disputes, *supra* note 93.

⁹⁷ *Id.*

⁹⁸ Peter Van der Auweraert, *Iraq Updates its Approach to Former Regime-Related Land and Property Claims*, TERRE NULLIUS (Mar. 11, 2010), <https://terra0nullius.wordpress.com/2010/03/11/iraq-updates-its-approach-to-former-regime-related-land-and-property-claims/>.

resolved to the satisfaction of the parties, to investigate the dispute using international standards of evidence gathering, and to ensure due process was provided to the accused.

In the end, this two-tiered system of dispute resolution best balances the need for peace against Syrian insistence on fighting impunity for those who committed crimes against civilians. Especially when backed by the ability of international non-governmental organizations (NGOs) to provide support to both formal and informal dispute resolution processes, the transitional government can both continue to enforce the end of violent conflict and manage a dispute resolution process out of the public eye until the new governance structure is enacted.

II. CONFLICT MAPPING OF SOCIAL MEDIA AND ITS IMPACT ON DISPUTE RESOLUTION DURING THE INTERIM PERIOD

Since the start of the Syrian conflict, both victims and perpetrators of war crimes have been prolific in their use of video postings on YouTube, Facebook, MySpace and Twitter.⁹⁹ In addition, Syrians have sent a large number of videos as attachments in emails to friends and acquaintances.¹⁰⁰ These videos depict not only atrocities committed against Syrians by the government, but also promote various armed group activities and recruitment of new members.¹⁰¹ As we have seen in Part I, the evidence provided through public source social media has changed the equation between truth and justice that may exit in any transition period following the Syrian civil war.¹⁰² In particular, video evidence collected by NGOs like Human Rights Watch (HRW), the Organisation for the Prohibition of Chemical Weapons (OPCW), and other NGOs with conflict mapping projects raises important implications for the transition options discussed above.¹⁰³ Proof might already exist that the

⁹⁹ See generally MARC LYNCH, DEEN FREELON & SEAN ADAY, U.S. INST. PEACE, BLOGS AND BULLETS III: SYRIA'S SOCIALLY MEDIATED CIVIL WAR 7 (2014), <http://www.usip.org/sites/default/files/PW91-Syrias%20Socially%20Mediated%20Civil%20War.pdf>. Cf. Lauren Kirkwood, *Study Finds Bias in Internet Postings About Syria's Civil War*, MCCLATCHY DC (Feb. 24, 2014), <http://www.mcclatchydc.com/news/nation-world/world/middle-east/article24764167.html>.

¹⁰⁰ LYNCH, FREELON & ADAY, *supra* note 99, at 14.

¹⁰¹ *Id.* at 6.

¹⁰² See *supra* Part I.

¹⁰³ See Syria: *Strong Evidence Government Used Chemicals as a Weapon: Civilian Casualties in Barrel Bomb Attacks on 3 Towns*, HUM. RTS. WATCH (May 13, 2014), <http://www.hrw.org/news/2014/05/13/syria->

Assad government used chemical weapons and barrel bombs, and killed civilians indiscriminately during the war. Similarly, what was done by ISIS, or by various opposition groups, might also be sufficiently documented to prove that members of these groups committed war crimes. As a result of this social media evidence, the truth of what has been done and by whom is known even before a peace agreement is reached.

Why a particular bombing, beheading, use of chemical weapons, or other indiscriminate killing was committed may be in doubt, but these matters are subject to more discrete items of proof. If the person involved was ordered to commit a criminal act, there should be evidence of such an order. If President Assad denies knowing about what was done, he may face a burden in court of presenting evidence of what he did to remove those who committed such acts from their leadership positions, or why he did not investigate what was done and by whom.¹⁰⁴ At a minimum such failure may subject the leader to criminal responsibility.¹⁰⁵ In any event, a decision to give amnesty to suspected war criminals in Syria in advance of these individuals agreeing to end the violence and stop fighting should not require the same blind trade between truth and justice that may have been required to end past conflicts.

The conflict mapping projects, in some respects, intensify the difficulties for the peacemakers in brokering a peace with known war criminals. Now the calculation is the hard pragmatic choice between continued fighting and loss of future lives. To the extent that such a choice has implications for the victims of these atrocities, it is likely not within the authority of the peacemakers to make these difficult assessments or trade-offs by themselves. For lasting peace some provision needs to be made to hold those who did these acts accountable. As I have argued elsewhere, in order for amnesty and forgiveness to be granted in the peace agreement, the victims must know what they are forgiving, and then

strong-evidence-government-used-chemicals-weapon; ORGANISATION FOR PROHIBITION CHEMICAL WEAPONS, <http://www.opcw.org/> (last visited Sept. 20, 2015).

¹⁰⁴ Kai Ambos, *General Principles of International Criminal Law, 21: Superior Responsibility*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 823, 832 (Antonio Cassese et al. eds., 2002); GUÉNAEL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY 24 (2009). The ICC uses the doctrine of *command* or *superior responsibility* to provide it with proof of intent necessary to convict an individual for war crimes. If a leader argues he did not know war crimes had been committed, then once having learned, what steps did the leader take to remove the individual from power.

¹⁰⁵ Ambos, *supra* note 104, at 833.

be the ones to grant the forgiveness.¹⁰⁶ Without their input, the agreement may only delay questions of retribution, reconciliation or forgiveness.¹⁰⁷

One option for peacemakers is to put the choice to the individuals seeking amnesty of whether they will submit their actions to an impartial tribunal, or whether they will instead leave the jurisdiction of the Syrian courts and the ICC as a condition of peace. Otherwise, the leadership of the parties might be given the option of submitting to the processes of a TRC or the local tribunal (like the Abunzi-like tribunals used in Rwanda),¹⁰⁸ to work out reconciliation between those who committed the atrocities and their victims and the victim's families.

In setting up these various options for dispute resolution during the transitional period, the U.N. or an international NGO (like HRW and/or other human rights organizations that are not intimately involved in the peace process)¹⁰⁹ may now provide a unique supporting role in the work of both the formal court proceedings and the informal TRC's or local mediation efforts. They can help provide the supporting evidence for these alternative forums to help make the determination necessary and appropriate to each alternative: to make findings of fact of what happened during any alleged war crime, and help the parties assess the nature of the act committed, in order for the victims to make meaningful determinations of whether forgiveness is in the offing.

First, we will look at how admissible proof that can connect war criminals with their murders and with the victims of their crimes may change the peace-making equation in dealing with the perpetrators of atrocities in Syria. We will look at admissibility standards in the U.S., the ICC, and in criminal prosecutions under present Syrian law to see what challenges will likely come from the use of social media evidence. Next, we will look at how such evidence might also be used in TRC or local community mediation settings

¹⁰⁶ Paul J. Zwier, *History, Creative Imagination, and Forgiveness in Mediation on an International Stage: Practical Lessons from Paul Ricoeur's Hermeneutics*, 30 J.L. & RELIGION 194, 195 (2015).

¹⁰⁷ Kristin C. Doughty, *Contesting Community: Legalized Reconciliation Efforts in the Aftermath of Genocide in Rwanda 337–38* (May 16, 2011) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with the Penn Libraries, University of Pennsylvania).

¹⁰⁸ See *Abunzi*, *supra* note 92.

¹⁰⁹ Note that some NGOs like The Carter Center refuse to use their conflict mapping for other than humanitarian purposes, in that it could potentially compromise its neutrality in negotiations for peace, if it were seen to be gathering evidence against the parties.

that might create a greater likelihood that meaningful reconciliation will take place.

A. Use of Social Media Videos and Proof in Formal Judicial Proceedings

Consider evidence recently collected by HRW concerning the Syrian government's use of barrel bombs.¹¹⁰ This evidence strongly suggests that Syrian government helicopters dropped barrel bombs embedded with cylinders of chlorine gas on three towns in Northern Syria in mid-April 2014.¹¹¹ The question is whether such evidence would be admissible, if provided to a judicial body like the ICC or a western style court. Allegations that the Syrian military used an industrial chemical as a weapon, an act banned by the international treaty prohibiting chemical weapons,¹¹² would be important in proving a case against Assad, or his military leaders, of committing war crimes. Syria signed on to the international treaty in October 2013,¹¹³ so it would be difficult to deny that it knew such acts were criminal. What would

¹¹⁰ See *Syria: Strong Evidence Government Used Chemicals as a Weapon*, HUM. RTS. WATCH (May 13, 2014), <http://www.hrw.org/news/2014/05/13/syria-strong-evidence-government-used-chemicals-weapon>. Improvised barrel bombs “are typically constructed from large oil drums, various types of metal cylinders, and water tanks filled with explosives and scrap metal to enhance fragmentation, which are then dropped from a helicopter. The heat from the explosion of the barrel bomb would destroy much of the chlorine and any remaining gas would be dispersed in the air by the explosion so the concentration of chlorine would quickly drop to non-lethal levels.” *Id.*

¹¹¹ *Id.* Much of the evidence gathered concerning the use of chemical weapons was through interviews of OPCW and HRW soon after the attacks. HRW's deputy director of the Middle East and North Africa went into Syria and interviewed a number of witnesses, concluding that Syria had used chlorine gas as a weapon and had targeted civilians. It recommended that the U.N. Security Council refer the situation in Syria to the ICC. The pictures and video evidence can help expose the true nature of Assad's denial that barrel bombs were used. *Id.* But see *Syria Conflict: BBC Exclusive Interview with President Bashar al-Assad*, BBC (Feb. 10, 2015, 5:57 AM), <http://www.bbc.com/news/world-middle-east-31327153>. In this interview, President Assad denied that Syria was using barrel bombs or chlorine gas in their war against the opposition. During the BBC interview, Assad seems to be denying that the Syrian government was engaged in the use of barrel bombs, or chlorine gas, or at least that he doesn't know that they are using barrel bombs or chlorine gas. Though his argument is a little suspect—that he has no reason to use these types of weapons against Syrian civilians, so therefore he isn't using them. Assad does not say that he has investigated their use, and claims he directed the army not to use these types of weapons. Presumably he could have offered his willingness to investigate, as that is the process he went through in helping the U.N. dispose of other chemical weapons. He does not offer a willingness to investigate whether his military is engaged in the use of barrel bombs or chlorine gas.

¹¹² See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Sept. 3, 1992, 1974 U.N.T.S. 45 (entered into force Apr. 29, 1997).

¹¹³ *Syria Officially Joins the UN Chemical Weapons Convention*, HINDU (Oct. 14, 2013, 3:11 PM), <http://www.thehindu.com/news/international/world/syria-officially-joins-un-chemical-weapons-convention/article5233423.ece>.

remain for a prosecutor would be to prove whether a particular military leader, or President Assad, knew the chlorine gas was being used, or knew that barrel bombs were being dropped on civilians.

The HRW and OPCW proof is just a small part of the evidence the NGO community has gathered during the Syrian conflict. For example, an organization at Stanford University has taken up the task of mapping militant organizations, including ISIS.¹¹⁴ Using special mapping techniques over time it has been able to show the growth of various militant groups and map their activities.¹¹⁵

In addition, consider what might be accomplished through a Conflict Mapping Project run by the U.N. to support later prosecutions regarding the treatment of women and children,¹¹⁶ and of the parties for war crimes, or assist in any process that would attempt to bring reconciliation between the parties and victims. If the U.N. is able to adequately segregate its mapping projects from its peacemaking efforts, it might be able to support post-conflict transition periods, depending on what type of transition is negotiated. Where the peace agreement asks for involvement of the ICC, it can use the information it gained as evidence, and where the peace agreement will use a TRC or other informal reconciliation process, it can use the data to support more meaningful confessions and possibilities for forgiveness.

Most of the data used in conflict mapping comes from public-source social media.¹¹⁷ There are some reports that over 700,000 videos have been posted by Syrians on YouTube since the conflict began in 2011.¹¹⁸ By coding and searching these videos, a map of the conflict can produce significant results.

¹¹⁴ *Mapping Militant Organizations*, STAN. U., <http://web.stanford.edu/group/mappingmilitants/cgi-bin> (last visited Aug. 26, 2015).

¹¹⁵ *See id.*

¹¹⁶ *See generally* MADRE ET AL., *SEEKING ACCOUNTABILITY AND DEMANDING CHANGE: A REPORT ON WOMEN'S HUMAN RIGHTS VIOLATIONS IN SYRIA BEFORE AND DURING THE CONFLICT* (2014), <http://www.law.cuny.edu/academics/clinics/iwhr/publications/Seeking-Accountability-and-Demanding-Change-A-Report-on-Womens-Human-Rights-Violations-in-Syria-Before-and-During-the-Conflict.pdf>.

¹¹⁷ Federico Guerrini, *How Researchers Use Social Media to Map the Conflict in Syria*, FORBES (Apr. 15, 2014, 10:00 AM), <http://www.forbes.com/sites/federicoguerrini/2014/04/15/how-researchers-use-social-media-to-map-armed-forces-in-syria/print/>.

¹¹⁸ Palanir Technologies provides technologies to map data over time in a variety of settings. *See Mapping the Syrian Crisis with the Carter Center*, PALANTIR: PALANTIR BLOG (June 5, 2014), <https://www.palantir.com/2014/06/mapping-the-syrian-crisis-with-the-carter-center/>.

Such a project would be able to coordinate videos with other reports of events at certain places and locations in Syria and map those reports with the information it is coding from the videos. Take, for example, a news report on Al Jazeera News, that ISIS had beheaded a Shia Muslim, simply for being a Shia.¹¹⁹ ISIS seemed bent on provoking Shias in Syria into an all-out civil war.¹²⁰ A mapping of the conflict would allow the mapper to identify the place Al Jazeera reported as where the beheading took place as one in which ISIS was involved. It could confirm that another related insurgent group had posted a video of a clash where the Shia was said to have been beheaded.¹²¹ It could then confirm that the video of the place where the clash occurred is consistent with the video of the beheaded body of a young Arab. The clash between the related ISIS group is easily identified by referring to that group's promotional video as being against a predominately Shia insurgent group. It seemed to corroborate that ISIS is taking responsibility for a real event—a war crime. An event that not only violates humanitarian law, but also, at least for some Muslims, is a misinterpretation of the meaning of “jihad” and violates seventy-five Islamic verses from the Koran, attributed to the Prophet himself, which forbid such acts against minority groups.¹²²

In 2011, a number of research organizations¹²³ noticed that there were an enormous number of YouTube videos that were being posted by various groups that seemed to be documenting acts of violence in Syria and started gathering social media postings on the conflict. At first, most were taken from hand-held devices like cell phones; the videos were poor quality and the camera moved and jerked throughout the video.¹²⁴ The sound quality was also

¹¹⁹ See *Twitter Users Call for #ISISMediaBlackout Following Purported Beheading of US Journalist*, AL JAZEERA (Aug. 20, 2014), <http://stream.aljazeera.com/story/201408201239-0024088> [hereinafter *Twitter Users Call for #ISISMediaBlackout*].

¹²⁰ Ahmed Rashid, *ISIS: What the US Doesn't Understand*, NYR DAILY (Dec. 2, 2014, 12:22 PM), <http://www.nybooks.com/blogs/nyrblog/2014/dec/02/isis-what-us-doesnt-understand/>.

¹²¹ *Twitter Users Call for #ISISMediaBlackout*, *supra* note 119.

¹²² But see Robert Spencer, *Muslim Cleric Justifies Islamic State Beheadings*, JIHAD WATCH (Aug. 25, 2015, 6:00 PM), <http://www.jihadwatch.org/2014/08/muslim-cleric-justifies-islamic-state-beheadings-islam-is-a-religion-of-beheading> (noting the Prophet spoke directly against the killing of minority religious groups in negotiating the rights of passage of Muslims to pilgrimage to Mecca).

¹²³ See, e.g., POLITICAL GEOGRAPHY NOW, <http://www.polgeonow.com> (last visited Aug. 26, 2015).

¹²⁴ John Hall, *ISIS Mass Beheading Video Took up to Six HOURS to Film and Cost \$200,000: Forensic Analysis of Syrian Soldier Murders Reveals Clues that Could Help Nail Jihadi John*, DAILY MAIL (Dec. 8, 2014, 1:45 PM), <http://www.dailymail.co.uk/news/article-2865745/Has-EXACT-location-infamous-ISIS-beheading-video-pinpointed-Forensic-analysis-filmed-Syrian-soldier-murders-breaks-filmed-long-took-cost-make.html#ixzz3YKpGgHDR>.

quite bad. Later in the conflict, there were more professionally shot videos filled with high quality sound and special effects.¹²⁵ In fact, there were approximately 600 videos posted per day between 2013 and 2014 trying to show the world what was happening in Syria.¹²⁶ Concerned that many of the videos were from civilians trying to get the world to know what was happening, some NGOs hired staff of young Arab-speaking researchers to code the videos according to a number of criteria, including type of group; its mission, place, time and date; weapons shown; and various information about victims.¹²⁷ They also did the same with “formation” videos posted by different rebel groups, which were trying to recruit disaffected Arabs, and so were claiming responsibility for events that they may or may not have actually participated in.¹²⁸

The problem conflict mappers recognized early on was how it might use these videos to help map the conflict, and thereby provide information to the world, and to humanitarian groups about what was going on in Syria. How would mappers go about verifying and authenticating the information in these videos in order to help humanitarian groups determine who should receive funding and help, and who was likely a terrorist group? Of course, one way is to use a mindset of a prosecutor and set out to code the videos according to time and place whether they showed a clash (violence), force on force, chemical weapons, shelling, improvised explosive devices, bombings, aircraft or instances of crime, and killings. An investigator could also code the videos according to whether the videos were of civilians, or of military, the uniforms worn (deserters from the Syrian army?), the weapons they carried, their politics, the symbols they used to identify their group, and the narration that accompanied the video regarding why the group had formed. The higher number of code factors, the more one can use mapping techniques to explore

¹²⁵ *Id.* The Carter Center’s conflict mapping project mapped some videos that were documented to have been shot and posted around the time that Saudi television was interviewing members of the insurgent group. Their appearance looks like the television studio not only did the news interview, it also then shot a promotional video for the group. These promotional videos apparently used the same kinds of special effects in their new casts, as was used in the video.

¹²⁶ Jennifer Elias, *Inside the Data Science That’s Shining New Light on Syria’s Civil War*, CO.LABS (July 28, 2014), <http://www.fastcolabs.com/3033609/inside-the-data-science-thats-shining-new-light-on-syrias-civil-war>.

¹²⁷ See PUB. INT’L LAW & POL’Y GRP., *MAPPING ACCOUNTABILITY EFFORTS IN SYRIA* 4–5 (2013), <http://www.dchrs.org/english/File/Reports/mapping-accountability-efforts-in-syria.pdf>.

¹²⁸ See Elias, *supra* note 126. See also CARTER CTR., *SYRIA COUNTRYWIDE CONFLICT REPORT #3*, at 11–18 (2014), http://www.cartercenter.org/resources/pdfs/peace/conflict_resolution/syria-conflict/Nationwide_Update_march-14-2014.pdf [hereinafter CONFLICT REPORT #3].

various relationships between these factors. One mapper has already recorded the existence of close to 6,000 different groups that have formed since the start of the civil war.¹²⁹ A conflict mapper could then map the rise and fall, and/or consolidation of many of these groups until the present.¹³⁰

Other conflict mappers could then search news stories and data gathered by activist human rights organizations, as well as Facebook postings and Twitter accounts to attempt to corroborate and authenticate what they see on the videos. They could also map the conflict by coordinating what they see on video with the movement of refugees. These groups might also enlist the help of a computer software maker, like Palantir, Inc., to help it see the relationships between events, times, and places in the videos of a particular group or groups it is tracking. Palantir's involvement has been crucial in helping The Carter Center see various relationships between the groups and data that was being produced for their ability to give advice for humanitarian purposes.¹³¹



Conflict Map of Territory Held.¹³²

¹²⁹ CARTER CTR., SYRIA COUNTRYWIDE CONFLICT REPORT #4, at 11 (2014), http://www.cartercenter.org/resources/pdfs/peace/conflict_resolution/syria-conflict/NationwideUpdate-Sept-18-2014.pdf [hereinafter CONFLICT REPORT #4].

¹³⁰ *Id.* For example, The Carter Center can still identify close to 1,000 groups that are active in the conflict, roughly grouped according to five different major groups. *See id.*

¹³¹ *See, e.g., Mapping Militant Organizations*, *supra* note 114. *See also* CONFLICT REPORT #4, *supra* note 129, at 3.

¹³² CONFLICT REPORT #3, *supra* note 128, at 9.



Islamic Front Formation Announcement

Freeze Frame from ISIS Facebook Video.¹³³

Much of what has been collected would be admissible in court. To be admitted into evidence, such materials must be properly *authenticated* in a courtroom proceeding by the fundamentals of due process.¹³⁴ The mapping project has included the gathering of sufficient evidence to support a finding that the particular videos are authentic.¹³⁵

A conflict mapper can potentially help authenticate the videos by providing evidence to identify and locate the witness who took the video, so long as that

¹³³ CONFLICT REPORT #3, *supra* note 128, at 12.

¹³⁴ See *e.g.*, FED. R. EVID. 901(a) (requires laying a foundation of “evidence sufficient to support a finding that the matter in question is what its proponent claims”). FED. R. EVID. 901(b) (provides an illustrative list of methods by which evidence can be authenticated).

¹³⁵ See FED. R. EVID. 901(a) (“To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it to be.”). Videos could be authenticated as a process or system. FED. R. EVID. 901(b)(9) (“Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.”). See also FED. R. EVID. 1001(a)–(b); FED. R. EVID. 1001(c) (provisions for using writings, recordings, and photographs); FED. R. EVID. 1001(d) (noting that an “original” of a writing or recording is “the writing or recording itself or any counterpart intended to have the same effect by a person who executed or issued it”; an “original” of a photograph includes the negative or any print therefrom; if data is stored in a computer or similar device, “any printout—or other output readable by sight,” that is *shown to reflect the data accurately*, is an “original.”); FED. R. EVID. 1001(e) (“A duplicate means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.”).

witness is also able to testify that the video looks like what they observed. That is the method used by HRW. On the other hand, taking the witness's statement may be effective for confirming the authentication of the video by HRW, but this is not sufficient authentication later in a court, unless that witness is also produced to authenticate the evidence. The ICC may authenticate the video based on the testimony of unavailable witnesses, but recognizes that such evidence is less reliable, and so a court may give the video evidence less weight.¹³⁶ Where, instead, the witness is not produced, or where the video is not posted by the person who took it, then the proponent supports the reliability of the evidence using other evidence to verify the posting.¹³⁷ Of course, in the great majority of cases either the eyewitness of what was taken on the video or the poster of the video may not be able to be located. This is not fatal to the eventual admissibility of the video in that the NGO conflict mapping project designed to collect such evidence would most likely also gather the circumstantial evidence necessary that will likely still authenticate it as evidence.¹³⁸

When a witness is unavailable or uncooperative, proving that social media content was indeed authored by the user can be a slightly more complicated task. Due process, however, provides that circumstantial evidence, including “appearance, contents, substance, internal patterns, or other distinctive

¹³⁶ See generally Michael P. Scharf, *Humanitarian Law-1949 Geneva Conventions-Grave Breaches-Role of Serbia in Conflict in Bosnia and Herzegovina*, 91 AM. J. INT'L L. 718, 718–21 (1997); ICTY R. P. & Evid. 92, U.N. Doc. IT/32/Rev. 44 (Feb. 11, 1994) (as amended Dec. 10, 2009).

¹³⁷ Social media sites are dynamic, complex, and may be unfamiliar to many judges. Testimony about how user profiles are created, security procedures, privacy settings, metadata, and general operation may help courts to determine whether a satisfactory foundation for authenticity has been laid. Furthermore, courts have raised legitimate concerns that social networking accounts may be hacked, fictitious accounts created, and accounts left open and unattended. Testimony thus should address those concerns and also explain the degree to which the social media in question may have been vulnerable to manipulation. These considerations are important both for proffering evidence and for challenging its admissibility. Federal Rule of Evidence 901(b)(1) allows for authentication through testimony from a witness with knowledge that a matter is what it is claimed to be. Most straightforwardly, the person who created the evidence can testify to authenticate it. Testimony also may be provided by a witness who has personal knowledge of how the social media information is typically generated. In such a case, the authenticating witness must provide “factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change, or the process by which it is produced if the result of a system or process that does so.” *Lorraine v. Market Am. Ins.*, 241 F.R.D. 534, 555–56 (D. Md. 2007). The social media websites themselves, law review articles, and experts can all provide this type of information.

¹³⁸ Witnesses may be fearful to come forward because of retribution by those depicted in the video. See SYRIA JUST. & ACCOUNTABILITY CTR., *MAPPING ACCOUNTABILITY EFFORTS IN SYRIA* (2013), <http://www.dchrs.org/english/File/Reports/mapping-accountability-efforts-in-syria.pdf>.

characteristics of the item, taken together with all the circumstances,” can help to authenticate evidence.¹³⁹ Thus, many paths to authentication exist, subject to the type of evidence in question.¹⁴⁰

Take, for example, a promotional video posted by ISIS that shows a beheading. First, ISIS’s video posting is often done on a Twitter or Facebook page. Social networking sites can include a wealth of information, such as profile pages, posts, photographs, and video, as well as several types of metadata, some of which are not publicly visible.¹⁴¹ Different types of social media evidence will require different indicia of reliability. For example, profile pages and posts may require sufficiently distinctive data, such as references about which only the author would have known.¹⁴²

¹³⁹ FED. R. EVID. 901(b)(4).

¹⁴⁰ Christopher Boehning & Daniel J. Toal, *Authenticating Social Media Evidence*, N.Y. L.J., Oct. 2012, at 248.

Social media sites are dynamic, complex, and may be unfamiliar to many judges. Testimony about how user profiles are created, security procedures, privacy settings, metadata, and general operation may help courts to determine whether a satisfactory foundation for authenticity has been laid. Furthermore, courts have raised legitimate concerns that social networking accounts may be hacked, fictitious accounts created, and accounts left open and unattended. Testimony thus should address those concerns and also explain the degree to which the social media in question may have been vulnerable to manipulation. These considerations are important both for proffering evidence and for challenging its admissibility. Rule 901(b) (1) allows for authentication through testimony from a witness with knowledge that a matter is what it is claimed to be. Most straightforwardly, the person who created the evidence can testify to authenticate it. Testimony also may be provided by a witness who has personal knowledge of how the social media information is typically generated. In such a case, the authenticating witness must provide “factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change, or the process by which it is produced if the result of a system or process that does so.” The social media websites themselves, law review articles, and experts can all provide this type of information.

Id.

¹⁴¹ See *id.*; *Key Facebook Metadata Fields Lawyers and eDiscovery Professionals Need to be Aware of*, NEXT GEN eDISCOVERY LAW & TECH BLOG (Oct. 11, 2011, 10:06 AM), <http://blog.x1discovery.com/2011/10/11/key-facebook-metadata-fields-lawyers-and-ediscovery-professionals-need-to-be-aware-of/> [hereinafter *Key Facebook Metadata Fields*].

¹⁴² Relevant factors include whether the person to whom the proponent of the exhibit wishes to attribute the printout has adopted the username shown on the profile page; whether the person has shared his or her social media password with other people; whether there is a photograph on the person’s or entity’s profile page that identifies the person to whom the proponent wishes to attribute the posting; and whether there is personal information on the profile page, such as a birthday, unique name, or other pedigree information that corresponds to known information for the person to whom the proponent wishes to attribute the posting.

Circumstantial evidence visible on the social media site, if it provides enough content and context, also may be sufficient for authentication. This could include, for example, a combination of photographs, video, comments, email addresses, and posting dates. Related data from other sources also may provide context to aid authentication, including email notifications of posting activity, and computer and account usage logs. Metadata, such as location, user identification numbers, IP addresses, and when messages were created or revised can provide context as well.¹⁴³

What would happen if the video has been taken down, or there is evidence that it has been obscured in an attempt to hide the identity of the original taker of the video?¹⁴⁴ Obviously, there are good reasons why victims may want to obscure their identity when initially posting the video. They may worry that the regime may itself be looking for evidence of victims so as to intimidate or remove them from being able to bring evidence against them. So, how could such videos be authenticated? Again, the primary tools for authentication are the self-authenticating nature of the videos (that barrel bombs look like those in the photo, and chemical plumes look like the ones shown in the video), and then corroboration by other circumstantial evidence (serial numbers on the bomb can be traced to bombs sold by a known arms dealer to the Syrian government before the incident where they were used).

On the other hand, a tech savvy criminal defense lawyer would advise that any video taken by an accused be taken down. Any video a prosecutor produces for admission a lawyer may thereafter attack by suggesting challenges to its authentication. The defendant might show how that video can be altered and edited since it has been posted, or, additionally, at the time of its posting. Application software, for example, can alter the metadata that accompanies any video posted on YouTube from its very beginning posting. The metadata can put a false time, place, and date simply by programming the camera to post the wrong information when first posted.¹⁴⁵ Other applications

¹⁴³ See Boehning & Toal, *supra* note 140.

¹⁴⁴ See, e.g., Umberto Bacchi, *Isis: French Jihadist Mickael Dos Santos 'Denies Appearing in Beheading Video'*, INT'L BUS. TIMES (Nov. 20, 2014), <http://www.ibtimes.co.uk/isis-french-jihadist-mickael-dos-santos-denies-appearing-beheading-video-1475833>.

¹⁴⁵ See, e.g., *ObscuraCam: Secure Smart Camera*, GUARDIAN PROJECT, <https://guardianproject.info/apps/obscuracam/> (last visited Aug. 25, 2015).

can be shown to add or remove images in a video by editing out or adding in other pictures.¹⁴⁶

Circumstantial evidence can help in this regard. Expert testimony that examines the initial downloaded file may provide evidence that no such editing or obscuring software was evidenced in the original posting. The absence of certain metadata tags can prove the negative, that these videos were not altered.¹⁴⁷

Again, while other circumstantial evidence can likely be offered to overcome these challenges, an archivist interested in authenticating the video offered at a dispute resolution hearing will do their best to download the original video when they first put it in their archives.¹⁴⁸ The archivist may use software such as Checksum,¹⁴⁹ which gives a proponent of the evidence an ability to provide a mathematical code when they initially download the file, to then show the one they are offering is the same as that downloaded one. If the proponent can show that the download occurs before the defendant had a chance to remove or alter the file, or someone else may have had the chance to do so, then the proponent has a better case for authentication.

Social media evidence is most likely to be admitted at trial when it is obtained through formal discovery requests made to the opponent or accused subject to a lawful search. Where such a process is impossible, thoroughly documenting and verifying the process and results of social media data collection can help the evidence withstand authentication challenges.¹⁵⁰ The simplest method is to capture and preserve static images taken from social media sites. In addition, downloading the video to one's own system, and then documenting the download, can also be an important way to preserve the video. These images may be difficult to authenticate without testimony based on personal knowledge.¹⁵¹ A conflict mapper should create a system for its downloading that will establish the use of a "custodian of records" that would be able to lay the foundation that the video is authentic.

¹⁴⁶ *Id.*

¹⁴⁷ See *Key Facebook Metadata Fields*, *supra* note 141.

¹⁴⁸ *Podcasts and Downloadable Videos*, INTERACTIVE ARCHIVIST, <http://interactivearchivist.archivists.org/technologies/podcasts/> (last visited Aug. 25, 2015) (describing methods of downloading original videos).

¹⁴⁹ SOURCEFORGE, <http://checksumchecker.sourceforge.net/> (last visited Aug. 25, 2015).

¹⁵⁰ See Boehning & Toal, *supra* note 140; *supra* note 132 and accompanying map.

¹⁵¹ *Key Facebook Metadata Fields*, *supra* note 141.

Collecting metadata for use at trial may require specialized software. Printouts, screen captures, and video saves and most archive tools will not provide all of the available metadata.¹⁵² Working with Google, a conflict mapper might develop the tools to download and collect content to better capture and preserve the unique metadata fields associated with social media.¹⁵³

Despite altruistic intentions, NGOs must be careful of privacy and other ethical concerns when collecting information from social networks.¹⁵⁴ Essentially, NGO researchers should adopt best practices approaches in their collection of videos, perhaps acting like attorneys and taking care to avoid conduct that could be considered “pretexting” or deceptive as proscribed by court rules of professional conduct.¹⁵⁵

Beyond the unique issues of authentication and ethics, social media evidence also must clear evidentiary hurdles such as relevance and hearsay. “Such issues, however, are generally more susceptible to traditional reasoning and evidentiary standards.”¹⁵⁶ In fact, electronic communications, such as emails, “lend themselves to novel uses of hearsay exceptions.”¹⁵⁷ Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.¹⁵⁸ Exceptions include present sense impressions, excited utterances, and then-existing mental, emotional, or physical conditions, for example.¹⁵⁹ Facebook status updates, public posts, chat transcripts, Tweets, and more lend themselves well to such exceptions. Litigators who keep these exceptions in mind may be able to find creative ways to overcome the hearsay hurdle to admissibility.

It is important to note, as a legal matter, that little help is likely to come from a prosecutor’s subpoenaing of third party vendors like Google and

¹⁵² *See id.*

¹⁵³ Google has the technology to help a mapper establish authenticity by, for example, generating hash values (unique document identifiers) for collected social media items and automatically creating collection logs. *See generally Download Your Data*, GOOGLE, <https://support.google.com/accounts/answer/3024190?hl=en> (last visited Sept. 2, 2015).

¹⁵⁴ Boehning & Toal, *supra* note 140, at 248.

¹⁵⁵ This guidance provided by state bar associations is not binding, but does suggest best practices that will help attorneys avoid ethical pitfalls that may taint evidence and destroy admissibility. *See generally* MODEL RULES OF PROF. CONDUCT R. 7.1 (1983).

¹⁵⁶ Boehning & Toal, *supra* note 140.

¹⁵⁷ *Id.*

¹⁵⁸ FED. R. EVID. § 801(c).

¹⁵⁹ FED. R. EVID. § 803(1)–(3).

others.¹⁶⁰ While the discoverability analysis is a product of the common law, there is at least one statute relevant to the discussion. In the U.S., the Stored Communications Act (SCA) limits the ability of Internet-service providers to voluntarily disclose information about their customers and subscribers.¹⁶¹ Although providers may disclose electronic communications with the consent of the subscriber, the SCA does not contain an exception for disclosure pursuant to civil discovery subpoena.¹⁶² The application of the SCA to discovery of communications stored on social-networking sites has produced mixed results.¹⁶³

Providers, including Facebook, take the position that the SCA prohibits them from disclosing social media contents, even by subpoena. Facebook's website says that "[f]ederal law does not allow private parties to obtain account contents (ex: messages, Timeline posts, photos), using subpoenas."¹⁶⁴ Specifically, the SCA, 18 U.S.C. § 2701, prohibits Facebook from disclosing the contents of an account to any non-governmental entity pursuant to a subpoena or court order.¹⁶⁵

The SCA does not override a party's obligation to produce relevant electronically stored information in a criminal proceeding.¹⁶⁶ To the contrary, a party must produce evidence of a crime that is within its possession, custody, or control.¹⁶⁷ Thus, a U.S. court can compel a party to execute an authorization for the release of social media content. With an executed authorization, a

¹⁶⁰ See generally *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010).

¹⁶¹ Stored Communications Act, 18 U.S.C. § 2702(a) (2013).

¹⁶² 18 U.S.C. § 2701(c).

¹⁶³ See generally *Crispin*, 717 F. Supp. 2d at 965.

¹⁶⁴ See *May I Obtain Any Account Information or Account Contents Using a Subpoena?*, FACEBOOK, <https://www.facebook.com/help/133221086752707> (last visited Nov. 5, 2015).

¹⁶⁵ One of the earliest cases to address the issue, *Crispin v. Christian Audigier, Inc.*, concluded that the SCA prohibited a social-networking site from producing a user's account contents in response to a civil discovery subpoena. *Crispin*, 717 F. Supp. at 991. In that case, the defendants served subpoenas on several third parties, including Facebook and MySpace, seeking communications between the plaintiff and another individual. *Id.* at 968–69. The plaintiff moved to quash the subpoenas. *Id.* at 969. The court held that plaintiff had standing to bring the motion, explaining that "an individual has a personal right in information in his or her profile and inbox on a social-networking site and his or her webmail inbox in the same way that an individual has a personal right in employment and bank records." *Id.* at 974. Moreover, the court determined that the providers were electronic communication service (ECS) providers under the SCA, *id.* at 982, 989, and were thus prohibited from disclosing information contained in "electronic storage," *id.* at 989.

¹⁶⁶ See generally Paul W. Grimm et al., *Back to the Future: Lorraine v. Markel American Insurance Co. and New Findings on the Admissibility of Electronically Stored Information*, 42 AKRON L. REV. 357 (2009).

¹⁶⁷ *Id.* at 413.

properly issued subpoena, and, in most cases, a reasonably small payment for associated costs, litigants can obtain all information related to a user's social media account.¹⁶⁸ How this plays out in a criminal proceeding is subject to debate.¹⁶⁹ What is left even more ambiguous is the ability of a court like the ICC or some foreign national court to exercise jurisdiction over these third party vendors and order them to turn over their electronically stored evidence as evidence of a crime. One could imagine that in the U.S., where national security interests were at stake, subpoenas to obtain such evidence might be forthcoming. One wonders whether an interim Syrian court's issuance of subpoena could have the same impact on Google's duty to produce its data.

The ubiquity of social networking sites, and the amount of personal information they contain, makes them a fertile source of potential evidence. However, the cloud-based, transient, and collaborative nature of these sites poses challenges unique to these mediums. At the start of a case, international NGOs should consider methods of data collection that will help to ensure authentication. Carefully documenting the process of data gathering, and using sophisticated software where necessary, will help to ensure that the fruits of discovery are not excluded from evidence due to a failure of authentication.¹⁷⁰

Under the ICC and under an inquisitorial system of justice, the use of hearsay and other evidence is governed by a broader standard of relevance. The evidence is not rendered inadmissible if it lacks firsthand knowledge, foundation or authentication, but is given less weight if it lacks any of these indicia of reliability.¹⁷¹ As a result, in proceedings conducted by the ICC, less in the way of authentication for admissibility might be required. In addition, Syrian courts, following civil court procedures most likely will also require less in the way of authentication of the videos. The alleged expertise of the court would allow it to make its own determination of the relevance of the

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *See id.* at 370–71.

¹⁷¹ 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, U.N. Doc. S/25704, at 36, annex (1993) and S/25704/Add.1 (1993), *adopted by* Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993); ICTY R. P. & Evid. 89(C), U.N. Doc. IT/32/Rev. 44 (Feb. 11, 1994) (as amended Dec. 10, 2009). *See also* Press Release, United Nations, International Criminal Tribunal for the former Yugoslavia, Tadic Case: The Verdict, U.N. Press Release CC/PIO/190-E (May 7, 1997), <http://www.icty.org/en/press/tadic-case-verdict>.

video, with as much of a worry that it will be prejudiced by seeing the video before judging finally its authentication.

If the Syrians choose a formal judicial process, either by using the ICC, a Supreme Constitutional Court given jurisdiction over those not granted amnesty, or a hybrid court—part Syrian and part international—it will have much of the evidence it may need to connect individual actors with individual acts of murder and indiscriminate use of force.¹⁷² Of course, the defense might raise the “Nuremberg Defense,” that the person responsible for using chemical weapons, beheading a person, or killing innocent civilians, was ordered to commit the act by someone who would kill him or his family if he did not so act.¹⁷³ These will present important issues for the tribunal to decide and will raise the possibility that the defendant will likely not be found guilty. On the other hand, there would not be the possibility most often raised in past cases where the individual denies any knowledge of or involvement in the act allegedly committed.¹⁷⁴ For example, an NGO conflict mapping project likely includes the coding and preservation of YouTube videos and their correspondence with evidence of other reports of surrounding events in similar locations. Such evidence presents the possibility that the truth will be known, and therefore that any reconciliation that might occur will be based on a better understanding of who did what to whom.

B. Use of Social Media Evidence by TRCs or Local Informal Mediation Bodies

Just as in cases where a TRC process has gathered witness statements from victims, the use of corroborating evidence can test the truth of what a particular accused says at a TRC proceeding where he or she is allegedly confessing the extent of their past doings and sincerely asking for forgiveness.¹⁷⁵ Here, however, the corroborating evidence comes from public sources and so can be used without violating promises made to the witness during the gathering of the information.

¹⁷² President Assad denies using barrel bombs or chemical weapons, or targeting civilians in any way. See *Syria Conflict: BBC Exclusive Interview with President Bashar al-Assad*, BBC NEWS (Feb. 10, 2015), <http://www.bbc.com/news/world-middle-east-31327153>.

¹⁷³ Paola Gaeta, *The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law*, 10 EUR. J. INT'L L. 172, 174 (1999).

¹⁷⁴ *Id.*

¹⁷⁵ See generally Michael P. Scharf, *Prosecutor v. Tadic*, 91 AM. J. INT'L L. 593, 718–21 (1997).

The importance of this kind of evidence should not be overlooked for judging the efficacy of an informal TRC or other local mediation process. One of the most important tradeoffs between formal and informal dispute resolution processes is whether the truth really can ever be known through either process, and therefore whether appealing to a person's desire to be reconciled will produce a true confession of guilt. The informal process is chosen in order to provide the individual accused with the choice of confessing or facing a formal judicial proceeding. The reality has been that such a choice is made often with the almost certain knowledge that, in refusing to testify, the formal process will be sufficiently delayed, and the capacity of the formal prosecution will be thereafter so compromised that no proceeding will likely take place.¹⁷⁶ The ability of an interim period dispute resolution process to use the conflict mapping information is helpful in two ways. First, it helps the Syrians assess the truthfulness of what the individual accused may say he or she did during a truth and reconciliation process. Second, it allows for the involvement of victims of those acts to directly confront the accused and better creates the possibilities of meaningful forgiveness and reconciliation. This is because true forgiveness and reconciliation will necessarily involve the victims of those actors' wrongdoings. The victims need to understand what was done and why to truly be able to choose to set it aside and forgive, while not forgetting. The forgiveness cannot be mandated or dictated by the peacemaking process. For true forgiveness to occur it must be freely given. Otherwise the resentment likely to remain in the victims and their families may cause a return to violence, should the perpetrators stay in the locality.

For Syrian peacemakers, the use of social media may be an important consideration for deciding whether it will grant immunity for certain acts, to whom it will grant immunity, and, in addition, which kind of dispute resolution systems it will adopt for which kind of disputes. The resolution system may very well suggest that immunity be given to Assad and/or key military figures in exchange for an end to the conflict, a set time for transitioning out of leadership, immediate removal from their involvement in the government, and/or their leaving Syria altogether. For those that remain, the question will be, more specifically put, what was their individual responsibility for the use of

¹⁷⁶ The use of TRCs in Liberia and Kenya produced no referrals to formal judicial proceedings, and impunity for those who choose not to submit to the process. Neela Ghoshal, *Four Years After Kenya's Post-Election Violence, Impunity Reigns*, HUFFINGTON POST (Dec. 9, 2011), <http://www.hrw.org/news/2011/12/09/four-years-after-kenya-s-post-election-violence-impunity-reigns>.

barrel bombs, chemical weapons, torture tactics, or the disappearance of civilians. These individuals may be tried according to formal procedures that provide due process protections. Alternatively, they could face a TRC process. The individuals could make that choice knowing that some conflict mapping evidence might be available that will test the sincerity of their confessions, as well as the impact on victims and the victims' willingness to forgive.

For those others—ISIS, al Qaeda, or other opposition group members—a different dispute resolution process might be employed. First, it must be recognized that the number of ISIS members who would likely remain or survive after the conflict is over between opposition groups and the Assad government is likely to be a small number. Those that do not die in conflict may try to flee to reform in a different setting. Those opposition groups members who remain likely will be those who have participated in the armed conflict in an attempt to fight what they may have thought was an illegitimate government at war with its own citizens. Still there may be accusations that some of these individuals were engaged in criminal acts and perpetrated war crimes during the conflict. Again, these individuals might be subject to dispute resolution processes if victims come forward to seek some sort of justice for what was done to them by these people. In these cases a more informal local or regional-led dispute resolution process might be employed. The peacemakers might decide that these individuals should be brought before existing Islamic courts or local councils to consider what they did and why they did it.

In either case, what can result from the existence of this evidence is that Syrian courts and mediators can obtain a more accurate and complete understanding of the nature of the accused's acts and the effects on the victims. Armed with such information, the tribunal can better assess the truthfulness of any confession that is given and the sincerity of the person's remorse. As a result, victims can also be more readily identified and brought into the reconciliation process, and the possibility of meaningful reconciliation can be more readily provided for. In addition, the international community can more readily assist in this reconciliation process without intruding on whomever is making the decision, or what punishment, compensation, or ritual of confession is provided for.

CONCLUSION

Any transition that Syria will face will have to navigate through a number of potential obstacles on the way to a sustainable peace. The first obstacle will

be what Syrians will decide to do about those who may have committed past atrocities, including Assad, members of his military and security forces, as well as any of the rebel groups that also engaged in war crimes.¹⁷⁷ A legal strategy that will require Assad to power share, on a way toward a more democratic form of government that is inclusive of all tribal and religious groups, will likely have to include both prisoner releases and some sort of amnesty for top leaders. The remaining disputes between Syrian citizen victims and the perpetrators of violence during the interim period will have to be handled by both informal, and then formal means. Perhaps the best mix of dispute resolution will include both informal dispute resolution mechanisms that draw on local leadership to help resolve them, followed by more formal methods—most probably hybrid regional courts run by both Syrians and international players committed to both the continued peaceful resolution of these disputes, and the building of religious freedoms and minority protections to keep the “winners” from seeking retribution and imposing their will on the “losers.”

Surprisingly, the role that social media will play will most likely complicate the transition for peacemakers. As we have seen, social media has a positive impact on peacemaking in at least two ways. First, it helps humanitarian groups identify those rebels who may have engaged in war crimes, which avoids giving aid and assistance to the wrong parties both during the conflict and during the transition. Second, social media also helps post-conflict to match accused war criminals with victims in a way that may bring about more truth speaking, and more forgiveness and reconciliation.

What is complicating the process is that social media also makes possible the more successful prosecution of those who have committed war crimes. How can peacemakers make promises of amnesty to those disputants who are likely war criminals when they know that evidence from social media may lead others to want to prosecute them for their crimes? The “fog of war” may have lifted sufficiently so that the nature of the choices available to Syrians presents an overwhelming ethical dilemma to the possibility of making peace. How will Syrians resolve the choice between peace and justice, or decide who to give amnesty to, and who they should insist on prosecuting in order to insure that, in the future, no Syrian actor uses war crimes to promote self and tribe?

¹⁷⁷ See *infra* Part II.

What is clear is that peacemakers need to be careful not to be seen as gathering evidence for prosecution, otherwise their role as peacemaker will be compromised. At the same time, social media evidence can serve two different purposes in two different phases of the peace process after the conflict has stopped. In the first phase, the evidence from social media can be used to bring about mediations that lead to better reconciliations. In the second phase, where reconciliation has not occurred because the perpetrators are neither forthright nor sincere in their participation in the mediation, evidence from social media sources can be made available to prosecute in more formal judicial settings. Justification for its use comes in the form of classic evidentiary principles based on reliable foundations, relevance, and authentication. In the process of their recruitment of others to their side of the conflict, there should be little hesitation by hybrid courts to use such evidence to bring these war criminals to justice, especially where such evidence is produced by recalcitrant groups themselves.