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ASIL

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Proceedings of the Seventh International Humanitarian Law Dialogs, August 25-27, 2013, Chautauqua Institution

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August 25-27, 2013, Chautauqua Institution

Edited by Elizabeth Andersen and David M. Crane



American Society
of International Law

**Proceedings of the Seventh
International Humanitarian Law Dialogs**

*August 25–27, 2013
at Chautauqua Institution*

Edited by

Elizabeth Andersen

Executive Director
American Society of International Law

and

David M. Crane

Professor of Practice
Syracuse University College of Law

Shannon Elizabeth Powers

Managing Editor
American Society of International Law

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Seventh International Humanitarian Law Dialogs

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*Dedicated to Shabana Basij-Rasikh,
2013 Recipient of the Joshua Heintz Award for
Humanitarian Achievement*

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Prosecutors at the Seventh International Humanitarian Law Dialogs



Back row, left to right: David Crane and Stephen Rapp

*Front row, left to right: Serge Brammertz, Fatou Bensouda,
Hassan Jallow, Brenda Hollis, and Andrew Cayley*

Introduction

Introduction

David M. Crane*

The long hot summer of the Arab Spring has stretched into years of a very cold winter. Born of hope, a sense of a new beginning in a region of the world almost static in its political development for decades, the harsh reality of Arab freedom and democracy fades with each shot fired, barrel bomb released, civilian killed. In the summer of 2014, a year after the Seventh International Humanitarian Law Dialogs (IHL Dialogs), the geopolitical landscape has changed significantly as the Syrian civil war drags on, the Egyptian experiment in democracy fades under the rule of the military, while Israel and the Palestinians exchange missiles and rockets, and Iraq splinters into sectarian violence fueled by radical Islamists of the Islamic State.

The Seventh IHL Dialogs convened at the end of August 2013 to ponder the implications of the Arab Spring and its impact on the rule of law in that region. Friends and colleagues from around the world once again assembled on the banks of Lake Chautauqua at the Athenaeum Hotel on the grounds of Chautauqua Institution to discuss the phenomenon of the Arab Spring.

* Professor of Practice, Syracuse University College of Law and Founding Chief Prosecutor, Special Court for Sierra Leone, 2002–2005.

Hosted by the Robert H. Jackson Center, the Dialogs began with a reception and dinner where Shabana Basij-Rasikh was given the Joshua Heintz Award for Humanitarian Achievement for her work educating girls in Afghanistan. It was the unanimous decision of the IHL Dialogs Executive Committee that this brave young woman be given this award, as she was a perfect example of that hope of younger generations in the Arab region that freedom would ring. The evening concluded with an interview of His Royal Highness Prince Zeid Ra'ad Zeid Al-Hussein with Greg Peterson. Prince Zeid's insights and at times humorous reflections about his life in the service to mankind set the tone for an exciting two days ahead.

As is the custom of the IHL Dialogs, the substantive program began the next morning, August 26, with the awarding of the Impunity Watch Essay Contest winner, Ms. Kayla McCall, followed by the keynote address by Prince Zeid, as he considered the ramifications of the Arab Spring and its implications for the rule of law. The current prosecutors of the International Criminal Court, the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Extraordinary Chambers in the Courts of Cambodia, as well as the Special Court for Sierra Leone, briefed the IHL Dialog attendees on current issues led by Professor Michael Scharf of Case Western Reserve University in a roundtable format. The depth and scope of their important work seeking justice for tens of thousands of victims of atrocity and impunity was impressive and showed how far we have come in the development of modern international criminal law.

After lunch on the first day, the Clara Barton Lecture was given by Shabana Basij-Rasikh live from Afghanistan. She was introduced by Eric Sigmund of the American Red Cross. The audience was moved by her testimony and her drive to develop a solid education system for girls in that part of the world. The lecture was followed by a panel discussion on the Arab Spring and its impact on the rule of law moderated by Professor Leila Sadat. The panelists included Professor Cherif Bassiouni, Jamel Bettaieb, Greta Barbone, and Dr. Roy Schöndorf. The afternoon ended with the Clayton Sweeney porch session, where high school students had a chance to sit down with several of the international prosecutors in an informal session on the porches of the Athenaeum Hotel.

The first day concluded with the annual Katherine B. Fite Lecture, honoring the important and impressive role women play in modern international criminal law. This year's lecturer was Karima Bennoune.

The second day began with a breakfast talk by the Consul General of Israel in New York, Ido Aharoni, who gave a provocative and necessary perspective for all of the participants to consider when contemplating the parameters of the Arab Spring. After breakfast, while the current and former international prosecutors drafted the 2013 Chautauqua Declaration, Professor Mark Drumbl gave the annual international criminal law year in review.

Later in the morning the ever-popular porch sessions were ably moderated by Professors Mike Newton, Bill Schabas, Michael Scharf, Paul Williams, Jennifer Trahan, Leila Sadat, and Diane Marie Amman. The sessions explored in more depth

the Arab Spring, rule of law, and future ramifications for justice and peace within the region, including women's and children's rights and the responsibility to protect. After lunch, Professor Cherif Bassiouni gave his overview of the Arab Spring in a way that only this great teacher and lawyer can do.

In the afternoon of August 27, the current and former Chief Prosecutors concluded the Seventh International Humanitarian Law Dialogs with the issuance of the Chautauqua Declaration, moderated by Elizabeth Andersen of the American Society of International Law. The Prosecutors focused on the past year's events, calling on the international community to continue to confront impunity and assist them in seeking justice for the oppressed.

The IHL Dialogs finished with a dinner cruise around Lake Chautauqua hosted by Professor Michael Scharf and the Case Western Reserve University School of Law. The food, company, and even the weather were the ideal blend to make the dinner cruise the perfect ending to an important and historic occasion.

What follows in these *Proceedings* is the considered wisdom and judgment of many of the world's leading policymakers, practitioners, and academics related to the phenomenon of the Arab Spring and its impact on international humanitarian law. It is an impressive array of thought and perspectives.

Each year the sponsors of the IHL Dialogs are to be commended for their consistent and important support, without which the Dialogs could not happen. Additionally, all of the

administrative team from the Robert H. Jackson Center deserves special recognition. The unrecognized professionals behind the scenes are always the ones who make an event go smoothly. Thank you to each of them. Ms. Shannon Powers and the American Society of International Law are also to be commended for their steadfast support in the editing and printing of the *Proceedings*' volumes . . . all seven of them and counting.

Lectures

Reflections on the Arab Spring

H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein*

Good morning, everyone.

David Crane called me six months ago, and he said, “Zeid?” and I said, “Yes?” He said, “Zeid, you have been living in the United States for some time now, have you not?” And I said, “Yes.” And he said, “Part of the time you have spent in the United States was in Washington.” “Yes, that is correct.” And he said, “And, presumably, while you were there, you spent time looking at the Articles of Confederation, the Constitution, the Bill of Rights, and the various Amendments,” and I said, “Yes.” And he said, “So you support free speech,” and I said, “Yes, I do.” He said, “Good, because you will be giving one on August 26 in Chautauqua.”

So here it is, a free speech, the reflections and disjointed impressions of an ordinary professional diplomat at the United Nations speaking in a personal capacity about the Arab Spring and accountability. Of course, this is a difficult task for anybody. When you look at the five countries most affected by the Arab Spring—Tunisia, Egypt, Libya, Yemen, and Syria—each contains within it so many moving parts. We almost do not have enough mental power to process and understand

* Ambassador of Jordan to the United Nations. This publication is based on Prince Zeid’s keynote address presented on August 26, 2013 at the Seventh International Humanitarian Law Dialogs held in Chautauqua, New York.

everything that is happening within each country, let alone try to delve deeply into these situations. And there are many other, very distinguished colleagues within the audience from those very countries who are in a much better place than I am to provide you with all the details over the next two days. What a relief! So I will shun description this morning in favor of broad reflections and impressions.

The first reflection that I would like to present to you is the conventional narrative on the background to the Arab Spring. The narrative is basically extrapolated from the four Arab Human Development Reports, prepared by the UN Development Programme (UNDP), which hold in sum that deficits in knowledge, freedom, and good governance in effect placed the Arab world, the region we describe as the Middle East and North Africa (MENA), in a basket labeled “Utter Failure.” When reading the four reports, we agree with their conclusions. One has to, and yet what is most interesting is that when compared to other regions, and focusing exclusively on rule of law indices only, the MENA region does not fare so badly, notwithstanding what the anecdotal and the UNDP-presented evidence would have us believe.

According to the World Justice Project’s Rule of Law Index 2012–2013, out of the 97 countries surveyed in detail along seven indices—the first being limited government powers; the second being the absence of corruption; the third, order and security; the fourth, fundamental rights; the fifth, open government; the sixth, regulatory enforcement; and the seventh, civil and criminal justice—the Middle East comes after Western Europe and North America and after East Asia and the Pacific, but—this is the crucial point—ahead of Sub-

Saharan Africa, ahead of Eastern Europe and Central Asia, ahead of Latin America, and ahead of South Asia.

So while the enormous upheaval shaking the Arab world must find roots in preexisting rule of law fissures—in addition to all of the other non-rule of law related areas or causes, such as high food prices, economic mismanagement, poor quality of education, and humiliation—these fissures on their own would not be enough to explain and account for the dramatic events unfolding before us now. In other words, the rule of law deficits on their own cannot account for all of what we see, because they are far more pronounced in other geographic areas of the world, and we have not seen anything akin to the developments we have seen with the Arab Spring.

The second impression that I would like to share with you is an impression I gleaned from a visit to Jordan last week. I was there for five days of a continuous series of discussions, and we felt, as we do now, that we were being whipped daily by a new staggering development. Today, we heard, for instance, that the experts sent by the United Nations to look at the site of the alleged chemical weapons attack were shot at by snipers and have been withdrawn temporarily, or not temporarily. We do not know, and we are waiting to see. And the gigantic developments in Egypt, and the indisputable fact—with only culpability remaining to be determined—that chemical agents were used in Syria on a large scale, dominated our thinking last week. What I found most interesting and most extraordinary about the events in Egypt, to begin with, was how they were viewed by notable Jordanian human rights and legal experts.

I had arrived in Jordan believing that while the people I was going to see would have no time for the Muslim Brotherhood, they would nevertheless have been equally appalled by the enormous bloodletting that accrued following the crackdown by the Egyptian military on the Muslim Brotherhood. To my astonishment, it was really quite the opposite. These people—activists, lawyers, people who devoted themselves to human rights issues not just within Jordan but also within the region—were very supportive of what the government was doing, notwithstanding the massive loss of life. Their view was that the Brotherhood in Egypt was leading that country and the region into a very dark future where human rights and civil liberties were concerned, and that the Egyptian people, broadly speaking, knew this and, with the help of the army, checked this development.

To give you an illustration of what this position maintains, I found this piece, written by an Egyptian, on the internet. He writes, “A lot of my dear American friends still ask me, what on Earth really happened in Egypt, for their benefit and anyone else on Earth genuinely trying to make heads or tails of us ‘crazy Egyptians,’ here is exactly what happened in Egypt over the past 12 months, but expressed in ‘American’ terms . . . There are no exaggerations or lies. These events all took place:

“On June 30, 2012,” he writes, “democratically elected Barack Obama wins the second round of an election with 51.7 percent. In the first round, he only got 25 percent of the votes. He takes the oath and is sworn in as President of the United States. The first five months of his term go relatively smoothly, where he makes almost no decisions (except for some dubious presidential pardons to a dozen convicted

terrorists and murderers, including some convicted for their part in the assassination of a former U.S. President). Then, suddenly, on November 21, 2012, President Obama issues a presidential decree giving himself sweeping powers to the extent that his future decrees become uncontestable in any court. In effect, his decisions, henceforth, are akin to the word of God. His laws, a new bible.

“Nationwide protests erupt as a result of his decree, and 1.5 million people organize a sit-in at the White House to peacefully request he rescind it. Some of Obama’s Democratic Party supporters attacked the peaceful sit-in outside the White House with guns and shoot five peaceful protesters dead. A few weeks later, President Obama dissolves the U.S. Supreme Court and labels them all ‘traitors to America.’

“One short week later, he fires the U.S. Attorney General and personally appoints a Democrat to replace him. A month later, he annuls the U.S. Constitution and forms a ‘constitutional committee’ to draft a new constitution.” And in parentheses, he writes, “committee includes no Republicans or Independents, no Muslims or Jews, and only a handful of women, and is composed primarily of Democrats and religious preachers.”

He goes on, “In a referendum not supervised by any judicial branch, this constitution narrowly wins, and President Obama ratifies it the very next morning, despite it having gotten the approval of 18 percent of all Americans.

“Within a month, he invites top global terrorists, known jihadists and al-Qaeda members from all over the world to a

rally in Yankee stadium where he cuts ties with, and declares war on, Canada.

“Throughout this whole time, the U.S. economy is sinking, the stock market collapsing, foreign investment has all but stopped, tourism has died, and electricity, fuel, and water shortages are a daily occurrence. Unemployment has almost doubled, and the U.S. dollar has lost 20 percent of its value globally.

“Democratically elected President Obama has done all this in his very first year in office. Ultimately, on June 30, 2013, 110 million Americans take to the streets in 50 states, peacefully and politely demanding for four straight days that democratically elected Obama leave immediately and not continue his remaining three years. That is it in a nutshell.”

This view, expressed by a young Egyptian, found some resonance in the writings of a Syrian friend of my family's who wrote to us last week, and his comments sort of complete the impression that was just read out. And he said this, “If the German army, the Wehrmacht, had overthrown Hitler as Chancellor on March 1, 1933, a few days after the Reichstag fire, wherein blood would have been spilled, it would have drawn the wrath of all true Democrats, and yet knowing now what subsequently ensued, perhaps it would nonetheless have been the right thing to do.”

Now, I would not equate the Muslim Brotherhood with the Nazi party, of course not, but what I want to convey to you is the complexities of these various situations and the very moral

dilemmas that we have to face. It is never that easy to just draw arbitrary lines across these issues.

The third reflection is one concerning Syria. It is actually very difficult to talk about Syria because things are moving very quickly there now. Most of us seek accountability for the appalling crimes that occurred in Syria over the last two years, and you reach a point where you can no longer stand watching YouTube, simply because the uncensored images uploaded there fill you with utter revulsion. So how could we not demand accountability for what has happened there? And yet Syria strategically is a very sensitive spot. While many of us would desire that the Syrian situation be referred to the International Criminal Court (ICC) at some stage, thus far, the Russians, the Chinese, and some other countries have not been in favor of this. The United States has been very much in favor of there being accountability for these crimes at a stage to be determined in the future. But with the Israeli presence and occupation of the Golan, there is a complication, because any Security Council referral of the Syrian situation to the ICC would drag that situation along also, and for obvious reasons, the United States would not be in favor of that. But this is still a script that is unfolding, and we must view it very carefully.

The fourth reflection concerns developments in Libya and in Yemen. As all of you are well aware, Libya and the ICC have been in a deep discussion over the admissibility and surrender of the two suspects for whom arrest warrants have been issued, Saif Al-Islam Gaddafi and Abdullah Al-Senussi. The Court ruled in July that they must be surrendered to the Court, and I understand an appeal is still in progress, and that the Appeals Chamber of the ICC must now decide on this.

In the case of Yemen, we have not seen what we expected to see, which is accountability for the former head of state. He was granted amnesty as the price for his departure, and although the amnesty, of course, carries weight in Yemen—and there are two Security Council resolutions endorsing it—it is ultimately an open question whether other courts have to abide by the amnesty should he set foot in other countries.

I think what these two examples show, though, is that we really need to be very careful here. Many of us have been very passionate supporters of the earliest intervention by courts into events where a tremendous amount of blood has been spilled. I think we have to revisit this. Not that we should in any way downgrade our support for the Rome Statute of the ICC, but we need to develop a more nuanced feel.

I recently examined the German example. You remember that we had an international trial at Nuremberg, and then a series of trials that were managed and run by the separated allied armies. The United States had the 12 subsequent trials at Nuremberg, and then the *Dachau* trials, and the other Allies—the Soviets, the British—had their own trials, and the Poles had trials as well. Early on, when the allied armies removed themselves, by and large, from West Germany, it was time for the West Germans to begin to deal with their past. And what is striking to me was that Konrad Adenauer was not in favor of an early address. Although he himself had nothing but revulsion for what the Nazis had done, he felt that the German people needed to address the issues of starvation, lack of resources, and the horrors that they themselves faced from 1945 to 1947 first.

What was interesting to me is that the Attorney General of the State of Hesse, Fritz Bauer, who later assembled the first large case on Auschwitz that was managed by the Germans—the *Frankfurt Auschwitz* trial—was not in favor of a rapid movement in that direction either, which is quite unusual. Normally it is the prosecutors and attorneys-general who would be absolutely gung ho, and the political leadership at the top would be saying, “No, no. Slow down.” But in the case of Germany, the feeling was that they needed space. There was the *Einsatzgruppen* trial in Nuremberg, one of the major trials in the subsequent period following the International Military Tribunal, the prosecution of which was conducted by Ben Ferencz, and then you had the *Ulm* trial before the *Frankfurt Auschwitz* trial. In that case, Bauer was willing to go along with Adenauer, as the German economic miracle began to emerge—in the same way that, following the U.S. Civil War, Lincoln was not insistent that there be a redress in terms of the culpabilities over the crimes that were committed during the Civil War. A pattern, of course, has since accordingly emerged.

When we began many years ago—and Professor Cherif Bassiouni was one of the fathers and architects of the ICC, along with Ben Ferencz and many others—there was a deep-seated feeling that any justice delayed is justice denied, that we must address these issues at the earliest possible juncture. And I still believe that to be essentially true and necessary, but I think we need to make slight modifications and establish a mental bridge between ourselves and the very people whom we need to help.

The other thing that has occurred to me recently is that we focus all too often on just ending impunity, and that alone is a hard enough task with inconsistent cooperation on the part of member states. So we have striven to punish those who have been guilty for the commission of the most appalling crimes. And, yet, what is astonishing is that when you look at all the trials that were conducted post-World War II, run by the allies—the Poles, the Soviets, and so forth—there is hardly a single case of remorse or contrition expressed by the perpetrators. Albert Speer was the only one who said anything at the main trial, at the International Military Tribunal at Nuremberg.

You had Rudolf Hoss. There was plenty of contrition on his part following his conviction by the Poles, but no one believed what he said, not least Primo Levi. Here was a man who was blamed for the most prolific mass killing in one spot—Auschwitz-Birkenau—and so how could you believe a mass killer when he says “I am sorry,” unless his confession is accompanied by something else? And nothing in Hoss’s actions or in the subsequent behavior of his family—his children, his wife—would lead you to think that somehow he was truly honest in his expressions of remorse.

Then as we look further, who else expressed remorse? There is a very interesting case of Franz Stangl, who was the Commandant of Sobibór and the Second Commandant of Treblinka. During his entire trial, he claimed superior orders—that he was ordered to do this—and it was his duty to oversee the death of anywhere between 700,000 to 1.3 million people in Treblinka. The most amazing thing is that the superior orders defense was, more or less, demolished at the *Ulm* trial

in 1958 when a German researcher established that no S.S. officer was ever punished for not obeying orders, or at least the punishment was very light. In Auschwitz, there were a few cases where this happened, and everyone knew that the S.S. orderly or officer concerned was not punished. So there was room for maneuver here. In any case, Franz Stangl held to this defense in 1970 and 1971, and then he was interviewed by this remarkable journalist, Gitta Sereny. She had four interviews with him, and in the final interview, she brought him to within a hairbreadth of a full admission of guilt, something that was not achievable in the context of a trial, but she got very close. I think this is the missing piece in the practice of international criminal law. It is no good punishing people who believe that they are innocent to their last breath or to their dying day notwithstanding the overwhelming weight of evidence presented before them in a trial pointing to the contrary.

We must find a way not to replace what we have but to extend it, so it is not just punishing these people. Perhaps it is not a judicial process, but it is something that psychiatrists have to help us with, and we have to exhaust all the appeals, which are almost infinite. But we need to take them to this point where they recognize their wrongdoing. Otherwise, what happens? Otherwise, their supporters within the broader community will themselves continue to deny the depth and the gravity and the depravity of the crimes that were once committed, and this is what happens.

Look at the former Yugoslavia. It is amazing to see. We had one case where a senior Bosnian Serb leader basically expressed remorse, and the judges decided to reduce her sentence. There were reports—I am not sure if they have been

confirmed—that once she returned to Banja Luka, she gave an interview and basically said that her expression of remorse was a device thought up so that there would be a reduction in her sentence. Was the remorse then genuine? It certainly did not appear to be so, based on her interview.

Our profession needs to think very deeply about how to move this forward, but not at the expense of what we have already achieved. Perhaps with all the people here, we could advance this. But it requires subtlety, it requires precise thinking, and it requires a nuanced approach to all these new situations that will present themselves. Because, ultimately, it is not just the case of punishing the person; we must know why they committed the crimes in the first place. And it is not a case of just presenting a historical narrative but understanding what it is about the psychological makeup of this human being that allowed them to do the unimaginable in many cases. That at least should find all of us in a common endeavor, because most of these people who kill are not pathologically driven to do it. They are not sadists. They are not people who have a long record of illness in any direction. They are normal people who do this, and in many cases—at least in the case of many Nazi officers—the circumstances were not such that they had no other choice but to commit these crimes. They could have avoided it if they wanted to.

So, in sum, when looking at the Arab world, accountability is very important. Do we need to be very critical in the way we approach it? Yes, absolutely. We must also understand—and this is my final point—that when you look at the Arab world (and this perhaps is an idea of where we are going in the future) there is no authentic Arab liberal

philosophy or no authentic Arab liberal philosopher at the moment. In an age of iPads and iPhones and Galaxys and so forth, there are hardly any philosophies anywhere, let alone in the Arab world.

But in the Arab world, the importance is here. If you do not have an authentic Arab liberal philosophy upon which you can build Arab liberal political parties, the default is the Islamic ideologies which are authentic to the region. We need to escape the charge from those who peddle Islamic ideologies whenever you invoke Jean Jacques Rousseau or the Social Contract or Montesquieu, or almost any western liberal philosopher, that these are imported western ideas. In the absence of a genuine drive from within to articulate something beyond the market, a social philosophy that works for us, there is a basic mimicry. People want to be like the West, but they just do not have the grammar, the tools to articulate it and to fashion it into a political platform. So for a long period of time to come, we are going to see this rather jerky movement forwards and backwards between the aspirations of, by and large, liberal youth juxtaposed with Islamic ideologies that have strong foundations, that have a good organizational structure, and that are indigenous to the region. I think that will be the narrative for the period to come, and we will have to see where accountability fits into this.

Thank you very much.

**The Second Annual Clara Barton Lecture:
SOLA – Educating the Future Leaders of Afghanistan**

Shabana Basij-Rasikh*

Greetings to the Seventh Annual International Humanitarian Law Dialogs, Chief Prosecutor Crane, Professor Bassiouni, distinguished guests, and my friends at the Jackson Center, especially Andrew Beiter, who has been extremely involved in our efforts in Afghanistan and who has also always involved his classroom in them.

Looking at the list of the previous winners of the Joshua Heintz Award for Humanitarian Achievement, I feel extremely humbled to be included among them. I wish I could be there in person, but my brother got married yesterday, and in Afghanistan the celebrations go on for weeks, so we are still celebrating. I am so very honored to have this opportunity to speak with you via Skype from here in Afghanistan.

I want to focus a little bit on how I became involved in the work I do today at the School of Leadership, Afghanistan (SOLA) and how I came to be so passionate about education in Afghanistan through my personal story.

* Founder, School of Leadership, Afghanistan. This publication is based on Ms. Basij-Rasikh's keynote address, delivered via Skype on August 26, 2013 at the Seventh International Humanitarian Law Dialogs held in Chautauqua, New York.

I grew up under the Taliban regime from 1996 to 2001. My understanding of the world was extremely limited. We grew up under a regime that banned people from watching television, from being connected with the world outside. Women were not allowed to go to work. Girls were not allowed to go to school, and I grew up basically in absolute isolation. Growing up, I did not even know what the world outside of Afghanistan was like or could be like. I had a vague understanding that Afghanistan was going through a really horrible time and that places outside of Afghanistan were relatively much better.

Today, I am one of the very few extremely privileged Afghan women. I do not mean that in an economic sense; I mean that in every other sense. I grew up in a family that valued education more than anything in our lives. My parents are so committed to education. I have traveled a lot at this very young age, but I have not met anyone as committed as my parents to education. I believe the reason for this is that both of them were the first in their families to receive an education. My mom and her sisters were the first women in their families allowed to go to school, and my grandfather was disowned by his father for sending his daughters to school. And my father was the first man in his family to go to school. When they faced the situation of the Taliban not allowing them to educate their daughters, it was extremely difficult for them. It was extremely difficult for them to accept the fact that four of their daughters would grow up uneducated, not being able to even read or write.

So they risked their lives, they risked our lives, and sent us to secret schools. These were really underground schools, literally classrooms that were run in a teacher's living room.

The first time I ever attended a school was at a secret school. I had no previous experience of public school to know what a proper school would look like by comparison. For me, probably one of the most dangerous things growing up under the Taliban—and this goes for my generation of both girls and boys, particularly boys—is that we grew up thinking that life under the Taliban was “normal.”

I have an older sister who also had to attend a secret school. Because she was old enough, she was required by the Taliban to wear a burka to cover herself when she went outside. Since she had to do that, she was also not allowed to be outside alone, unaccompanied; she had to have a male escort. So I dressed as a boy to go with her to school. That was the only way both of us could receive an education. But again, to me, this was a normal way of growing up.

The first time I heard about the United States was 9/11. A friend of mine came to my house and explained what she had seen on television a few days before when she was in Pakistan. I could not believe her story. I thought she was making up a story, simply because I could not comprehend the fact that human beings had the capacity to build tall buildings like the twin towers. The only reference I had was the tallest building I had ever known to exist, which was in the middle of Kabul city, and it was only 18-stories tall. Every time I passed it by, I just could not believe how the engineers and the workers had built it.

The first question I asked my friend was, “How many days does it take to go from the first floor to the top floor?” I had no reference for elevators. “Are there restaurants on the way? Are there bathrooms? Is there a huge line outside these buildings, so that people can go to the top and see the world?” Basically, it took me a long time to comprehend the fact that thousands of people died that day. And then it was so strange to me, at that young age, to hear the conversations of how we Afghans were to blame for what happened. I just could not make that connection. How could we have done that if I did not even know that such buildings could exist?

I was extremely lucky to have the opportunity to come to the United States as a high school exchange student in 2005. I ended up in Wisconsin for a year. I gained 40 pounds. Other than being absolutely amazed by the food—and snacking, because we Afghans do not snack, we only eat three times a day—what I found to be so beautiful was the fact that I had the opportunity to get outside of my comfort zone at a very young age, to look at my own country from an outsider’s perspective, and to hear what people thought about us and about my country. Because for many people I was the first Afghan they had ever met, I was faced with so many questions that I often had not thought of answering even to myself. It really compelled me to learn a lot more about Afghanistan, so that I could answer people’s questions, and to learn more about Islam, so that I could answer all the questions that people had, especially about Islam and terrorism. My challenge was to really explain how this was not part of what I thought of my religion.

But as I learned more about Afghanistan, I grew more aware of the problems in my country. Growing up, I definitely knew that we had many problems. Yes, the educational system was not working. Yes, many people did not have access to the most basic health care. I knew a lot of these things, but I had never taken the time to absorb them and to really understand what they meant.

I knew that the illiteracy rate for women in Afghanistan was one of the highest in the world. Ninety percent of women in Afghanistan are not even able to read or write and will never have an opportunity to learn. Comparing that with the life of people in Wisconsin around me, it was a lot to understand. To make a long story short, I went back to Afghanistan at the end of my academic year, in the middle of 2006, and I spent a year building a school in my father's village. But when I came back to the United States to attend Middlebury College, I was yet again surrounded with this sense of, why me? Attending Middlebury College, or even just earning an undergraduate degree, put me among the less than six percent of Afghan women lucky enough to go to university. That I was able to study abroad in a place like Middlebury, when even less than two percent of Americans have access to such education, always kept me thinking, why me? How did I deserve this opportunity? And then, what next? What is it that I can do with this education?"

Interestingly enough, I always thought of going to law school after finishing my undergraduate degree. At Middlebury I wrote my senior thesis on safe houses or shelters in Afghanistan. These are very recent; until 2004, women did not have a way of responding to domestic violence or any form

of abuse and violence other than just bearing the fact that they had been violated. This really intrigued me and inspired my thesis. I interviewed a lot of women who were staying in shelters. These were also very secret in Afghanistan, because a lot of these women were shaming their families for running away or for responding to violence in such a way.

With all of this happening, it really hit me that to reduce any form of violence in Afghanistan, or to deal with the many problems that Afghans face today—whether lack of proper health care, lack of engineers, lack of proper leaders to really bring Afghanistan out of its problems—it all comes down to education. I was asking myself how Afghanistan could prosper if we as Afghans cannot come up with solutions to our problems, especially because our educational system does not prepare us to be leaders. What I mean by that is our educational system is based on memorization. Children who go to school spend no more than three hours there on a given day. They only learn to memorize. What is written in a textbook is taken as fact. It is never questioned. So thinking about all of this, how can you expect leaders to emerge from that?

The fact that Afghanistan has gone through 30 years of war—and this may sound strange to many of you sitting in the audience today—actually makes it a land of opportunity. It is a dreamland for entrepreneurs simply because there is so much need. There is so much that can be done in Afghanistan, and when you think about that entrepreneurial drive, you think immediately about creativity and critical thinking and analytical thinking. That is simply discouraged and killed off starting in elementary school in Afghanistan. Comments like “why this” and “I have a question” are never encouraged and

are often even punished because teachers understand them as if the student is questioning their ability, which is very unfortunate.

So when I was in college, I started SOLA. It is very small, but I believe that unless we change the educational system in Afghanistan and give young people the opportunity that they deserve, we cannot expect change in our health care system, in our political system, or anywhere else.

Why do I think differently? Why do I do what I do? It all comes down to the fact that someone in my life—my parents, my family, my school, my teachers, my professors—paid attention to me and to my education. And if that can happen for lots of members of the young generation, things will change.

If you are interested in what is happening in Afghanistan, based on what you read, you might have a very hopeless picture of the country. When I say “you,” I mean you, Americans, might think that it is a lost cause and that investing in Afghanistan is a waste of the money. But as a young Afghan woman, and especially as someone who grew up under the most terrible government in the history of Afghanistan, I can at least try to tell you that is not the whole picture. Afghanistan is a very complicated country. What is happening here is extremely complicated, and yet in the midst of all this, I see a lot of hope. I see it through the students who attend our school. I see it in the changes that you never get to hear about but that we see here in Afghanistan.

Just three years ago, I could not have had this conversation with you at this hour in Afghanistan because we did not have electricity, but I can right now because we do have city power. That may seem to be a very small change, but it is huge. The first time I ever experienced 24 hours with no outage in electricity in Afghanistan was when I was 20. I was literally waiting for the power to go off, and it was strange to still have it on, until my youngest brother, who is my only post-Taliban sibling, reminded me that we no longer live in the Taliban era, and that is true.

Changes are very slow in Afghanistan, but they are happening. Let me give you a few examples of the students at SOLA. But before I do that, I want to briefly explain what we do at SOLA. It is a very small school. I co-founded SOLA while I was in America in 2008 with four students. Today we have 25 students in Kabul, and we have helped 36 students from 15 different provinces secure scholarships into 34 educational institutions in five different countries. All of those scholarships amount to \$6.2 million.

I think that even more than the Taliban, our biggest challenge in Afghanistan is ethnic tension. The fact that we cannot get along as a country because we have so many different ethnic groups is a problem. And it is only a recent problem; it is a product of the 30 years of war, especially the civil war. Yet our students come from 16 different provinces. They are encouraged to live together in a very small community at SOLA. They take a pledge to accept, respect, appreciate, and promote the different qualities that every single person brings to the SOLA community. Because we cannot choose one ethnic group's language over the other, students

also sign a language pledge to speak only English. It also helps that we are preparing them to take advantage of educational opportunities outside of Afghanistan, where critical thinking and creativity are encouraged.

I get my inspiration and my commitment to education from these young girls who travel miles and miles to come to Kabul so that they can receive a better education in our school. And what to me is so fascinating about them is that they have very supportive parents.

I will give you one specific example from an insecure province in Afghanistan. I admitted a student over the phone in 2011. Her admission interview was over the phone, because she could not access the internet or fill out an application. When she came to SOLA, she spoke only two words of English: “good morning.” After she signed the language pledge, I would see her at lunchtime, and she would say “good morning.” Before I went home in the evening, she would say “good morning” with a big smile. Within a year, this girl had learned both English and a language that was spoken in Kabul but not in her native province. She is so committed to her education because her father had taken risks back home on her behalf. Six months ago, she traveled home during a holiday break. Her father picked her up from the provincial center, and as they were driving to their little village, they missed being killed by a roadside bomb by minutes. They assumed that it had been set for someone else and that they just happened to travel on that street. But when they got home, her father received a phone call, and the person asked, “Why are you still alive? I was planning your funeral for the holiday. If you send your daughter back to school, we will try again.” And this

father said, “You can kill me now, if you wish, but I will not stop my daughter’s future because of your backward ideas.” He continued to say, “If it is in my fate to die in your hands, so be it. Go ahead and try. My daughter is going back to Kabul.”

She not only returned to Kabul, but this summer I accompanied nine SOLA students to the United States, where they each received a full scholarship to various schools, and she was among them. She is attending a boarding school in Massachusetts for four years this fall. When her father was saying goodbye to her at the airport in Kabul in June, he said, “Listen, do not forget that you are not doing this just for yourself. You are doing this for the thousands of girls, especially in your province and in your village, who will never have this opportunity. So study hard, and do not forget those women.” To me, that is a sign of great hope, the fact that a man can be a fierce advocate for education, and please excuse me, but if I were to show his picture to the average American, they would immediately assume he was a member of the Taliban with his long beard and turban on his head. That kind of man, in the form of fathers and brothers, as well as mothers, makes my work possible.

So I would like to convey to you an image of Afghanistan in which there is so much hope because of our parents who literally risk their lives every day to send their daughters to school. We need such work so desperately. Our percentage of educated women is shockingly low, and until and unless that changes, we will not see any progress in Afghanistan.

I have always wanted to either be a doctor or at one point a lawyer and then an engineer. All of these desires were driven

by the extreme need I would see while I was building that school in my father's village. The kinds of roads that I traveled made me want to be an engineer to help build these roads. When I was working at the shelter and working on my thesis, I so desperately wanted to become a lawyer so that I could help defend these cases of women who were brutally abused. I wanted to become a doctor because of the fact that if a family member in Afghanistan were to be diagnosed with cancer today, they would just have to wait to die, because there is simply no treatment available.

But the reason I ultimately chose to become an educator is because all of these students who I help, because of all these really smart, bright, committed, and driven young girls who want to receive an education so that they can go on to become the doctors, engineers, and lawyers that Afghanistan so urgently needs today. That is why my work seems like an absolute pleasure to me every single day, to the point where I can easily work until after ten o'clock every night. That is not good because for me, it is always family, education, and then work. I always try to remind myself of that, but to me SOLA is not work. It is absolutely the kind of work that my family supports me in doing, and it is so rewarding to me. I feel very fortunate to have found my passion at such a young age.

I thank you very much for listening.

**The Third Annual Katherine B. Fite Lecture:
Perspectives from North Africa on the Arab Spring**

Karima Bennoune*

Thank you very much. I would really like to thank the organizers so much for inviting me to be here. There are so many people in the room whose work I have admired for so many years. It is an honor to give a lecture named after Katherine B. Fite. And, as a human rights lawyer, I really have to start by thanking the prosecutors and all of the international criminal lawyers in this room who do such incredibly hard work to try to find real remedies for real victims in a world where, as we know, there are all too few remedies and all too many victims.

I thank you also personally, as a Bennoune, because I know what it means to try to break out of generations of impunity. I was thinking about this yesterday getting ready for the talk. My Algerian grandfather, a peasant leader named Lakhdar Bennoune, was killed by the French army during the War of Independence back in the late 1950s. My father, Mahfoud Bennoune, was imprisoned and tortured by the

* Professor of Law, University of California Davis School of Law. This publication is based on Professor Bennoune's keynote address on August 26, 2013 at the Seventh International Humanitarian Law Dialogs held in Chautauqua, New York. Excerpts are from *Your Fatwa Does Not Apply Here: Untold Stories from the Fight Against Muslim Fundamentalism* by Karima Bennoune. Copyright © 2013 by Karima Bennoune. With permission of the publisher, W.W. Norton & Company, Inc.

French military around the same time, and then 30 years later during the internal conflict in Algeria in the 1990s, my cousin Ahcene was murdered in front of his children by the Armed Islamic Group in 1994. There has never been any accounting for any of this, three generations of impunity, and I know that is why I became a human rights lawyer. I also know that that is part of why I am so inspired by the work of the prosecutors and their international criminal law colleagues here, because every time you are successful in your pursuit of a perpetrator of grave crimes, you are giving a little bit of justice back to a victim's family or to many victims' families. You are also restoring my hope and the hope of many others that justice, however imperfect, is not just a mirage, and that someday, somehow, there may in fact be a reckoning for what happened to our families, as well to so many families across North Africa and elsewhere. Because what you do, at the end of the day, is about saying that what happened to our families was in fact important—even if the world would rather forget—and it matters. And it still matters.

I think that for me, that is what the first phase of the revolutions of 2011 was about. They were about saying that people in this region are in the human category like everyone else and are as deserving of human rights. As Jamel Bettaieb reminded us this afternoon, this includes economic, social, and cultural rights, as well as civil and political rights. I think that the first phase was also about trying to end this genealogy of impunity for abuses of those rights.

I am also grateful that this round of International Humanitarian Law Dialogs is focused on the transformational events happening across North Africa and the Middle East,

because I know that it is imperative for the international community to engage with the developments on the ground there and to support those like Jamel who are striving for human rights and equality.

As this is an after-dinner speech, and I know it has been a very interesting but long day and the topic is a heavy one, I thought I should try to start with an Arab Spring joke. But the way that things have been going this summer, I have to say I could not find one that was suitable for polite company.

So I thought perhaps the funniest joke I could tell was that back in February 2011, just after the fall of Hosni Mubarak, my editor began to worry that my book, *Your Fatwa Does Not Apply Here: Untold Stories from the Fight Against Muslim Fundamentalism*, had become irrelevant because the topic of Islamism was now obsolete—the seemingly liberal Arab Spring had sort of rendered the topic moot. She was very worried about the book. I have to say I was delighted for about five minutes. Unfortunately, the punch line is that she had nothing to worry about, and I would prove to be disappointed like so many on the ground. In fact, the struggles of people of Muslim heritage against fundamentalism have never been so relevant, happily, I suppose, for my book, but sadly for the region and its people.

So this evening, I would like to share with you a few relevant excerpts from the book, which is being released today after three years of research and writing. For this project, I interviewed nearly 300 people of Muslim heritage from nearly 30 countries, from Afghanistan to Mali. The point was to try to learn about their opposition to fundamentalism and their

experience with fundamentalism, because it seemed to me that international lawyers need to listen to what people on the ground have to say about the challenges they face and the way the international community ought to respond if we are serious about the rule of law and accountability. Yet international human rights law scholars do not often do field work. But to me, it remains something that is very important.

The people I met were very diverse, and they were all tremendously inspiring to me. My interviewees included an imam's daughter in Niger named Aminatou Daouda, who promotes the UN Convention on the Elimination of All Forms of Discrimination against Women and believes that to be entirely reconcilable with her faith. They include a Malian teacher, whom I will call "Mr. Bodmar," who put himself on the line to keep his school open and to keep educating girls and boys together in the same classroom in the town of Gao, and who would force himself to go out and watch the amputations carried out in public by the jihadists occupying Northern Mali, so that he could document them and try to help the victims afterwards. They include Maria Bashir, the only woman chief prosecutor in Afghanistan, who had the courage to pursue both those involved in corruption and those involved in violence against women and, as a result, has become one of the Taliban's top targets in Herat. She has 23 bodyguards and has survived an attempt on her life but still persists, because she believes that life will only improve in her country if women like her take these kinds of risks.

Why are these people not better known internationally? This to me really is the huge question coming out of this research. I think recognition of what is actually happening in

any context is a *sine qua non* for accountability. It is part of the accountability discussion, and that is, in part, why I carried out this research.

I also did it because my own father, Mahfoud Bennoune, an Algerian anthropologist, risked his life throughout the 1990s to stand up to extremism in Algeria. Even when he was driven out of his home and forced to stop teaching at the university due to death threats from the fundamentalist armed groups, he remained inside the country, and he continued to publish pointed criticisms of both fundamentalists and the government that they battled.

For example, in a three-part series published in the newspaper *El Watan* back in November of 1994, a series that was called “How Fundamentalism Produced a Terrorism Without Precedent,” he denounced what he called the terrorists’ “radical break with true Islam as it was lived by our ancestors.” So for me, I have to say—I know this was mentioned here—I do not think there is much that is indigenous about Islamism in many contexts. In fact, it is often a project that seeks to radically alter the diverse ways that people of Muslim heritage live their culture and their faith.

Unfortunately, “Algerian Democrats,” as they were called, like Mahfoud Bennoune, like so many others, received very little support internationally in the 1990s, including, sadly, from the international human rights community, which often seemed unable to understand what was happening on the ground. This is because it did not grasp the threat to human rights from the ideology of Islamism itself, and also because it focused almost solely on state abuses, which were admittedly

grave. They were indeed grave, but they represented only a small fraction of the violence, which was mainly about the fundamentalist armed groups' war against society. And unfortunately, this misunderstanding persists even today.

So to correct the historical record, I think it is important to explain that the Islamic Salvation Front in Algeria, or the "FIS" as it is known, participated in the electoral process back in 1991 while its leaders said openly that they did not believe in democracy except as a means to come to power. They said this very clearly, and their associates were already engaging in violence against women and in violence against young conscripts.

Most of this was overlooked internationally by outsiders who were too busy celebrating the advent of a multiparty system and were not looking closely at what was happening on the ground. Outside, there is one summary version of what happened in Algeria in the 1990s that is often the only one to be heard: "The fundamentalists were participating in the elections. Their victory was stolen, and that was when the trouble started." But on the ground, many people believe this to be a gross oversimplification of what actually happened. Openly declaring that they would abolish democratic institutions, the FIS leaders proclaimed that they would rule through a *majlis al shura*; that is to say, a cabal of clergy. They campaigned under the banner "No Charter, No Constitution, said God, said the Prophet." They described the mixing of the sexes as a cancer, and they besieged women's college dorms. Their words and their deeds, understandably, utterly terrified liberal Algerians and ordinary Algerians who did not espouse this sort of agenda. In fact, the FIS second-in-command, the

firebrand Ali Belhaj, asked, “If we have the law of God, why should we need the law of the people?” About non-fundamentalist Algerians, he raved, “One should kill these unbelievers,” and this was before the cancellation of the elections.

In the opening days of 1992, hundreds of thousands demonstrated on the streets of Algiers calling on the government to halt the electoral process midway when it looked like the FIS would win and never relinquish power. The military-backed government did that on January 11, 1992, and it later banned the FIS.

This is something that has been greatly criticized internationally. There are divided opinions about this internationally. There are divided opinions about it in Algeria, but I would say that many people in Algeria believed something that is not understood outside, which is that as terrible as things became afterwards, it might well have been worse had Algeria’s murderous fundamentalists been allowed to dismantle the republic from inside. And I think those of us who live in strong, functioning republics sometimes take for granted exactly what that means. One intellectual told me in Algeria, “We would have become Afghanistan.”

So I think one of the things that the international community misunderstands in the current moment is that while democracy is about elections, it is not just about elections. It is also about democratic values. I am not dismissing elections, but I think we cannot lose the democratic values piece.

Clearly, the cancellation of the second round of the Algerian elections back in 1991-92 was no panacea. It also provoked many problems. There was a decade of conflict that ensued with the military-backed government on one side and the fundamentalist armed groups, some linked to the FIS, on the other. But—and again I think this is not well understood outside—the vast majority of the violence came from the fundamentalist assault on the ordinary Algerian population. I encourage anyone wondering whether this is true—because it is so different than the narrative that is heard from the reports of many human rights groups and from the media—to in fact go to Algeria and talk to the victims themselves. That is what I have spent the last three years doing, interviewing victims who say that they were victims of non-state terrorism and also victims in smaller numbers who say that they lost family members to the state.

One of the things that remains vital, of course, is that there be a truth commission in Algeria to further clarify the historical record and to allow all these victims' experiences to be systematically documented, something which victims' groups on both sides of the conflict have now been working toward together for a number of years. This is very inspiring to me. There is something called the Coalition of Associations of Victims of the 1990s that brings together vast numbers of victims of the armed groups and the smaller, but significant, numbers of victims of the state, and one of the things that they are working for is a truth commission. The narrative that I just gave you of what happened in Algeria is in fact the narrative given by this coalition of victims groups as well.

Now, excuse me for this after-dinner history lesson about Algeria, but Prince Zeid reminded us last evening about the importance of looking to history, and I think too many Algerians died in the 1990s for what happened to be misunderstood. This is especially true in light of what is now happening in Egypt, about which there has been a lot of recycling of some of the mistaken outside narratives about what occurred in Algeria. So, setting the record straight about Algeria's "dark decade" is both a question of accountability for past abuses, and of enhancing our comprehension of present ones.

Many Egyptians, as I am hearing, feel that they are experiencing entirely the same international misunderstanding of the situation on the ground now. I know that is hotly disputed, but I am beginning to hear a similar narrative from many Egyptians, especially many women's human rights defenders who say that the international community must consider both state and non-state threats to human rights in their country and that elections alone do not make a democracy. One of my goals in writing my book was to try to clarify some of this history and to try to win more support for the voices of those in the region who support democratic and human rights values and who are standing up for human rights, sometimes having to challenge states and non-state armed groups at the same time.

It is a bit of a ways into my speech to say this, but I did want to dedicate my remarks here to Amel Zenoune Zouani, who is one of the people whose stories I tell in the book. She was someone who was very gifted and who could have

followed in the footsteps of Katherine Fite and achieved many things in the legal field.

Amel said to her father when she was in her early 20s, “I will study law, and you will always hold your head high. I am a girl, and you will always be proud of me. I will do the work of a man.” She was a 22-year-old law student. She had the same dreams that I had of a legal career back in the 1990s, dreams of working in a society governed by the rule of law, of taking care of her family. She utterly refused to give up her studies, despite the fact that the fundamentalist armed groups in her area had threatened all who continued their education, and despite the fact that she was a woman from one of the most dangerous parts of the countries that was then known as the “Triangle of Death” due to the ferocity of jihadist attacks against the civilian population.

On January 26, 1997, about 16 years ago, Amel Zenoune boarded the bus in Algiers, where she was studying, to go home and spend a Ramadan evening with her family in the town of Sidi Moussa. As a result, she would never finish law school. When the bus arrived outside her hometown, it was stopped at a checkpoint manned by men from the Armed Islamic Group. Amel was carrying her schoolbag with her, so they pulled her off the bus and killed her in the street in front of all of the other passengers. The men who cut her throat then turned to the other passengers and said, “If you go to the university, the day will come when we will kill you all just like this.”

Amel died at exactly 5:17 p.m. We know this because when she was killed, her throat was cut, she fell in the street,

and her watch stopped at exactly that moment. And her mother honored me by showing me her watch. For some reason, one of the things that really stayed with me is that the second hand is still sort of aiming optimistically upward towards a 5:18 that was never going to come for Amel.

Shortly before her death, she told her mother Houria, “Mom, please put this in your head. Nothing will happen to us, *insha’Allah*,” God willing, “But if something happens to us, you and Dad must know that we are dead for knowledge. You and father must keep your head high.” As is the case with so many of the countless thousands of Algerians murdered by armed fundamentalist groups, and the smaller but significant numbers killed in the state’s harsh counterterrorist response, no one has ever been brought to justice for Amel Zenoune’s murder. Most of the murderers have been amnestied under the 2005 Charter for Peace and National Reconciliation—a truly Orwellian name—which codified nearly blanket impunity for many state and non-state perpetrators of the “dark decade.” So both the state and the international community have failed Algeria’s victims.

Amel Zenoune’s watch stopped at 5:17, which is truly an unimaginable loss, but I try to find hope in two things. The first is the incredible strength of her family who continues to tell her story and to go to demonstrations for accountability with other victims, despite the official amnesia. In fact, it is illegal in Algeria to say certain things publicly about the 1990s, but they continue to speak out, as do some of the groups of victims of the state. And not only that, Amel’s sister, Lamia, fulfilled Amel’s dream. She overcame her own grief and actually went to law school, became a lawyer, and now

practices today in Algiers, something which is only possible because the fundamentalist armed groups were largely defeated in the country. I also find hope in the fact that Amel Zenoune Zouani lives on across North Africa today where women and men continue, as she said, to strive for knowledge and to keep their heads held high.

I want to share a few excerpts from my book, which demonstrate that second point. These excerpts are from the chapter called “Sidi Bouzid Blues and the Green Wave: Journeys through the Arab Spring and Fall.” As an aside, I should say that I realize that all these seasonal metaphors about the Arab Spring have completely gotten out of control. In any case, this chapter is based on interviews that I conducted in particular with women’s human rights defenders in North Africa in 2011, just after what we called here in the United States “the Arab Spring,” although that name is not used on the ground. And, time permitting, I will also say a few things about the long hot summer afterwards. In fact, I just came back from spending this summer in Algeria and in Tunisia.

States of Grace

On my last spring day in Tunis, in March 2011, I interviewed Alya Chammari, a human rights lawyer under Ben Ali. Her husband, Khemmais, who was sentenced to five years in prison under Ben Ali and subsequent to the revolution has become the Tunisian Ambassador to UNESCO, gives his own interview nearby.

The air around Alya shimmers with possibility this spring. “We didn’t think we would live this extraordinary moment[,” she says.] In Tunis, it does indeed seem in this season that anything is possible. . . . [Alya envisages,] “We could be the first state of the Global South with a Muslim majority population to install a real democracy, based on equality between men and women, based on judicial, economic, and social justice.” . . .

Alya Chammari is euphoric but not naïve. In this early phase, she is not in denial, like many others in and out of North Africa, about what dangers still lie ahead. She recognizes “the possibility of the confiscation of this revolution by the most retrograde elements of political Islam. Wahhabism exists in Tunisia. Salafists also. For them, the objective is to destroy the Republic and to install a Caliphate.”

Nor does Alya Chammari spare Ennahda [the fundamentalist group that has since become the ruling party] . . . “Democracy is in danger with these people, the rights of women also.” She denounces the “strategic discourse” they use “to make us believe that they have become very moderate.” . . .

And if you read the western press, you will only hear about the “moderate party.” That is not a view shared by a significant number of Tunisians.

Alya argues that the events of International Women's Day in 2011 prove their claims untrue. "Just after March 8, when we were calling for equality in inheritance, for the freedom of Tunisian women to marry non-Muslim men, they showed their real face. They were against all these demands." . . .

I ask what strategies Tunisian feminists should employ in the face of these perils. She highlights the same one [lawyer] Bochra Belhadj Hmida had underscored to me. Most of all, both women want "separation of religion and law." . . .

I asked Alya Chammari whether the fundamentalists could ever accept a secular constitution.

"No. They will scream atheism. They will say we are heretics."

This does not dissuade her. She knows [that in her view,] a secular constitution is the best way to guarantee human rights in her country, and she is willing to demand it, whatever epithets may be thrown her way and however long it may take. It is the same refusal to kowtow to "realism" that made her and her husband oppose Ben Ali all those years when they could have had a comfortable life . . .

Back in March 2011, Alya Chammari suggests that . . . there has to be a clear strategy to communicate that a separation of religion and state is the only way to guarantee everyone's freedom of religion. She does not want political parties banned, or

people silenced. Instead, she wants to see the fundamentalists countered by a progressive strategy of engaging youth and working on the ground in communities [especially on economic issues] . . .

Chammari rushes to acknowledge that “Islam is our heritage.” However, she rejects “all that is oppressive in Islam, and in Islamic Law which is not of divine heritage.” [It is a very brave thing to say.] Alya reminds me that it is everyone’s right to question aspects of her own heritage, to try to take into the future that which is liberating and leave in the past that which is not. It is the only way humanity has ever advanced . . .

[She says,] “I have no confidence in any political current founded on an interpretation of religion that is not egalitarian, and that talks about Islamic law as the essential referent.” Religion, she opines, should not be used by any political party. “It belongs to everyone. No one has the right to present themselves as the spokesperson of God.”

That is one of those things that I want to put on t-shirts, that I think is relevant in the United States, as well. No one has the right to present themselves as the spokesperson of God.

[She says,] “You can say, ‘I am conservative. I think women are below men.’ Just don’t say it is because you are a Muslim. My interpretation of Islam is different.” She thinks the religion calls for equality.

Acutely aware of the closing window of the revolutionary moment, she wants the Left [and liberals] to get organized, to unify. NOW. “We are living in a state of grace. This will end soon.”

Alya Chammari is already clear in March 2011 about the challenge that will lie before her compatriots as fall approaches.

“We need to try to save democracy.”

The Sweet-Potato Seller of Tahrir Square

In the spring of 2011, six weeks after the fall of Hosni Mubarak, the mood in Cairo is somber, less exultant than in Tunis. The scale of Egypt is so epic, it makes everything more difficult. There are some 83 million Egyptians waiting for the fruits of the revolution, compared with something like ten million Tunisians.

“When I go to Tahrir Square on March 26, 2011 . . . rival protests [to define Egypt’s post-revolutionary future] continue. [Criticism of fundamentalism here does not just come from women’s human rights defenders.] . . . A man who sells chickpeas cooked with tomato . . . offers me his commentary on the scene. His stand bears a sticker inscribed “Do not forget to mention Allah.” . . . [H]e tells me his name is Yousri Mohamed Taha, and he is originally from Aswan. During the revolution, Mr. Taha closed up his stand but stayed in the square “to bring

Mubarak down.” The revolution has not ended, he feels. The freedom and the social justice they had demanded, “you cannot achieve in two days.”

I did not ask him about fundamentalism. Of his own volition, he tells me, “I am a Muslim, but we have to separate religion from politics. Religion is inside all of us. All Egyptians, Christians and Muslims, must live together.” That is his biggest preoccupation [in March 2011] . . .

Not far from where the sweet-potato salesman and the chickpea vendor peddle their wares . . . the revolution continues . . .

. . . [A] gray-bearded imam named Gamal Ahmed Aallam [sometimes known as the “Imam of Tahrir Square”], who was told by the Egyptian army not to speak here today, does anyway. Wearing glasses, a blue robe, and a trim white turban, he preaches fraternity between Muslims and Christians. He denounces the Salafists. “Islam is above groups and [political] parties. We are all children of this country.” . . .

The imam of Tahrir continues. “We refuse and reject all people who make sectarian violence . . .” The imam speaks as an Egyptian, not as a Muslim. He speaks in the name of Egypt, not in the name of God. He calls for the release of all Christian protestors who have been arrested, and he leads people in prayer for those dying in every country in

the region where they are trying to get rid of dictatorships. I too want to pray with him.

His kind of God is great.

The Arab Autumn

As memories of spring fade, Kafka stalks North Africa. [In Tunisia, a] prominent Ennahda woman deputy [from the ruling party] denounces single mothers, saying they need to be “taught morality” and are not suitable for “our religion.” An Ennahda spokesman named Samir Dilou, who has defended polygamy as a constitutional right, becomes Tunisia’s first human rights minister. [This is the person in charge of transitional justice, by the way.] He goes on to deplore homosexuality as “a perversion that requires medical treatment.” On the streets, Salafists attack nonveiled women, hurling the slogan of the revolution against them now, telling them to “dégage”[to get out]. Emboldened by Ennahda’s laissez-faire approach, these Salafists besiege the Manouba University campus, on the outskirts of Tunis [which I visited this summer], trying to introduce the niqab [the full veil that just leaves a small spot for the eyes], shutting down classes and exams, threatening teachers and the dean. Ennahda does not stop them.

I interviewed Amel Grami, who is a very prominent specialist in Islamic history and one of Manouba's professors who stood up to the Salafists on her campus, which they had dubbed "Manoubastan." At one point, she was actually physically assaulted by some of these students, picked up and thrown off her own campus. Those of you who are academics, think about what that would mean. She told me with tears in her eyes, "It hurts me, these groups of students considering that I am representing evil. I cannot forget this, and also some of them used the threat of rape against me. I spent my life teaching values, and I am a member of many groups of interfaith dialogue, and my whole project is about differences, the right to be different and the philosophy of difference." "And now finally," she says, "I find myself the other."

Alya Chammari could already see this coming back in October 2011. When my recorder is turned off [which is usually when people say the most interesting things], the intrepid human rights lawyer tells me that she defended Ennahda political prisoners during the Ben Ali dictatorship.

Now she asks them if they will defend her.

Winter in Cairo

Egyptian women's rights activist Doaa Abdelaal and I hold a follow-up Skype interview at the end of 2011.

She sounds weary but resolute . . . "Everyone has realized there is no way back. We have to go on."

. . . [S]he sighed as she considered the landscape. “Sometimes you cannot imagine that these are the choices.” [She was considering the army on one side, and the Muslim Brotherhood on the other. These are the choices.] “We have to create more choices . . .”

[Considering the same problem, the Algerian satirist whose writing I really love], Chawki Amari explained in an opinion piece what he calls, “[t]he convergence between headshrinking autocratic Arab nationalism and fascist-type Islamism.” Their common points? “[C]ontempt for the individual . . . and an aversion to collective and individual freedoms.”

Refusing to choose the “headshrinking autocrats” or the “fascist-type Islamists,” Doaa Abdelaal still hopes instead that the fundamentalists will be constrained by the realities of politics and the needs of Egyptians. [The slogan “Islam is the Solution” does not really get you very far when what you need is a job. As Doaa said,] “The whole infrastructure of the society is really shaking, and some of the small, faraway governorates and villages are really poor places. They need to come up with a real political solution, not about covering women’s heads.”

[And then she said something really brilliant that, again, I want to put on t-shirts. She said,] “I don’t think reciting the Qur’an over a broken pipe will fix it.”

In Search of Imaginary Republics

By the summer of 2013 in both Egypt and Tunisia, many ordinary people had had enough of their new fundamentalist rulers and began to revolt. As it were, the transition was continuing. Citizens had recognized that there would be no accountability for past abuses but rather a new generation of abuses with yet again no recourse. So it was back to this idea of a genealogy of impunity with which I began. As the Tunisian journalist, Olfa Riahi, told me of Ennahda a few weeks ago, they were not revolutionaries. “The system would remain the same, except now they would command it. That was the only difference.”

. . . By September 2012, leading Tunisian intellectual Yadh Ben Achour is warning, “We risk in a short time finding ourselves in a worse dictatorship than that of Ben Ali, a theocratic dictatorship.”

Tunisia experienced, as was mentioned this afternoon, its first political assassinations of those who opposed fundamentalists, including the outspoken lawyer, Chokri Belaid. He was a human rights lawyer. He had defended the human rights of Salafist prisoners during the Ben Ali era, and then later on had also recognized the terrible danger that their agenda meant for his country. He was gunned down in February 2013, and then, at the end of July 2013—last month—the Constituent Assembly delegate, Mohamed Brahmi, was killed.

Of course, you can see already that Tunisia is in a better position than many countries because two assassinations are still terribly shocking to the public, and it is not violence on the scale of some other countries in the region, thankfully. But it is very important to stop the violence before it escalates. And most of the Tunisian activists that I interviewed this summer were being threatened. They were being threatened on Facebook. They were getting threats on their telephones. So I think there is a real need to take preventive action to protect these people on the ground now and for the international community to support them in that process.

Meanwhile, fundamentalist violence against Copts and police officers in Egypt has been skyrocketing this year as well. Mohamed Morsi and the Muslim Brotherhood had tried to put a stranglehold on all aspects of political life, forcing through an Islamist constitution that would have set Egypt back years. The economy was at a standstill, and we all know what happened after that with the ouster of the Muslim Brotherhood government of President Morsi, very much the way that the ouster of Hosni Mubarak had happened in 2011, as well. Now there is something called the *Irhal* campaign in Tunisia, pushing for not exactly the same outcome but for some Ennahda officials to leave power and to set a time limit on the Constituent Assembly to finish its work in accordance with the actual decrees that authorized it in the first place.

The popular movement—and I am not talking about the army here in the Egyptian context—understood what it was doing as trying to get the 2011 revolutions back on track. They were seeking neither, as Chawki Amari had put it, “the headshrinking autocrats” nor the “fascist-type Islamists.”

Though, unfortunately, there is still a very real danger that they will be stuck with one or the other.

I think the headshrinking autocrats, as they are called, and the fascist-type Islamists actually need one another. The abuses of one are used to justify the excesses of the other and so on, and this is a dynamic that has to be broken. In fact, I think the only way to arrive at real transitions and real transitional justice in these contexts is to build an alternative which represents neither of these forces, and that is for me—and I think for many of these activists on the ground—a real outstanding challenge.

Doaa Abdelaal, the Egyptian women's rights activist, wrote to me from Egypt on the night of August 14. This was the night of terrible violence between the Security Forces and the Muslim Brotherhood protesters, some of whom were entirely peaceful, and some of whom were armed. She said she was actually crying while she was writing her message. She was so upset about what had happened. She explained:

We all worked hard to turn 30 years of oppression, torture, and authoritarian rule into something better. When the revolution started in 2011 until now, none of us thought twice about giving our time, our money, our blood, our lives for these changes, but the Islamists hijacked the scene, and they took us backwards.

Some of us were ready to believe in them, but they failed everyone, and they failed even their own believers. The worst thing is that they began

attacking Copts and Shia and all who were different, and clashing with security forces which were not trained for these kinds of confrontations. They failed us when we asked for reforming the Ministry of Interior and when we asked for the Army budget to be monitored by the civilian government. They failed us when they pushed for a rushed constitution and a lot more.

They emphasized that democracy is only about elections, forgetting about the rule of law and about freedoms.

This is her view, which I think is shared by many but clearly not shared by all, as there are very divided views in Egypt about this. But she was determined to go on:

We as pro-democracy groups have no other option but to revise our strategies and go back to work again, but I have to say we are tired. Still, if we want to change, we have to keep moving. However, if the world keeps lamenting that representative democracy died in Egypt, this will not help, because what we look for is the democracy that respects all and listens to all voices.

We were talking about optimism versus pessimism this afternoon. Let me end by saying that I do believe there is still hope for the democratic struggle in Arab- and Muslim-majority countries that was unleashed in the spring of 2011.

Just look at the courage of people on the ground, look at how unbelievable it was that they were able to achieve what they were able to achieve in the early phase in 2011. But the struggle against fundamentalism also has to be at the core of this democratic movement. I think it has become absolutely clear in the region in the last couple of years, and it became absolutely clear in Algeria back in the 1990s, rule by religion is incompatible with modern understandings of the rule of law. There is no problem with religion, but there is a problem with rule by religion. Religion is a very important part of many people's lives, but ruling with it is something altogether different. And I think the only hope for human rights, including women's rights in the region, is the resounding defeat of fundamentalism.

The Tunisian lawyer, Bochra Belhadj Hmida, who is now receiving regular death threats but is still protesting day after day outside the Constituent Assembly against the way Ennahda is now trying to rule her country, told me that she remains optimistic, and so I feel no right to be pessimistic. She remains optimistic because of what she calls the extraordinary resistance to the attempts of the Islamists to put her country back under a totalitarian regime. But let me be very clear, as is Bochra Belhadj Hmida, who is a human rights lawyer, that the defeat of fundamentalism must always itself be carried out in rights-respecting ways—peaceful, popular, mobilizing, grassroots-organizing, education.

I do recognize that force may sometimes need to be used against armed Salafi-jihadist groups. I have no naïveté about that whatsoever. However, clearly, that force needs to be used in accordance with international law, and this reminds me of

the words of Mbarka Brahmi, the widow of the assassinated Tunisian politician Mohamed Brahmi, who is a devout Muslim woman and whom I heard speak on August 1 in front of the Tunisian Constituent Assembly during protests against the Ennahda government. She said:

The people will bring down the obscurantists and the terrorists, but we will sweep them away with civilized methods, not with their methods, with social movements in every corner of Tunisia, and we will win. Justice will win. Tunisia will win. A civil republic will win over the dark Tunisia that they wish for.

I think it is important for us to remember that for Mbarka Brahmi's prophecy to come true, activists on the ground will need international support and, most of all, understanding of their context. I think that one of the most important things that we can do is to try to comprehend the challenges they face.

When I listen to these women and men across North Africa and all of those that I met for my book, and when I think back to the story of Amel Zenoune and even people in my own family, I believe that in the seasons beyond the Arab Spring, it will take an unflinching, multidirectional fight against autocracy and fundamentalism, a very rigorous commitment to all kinds of equality, and a very reliable political and moral compass to find what the Algerian writer Mustafa Benfodil has dubbed the "imaginary and poetic republics of North Africa" and to keep them. But thanks to the courage of the activists on the ground in 2011, I also know

now that somewhere these imaginary and poetic republics do indeed exist.

Thank you very much.

The Israeli Perspective on the Arab Spring

Ambassador Ido Aharoni*

Thank you so much, Mark, for your introduction.

I am very, very happy to be here. I am especially grateful to Professor Crane for initiating this and to my dear friend Roy Schöndorf from the Israeli Ministry of Justice, whom I have known for many years dating back to when he was at New York University and I was in New York in a previous capacity.

I was asked to address the issue of where Israel stands on the “so-called Arab Spring.” I use the phrase “so-called Arab Spring” for a somewhat philosophical reason. I believe the word “spring” has a cultural meaning, and it stands for a few things that are in total opposition and contradiction to what is happening on the ground.

First, the word “spring” implies a season; in other words, we are looking at a seasonal thing, it is going to be over soon. We do not think we are looking at something that is going to be over soon. If I may take a broader historical perspective, I think that in many ways we are looking at the beginning of the undoing of the Sykes-Picot Agreements. The Sykes-Picot Agreements of 1916 arbitrarily divided the region, ignoring

* Consul General of Israel in New York. This publication is based on Ambassador Aharoni’s keynote address on August 27, 2013 at the Seventh International Humanitarian Law Dialogs held in Chautauqua, New York.

ethnic, religious, and tribal affiliations. I think what you see now is a reflection of an age-old rift between Sunni Islam and Shia Islam that will stay with us for many, many years. It is impossible to predict for how long, but we believe that we are looking at a historical tectonic shift in the Middle East that could last a generation or two. It will not be a smooth transition. It will be violent. It will be messy, and we have to be prepared for it. That is the first reason why, philosophically, I think the word “spring” is misleading.

The other reason is that when we use the word “spring,” we by definition refer to something that is positive. It is associated with growth and renewal. I am not so sure that we are looking at something necessarily positive to all parties involved. I think we are looking at a very chaotic situation. If you take, for example, the role of Iran—in Syria, supporting the regime against the people, and in Bahrain supporting the people against the regime—it can be rather confusing. There is no one rule. There is no one explanation. There is no one key that we can use in order to generalize about the region. We have to study carefully each and every case and draw conclusions accordingly.

Despite the fact that on a philosophical level, I think it is impossible for us to predict the outcome of this process, I would like to share with you what we have learned thus far from Israel’s perspective; what we have learned from the regional wave of instability that I would like to propose should have a different title than the “so-called Arab Spring”—perhaps, “The Rise of Political Islam.”

What have we learned? First, from Israel's point of view, the old appealing, some say infamous, argument known as the "linkage argument" suffered a major blow. The linkage argument was used mostly by Arab leaders in their interaction with western leaders to explain events in the Middle East. The linkage argument had, and has, many fans in Europe and even here in the United States. Essentially, the linkage argument claims the following: the root cause for all instability in the Middle East is the Israeli-Palestinian conflict and therefore, in order to bring about stability throughout the region, we need to first resolve the Israeli-Palestinian conflict.

Now, we know that the reason there are masses marching against their own regimes in Egypt and Syria, and before that in Tunisia and Libya and elsewhere, has nothing to do with Israel or with the Palestinians. It has everything to do with the domestic situation in those countries. We knew that all along.

People tend to forget that when Saddam Hussein invaded Kuwait on August 2, 1990, he did not do it because of the Palestinians or because of Israel. It had nothing to do with us. When Osama bin Laden was attacking U.S. targets in North Africa and in Yemen, way before 9/11, it had nothing to do with the plight of the Palestinians. And even 9/11, if you analyze the letter that Mohamed Atta left in his car, had nothing to do with the plight of the Palestinians or the actions of the Israelis.

So the linkage argument suffered a major blow as a result of recent events and put the Israeli-Palestinian conflict in a different, more realistic context. Now, this is not to say in any way, shape, or form that it is not essential to bring about a

resolution to the Israeli-Palestinian conflict, and I will talk more about that in a minute. But when you hold a discussion in the right context, it is much easier for Israelis and Palestinians to achieve a resolution and to achieve an agreement. So that is the first thing that we learned.

The second thing that we learned—and we, the Israelis, learned it the hard way—is that democracy is more than just a political process. In 2006, free democratic elections were held in the Gaza Strip. Former U.S. President Jimmy Carter even came to supervise the elections, and, I can tell you as an Israeli official, the elections were held flawlessly. They were executed with no problems whatsoever. Well, the only problem was that Hamas emerged victorious. We have a saying in Hebrew: “The operation went perfectly fine. The only problem was that the patient died.” In many ways, we, the West, allowed a terrorist group, Hamas, to exploit the democratic process in the name of democracy.

Now, we have to understand that Hamas is considered to be a terrorist organization, not just by Israel, and not just by the United States. It is a terrorist organization according to the European Union and, in fact, according to the entire International Quartet as well. Life in Gaza under the rule of Hamas is not something that any person should or would like to experience. If you are an opinionated human being, or if you are a human rights activist or a gay activist, it is especially not recommended to spend time in Gaza.

Those of you who are familiar with political science theory probably know the theory of democratic peace, which was, I think, somewhat empirically proven. The theory of

democratic peace talks about the fact that democracies do not invade one another. There is discussion of the fact that no democracy was ever defeated by tyranny. Basically, we believe, even if it has not been empirically proven, that a more democratic Middle East by definition is a safer Middle East for the state of Israel. However, we are not sure this is what we are looking at. Democracy is not just about the ability to implement the political process through elections. Democracy is more than just elections. Democracy, in the first place, is about values. It is about people's ability to internalize those values, and of course, most importantly, about their ability to live by them.

Take the example of Egypt. You have 84 million Egyptians. We all talk about what is happening in Egypt in terms of the struggle between the military and the Muslim Brotherhood, but very few people actually pay attention to the society, economy, and demography in Egypt. What is the level of illiteracy in Egypt? Nearly 30 percent of people aged 15 or older are illiterate in Egypt. We have to ask ourselves: what is their ability to be competitive in the future, in the world of internet and Facebook, where you need to have English as a mandatory tool in communicating with the world? Fifty percent of Egypt's population is under twenty-five years old. It is a recipe for disaster. So the question that we all have to ask ourselves before we talk about implementing the democratic process—which is important—is, what can be done in order to heal the grassroots, in order to heal the system and prepare people for life in the modern world. That is a task that the world had to face after World War II. I think that the task in the Middle East today is no less challenging to the West when you look at Egypt and you look at Syria where 54 percent of a

population of 23 million is under the age of 25. It is a question that we all have to ask ourselves.

I did not even say a word about GDP *per capita*. In Egypt, it is \$6,700; in Syria, \$5,100. I do not have to tell you that GDP *per capita* in the United States is \$46,000, I believe, a year. In Israel, we are rapidly approaching the European average of \$33,000 a year. So the gap is huge, and the West needs to help those countries close the gap. So I am not so sure that the way we understand democracy is the way the people of the region understand democracy.

The third thing that we learned is that in every situation of chaos, there is also an opportunity. As far as Israel is concerned, we are looking at an abundance of opportunities for Israel in the region: from the largely successful attempt to ease the tension between Israel and Turkey, all the way to the constructive—as well as productive—relationship between Israel and Egypt despite the Muslim Brotherhood having emerged victorious in the Egyptian democratic process, not to mention the resumption, with the help of the U.S. administration, of the Israeli-Palestinian political process. We see opportunity all around us. Long term, there is no reason why post-Gaddafi Libya should not one day have relations with Israel. There is no reason why Iraq post-Saddam Hussein should not one day have diplomatic ties with Israel. I think that the events in the region highlight the fact that Israel has no real dispute with Lebanon, for example. Not over territory, not over water. The only problem that we have with Lebanon is the inability of the Lebanese government to prevent Hezbollah's aggression against us. But if you look at the positions of both countries, Israel has never had any territorial claims over

Lebanon. There is also no reason why we should not further strengthen the ties between Israel and Jordan in light of events in the region. I can go on. The number of opportunities for the state of Israel, and for the West, in this chaotic situation is abundant.

I believe that the resumption of the Israeli-Palestinian talks is an extremely positive development when you look at the regional picture for several reasons. The first reason is because a lot of international pressure was removed off the Israelis and the Palestinians. Today, we are negotiating quietly, secretly. As many of you know, a precondition to the success of any negotiations is not having the media present. But we have certain issues that I would like to raise with you here today.

As someone who was at the White House as part of the Israeli delegation headed by the late Prime Minister Yitzhak Rabin and Foreign Minister Shimon Peres almost exactly 20 years ago, on September 13, 1993, I look at the situation today, and I ask myself what happened in the last 20 years.

If in 1993 there was a majority of Israelis that believed in the concept of territorial compromise, then today you are looking at an entirely different situation. The political camp that prevailed in the 1992 Israeli elections, headed by Yitzhak Rabin, believed that at the core of this conflict, there was a deal to be made, and the deal was very simple. You give them what they want, land, and you get what you want, peace and security. Yitzhak Rabin was elected on the notion of territorial compromise in 1992. Benjamin Netanyahu was elected in 1996 when he said that he supported the Oslo Accords. Ehud Barak

in 1999 was elected on the ticket of territorial compromise. But then something dramatic happened that changed, I believe, in a very fundamental way, the dynamics of the negotiations and interaction between Israelis and Palestinians.

Israelis and Palestinians went to Camp David in the summer of 2000 per the invitation of U.S. President Bill Clinton. Clinton put forth a very far-reaching proposal that would have given the Palestinians the vast majority of their territorial demands. While Israel said yes, the Palestinians rejected the deal, and shortly thereafter, they waged the Second Intifada.

The Second Intifada largely targeted the Israeli population. It was not primarily targeted against the Israeli military. Seventy-five percent of Israel's fatalities and casualties were civilians, and the Israeli public started to ask questions regarding the nature of the conflict. If this conflict is really about land, then why did the Palestinians refuse Clinton's proposal?

Several years passed, and then in the summer of 2005, another dramatic event took place. Israel's Prime Minister at the time, Ariel Sharon—the most unlikely person to do so—practically fulfilled the so-called Palestinian territorial fantasy by pulling out of Gaza unilaterally. He asked for nothing in return. He just gave them the key to Gaza, and he moved Israelis living there back into Israel, only to be answered by a barrage of rockets and missiles—12,000 of them, to be exact—over seven years. The rockets terrorized the entire southern region of Israel and inflicted major economic harm, estimated in the billions of dollars, on the Israeli economy.

And then a third event of massive implications took place in 2008. According to Condoleezza Rice's memoir, Israel's Prime Minister at the time, Ehud Olmert, went one step beyond the Clinton proposal and offered the Palestinians 100 percent of all of their territorial demands, and the Palestinians again declined the offer.

Israel may be a somewhat awkward democracy, but it is without question a very dynamic, vibrant democracy. Believe me; I have the task of defending this democracy. Currently I think it would be safe to say—and this is supported by every major study conducted in Israel—that there is a solid majority of Israelis that believes that the conflict is essentially not just about territory. That is a dramatic development.

If you want to know why Prime Minister Netanyahu insisted on part of the agreement including Palestinian recognition of Israel's right to exist as a national homeland for the Jewish people, this is the answer. Because many Israelis fear that the unfinished business between us and the Palestinians is not the 1967 Six-Day War. There is a phrase in Hebrew that we are still fighting "the seventh day" of the Six-Day War. And the Six-Day War was over land. But many Israelis, including my own 88-year-old father who fought in 1948, Israel's War of Independence, and who was a big supporter of Yitzhak Rabin, will now tell you: "We are back to 1948. The question that has to be answered is not 1967 but 1948." Now, what was 1948 all about? 1948 was about our very right to exist as a nation.

This only adds to the fact that the Palestinians are making an effort, although I think to their own detriment, to

delegitimize Israel in the international arena. It is not helpful when you come to the Israeli public to negotiate. Remember, Israeli democracy has its way of allowing the public's will to eventually prevail. That is how Israeli democracy is built.

Look at the Israeli elections a few months ago. Three parties did well: Yair Lapid's Yesh Atid, Naftali Bennett's Habayit Hayehudi, and Shelly Yachimovich's Labor. Combined, they won 45 seats, 14 seats more than the Prime Minister's party, Likud-Beiteinu. All three of these parties ran on a platform that was 100 percent domestic. They had a position on the Israeli-Palestinian conflict, but it was not their main agenda. The one party that ran on the platform of peace with the Palestinians, Tzipi Livni's party, won only six seats in the Israeli Knesset. She is now the chief negotiator with the Palestinians.

I am mentioning this because it is important to understand Israeli society. It is important to understand Israeli public opinion. It is important to reach an agreement between leaders, but in the age of the information revolution and transparency, you have to engage in a conversation with the grassroots. Otherwise, it is not going to fly, and that is the case with the Israeli people. So I think the Palestinians have to work very hard to convince the Israelis that there is a deal to be achieved here because, as I said before, the Israeli public today is in a place where they believe that the conflict is not just about land. And that is a major problem for the Palestinians.

There is a story about Israel's founding father and first Prime Minister David Ben-Gurion. In 1948, shortly after he proclaimed Israel's independence, he started to receive gifts

from all over the world. Heads of state were sending him gifts. People sent him paintings and chandeliers and statues and so on. As you know, Israel was attacked by seven Arab countries immediately after its Proclamation of Independence. In the middle of the war, Ben-Gurion received a very unique gift that arrived from the King of Burma, which is today the Republic of Myanmar. The king decided to send to the newly reborn Jewish state a very special gift. He put a huge white elephant on a boat and sent the elephant to the port of Tel Aviv. Now, Tel Aviv had a tiny port, and the elephant arrived at the port and caused a great deal of confusion.

They had no idea what to do with it. First of all, Israel of 1948 was only 600,000 people. The Tel Aviv Zoo was the only zoo in the country. It was the size of your average petting zoo here in America. It obviously could not house an elephant, and worse than that, they could not find a single veterinarian that had any prior experience taking care of elephants. So there was a real fear. What should they do? Let the elephant die from lack of proper care? Imagine that in the midst of the war, David Ben-Gurion, Israel's Prime Minister, of all things, had to deal with the elephant. The story is in Abba Eban's memoir. Ben-Gurion convened his immediate staff, and he said, "Guys, help me out here. What do we do with the elephant? I do not want to offend the King of Burma. Every vote in the United Nations counts." So Abba Eban said to David Ben-Gurion—according to his story—"Mr. Prime Minister, I suggest that you write a very nice letter to the King of Burma in which you will tell him what my grandmother used to tell me." Ben-Gurion asked, "What did she used to tell you?" And Eban said, "My grandmother used to tell me to never accept a gift that eats."

What is the point of the story? What Abba Eban actually tried to say is, I think, a very important lesson to all of us in diplomacy and peacemaking. It is that the ultimate expression of caring or, if you may, of love, is the unconditional form of love and caring. I think this is the main lesson in interpersonal relations, as well as in bilateral relations between countries. It relates to what we are all learning from the events unfolding in the region. The caring of the international community to the people of the region has to be unconditional, has to be about the well-being and the good of the people. I do not want to brag about it, but Israel is very quietly treating dozens of Syrians every day in Israeli hospitals. Very little of it is reported in the media. I think there was one *New York Times* story about it. But I can tell you we are doing it quietly. We do not want to compromise the safety of anybody, but we are doing it because we believe that it is the right thing to do. I think that is the best we can do at this point—to make sure that we care for the people, and we do it unconditionally. We set aside cold interests, and we take care of what needs to be taken care of.

Thank you so much.

Reflections on Events in the Arab World – The “Arab Spring” and Transitional/Post-Conflict Justice

M. Cherif Bassiouni*

Once again, we are completing a few days of immersion into contemporary issues of international criminal justice, during which we had a chance to meet with extraordinary people who are working to make things happen at all levels. These meetings bridge several generations and, more particularly, they include the younger generations that will pick up the relay after those of us from the older generations depart from the scene. We have also heard some extraordinary speakers, not the least of whom was my predecessor at the podium today, Karima Bennouna, who was exceptional in her presentation.

We owe a debt of gratitude to David Crane, to Jim Johnson, to Greg Peterson, and to all who organize these annual events. All three are always the first to remember others and to thank them, and I think it is our turn to thank you. This is an extraordinary endeavor that you have started from scratch, and I am certain that in the years to come, it will continue to move ahead and have an enormous influence on international criminal justice.

* Emeritus Distinguished Research Professor of Law, DePaul University College of Law. This publication is based on Professor Bassiouni’s keynote address on August 27, 2013 at the Seventh International Humanitarian Law Dialogs held in Chautauqua, New York. These reflections were edited by the author for publication in July 2014.

Having already spoken on the panel, what follows are some reflections and observations to supplement my panel remarks. When I spoke on the panel earlier, I referred to the Arab world as being conspiratorially minded, and I thought for a while about where all this comes from and how similar the thinking of people in that region is. But it is not necessarily in line with western thinking, so I thought that, contrary to what most of you would expect me to come up with—namely an Arab story—I am going to tell you a Jewish story that nonetheless applies.

It is a story that took place many years ago in Russia in a particular city where there were two merchants who were very much in competition with one another. They always wanted to know what the other was doing. One day, one of them goes to the train station, and lo and behold, he sees the other merchant standing at the train station, and he is totally confused. He knows that there are two big wholesalers from which he and his competitor buy their merchandise, one is in Minsk and the other is in Pinsk. So where is his competitor going? Is he going to Minsk, or is he going to Pinsk? So he goes up to him, and says, “Shalom. Where are you going?” And the man says, “I am going to Minsk.” He then concludes, “If he is telling me that he is going to Minsk it is because he is going to Pinsk. But on second thought, he knows I am not gullible and so that is what I am going to think. That means that he is really going to Minsk!” So much for convoluted thinking.

When you look at different perspectives that are coming out of the Arab countries—and remember, as I suggested earlier, please keep each country separate because each country has a different historical background and a different

set of experiences—each country has the equivalent of the Minsk-Pinsk theory. Each Arab country sees what happened to it with different eyes than outsiders, and within each country there are different perspectives. Sometimes polarization is extreme and perceptions and narratives are quite opposed—some not necessarily making sense except to their respective exponents. What is urgently needed now in Arab states where conflict occurred is investigation and evidence-gathering, as I discovered as the Chairman of the Commission of Experts established to investigate violations of international humanitarian law in the former Yugoslavia. Without the evidence produced by a thorough investigation, the UN Security Council would have had no basis for establishing the International Criminal Tribunal for the former Yugoslavia.

But the road to peace and reconciliation has other ways. Truth and justice are indispensable, but understanding each other's narrative is paramount to reconciliation. I am thinking of the two Israeli officials who are here today in their personal capacity. They know that the only way they can deal with Palestine and other Arabs is to understand the state of mind of the people and the power plays that are at stake. So this becomes very important in looking at what to do in terms of "transitional justice," bearing in mind that, in Arabic, the word "transitional" modifies "justice," and it has such a western tinge to it. Justice is a key word in the Muslim and Arab countries because the term is referred to in the Quran 22 times. You cannot have a fundamentalist argue against justice because it is in the Quran 22 times, and in the attributes of God in the Quran, God is defined as the "God of justice," much as the Torah and the Talmud refer to God as the "God of justice." So that is where you relate to the culture and to the cultural

factors that impact upon the different groups in the societies with which you are dealing.

But justice and politics do not always go hand in hand as described below, using mostly Egypt as an example. Political considerations and power interests are often in conflict with the pursuit of justice. And sometimes hard choices produce hard outcomes. As of July 2013, the Muslim Brotherhood found itself being repressed by the Egyptian military, which intervened for fear of having a system that would develop into a theocracy. Some 3,000-4,000 people are estimated to have been killed, 20,000-22,000 injured, and estimates range from 16,000-22,000 of those who have been arrested. But if you compare it with the potential harmful consequences that would have obtained in the case of a civil war—as in Syria or Iraq or previously in Algeria—had the Muslim Brotherhood remained in power, it would have been much worse. This does not, however, excuse the abuses of power, the indiscriminate use of force, and the commission of crimes. For that, accountability is necessary, as is victim-redress. But in the Arab and Muslim worlds this is still far away.

In the meantime, internal struggles are ongoing in the Arab and Muslim states. In Egypt, the Muslim Brotherhood is the dominant group among the spectrum of Islamists throughout the Arab World. Other groups include some that are supported by Saudi Arabia and the Gulf states, like the Salafi, who are essentially Wahabi. From there, you have a cascading effect of other groups, some who are even more violent and who are part of a loose network referred to as al-Qaeda.

Al-Qaeda does not exist as an organization. It is, at best, a network of organizations and, as with any network of international organized crime, its relations are constantly changing. It is a relationship that is based on opportunity, which lies where there is a theater of military operations. It is the equivalent opportunity for organized crime, namely where is there an opportunity to make money. In the days of Sierra Leone and Liberia, it was in the diamond market, so groups moved into the diamond market. Then some awareness was raised about what was happening, and the international community started to put limitations on De Beers and others, trying to have some type of a process by which to mark diamonds, to separate the legitimate ones from what was referred to as “blood diamonds.” Money laundering became more controlled. But illegal flows of funds continue. Controlling international criminality faces the same difficulties as combatting transnational criminality. And this affects international accountability.

Various al-Qaeda-labeled groups also have shifting alliances and interests. Individuals within these groups move from one group to another. So you may have a group constituted, say in Peshawar, and half a dozen of these people find their way to Iraq, and they become part of another group. It is difficult to track these amorphous groups in terms of personnel, leadership, and shifts from one arena to another, and therefore it is difficult to identify the participants, their specific goals, and their connections to others.

In terms of risk assessment, you have to consider each group as a separate mass. The counter-strategies and tactics of addressing each separate mass are different from the strategies

of addressing the overall phenomenon. For example, the Muslim Brotherhood is highly structured, well organized, and vertically integrated with internal and lateral connections with similar or sympathizing groups that are fairly well established along the lines of their own managerial system. This is not the case with al-Shabab in Somalia or Boko Haram in Nigeria. The new phenomenon called The Islamic State in Iraq and Syria (ISIS) operates mostly in Syria with ramifications in Lebanon, but likely with designs for future activities in Iraq. ISIS is a new phenomenon. It seems to consist of well-trained and disciplined soldiers who are believed to come from many countries. Young Muslims who are disgruntled with the United States and Europe, mostly because of their support for Israel and dictatorial and/or corrupt regimes in the Muslim world, see joining ISIS as their opportunity for revenge. But their methods and means are both un-Islamic and inhuman.

Going back to the Muslim Brotherhood in Egypt, what most people do not know is that the Muslim Brotherhood, which started about 85 years ago and has been repressed mostly in Egypt but also in other countries, has developed what they call the “secret organization.” Nobody knows exactly when in the course of its life this occurred but the estimates are that it was probably in the early 1950s, during the Nasser regime. To my surprise, I have never seen anything in the western media referring to the “secret organization.” When the “secret organization” was established under the Nasser regime, Nasser tried to publicize it a great deal, so a little bit more was known.

“The secret organization” was organized along a cell system, and they studied very closely the Communist cell

system that had infiltrated Western Europe during the rise of the Communist movement in Europe after World War II. The cells were small cells. Reportedly, they were between five and ten individuals with one leader. The leader was absolute. Everybody in the cell pledged to obey the orders of the leaders, no matter what they were, and only one person in the cell who was not the leader knew another person in another cell who was not the leader. So the relationship, as it was reported, was like clusters of different grapes that seem to all be connected, so that if the security apparatus caught one of the grapes, you could not really go up further than just another grape in another unit. Then it becomes really very unlikely that you can find the person in that other unit that will relate to another unit. So the damage can be contained, and the national security apparatus is stymied. The problem is in finding the chain of decision-making.

Assuming this to be a relevant fact, how will that play out in Egypt and maybe in other countries that try to repress the Muslim Brotherhood and other violent Islamist groups? My guess is that in Egypt the “secret organization” has already been activated, because the trigger is always when the leadership is eliminated. Certainly, the leadership of the Muslim Brotherhood, the Bureau of Guidance, has been totally decimated, with the Supreme Guide Mohammed Badie arrested and his number two, Khairat al-Shater, in prison. Mohamed Morsi was never in the senior leadership—he was more of a figurehead—but he has also been arrested as has most of the organization’s leadership. But this does not mean that resistance has disappeared, or that violence has come to an end.

Triggering the “secret organization” means that one will no longer see the type of public confrontations that existed so far. What you are going to see instead are the individual incidents that are going to start happening throughout the country. Whether it is a bomb here or a bomb there, or what we would call in a simplified way “acts of terrorism,” these are going to be individual acts that are going to destabilize ordinary life, and they are going to be very difficult to track. It is a typical Mao Zedong guerilla strategy. If you read Mao’s little red book, you will see a description of how a little mouse can defeat an elephant. You know how it works. The mouse goes into a small room and drags the elephant into the room. The elephant is unable to move. The mouse bites the elephant’s toe in front. So the elephant turns his head to get the mouse and hits his head on the wall, gets injured, and the mouse keeps on biting and alternating front and back so the elephant keeps on hitting his head against the wall until he ultimately falls down. That is the strategy that we may see develop in Egypt.

Part of the Muslim Brotherhood’s strategy is going to be to ride the wave of what we call “transitional justice.” There are already movements within the Muslim Brotherhood in the United States, in Switzerland, but mostly in England, that have rallied a number of the members of the House of Lords and House of Commons. They are going to follow the same strategy as the Shia in Bahrain. The Shia in Bahrain were very capable, with substantial resources, of having a disproportionate impact on world public opinion against the government of Bahrain by mobilizing resources in the western world supportive of the human rights movement, of the international criminal justice movement, to show how bad

these governments were and how much was needed and arguing that these governments had to be prosecuted.

The present movement in the United Kingdom is aiming for a referral by the UN Security Council to the International Criminal Court (ICC). They want to see if they can at least mobilize public opinion to refer the case. They want to argue genocide on the ground that the intent to eliminate the Muslim Brotherhood in whole or in part is an attack upon a religious group of people. If not, they will fall back on crimes against humanity. But they do not think that crimes against humanity is bad enough, so they are after genocide.

In Egypt, another destabilizing tactic used by Islamists is to support the Sinai Bedouins against the military there. There are infiltrators from al-Qaeda-affiliated groups that have come into the Sinai, reportedly from Yemen, the Sudan, Afghanistan, and Iraq. They have been identified by Egyptian military intelligence as operating there. There are a number of people from Hamas and some of the offshoots of Hamas who engage in violence that have come into the Sinai. A substantial amount of weapons from Libya have found their way into the Sinai, and some of these weapons have been sent from the Sinai to Gaza. This was quite evident to me when I chaired the Libya Commission of Inquiry, and we made it known publicly, but for some particular reason, neither the Egyptian authorities nor the international community paid too much attention to the warnings. Gaddafi used to buy tons of equipment, which he did not know what to do with, and in many cases, he would just pile them up somewhere, and we would stumble over a pile of something in the middle of the desert, which was totally unguarded. Of course, the various brigades and the younger

people in the various towns would go there and take as many weapons as they wanted.

The media only spoke of it in one instance when a massive weapons cache was found near Zintan, and young people went there and just picked up what they could. You could see pictures of people breaking the wooden crates and just rummaging through the things. There were concerns that there were also other weapons of a more sophisticated nature that could cause greater damage to more people. Whether they were utilizable or not because of the passage of time is another question, but certainly, it is quite possible for people with some technological capabilities to restore some of these weapons and use them.

In any event, now you can see the connection of the weapons in Libya moving through Egypt, finding their way into the Sinai, and at first being supported by the Muslim Brotherhood because the target was Israel. Then it turned around, and it is now supported by the Muslim Brotherhood and Hamas to be used against the military in the Sinai.

The Sinai is subject to the 1979 Peace Agreement. I had the honor at the time to be one of the legal advisors to President Sadat at Camp David, so I know a little bit about what the treaty required. There are limitations in terms of zones as to how many Egyptian troops can be there. The second Egyptian army is located in the Sinai. It is limited in troops and in equipment, particularly with respect to tanks and artillery that it put in Area C of the Sinai. There has been an increase in the number of troops that have gone into the Sinai in the last few months, with Israel's approval. But the Egyptian

military has not proven to have trained its conscripts well enough to be able to stand up to the more wily, better-trained, and more experienced fighters who come from the three different groups fighting in the Sinai against the Egyptian forces.

A lot of very classical guerilla actions are being taken by these groups against the military. A few days ago there were 24 soldiers who had finished their period of conscription in the army, and they were supposed to be released. They got to the place where they were supposed to be released, but, you know, armies being what they are, there was a little bit of bureaucracy there, and they said, "We cannot process your papers today. Come back tomorrow." So they sent them to certain barracks, and on their way back the next day, they were ambushed. Those who ambushed them wore black masks, which is very typical of these people who have fought in arenas other than in the Sinai. The Sinai Bedouins would not have covered their faces in this way. Neither would the Gazans. So the assumption is that these fighters came from the outside. They spared the drivers of the two buses, and killed the 24 conscripts who were on their way home. Twenty-one of them were from a small town called Shebin el-Kom. I spoke with one of the relatives, and he told me the entire town was shocked.

The reaction in Shebin el-Kom was that the Muslim Brotherhood is done in their town, because the entire town was now feeling the effects of this atrocity, and they could not care less what the government was going to do. They were going to take care of anybody whom they believed to be a member of the Muslim Brotherhood.

This is how a strategy of radicalization works. For the Muslim Brotherhood as well as other organizations, radicalization is what leads to more violence, and eventually a civil war that disrupts society. You create a trap for the police and the military to intervene, because the military, in particular, are trained to do battle in the field against an enemy that must be defeated. They are not trained to engage in anti-guerilla tactics.

So you are now going to see something entirely different in the dynamics of the process, but more importantly—and I am jumping to a conclusion before going to different arenas—what you are going to see is a new connection between what is happening in Syria, Iraq, Egypt, maybe Yemen (although it is a little too remote), and certainly Libya and Tunisia. You are going to see a linkage that appears to be just casual at first, then opportunistic. But my feeling is that the only way that the Islamist movement can succeed is by creating a regional rebellion that has some level of coordination, so that they can all, more or less, happen at the same time to have the maximum geopolitical impact. Syria and Iraq are good examples.

In Libya, the situation is quite serious, in my opinion, and I think the referral by the Security Council to the ICC has been poorly handled. This is where those of us who are advocates and proponents of international criminal justice are perhaps losing track of the fact that international criminal justice is a component of a wider strategy. If we lose track of that, we can sometimes do more harm than good.

Philippe Kirsch, who served with me on the Libya Commission and succeeded me as chair, went to see Saif al-Islam in Zintan. The first thing that Saif al-Islam showed him was his hand, from which three of his fingers had been cut off by the Zintan Brigade. He is being held by the Zintan Brigade. He is not being held by the government. The Zintan Brigade is not giving him up to the government. The government has no control over him. So to a large extent, the government's opposition is in part a reflection of the fact that they have no control over whether to deliver him or not. Saif is there because he is the one who knows where the money is—whether it is in Switzerland or elsewhere, which bank accounts, which corporations—and he can identify the figureheads. The Zintan people are not turning him over because they want to exchange his personal safety for the information so they get the money. They have not made a deal with the government yet as to how they are going to divvy it up, so it is at a standstill.

That is a factor that does not go into consideration of “able or willing” or legal interpretations of the situation. The ICC made a decision that he has to be surrendered to the ICC.

Conversely it decided that al-Senussi, who was the head of internal security and responsible for the cold-blooded killing of 1,200 prisoners in a major prison, which is what triggered the rebellion in Libya, could be tried in Libya. These victims were mostly political opponents of the Gaddafi regime—middle-class and professional people. Most of them came from the Benghazi area. They were put in a prison. The prison was understaffed. They did not have enough food. The prisoners were not taken out. They suffered from a lot of problems, skin

problems and disease. They went on a hunger strike. The prison guards called on al-Senussi, who came in. He put machine guns around the towers, invited the prisoners to all come out in the courtyard to discuss their grievances, and machine-gunned them all down. They kept the story secret for the next ten years. Every week, family members would come and bring food and clothes for their loved ones in prison, who had died. Nobody told them anything about it. When word eventually got out, you had that extraordinary explosion. It was mostly in Benghazi, where most of the prisoners' lawyers resided, and that is why all of the lawyers congregated at the courthouse. This was the first demonstration that then led to the demonstrations in Tripoli and so on.

This is why it is so important for the Libyans that al-Senussi be tried in Libya. The Libyan people do not want to be deprived of the legal revenge of bringing that fact out in the open and prosecuting him. Over their dead body will they surrender al-Senussi to the ICC. And it is not that this is an impossible situation. It is a very easily negotiable situation. The Libyans need to have the story of al-Senussi told to their public.

Libya is ungovernable; it is in a state of chaos. The country is divided into three regions, and each of these regions has its own tribal divisions within it, but these are more geographic divisions than tribal divisions. Within those three tribal regions, there are historical differences. Libya is not a country that has a tradition of nationhood. It is a regional tribal society, which could very well disintegrate into three regional tribal societies and be very happy. The people in Benghazi

have no place for the people in Tripoli, and they can accommodate themselves with a link to Egypt.

The Libyan Islamists who are affiliated with Egypt's Muslim Brotherhood have about one-third of the popular vote. They are working very hard through the unpublished transitional justice law in Libya. They have a commission of eight people who are going into the various prisons. We have interviewed them. I followed them. I went into two prisons with them. They are using it as a mechanism for recruitment. Again, think in the tribal sense. You go to a prison, and you find somebody in prison, and you say, "What are you charged with here? Well, you are charged with killing three civilians in the Battle of Misrata. Okay. Let us find out who the three civilians were. Let us work out a deal. The civilians will forgive you, the families, or your family will pay the other family some victim compensation. We will get you out." Now, if you get that person out, that person owes you his allegiance, and his allegiance means that all of his families and friends owe you their allegiance. That one person gets you one hundred votes. So it becomes a method of recruitment, even though that person may have been a Gaddafi supporter and an anti-Islamist, but you got that person out of prison, so they are indebted to you. That is the way that they are building up their support. The Islamists in Libya do not want the pro-al-Qaeda people to come in, but they are ready to fight in the same ways.

The Libyan Muslim Brotherhood is mostly Benghazi-based, and that is one side of Libya, whereas, the other side of Libya that is close to the Tunisian border is not as largely populated. The Benghazi area has a population of over 1.2

million. The other side, which has only a population of about 300,000, has ethnic and commercial ties with Tunisia.

Tunisia, as we heard Karima Bennoune discuss, is still struggling with an Islamist movement, but it is moving toward national reconciliation and democracy. Its President, Moncef el-Marzouki, is working effectively to produce this outcome. The problem in Muslim countries is how to enhance secularization and democracy without offending the Muslim population that wants to see something about Islam in its system of governance.

Another reflection is about the state of Islamic law and how it is manipulated by poorly educated popular preachers and leaders of political groups to incite violence. I will start with a story which is intended to convey to you the complexity of the Sharia, which has four Sunni schools, three Shia schools, several other small sects, and 1,400 years of accumulated jurisprudence or doctrine, *fiqh*, which is an enormous legacy that is very difficult to sort out. Notwithstanding the fact that I went to the University of Cairo Law School, studied the Sharia, and had one of the greatest scholars, Sheikh Muhammad Abu Zahra, as my mentor with whom I worked over the years, I am still a student of the Sharia. The range of doctrinal views can be explained by the following story.

The story goes like this: Somebody goes to an imam and says, “You know, Sheikh So-and-So, I have a problem, and I need a fatwa from you.” “What is the problem?” He said, “Well, the other day, I left my house, and as I left, I forgot to close the door. A dog came running in, and the dog came

exactly to the corner that I use for prayer, and he peed on the wall. So the wall is obviously impure. What should I do?" The scholar thought for a while and said, "Well, my son, the only way you can make it pure again is to tear that wall down and build a new wall." The seeker of the fatwa said, "Well, Sheikh So-and-So, I came to you precisely because this is the problem. This is the wall between my house and yours." And the Sheikh responded, "Oh. Well, in that case, my son, a little bit of water will purify it."

You can take any doctrine in Islamic law, and you can run it by the various schools, and you are going to have a range of interpretations from tear down the wall to a little bit of water will purify it. It depends on who the interpreter is; there are few unified positions. This is not like the Catholics who have a Pope who is infallible, whose decisions apply worldwide. This is a very fragmented system whereby the decisions are made by so many in different hierarchies throughout the Muslim world with different results.

Suffice it to look at what is happening with the Shabab in Somalia, Boko Haram in Nigeria, and similar groups in Mali, Chad, Pakistan, Afghanistan, and other parts of the Muslim world, and you will see what we can all recognize in them as being essentially a deficit in human development. But you can also see disciplined and organized groups developing in each one of these societies headed by people who claim not only the military and political leadership, but in many cases, they are the same people claiming the religious leadership. They are then the interpreters of the Sharia. They are then the interpreters, appliers, executors of the political strategy and of the military strategy based on what they say. How to stop

them? How to deradicalize those willing to follow them? That is a challenge that Muslim political and religious leaders have failed to address so far. The United States and the West are also at a loss on how to address these new realities. So far, the only response has been repression, and that has not been succeeding. But politics plays its role there too. Few, if any, Muslims are involved in the effort against violent radicalization, just as few of Arab origin are involved in efforts to bring solutions to the conflicts in the Arab world and with Israel. Islamophobes and pro-Israeli forces have barred Muslims and others of Arab origin. The result is, and will continue to be, more anti-U.S. and anti-western violent conflicts in the Arab and Muslim worlds—and the United States and Europe will become the targets of the future.

As the United States discovered in Afghanistan and Iraq, a conventional military approach does not work. A different approach is needed. Large-scale repression by friendly regimes, like in Egypt against an estimated seven million members of the Muslim Brotherhood, is also not workable for long.

Arab and Muslim governments are ill-equipped to deal with these and other similar situations and find themselves under enormous pressure by the international community, the human rights community, and others to do something different. But what? And how? That is where things hit a dead end, except for senseless repression abetted by the United States and other western states. Existing regimes are not prepared to become secular democracies, and that is why they are not interested in pursuing transitional/post-conflict justice. But the problems and aspirations of these societies will not go away.

They will resurface—in a peaceful way if permitted, if not, in violent eruptions.

I will make a concluding observation on what is happening. In my opinion, the focus should be on Syria, Iraq, and Libya. The urgency with Egypt has passed as the Egyptian military has dominated the situation. But problems in Sinai and Gaza are present. And Egypt's future is up in the air.

The “Arab Revolution,” as I once called it in 1973 in a book that I co-authored with Eugene Fisher, and to which the world's leading historian, Arnold Toynbee was kind enough to write a preface, is not over. It is ongoing, and more conflicts are in store. The United States, NATO, and the European Union need to develop a comprehensive long-term strategy to address the political and social fragmentation and its consequential violence. But for that, they will need genuine experts who are from the Muslim and Arab worlds, experts who are connected to these societies and who are put in leadership positions and not kept in the lowest ranks of advisers while the real shapers of decisions have different political agendas. The years to come will see an even greater fragmentation of the Arab world and expanded international violence by a new breed of Muslim Jihadists who will eventually take their fight to what they view as their enemies. Repression will only increase their resolve—the writing is on the wall.

Thank you for the opportunity to share these thoughts with you, which I hope were not too disjointed.

Commentary

**Impunity Watch Essay Contest Winner:
Our Time is Now!**

Kayla McCall*

I was never able to fully comprehend what the word “resistance” meant; it was not until I joined the 2013 Summer Institute for Human Rights and Genocide Studies that I learned the meaning of the word. It was here that I came to the realization that I have been subconsciously resisting for many years. I was a victim of bullying from the time I started fourth grade, up until the day I walked through the doors of my high school. Five years I was bullied; for five years I had to face cruelty on a day-to-day basis, and for five years my parents watched me cry, as their daughter wondered what was wrong with her.

Every day was a new struggle, where I had to stand at a bus stop with a group of kids that would glare and snicker at me. I remember my mother would ask me if I wanted her to drive me to school, and I would say no. Each day, I would have to fight to find a seat on the bus since nobody was willing to let me sit with them. If a person refused to move, I would sometimes have to literally hop over them just to take a seat.

* Kayla McCall is a high school student at Lancaster Central High School. This is the winning essay in a high school essay contest sponsored by the Summer Institute for Human Rights and Genocide Studies, the Robert H. Jackson Center, and Impunity Watch Law Journal. The winning essay was formally recognized at the Seventh International Humanitarian Law Dialogs.

Again, after coming home feeling discouraged, my mother would ask me the next morning if I wanted her to drive me to school. I remember looking at her and saying, “Mom I can’t. I can’t let you drive me to school because if you do they’ll win.”

Resistance is to be passive physically, but to be a warrior both in spirit and in mind. Using violence as a weapon ultimately creates more problems. Violence leaves behind a trail of devastation and sorrow. To have the power of an educated mind, voicing what is unjust is the greatest weapon any individual can acquire. Through the Summer Institute I was privileged to meet so many amazing people who have peacefully resisted for a right that had been taken away from them. Out of all the speakers that came to talk to us, there was one woman whose story and determination moved me the most.

Shabana Basij-Rasikh is twenty-two years old.¹ She grew up in a country where approximately six percent of women obtain a college degree.² With the support of her family, Shabana graduated from Middlebury College in Vermont.³

¹ See Shabana Basij-Rasikh, Transcript, *Dare to educate Afghan girls*, TED (Dec. 2012), http://www.ted.com/talks/shabana_basij_rasikh_dare_to_educate_afghan_girls/transcript [hereinafter TED Talk Transcript].

² Sara Van Wie, *Leading Change: Featuring Shabana Basij-Rasikh*, GEORGE W. BUSH INSTITUTE (May 7, 2013), <http://www.bushcenter.org/blog/2013/05/13/leading-change-featuring-shabana-basij-rasikh>.

³ See *id.*

Shabana used her family's support as well as her past to fuel her success by co-founding SOLA, the School of Leadership, Afghanistan, Inc., a non-profit with the goal of giving Afghan women access to education.⁴ SOLA is the first, and possibly the only, boarding school for girls in Afghanistan.⁵

When Shabana was six years old, the Taliban took over Afghanistan and made it illegal for girls over the age of eight to attend school.⁶ For five years, Shabana had to dress disguised as a boy in order to escort her older sister to a secret school.⁷ This was the only way the two of them, as female students, were able to seek an education. Every day they feared for their lives. To be fearless does not mean to be unafraid. Being fearless is to have the courage to resist and continue to look fear in the face in times of adversity. To avoid getting caught, Shabana and her sister took a different route to the

⁴ *Id.*; see School of Leadership, Afghanistan, Inc., SOLA-AFGHANISTAN, <http://www.sola-afghanistan.org>.

⁵ School of Leadership, Afghanistan, Inc., *Shabana Basij-Rasikh*, SOLA-AFGHANISTAN, <http://www.sola-afghanistan.org/shabana.html>.

⁶ TED Talk Transcript, *supra*, note 1; see Bureau of Democracy, Human Rights and Labor, *Report on The Taliban's War Against Women*, U.S. DEPARTMENT OF STATE (Nov. 17, 2001), <http://www.state.gov/j/drl/rls/6185.htm>. "Since 1998, girls over the age of eight have been prohibited from attending school."

⁷ Van Wie, *supra*, note 2.

school and would cover their books with grocery bags so it looked as if they went shopping.⁸

The school was held in a house that held more than one hundred girls.⁹ Every day those girls, their parents, and their teachers risked their lives to ensure a brighter future for these young women.¹⁰ When Shabana was beginning to lose hope, her father told her, “Listen my daughter; you can lose everything you own in your life. Your money can be stolen. You can be forced to leave your home during a war. But, the one thing that will always remain with you is [your education].”¹¹ Shabana is just one out of millions of others who have been, and still are, advocating for change and speaking out against injustice around the world.

Another remarkable woman whose name remains unfamiliar to many is Irena Sendler.¹² Irena was born in 1910, and died in 2008.¹³ She was a Polish Catholic social worker

⁸ TED Talk Transcript, *supra*, note 1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See Dennis Hevesi, *Irena Sendler, Lifeline to Young Jews, is Dead at 98*, New York Times (May 13, 2008), http://www.nytimes.com/2008/05/13/world/europe/13sendler.html?_r=0.

¹³ *Id.*

who worked in Warsaw during World War II.¹⁴ During that time, she became known for heading the Children's Bureau of Żegota, an underground organization that saved 2,500 Jewish children by pretending they were sick from typhus and smuggling them to safety in ambulances. The organization also hid Jewish children in other things, such as trash cans, potato sacks, and even coffins.¹⁵

The Jewish children that were smuggled by Irena's organization were placed with families, orphanages, hospitals, or convents during World War II. Later, after the war, Irena tried to reunite these Jewish children with their surviving family members, if any. Here is a woman who is considered a hero by many, yet Irena did not think of herself as such: "I could have done more," she said, "this regret will follow me to my death."¹⁶ Irena's story is inspiring and shows how one person can truly make a difference. By educating people using life stories such as Shabana's and Irena's, we can learn lessons that will help create a brighter future and an even better generation.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Irena Sendler: Social worker who saved 2,500 Jewish children in Warsaw and was tortured by the Gestapo*, THE TELEGRAPH (May 12, 2008, 11:11 PM), <http://www.telegraph.co.uk/news/obituaries/1950450/Irena-Sendler.html>

It is our moral duty as a global society to become the voice for those who dare not, or cannot, speak. Martin Luther King Jr. once said, “In the End, we will remember not the words of our enemies, but the silence of our friends.”¹⁷ Too many of us keep silent, hoping someone else will fix what is in the world which is found to be unjust. Our time is now! We cannot afford to remain voiceless for our brothers and sisters who have had their rights stolen. Find out about an ongoing conflict in the world and educate yourself about it. Find a problem that sparks an interest, and find small ways to resist and make a difference.

¹⁷ MARTIN LUTHER KING, JR., *THE TRUMPET OF CONSCIENCE* (1967), quote available at <http://mlkday.gov/plan/library/communications/quotes.php>

Recent Developments in International Criminal Law: 2012–2013

Mark A. Drumbl*

Good morning, everyone.

I was struck yesterday by Prince Zeid's comments about the value of journalistic interviewing in pushing a little bit closer towards uncovering the truth in contexts of mass atrocity. This push contrasts with the pull of criminal law, where the defendant tends to adopt a combative, confrontational posture. In that sense, courts of law may promote law, but they may not necessarily promote truth-telling, remorse, or contrition.

I am reading a book called *Evil Men*. It was written by James Dawes, an English professor. Dawes interviewed about a dozen elderly Japanese men. These men served in the Imperial Army in World War II, notably in China. They were arrested by the Soviets and sentenced to a short stint in prison in the Soviet Union. Thereafter, they spent about a decade in reeducation camps in China. They were subsequently released back to Japan. Dawes interviewed them. Dawes sought to

* Class of 1975 Alumni Professor and Director, Transnational Law Institute, Washington and Lee University School of Law. This publication is based on Professor Drumbl's keynote address on August 27, 2013 at the Seventh International Humanitarian Law Dialogs held in Chautauqua, New York.

bring out stories of their experiences during the war. Let me read to you from one interview with a man named Kaneko:

“Children, I never could do. I never could on my own target and shoot them. And stabbing kids with a bayonet, I’ve never done that a single time. I just couldn’t do it to kids, but women were no problem.” Pause. Question repeated. “There were no children, no kids.” Pause. Interviewer asks again. “Wait. There was just one. It happened when we went to a village, and the old soldiers were first set on rape.

“There was a woman trembling in the corner. I’m holding both her legs. We lift her up. We toss her into the well, and there’s a kid. This kid, because his mother had been thrown into the well, the kid went around and around the well yelling ‘Mama, Mama.’ He was four years old, you know, and he couldn’t quite reach. But then he had a chair . . . that he dragged out, and he used that as a stand. And he said ‘Mama,’ and he threw himself into the well.

“Oh, this is just too much, we soldiers thought, and at the end, the old soldier said, ‘Kaneko, throw a grenade in there.’ We had these handheld grenades. I primed the grenade and threw it into the well and blew it up and killed them both, and that’s what happened. That has stayed inside of me to this day. That stays with me, no matter what.”

Later in these hour-long interviews, after further conversation:

“I didn’t want to kill any kids. So when I shot all the kids, I would shoot them blindly. I’d close my eyes and do it. I thought it would be bad luck if I had stabbed them. I intended not to kill children; however, of course, I was using a machine gun, so it was just a *rat a tat-a tat a tat a tat*, a machine gun. There were children there. I had my eyes closed. That’s how it was.”

This interview bumps from a posture of complete denial to a posture of exceptionalism: in other words, in the case of murdering children, it slides from “none” to “well, there was just one.” And then, in an additional twist, it moves to an admission of indiscriminate child killings.

What I find striking about this particular interview—and I will come back to Kaneko later on when I end my remarks—is that stories of atrocity do not necessarily fit so well with the procedures and regularities of criminal trials.

Kaneko himself had served time in a Chinese reeducation camp. The Chinese reeducation camp, however, treated the Japanese prisoners like gold. They were offered instruction, learning, three meals a day, and handled very primly, as opposed to in the Soviet gulag from whence they had first come.

I also like this story for another very important reason. When we talk about international criminal tribunals, international prosecutors, and international trials, we are in fact dealing with a very small percentage of the places and spaces in which issues of justice for atrocity are actually dealt. If you did a head count and a numbers game, the overwhelming majority of prosecutions, justice-seeking ventures, and accountability ventures happen at the national level. There is so much talk about the International Criminal Tribunal for Rwanda (ICTR). The ICTR has dealt with approximately 90 people. National institutions in Rwanda have processed somewhere between 500,000 and 1.2 million individuals. Initially, specialized chambers of national courts dealt with about 10,000 defendants. Then, beginning in earnest in 2005, the *gacaca* process involved the remainder—a vast number indeed. While *gacaca* initially was understood to be a form of indigenous customary restoration, it turned into something that looked an awful lot like a criminal court, albeit without key due process protections such as defense lawyers.

International law is, no doubt, a trendsetter, but we still need to realize that the vast majority of work is occurring at the national level or in local institutions. Considerable accountability activity also occurs in places that are not at all like criminal courts, for example, truth commissions and ceremonial reintegrative rituals. I think it is crucial for us to remember these contributions. International law is shiny, alluring, modern, progressive, technocratic, neutral, and aspirational. But at the end of the day, it is strikingly minoritarian when it actually comes to the sheer volume of perpetrators and victims that it addresses and redresses.

Given the small number of people they do deal with, we cannot anticipate that international trials will actually stop impunity. Going back to Kaneko, his experience after the war was to return to Japan, become a family man, and work. He became very politically involved in pacifist causes. He beseeched the Japanese to talk about the violence that happened, particularly in China—an unpopular position, at least officially, in Japan. What is vexing in his story—and I am going to come back to it now—is that when asked what atonement meant for him, when pushed about what redemption entailed in his case, his response had nothing to do with courts, justice, or process. It had entirely to do with his refusing to remain silent about what happened during the war. He said that his redemption would be never to fight for Japan again. When you read his particular story, it seems hollow and empty in that regard, but that was his redemption song.

All that said, let me share a few words about the international criminal tribunals. Since I do not want to repeat what was said yesterday, I would like to give you a broader bird's-eye view of what these particular institutions have accomplished to date.

When you add them (the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, and the International Criminal Court) together, we have the following: there have been in total 204 convictions for war crimes; 80 for genocide; and 268 for crimes against humanity. Many people are convicted for more than one of these crimes.

Genocide is a set of violent acts undertaken with the intent to destroy in whole or in part a particular national, religious, racial, or ethnic group. Crimes against humanity involve a series of enumerated offences committed as part of an attack that is widespread or systematic in nature. The largest cohort of people convicted for crimes against humanity has been convicted for murder as a crime against humanity, as opposed to other crimes against humanity, such as torture, rape, or extermination.

Sentencing is something that we have not talked about at all so far at this particular event. So what happens to international convicts? Well, at the International Criminal Tribunal for the former Yugoslavia (ICTY) the median sentence is approximately 15 years. Defendants before the ICTR face a median term sentence that is about ten years longer, while nearly half of all defendants are sentenced to life imprisonment (hardly any ICTY defendants are sentenced to life). Term sentences lengthen at the Special Court for Sierra Leone (which lacks the power to issue life sentences). One particularly instructive takeaway from these figures is the disparity in the punishment a convict would receive based on which institution is prosecuting. The International Criminal Court's (ICC) one trial verdict so far, in the *Lubanga* case, resulted in a 14-year sentence, but that is slightly anomalous, I think, in the sense that the crimes related to the conscription, enlistment, and use of children under the age of 15 in armed conflict. That, ostensibly speaking, is a serious offense, but it is not as serious or as grave as some of the other potential charges that the ICC may deal with in the future. So one major takeaway point from the sentencing practices of the tribunals is the extent to which the punishments vary.

Also, the punishments are not much more severe, and may in fact be a lot less severe, than what you would get in the United States for a simple drug offense. I think it is important for us to retain that fact. After all, we are talking about people like Kaneko, whose story I read to you, and others who are much higher up in the chain of command.

Another difference among the tribunals that I think is quite relevant and has not yet been fully discussed is where these defendants actually go to serve their sentences. Almost all the ICTY defendants serve their sentences in European prisons. At the ICTR, the vast majority serve them in African prisons, in Mali and Benin in particular. The conditions of imprisonment, and the availability of access to rehabilitative programming, vary widely among the many jurisdictions in question.

The Extraordinary Chambers in the Courts of Cambodia (ECCC) and the ICC have the ability to award reparations. The Rome Statute created a Trust Fund for Victims. To date, the Trust Fund has been capitalized in the approximate amount of 4.5 million Euros. Reparation funds can be distributed individually or collectively. Collective reparations aspire to rebuild war-torn communities as a whole in the Democratic Republic of Congo (DRC) and Uganda.

Cherif Bassiouni spoke yesterday about the importance of thinking about victims in the process. I think that is something we can all agree on, conceptually speaking, as being terrifically important. Practically speaking, however, this can prove quite difficult. At the ICC, for example, victims can participate in the criminal proceedings, and as I said before,

can also participate in reparative processes with regards to the receipt of funds. When victims participate in the criminal process against an accused, tensions may arise for both the prosecutor and for the defense. It can be difficult for the defense in that victim involvement can impair the defendant's due process rights by creating an appearance of guilt and by permitting untested evidence to be adduced. When it comes to the prosecution, what happens when the victims would like the prosecutor to do something that the prosecutor does not feel is appropriate or desired? To some degree, this arose in the *Lubanga* proceedings that I mentioned to you earlier, to wit, the case of the DRC rebel leader who was sentenced to 14 years for child soldier crimes. Concern understandably arose among victims that Lubanga was only charged with a very narrow range of criminality, namely the recruitment of child soldiers, and that much more serious charges of sexual violence, both against civilians as well as soldiers within his particular armed forces—notably girl soldiers—were cut out of the judicial process. In short, victim involvement can be very invigorating, but it can also complexify matters significantly.

Then there are difficulties when it comes to determining who is a victim. At the ICC, this is determined by the definition in Rule 85 of the Rules of Procedure and Evidence. In the ICC's Darfur situation, it has been noted that 189 victims have been formally joined to the proceedings; Uganda, 41; and in the DRC, 625. But these conflicts have victimized millions of people. In this way, some tension arises between those who have been officially determined to be victims and those who have not, those who were not aware of the option, and those who chose not to apply for victim status.

So I think we need to be very mindful that the ICC does a lot more than criminally convict, and that is generally good, but in doing more, sometimes an institution can create more pain while also expiating some pain. Law is intrinsically indulgent and exigent at the same time; it is both over-inclusive and under-inclusive.

Let us dig a little bit deeper in the case of some of the specific individual tribunals. We learned yesterday that at the ICTY controversy rages over acquittals of certain high-profile defendants and also over the development of legal theories, in particular, the specific direction test when it comes to aiding and abetting. So I will not revisit that.

I do want to talk a little bit about the *Karadžić* trial that is ongoing. This summer, charges of genocide were reinstated by the Appeals Chamber in the context of seven municipalities in Bosnia. The only place in Bosnia where genocide has been judicially authenticated is Srebrenica. Prosecutors are attempting to expand this, which emerges as a possibility in the *Karadžić* case.

But I want to ratchet into another comment that Prince Zeid made on Sunday which related to history. We were told that we need to know more about history and that leaders need to know more about history. It is safe to say that we can all agree with that in principle. But history is not neutral; history is contested. History is not science; history is often perceived. And I think the *Karadžić* case presents a great example of how courtrooms can very well permit the proliferation of multiple versions of history. In the *Karadžić* trial, prosecutors have a historical narrative, and it is a historical narrative with which

probably we all largely agree. It portrays Karadžić as a leader: a rhetorical force behind the Bosnian Serb population who mobilized this collective, controlled it, unleashed terror on Sarajevo, and engaged in brutality in camps where Muslims were held as prisoners. Karadžić personified the paradigmatic crime of the Serbian people committed in the name of the Serbian nation.

Karadžić, though, has a different view of history in court. Karadžić represents himself—he gets help from Peter Robinson, but Karadžić is a lawyer and is quite involved in this case. Karadžić renders a historical account that posits he did what he did because the Serbs are structurally under threat, historically from other groups. The Serbs were the only resisters in World War II to other populations in the area, notably Croatia, who essentially sided with the Nazis. The Muslims were aggressive and numerically superior. Karadžić presents himself as working for the collective self-preservation of the Serb nation. At the end of the day, this version of history placed him as a defendant because the international community was tricked, and because Serbia is simply fated always to despair.

I have a question, and the question is this: If Karadžić is convicted and if the Court legitimizes the prosecutorial version of history, which I am confident it will do, will that actually make a difference on the ground in Serbia, for example, for people who might be sympathetic to Karadžić's vision? I do not know. Does that mean the Court should not do it? No; of course it should do it. But I think we need to be cautious about not overestimating or overvaluing the influence and importance of a judgment to authenticating history. Courts

may have some role in clarifying history, but courts also permit dissident views of history to get palpable air-time. This happened in the *Milošević* case, as well. Over time, audiences may get tired of these contested histories, but a space does emerge to disseminate them.

One issue that we did not really get into yesterday that I find very interesting at the ICTR is the increased success of the ICTR in transferring cases to the national level in Rwanda as part of the completion strategy of the Tribunal under Rule 11 *bis* of the overall proceedings. This was tough at first because the judges hesitated to send cases to Rwanda out of concern over the availability of due process in the Rwandan courts and the thickness of judicial impartiality. Rwandan national institutions have overcome that particular hump, so the ICTR has been able to turn to transfers as a way to relieve certain parts of its caseload.

But I also think it is important to recognize that, in the Rwandan context, the march to justice for the crimes of the preceding Hutu government does not necessarily mean that the current government of Rwanda is beyond reproach. Far from it: Rwanda's government is not exactly a friend of human rights. It is a tightly-controlled dictatorship. Transitions from atrocity are not always neat transitions to democracy. If we think that the role of criminal prosecutions is always to lay the groundwork for a new democratic society, I think we are setting the bar quite high. Historically, transitions from atrocity take three basic forms. One is certainly a transition to democracy. A second is what I see happening in Rwanda: a transition from atrocity to something that is a lot more benign, but it is still not democracy. And then there is the third

aspect—which does not really get a lot of air play—which is accountability for a previous atrocity in a context where newer atrocity just keeps on emerging in the future. That is the situation in the DRC. So we have transitions that just lead to repetition of harms with some justice sprinkled along the way.

I think one thing that, to me, was a helpful takeaway from the conversation that we had yesterday about the Special Court for Sierra Leone is the fear that the aiding and abetting theories developed at the ICTY might begin to affect the calculus of liability at the Special Court, particularly when it comes to the *Taylor* appeal. Although this ended up not happening, these fears remain perplexing. After all, the Special Court for Sierra Leone was quite happy when its jurisprudence on the criminalization of child soldiering was picked up by the ICC and helped influence and guide judgment in the *Lubanga* case. If one is going to assume a level of exchange and connection and cross-pollination between the work of the international criminal tribunals, I guess one has to take the good (i.e., maximal chance of conviction) with the bad (i.e., impeding conviction). Is there greater value in having a harmonized international system or in a pluralistic system where different tribunals in different places do things along their own lines? I am not convinced whether one is innately preferable to the other.

Another tribunal that we have not spoken about at all so far here is the Special Tribunal for Lebanon (STL), which was set up in 2007 by the UN Security Council under Chapter VII of the UN Charter in response to a request from Lebanon. This Tribunal is concerned with a narrow set of crimes, in particular the assassination of Lebanese leader Rafik Hariri in which

there is ostensibly some Syrian connection. The STL is *sui generis* in that it is proceeding on terrorism-related crimes and also permits matters to go forward without defendants actually being in court. The latter possibility is certainly very different than what one ordinarily sees in international criminal process.

Let me dwell on one final observation about the international tribunals, return to something at the national level, and then offer some broader-based concluding thoughts.

Justice costs money. Someone is paying for these trials. They have a balance sheet. The overall budgets of the tribunals consume a lot of money. Since 1993, the combined budget of all the international criminal tribunals is over \$6 billion USD. In Rwanda, the average ICTR conviction costs something like \$20 million. Rwanda's *per capita* GDP is tiny. We do not live in a world of infinite resources. So when we discuss justice, perhaps we ought to be mindful of a conversation that is open to some kind of a cost-benefit analysis or cost-benefit approach.

There are lots of other ways to achieve transitional justice. Many of those are a lot cheaper. There are other ways of reintegrating people following conflict. Mozambique, for example—a place one does not talk about very much—after conflict reintegrated fighters who had committed war crimes, both adults and children, at the cost of a few thousand dollars each.

\$6.28 billion for the international criminal tribunals is roughly the same amount as the U.S. federal court system budget for an entire year. It is the same amount of money that

was spent on the 2012 presidential election. Maybe that makes you less annoyed with the six billion dollars or more annoyed. I do not know.

The 2012 London Olympics cost \$15 billion, two and a half times the cost of the international criminal tribunals to date. According to experts at Fordham University—from whose work I am extracting some of this information—Wall Street bonuses in 2011 were \$20 billion. You know, maybe in comparison, the international tribunal budgets are not that heavy. Nonetheless, I think we have to be sensitive to fiscal realities, even when we talk romantically about accountability and justice. Both still have to be paid for.

So who is paying for it? Well, you might be surprised to know the top funding source historically for the ad hoc tribunals until today is the United States, followed by Japan, Germany, the United Kingdom, France, and Italy. Now, U.S. support is diminishing.

The reality that these institutions are funded by the rich limits their ability to actually investigate the rich when the rich may be involved in criminal activities.

So these are some of my reflections on what has happened this past year in international criminal law. Looking further back, and farther ahead, international criminal law has achieved four major successes. It has built institutions. The institutions are busy. They are not empty suits. They have created communities of conscience and communities of expertise. A networked group of international criminal lawyers has emerged. Students study international criminal law;

professionals practice it. International criminal law is in the news all the time. One can no longer talk about mass violence in the absence of some reference to international criminal law. The references may be anemic, the law may be impotent and even applied in an inconsistent way, but it frames political conversations.

What about future challenges? What about plotting future directions? First, I think we need to think much more actively about returning justice to the national and local level. We need to re-nationalize and de-internationalize justice. Instead of international law being some technique that gets applied everywhere equally by a transnational elite, I think it is important to empower the local and engender local ownership. I think this is going to happen anyway. Increasingly, and perhaps inexorably, the domestication of international crimes in national criminal codes is going to pre-determine the jurisdictional level at which juridification occurs.

Secondly, we need to think more pluralistically and more inclusively. Justice can—and should—be imagined as meaning much more than just criminal law. Effectiveness in these areas means invigorating methods of justice other than criminal trials.

Thirdly, I think we need to subject criminal justice to scientific study. In other words, is this a method that actually works? Does it deter people from committing atrocities? Does it serve retributive or rehabilitative goals? Does it help authenticate history? The truths that come from international criminal tribunals are very comforting truths. International criminal tribunals say the following: “You, a small number of

people, are responsible for terrible acts of violence, and you should face criminal prosecution for these heinous acts.” By individualizing guilt in a handful of defendants, everybody else gets a free pass. We do not talk about the bystanders who failed to act. We do not talk about people who offer low levels of financial, political, and community support. We do not talk about foreign leaders who do nothing while genocide rages. It is very easy to blame a small number of ugly people for terrible incidents of mass violence, but I would say that is not enough, and we cannot just stop with prosecuting the most responsible. We would be well served to have much broader conversations about the fact that those most responsible would never have been able to do what they did but for the support, condonation, acquiescence, complicity, and involvement of huge numbers of people in a lot of places.

Finally, let us reflect on the reality that our focus on prosecuting the highest-level offenders can often be very theoretical for people living on the ground. In my work with victims, I have always been struck by how, regardless of the position of the perpetrator in the hierarchy of oppression, there are many times when victims actually view the low-level perpetrator as being just as responsible as the high-level leader. What Kaneko did, for example, matters greatly. The high-level leader may have said something or financed something, but he did not lift up the perpetrator’s hand. He did not actually make the perpetrator commit criminal acts. We cannot lose low-level perpetrators, such as Kaneko, in the shuffle of justice. Many incidents of atrocity are very local in nature. Many involve neighbor killing neighbor. People who lived in tranquility, or even friendship, may turn on each other. Pain and justice is often lived and suffered very locally and very privately. Sure, Charles Taylor is responsible in Sierra Leone, but the actual

people who did the amputations and the killings were not Charles Taylor. And there were many people in Sierra Leone who were poor, disenfranchised, and still did not participate in killing anybody at all. I do not think we can view the low-level perpetrator as just a robot or an automaton. Considerable agency bubbles to the surface—this agency needs to be recognized. Recognizing the agency and potentiality of ordinary people is a condition precedent to stopping atrocity from becoming truly massive in nature.

Thank you very much.

Transcripts and Panels

**Interview with H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein,
Ambassador of Jordan to the United Nations**

This interview was conducted by Gregory L. Peterson of the Robert H. Jackson Center on Sunday, August 25, 2013. An edited transcript follows.

* * * * *

GREGORY L. PETERSON: This is not going to be your normal interview. We have not rehearsed this at all.

You need to know that Prince Zeid's favorite sport is rugby. Who do you root for? Now that you are a high-end ambassador, a world figure, who do you applaud for?

H.R.H. PRINCE ZEID RA'AD ZEID AL-HUSSEIN: Well, I do not watch it anymore, but I used to root for France. I used to love the way they played the game, very attacking, very stylish, skillful. That is the team I used to root for the most.

GREGORY L. PETERSON: Do you play pick-up?

H.R.H. PRINCE ZEID RA'AD ZEID AL-HUSSEIN: No, no. I had a motorcycle accident two years ago, and actually, I had to give a deposition, because I filed a lawsuit against the well-known pizza delivery company whose vehicle crashed into me. But they have utterly removed any possibility of me playing rugby again, unless I can wear a helmet!

GREGORY L. PETERSON: Where was this accident?

H.R.H. PRINCE ZEID RA'AD ZEID AL-HUSSEIN: I have already retained counsel! And you would be too expensive for me!

GREGORY L. PETERSON: Do you know what kind of pizza they were delivering? Did you get that as part of the deposition? Was this a pepperoni special?

H.R.H. PRINCE ZEID RA'AD ZEID AL-HUSSEIN: I am not answering!

GREGORY L. PETERSON: We are at the Robert Jackson Center, and I just have to get this question out. I know you have written extensively about your intimate role in the creation of the International Criminal Court (ICC). What does Robert Jackson mean to Prince Zeid?

H.R.H. PRINCE ZEID RA'AD ZEID AL-HUSSEIN: It means you can get somewhere in law without ever having gone to law school, which is precisely what happened to me.

When you hear someone speak, not just so thoughtfully—and his opening statement at Nuremberg is well known to the people the world over—but his exquisite use of language is perhaps even more inspiring today than it was to those who heard him at the time, simply because we do not hear people speak like that anymore, not even outstanding lawyers, with some exceptions.

I think the way he couched the case was extraordinary because there was criticism of the International Military Tribunal (IMT) at the time. It was not an easy endeavor to get it up and running. But I think that in his opening statement, he provided the foundation for what he was able to accomplish later on.

One understands that, yes, of course, he made some mistakes during the course of the trial, and he compensated for them by using methods which would be very familiar to us now but maybe at the time were not well established. So he was breaking new ground. But when you think of the Tribunal, you think of Robert H. Jackson and how it was really the fulcrum on which world events were shaped.

GREGORY L. PETERSON: Are you able to see a direct line from the London Agreement—of which Jackson was one of the architects and which created the protocol for the Nuremberg Trial—and the actual prosecution of the trial, to what goes on today at the ICC, and in Rwanda and Yugoslavia? Do you see a legacy there?

H.R.H. PRINCE ZEID RA'AD ZEID AL-HUSSEIN: Yes, there is one, but it is a very difficult circumstance that we are dealing with now. In effect, when Germany was destroyed, the Germans themselves did not engage deeply with what was going on at the IMT and the 12 subsequent trials and the Allied run trials. It was really only around 1965 that the Germans themselves had to deal with it, because Konrad Adenauer was not keen on proceeding with a German reckoning of Nazi crimes soon after the end of the war. So there was a psychological space that was given to Germans in a way, until

you got to the point where the statute of limitations was running out on two categories of relevant crimes under the 1871 Penal Code. And then finally the Germans had to come to terms themselves with what it was they had done by holding the *Frankfurt Auschwitz* trials.

In the case of the ICC, we do not have this sort of postponement in effect, and you are not yourself taking control over the country. You do not have a trusteeship where you could basically put in place what you want and what you need right away, notwithstanding whatever the people may think. So you now have a much more complicated situation, because we believe that there needs to be accountability and that these proceedings must begin as early as possible.

In many respects, these countries are nowhere near ready to deal with these issues, and we have seen this. The prosecutors who are here know this far better than I do. While supporting this endeavor completely, we need to keep a critical eye on how we can improve the efficacy of what it is that we are trying to do. So there is a direct link, but in some ways, the proceedings at the IMT were not as fraught with the challenges that I think one experiences today in many parts of the world where crimes are being committed on a massive scale.

I have somehow totally avoided your question, I think.

GREGORY L. PETERSON: We are going to stick with our line here. To me, it is much easier to find a direct line from Jackson to every one of you here.

You played such a major role in the establishment of the ICC. You were elected the first president of the governing body of the ICC and oversaw a lot of its growth in the following three years, and you also chaired the complex negotiation over the elements of the individual offenses. Talk about that whole negotiation process where you get a whole group of people in a room and you are working the semantics of just coming up with the elements of the crime.

H.R.H. PRINCE ZEID RA'AD ZEID AL-HUSSEIN: I must acknowledge Professor Mike Newton because he was in the group with me, and Herman von Hebel, who is the current Registrar of the ICC. Herman was chairing the working group, and I was chairing the informal negotiations.

I think what was so amazing to me is realizing that, contrary to what most people believe, it is not simply just a case of states negotiating a particular text and then coming to an agreement. There were two things that came to my mind very quickly. One is that there was a tremendous amount of technique that you, as a coordinator or a chairperson, can develop and learn from others who have far more experience than you. Not just anyone can do this. Others have done this, and then you learn from them, and you have to use those techniques to try and forge an agreement.

The second is that so much depends on personality. You can have the same countries represented in the room—we were about 60 to 80 who were negotiating the elements for the offenses that fall under the Rome Statute—but if you replaced the representatives with a different set, we may have never reached an agreement in the end. So the personalities

themselves were very much decisive in this, and I think throughout the whole experience. And of course, Professor Cherif Bassiouni was with us before Rome and during Rome, and I think he can also attest to this. We were extremely lucky. We were lucky in Rome, and we were lucky after Rome, that we had the right sort of people and the right sort of mix to get through this.

The breakthrough came when the United States, together with Switzerland, provided a basic template for how we were going to deal with the three categories of elements. We also had to get our heads around a particular article, within the general part of the Rome Statute, Article 30 on *mens rea*, and fully understand how the elements fit in with general intent, and with the exceptions. Then once we got the structure down, it basically started to come into place.

GREGORY L. PETERSON: In 2009, the Dialogs focused on what Robert Jackson during the IMT called the “supreme international crime”—the crime of aggression. Could you explain a little bit where that stands?

H.R.H. PRINCE ZEID RA’AD ZEID AL-HUSSEIN: We have nailed down the definition. I think we came to an agreement on the definition, more or less, before we went to the Review Conference in Kampala. Essentially, we borrowed language from UN General Assembly Resolution 3314 and customized it so that it would fit into a penal code.

Initially, it was not as difficult as we thought it was going to be, once we understood that we had to very carefully balance the interests of the Permanent Members of the UN

Security Council and the rest of the ICC membership. But that was quite easy in comparison to the negotiations we had to conduct on the grounds for the exercise of jurisdiction and the method by which the changes had to be negotiated, because there were two paths toward having the amendment in place, and they seemed to be mutually exclusive. So we had to work around that issue.

GREGORY L. PETERSON: This is now much more important. Talk to me about Jon Stewart. You had an extraordinary opportunity to be interviewed by Jon Stewart on *The Daily Show*. What was that all about?

H.R.H. PRINCE ZEID RA'AD ZEID AL-HUSSEIN: Well, I think you are funnier than he was! But now I have just guaranteed that I will never be invited back to his show! He is a very funny guy. You sit in front of him, and he just makes you laugh without him even having to say anything. So that was fun. I enjoyed it.

GREGORY L. PETERSON: What was the context in which you were invited to *The Daily Show*?

H.R.H. PRINCE ZEID RA'AD ZEID AL-HUSSEIN: It was last minute. His Majesty the King was invited to speak on the show and to introduce this book that he had only just recently completed. He was basically going to sell the book. I had not read the book. I was told two or three days before the show was being filmed that I had to go. The King could not go, so I had to go instead, and I had to peddle the book.

So I got a copy of the book, and I read it twice. I skimmed it the first time, and then I read it in detail, and I made all sorts of notes. I arrived at the studio more than ready to talk about the book. And the producer said, "He is not going to ask you about the book. He wants to ask you about what has been happening in the Middle East over the last two or three days." And I said, "But I do not know anything! I have just been reading the book. I have not been watching the news!" So that was my quandary. I will leave it to the judgment of the viewers, but I think I did an okay job.

GREGORY L. PETERSON: Did he talk to you beforehand?

H.R.H. PRINCE ZEID RA'AD ZEID AL-HUSSEIN: Yes, very briefly. He said he was furious he had never been invited to the Robert H. Jackson Center!

GREGORY L. PETERSON: When you are done, do you go back to the green room and kibitz with Stewart?

H.R.H. PRINCE ZEID RA'AD ZEID AL-HUSSEIN: Something like that. No, no. The show is filmed at six o'clock, and his stock and trade is to take one of us public officials and get us to sing. He will throw these soft lobs by saying something like, "So how is the situation in Jordan?" And then, I would sit there and say, "It is very good, peaceful, quiet, calm," this sort of thing. Then the show is broadcast at eleven. So between six o'clock and eleven, the crew rummages through all the newsreels looking for footage of a Jordanian policeman beating the life out of someone! Then they show the Ambassador saying, "It is all quiet and peaceful," with the

footage playing in the background. That is his stock and trade, so I was very careful about how I responded.

GREGORY L. PETERSON: You gave a speech at the American Society of International Law's Annual Meeting several years ago called, "Peace versus Justice: Contradictory or Complementary," where you spoke about Richard Goldstone, the International Criminal Tribunal for the former Yugoslavia, and this whole issue of peace versus justice. Could you synthesize your views on that process and whether it has changed since 1995? If you do not remember your remarks, I have a copy here.

H.R.H. PRINCE ZEID RA'AD ZEID AL-HUSSEIN: When I was in the former Yugoslavia, we reached a point where we had been negotiating with the various sides for so long that it really felt like it was a pointless exercise. To a certain extent, when you see now the need or the desire by a number of governments to convene a second round of talks over Syria—and I should be careful to note here that I am speaking only in a personal capacity—it is reminiscent of what we went through in the former Yugoslavia in 1994 with the Contact Group Plan. It was the last in a series of plans to bring about peace, and there was really no reason to believe that the warring sides had exhausted themselves and would want to strike a deal at that stage. But in the absence of anything else, we still felt we had to talk.

Suddenly, there was this man, Richard Goldstone, and he said he was going to investigate three Bosnian Serb leaders. Panic spread throughout the United Nations. If he indicts them, will we be able to talk to them, and if we cannot talk to them,

how are we going to bring an end to the fighting? And then after Srebrenica, he did indict them. Panic ensued, and people were furious with him. But in the end, the indictments forced us to think differently. We could not deal with the same people anymore. Something had to change. In the event that there was a new development, a new marketplace bombing, we could not just sit there idly, note it down, and report to the Security Council. The United Nations had to turn the key. It was a dual-key arrangement with NATO for air strikes; the United Nations would turn the key. This in fact then happened at the end of August 1995. And then we had a process that ultimately led to the end of the fighting.

Now, it can be argued that the conflicts still exist in Bosnia, that it never really went away, even though the fighting ended in 1995. So we must think very deeply about what is required to ensure that we move from an absence of fighting to true and lasting peace.

GREGORY L. PETERSON: At that time, Goldstone became the first Chief Prosecutor of an international tribunal with the ICTY and then Louise Arbour, Carla Del Ponte, and now Serge Brammertz. Do you want to talk about Serge?

H.R.H. PRINCE ZEID RA'AD ZEID AL-HUSSEIN: He is a great guy. He is a good friend, and I say that because I know he says the same about me, so it is reciprocal.

GREGORY L. PETERSON: That was a planted question by Serge.

GREGORY L. PETERSON: Recently, you had a chance to speak at the International Center for Ethics, Justice and Public Life at Brandeis University. You argued in that speech at Brandeis that the rule of law is essential to make humanity whole following crimes committed against it, but that law is not enough.

H.R.H. PRINCE ZEID RA'AD ZEID AL-HUSSEIN: I think I said it far more eloquently than that! You have butchered my lecture!

GREGORY L. PETERSON: I am not using a quote; I am reading from a report. I think it was written by Don Ferencz. See the picture of Don?

H.R.H. PRINCE ZEID RA'AD ZEID AL-HUSSEIN: Look at that. You got it off the Internet.

What I tried to argue is that ending impunity is not enough. It is not enough that we just punish people. We have to somehow make them see what it is that they have done. A few of the people who perpetrate these crimes are pathologically of a sort where you can say they are sadists, or they enjoy participating in the commission of crimes. But the vast majority of people, it would seem, are normal people who are presented with extraordinary circumstances and then who commit these crimes. And yet, with very, very few exceptions since 1945, no one is prepared to show any remorse for them. No one. So we hanged them—or after Nuremberg and Tokyo, we locked them away—and yet hardly a single one climbing the steps to the gallows ever showed any contrition or remorse or ever believed that they were anything but innocent.

So there is something missing in this puzzle, and I think we need to discuss it. Just punishing them is not enough. We have to make them say “I am guilty of the most terrible crimes, and I am saying it not because I need a plea bargain and not because I want to be excused from prosecution. I am saying it because, given the weight of evidence presented before me, what I did was terrible.” And unless victims hear this, there is something missing. I tried to present this case in the lecture that you basically just destroyed!

GREGORY L. PETERSON: I clearly did!

There is so much going on in the Middle East, in case you missed it while you were reading other books. There are some things going on in Egypt. We will bring you up to speed afterwards. Obviously there is a lot going on in Syria as well. And there is talk about the potential prosecution of international war crimes in both locations. What advice are you giving, that you could talk about here, as to what sort of tribunal we could have. There have been various tribunals, most of them represented right here. We have permanent, we have hybrids, we have everything humanly possible. What would be a model you could see given a scenario in which Assad was arrested tomorrow?

H.R.H. PRINCE ZEID RA’AD ZEID AL-HUSSEIN: You have been talking to Ambassador Stephen Rapp because he asked me the same question at dinner.

I will be talking about this tomorrow, so I do not want to undercut my own delivery. But what we need to do, I think, is very carefully balance the interests of seeing justice done with

the rhythms of a society which may need to have their own imprint on this. I think we have perhaps taken too hard a position, although we need to constantly and very passionately defend the Rome Statute.

I think we just need to find the spaces and the right path into a particular society. I remember when Pierre-Richard Prosper, one of Ambassador Rapp's predecessors, returned from Iraq where he was working on the war crimes statute, probably with Cherif Bassiouni. He came back to New York, I had a meeting with him, and I said, "So, Pierre, how is it in Iraq? How do they view accountability?" And he said, "Well, for them, there are really two options, and they want the answers to these two options, which they see as the only two courses available to them. Can they hang 5,000 people if they cannot hang 20,000 people?"

I think that in Egypt and Syria, the thirst for retribution and revenge would be very great. But we have to work on accountability by whatever method is desirable to them and to the international community. And the truth in a broader sense also has to come out.

The sad thing about the Iraq case is, yes, we have seen a number of senior Ba'athists tried, but the Iraqis still do not know how to deal with their history, with their memory. What occasions do they celebrate? What do they commemorate? What do they not commemorate? Who are they in the broader sense? There are 29 ethnic groups—how do they fit in, and how does it all tie into memory? Cases have been tried, but the deeper questions still remain, and perhaps we can learn from that and see that we not repeat in Syria the mistakes we made

there. But it may be some time before we get to a Syria that is stable enough for trials to be conducted.

GREGORY L. PETERSON: You are a rock star in the international criminal law world. You are looked to for sage advice. You are a go-to person. I am always curious. You got your B.A. from Johns Hopkins University and your Ph.D. from Cambridge. Was there an “aha moment” where you decided that you would cast your professional lot in the international criminal law world, to create a consciousness, a discussion? Was there a moment in time that kicked you into that gear?

H.R.H. PRINCE ZEID RA’AD ZEID AL-HUSSEIN: There were two moments. The primary one came when we were in the former Yugoslavia. I was part of a team. We were shuttling between Pale and Sarajevo in 1994, soon after Jimmy Carter had come to Bosnia to see whether he could cement a cease-fire on the back of what we called “winter cease-fires.” In the winter, it would snow so there would be little fighting, and you would try to build on that. So President Carter came. He managed to get a basic commitment to a cease-fire, and then we began to shuttle back and forth between Pale and Sarajevo to cement the cease-fire.

One evening, when we were driving back from Pale, a well-known figure in the former Yugoslavia—who was subsequently indicted for war crimes—drove up next to us. He had put the head of a small Bosnian child on the bonnet of the car with a UN helmet over it. We saw lots of things when we were there. But even if someone was to explain to you in a court of law why and what it was done for, at least in a basic academic sense, no explanation holds when you see it. There

does not seem to be any argument that can justify the sort of things that one sees in the case of war.

After that, I left the United Nations and joined the Permanent Mission of Jordan to the United Nations, and my uncle, Prince Hassan—our Crown Prince at the time—called me up. He is a very close friend of Cherif Bassiouni's, and Cherif must have invited him to attend a meeting on international criminal law in Malta. He could not go, so he called me up, and he said, "I would like you to go instead." And I said to him, "But I have no background in this." And the more I complained, the more he insisted that I go. He did not tell me that I would be chairing the closing panel.

So I turn up to hear Cherif speak with all the authority that he has about these issues, and I was shaking like a leaf, thinking, "What on Earth can I say? I am a complete imposter. I have no clue." I must have come off that way, and so some people must have thought, "Poor fellow, we will give him a second chance," and they invited me to continue working on this front.

GREGORY L. PETERSON: What is the question that we have not asked tonight that you get asked the most? What am I missing here?

H.R.H. PRINCE ZEID RA'AD ZEID AL-HUSSEIN: People in the United States would ask me, "What advice would you give to President Obama [or President Bush before him] if you could sit with them and talk about the Middle East?" That is the most common question.

GREGORY L. PETERSON: If you had a chance to sit with President Obama, say you had an hour, just you and him over a brewskie. What would you say?

H.R.H. PRINCE ZEID RA'AD ZEID AL-HUSSEIN: First thing I would say is always talk to me!

I think the most important lesson is that most of what we are seeing is permutations of developments that we have seen before in world history. They are unique but not so unique that we cannot derive lessons from the past. I think there are too many world leaders who are not really interested in understanding that, who do not have historians around them, who maybe do not read as much history as they should; you find that most professional historians write for professional historians. It is a very sad state of affairs, because I think one has to remain attuned to these complex developments as they happened in the past and derive the right lessons from them.

Next year will commemorate the centenary of the start of the First World War. There has been a profusion of new books published. I think we need to have international conferences on that topic, simply because the events in 1914 and onward really shaped the rest of the century and still shape events today.

When you hear that the Kurds within the Kurdish regional government in Iraq, led by Masoud Barzani, are forming increasingly stronger ties with the Democratic Union Party and the Kurds in Northern Syria, it is an outcome of the fact that the powers at Versailles decided, I think very deliberately, that the Kurdish nation was not going to enjoy its own state at the

time. And here we are, one hundred years later, and we still see the effects of that decision, how it can affect neighboring sensitivities, whether it be in Iran, Turkey, Syria and so forth. These events, they take years for the pressures to build, and then you have a sudden decompression.

I think we are coming up to such an event again in the Middle East and beyond. Unless we feel that we are somehow far superior to our predecessors in disentangling our issues and working out remedies for them, which I am sure we do not, then what hope do we have that we are better able to handle them than they were at that time?

I find it striking, for instance, when I get all these assessments from various firms that supply Wall Street with analyses. I remember in July 2012, I saw some articles about the Cypriot banks, and then they all but disappeared, until the moment the banks were on the brink of insolvency. Then, suddenly, everyone started to talk about them again, and I thought, “What? No one noticed this? All these people paid these vast sums, and no one noticed this?”

These firms provide these assessments, and governments rely on them. It is amazing, because you see them, they give you five pages, and each story comes in a little box. They have something about the economic crisis in Brazil, and there is something about the labor market in India, something about Syria, and all the boxes are of equal size. It just seems insane, because they are not all equivalent in terms of the effects that they could have in terms of shaping our future. Why do we treat them as equivalent? Some I think bear gravity that is in

excess of all the rest combined, and we do not see it. There are a lot of analysts who really do not analyze properly.

I do not mean to be flippant about it. I would also say that there are various heads of state who do spend a lot of time keeping up to date on what historians are digging up and improving our understanding of previous or past developments.

GREGORY L. PETERSON: This is more of a personal curiosity. You wrote an article back in 1994 about the Suez Canal titled, “A Nightmare Avoided.” Could you briefly summarize what that was about? Is that relevant today? You hear about the Suez Canal and about making sure that it continues to be an open, viable thing.

H.R.H. PRINCE ZEID RA’AD ZEID AL-HUSSEIN: It was Anthony Eden, the British Prime Minister, who had used the word “nightmare” in describing his quandary. Very simply put, Jordan and the United Kingdom had a defensive alliance which mandated that if Jordan were to be attacked at any stage, the United Kingdom would come to its aid. The problem dawned on the British as they were beginning to collude with the French on seizing the Suez Canal, and the Israelis already had advanced planning on it as well, Operation Kadesh. Eden began to realize the complexity of the situation he was in when Moshe Dayan, on October 12 or 13, 1956, said to Israeli Prime Minister David Ben-Gurion that before there is any prosecution of a war against Egypt, strategically there should first be a seizure of the West Bank so as not to have that flank exposed. Three or four days after that, the French Foreign Minister mentioned to Prime Minister Ben-Gurion that

if the Israelis were indeed to take that particular position and seize the West Bank, it would invite a British reaction, and the British and Jordanians at the time already had advanced planning in the works over the bombing of certain Israeli sites—Haifa in the North, Eilat in the South, and so forth. So Anthony Eden was caught in this amazing position, in which, perhaps, only a British Prime Minister could find himself: that the United Kingdom could be allies and working with the Israelis in prosecuting a war against Egypt, and at the same time be attacking the Israelis because the Israelis had attacked Jordan. This was the nightmare that Eden had to try to avoid.

GREGORY L. PETERSON: I am so proud and so thrilled that you joined us, that you are going to present us with a speech tomorrow, and that you gave me the opportunity to say, “Thank you, His Royal Highness.” This is great. Thank you.

H.R.H. PRINCE ZEID RA’AD ZEID AL-HUSSEIN: Thank you. Thank you very much.

Update from the Current Prosecutors

This roundtable was convened at 10:30 a.m., Monday, August 26, 2013, by its moderator, Professor Michael Scharf of Case Western Reserve University School of Law, who introduced the panelists: Fatou Bensouda of the International Criminal Court (ICC); Brenda Hollis of the Special Court for Sierra Leone (SCSL); Serge Brammertz of the International Criminal Tribunal for the former Yugoslavia (ICTY); Andrew Cayley of the Extraordinary Chambers in the Courts of Cambodia (ECCC); and Hassan Jallow of the International Criminal Tribunal for Rwanda (ICTR) and the International Residual Mechanism for Criminal Tribunals. An edited transcript of their remarks follows.

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MICHAEL P. SCHARF: I am Michael Scharf, and it is a very great pleasure to once again be invited to moderate this particular panel, which I consider one of the high points of the Dialogs.

The prosecutors have already been introduced, but I want to tell you a little bit about some personal connections which will be relevant to the way we proceed on this panel. Let us start with Fatou Bensouda. A year ago almost to this day, she was at my house for a barbecue when she was at my law school to receive the Case Western Humanitarian Award for Advancing Global Justice. Then we went to the Rock and Roll Hall of Fame, where I found out that she was the national dance champion of her country.

Brenda Hollis is actually an honorary alumna of Case Western, having received the honorary doctorate degree two years ago.

Serge Brammertz lectures every year for David Crane's course in Utrecht at the Summer Institute for Global Justice that Case Western and Washington University co-host, so he is part of the family.

My home away from home during my last sabbatical was the office next to Andrew Cayley's at the Cambodia Tribunal, where I spent a semester, so we have that in common.

And I have been to Hassan Jallow's tribunal and had the privilege of lecturing there several times. His hospitality is world-renowned.

So we all have a connection. Why is that relevant? It is relevant because the format for this panel is going to be like the *McLaughlin Group*. Instead of having each of the prosecutors speak for 15 or 20 minutes, we have divided it up into some questions, and I will be peppering them with follow-up questions. So it is going to be a much more interesting interchange, and hopefully, there will be time at the end for audience questions as well. Since you know that we have this close relationship, you will not think I am insulting them when I ask them the tough questions, because they can take it from me.

We are going to start with Andrew Cayley, because he said that he has the least to speak about, so he wants to go first. That is not at all true.

Things are happening at the Cambodia Tribunal. It is in the middle of this über trial of the top Khmer Rouge figures that are still alive. “That are still alive” is a big caveat, because they started with four, and they are down to two. But it is an exciting trial, and there are questions about whether there will be a follow-up trial which would expand the scope of criminality. There are all sorts of political currents going on. Everything that is going on in Cambodia is interesting.

So the first question for the panelists is, what was one of the most important developments at your tribunal during the last year? And we will dive in with Andrew.

ANDREW CAYLEY: Thank you, Michael. If I could just say a little bit for the people who are not immediate members of this international legal fraternity. Very briefly, the court I work for is called the Extraordinary Chambers in the Courts of Cambodia. The shorthand for that is the Khmer Rouge Tribunal. It started functioning properly in 2007–2008. It is a very special kind of court, in difficult ways, in that uniquely amongst all of the courts—although the Sierra Leone Court, for which Brenda is the Chief Prosecutor, has certain similarities—it is a domestic court. It is the result of an agreement reached between the United Nations and the Cambodian government to try the remaining senior leaders and those most responsible for what happened during the Khmer Rouge period. From 1975 to 1979 an extreme Maoist communist government came to power and essentially

murdered, starved, or worked to death two million people in the space of less than four years. Those are the crimes that we are looking at.

The United Nations decided to set up a court with the Cambodians, so it is a national court. It is not really an international court; it is a national domestic court with certain internationalized features. There are Cambodian lawyers, prosecutors, and judges working in the court alongside internationals. That brings many problems, because the government has a very understandable interest in how far the Court goes and who is prosecuted, because there are many members of the Khmer Rouge who have been reintegrated into Cambodian society. The civil war went on in Cambodia long after the Khmer Rouge fell from power, and one of the government's interests is to reintegrate many of these people, hundreds of thousands of them, into the country as a whole. But there is a tension between that and trying these former senior leaders of the regime for these terrible crimes. So understanding that situation is the most important development.

We have had two cases. The first case that we finished concerns the commander of a camp called S-21, which was the central security camp. It was the central part of a security apparatus that the Cambodians ran, arresting people whom they regarded as counter-revolutionaries, often on very flimsy grounds. I do not know if any of you have ever been to Phnom Penh. S-21 is now a museum. Oftentimes, it was not just the person regarded as the counter-revolutionary who was arrested, but it was their whole family. It also involved people who were educated. They were regarded as counter-

revolutionary. Within this camp, in the space of three and a half years, 15,000 people were murdered. We have completed our case about this camp.

What is the most important development? The most important development is that we are coming to the end of a second case, which originally involved the four most senior leaders of the Khmer Rouge period still living. Unfortunately, we lost one through mental incapacity, a lady named Ieng Thirith, who was the Minister of Social Affairs. She was in the early stages of senile dementia when we started the trial, and then during the trial, we lost her through incapacity. This was actually a very important development domestically, because the country literally has no developed legal system. In Cambodia, people who are lacking mental capacity are constantly appearing in front of domestic courts, being tried and convicted of crimes when they may lack mental capacity. Although we lost this individual, we actually demonstrated to the domestic system that these issues are important, and even somebody accused of terrible crimes, as she was, had to be separated out of the proceedings because she was no longer mentally capable of participating in the legal process.

Unfortunately, her husband, Ieng Sary, who was the Foreign Minister, died in March of this year. So we are down to two accused.

We also have a lot of financial problems because the Court is voluntarily funded. I will talk a little bit more about that in a moment. But we are now coming to the end of that second trial. A lot of the fair-weather critics of the Court said that we would never bring this case to a conclusion. Within the

next four weeks, we will file our final written submissions, and then in October, we will have oral submissions. That will be the end of that case. We hope that the two accused live long enough so that the Trial Chamber can come to a judgment, but I think the fact that we are bringing *Case 002* to a close is probably the most important development of this past year.

MICHAEL P. SCHARF: Excellent. Very much in the economical spirit of this format, so thank you very much, and we will return to you for some tougher questions in a minute.

Let us then go to Brenda Hollis, whose tribunal is coming to a close. The *Taylor* appeal decision is expected in September. Meanwhile, Brenda was confiding in me that the Yugoslav Tribunal's recent precedents on aiding and abetting are keeping her up at night. Brenda, tell us about the most important developments at the Special Court for Sierra Leone.

BRENDA J. HOLLIS: Sure. I have 50 pages of comments to make.

As was just mentioned, we have completed the appellate submissions in the *Taylor* case, and we should have the judgment in that case no later than the end of September, perhaps a little before that. That is significant, but I do not think it was the most important development in the last year.

We are also moving to close our court. We will be the first court to actually close since Nuremberg. That is a lot of work, and that is significant, but again, I do not think it is the most important development in the last year.

What I think is the most important development is the conclusion of criminal proceedings against five individuals charged with contempt of court for interfering with witnesses, including attempting to bribe witnesses to change their stories. They were convicted on the evidence, and their sentences ranged from 18 months suspended for a person who pled guilty and assisted the prosecution, to two and a half years. Two of the individuals are currently serving long-term jail sentences for crimes against humanity and war crimes, and their sentences were to be applied consecutively, which is I think important as well.

Why is that the most important development for me? We will be closing. There will be a residual court that will have the ability to prosecute people for contempt, but many people do not know that or do not acknowledge that, and so they are of the view that once we close, they can come out and take their revenge on people who have had the courage to come forward and testify. So the fact that we went forward very aggressively asking for investigations into this interference with witnesses, that the judge reviewed the evidence and found them guilty, and that the persons who actually did it—perhaps not the planners, but the ones who actually did it—were then sentenced to jail, for me, is a very significant development. I believe risk to our witnesses and risk to our sources will be very high when we close, and this is a reminder to everyone that if you do it, you may very well face prosecution and end up in jail. I am hoping that once we actually close our doors, this development will help protect these courageous people without whom we would not be in business.

MICHAEL P. SCHARF: Excellent. And now let us turn to the Rwanda Tribunal and Hassan Jallow. I understand you are finishing appeals. You have cases going to the Rwandan national courts, and you are now working on your own residual mechanism. Tell us about what is going on in Arusha.

HASSAN B. JALLOW: In December last year, with the delivery of judgment and the conviction of Augustin Ndirabatware for genocide, we officially concluded all of our trials. After some 93 indictees, we finished the trials of most of them and secured some 63 convictions and 12 acquittals. We referred some of the cases to Rwanda for trial and some to France. So we are now focusing on the management of the appeals, which we anticipate finishing by the end of 2014, except for one case, the *Butare* case, which involved six accused, and this is mostly because it is the biggest case we have. The *Butare* case has a voluminous record involving extensive translation needs, and as a result, it is going to take up to September of 2015 to finish that particular appeal. So the trials are over, and our focus is on appeals.

We are also working on a number of legacy projects, some of which have been concluded, including lessons on the investigation and prosecution of sexual violence, lessons on the transfer of cases, and how this could relate to the complementarity regime of the ICC, et cetera.

Of course, I wear a double hat. I am also the Prosecutor for the Residual Mechanism. The Mechanism will take over certain functions from both the International Criminal Tribunals for the former Yugoslavia and Rwanda, and since July first of last year, the Arusha branch is up and running. It is

focused on tracking the remaining fugitives, managing the archives, and witness protection.

In July of this year, we managed to also get The Hague branch of the Mechanism off the ground, and it is now functioning, as well. So the major development for us really has been the conclusion of the trials in the ICTR and the commencement of the Residual Mechanism's operations.

MICHAEL P. SCHARF: Thank you for bringing us up to date on the Rwanda Tribunal.

Now to Fatou Bensouda who was Deputy Prosecutor of the International Criminal Court for nine years and now is in her second year as Chief Prosecutor. Fatou, you have all sorts of places around the world that are keeping you up at night. The Libyans are not turning over Gaddafi or al-Senussi. The Kenyan witnesses are refusing to testify. The Court has said that the *Gbagbo* case must be stayed until you get more evidence. I am curious as to what you would consider *the* most important development in the last year.

FATOU BENSOU DA: Thank you, Michael. First of all, I just want to take this opportunity to say hi to everyone and to express how happy I am, as always, to be here in Chautauqua. I have come to the Dialogs six times now, so that should be a testament to the fact that I love to come.

What was the most important? Where do I start? A lot of things have been happening, as you know, over the last year at the Court. Many developments have taken place. I recall when

my deputy—I now have a deputy—was being sworn in, I told him that there is never a dull moment in this place, and he thought I was joking. But I think by now, he does agree with me that there is really never a dull moment at the ICC.

But let me just take a couple examples of important developments that have taken place at the Court. One of them is Ngudjolo's acquittal. Mathieu Ngudjolo was charged together with Germain Katanga, and last December, the judges of the Trial Chamber decided to acquit Ngudjolo of all charges. Of course, his release was disappointing for the Prosecutor's Office, but I think it is also important to show that this is a judicial process, and justice is not always about convictions. If the Chamber felt that we did not present sufficient evidence to convict him, that is their decision. But, of course, we at the Office of the Prosecutor did not agree with that decision. We have taken it to the Appeals Chamber, and we are fairly confident that we have put a strong case before the appeals judges for them to revisit the Trial Chamber's decision. So I think that is quite important.

Another important development was the surrender and transfer of Bosco Ntaganda. Bosco Ntaganda was charged together with Thomas Lubanga. It was one of our first cases. We decided to unseal the charges against Thomas Lubanga when we got an arrest, but we kept the charges against Bosco Ntaganda sealed until we saw a good opportunity to reveal them publicly. But it has been more than five years since the charges against him were unsealed and since we have been calling for his arrest. All of a sudden, last March, Bosco Ntaganda walked into the U.S. Embassy in Kigali and surrendered himself. I think this is very important. It

demonstrates that in the independent exercise of our mandate in this case, we were able to work with the United States closely and in a cooperative manner. The United States assisted the ICC in transferring Ntaganda to The Hague, because that was what he asked for. He wanted to go to The Hague and quickly, and the United States authorities were able to say that they would assist his quick transfer, and they did. It was a very well-coordinated, seamless process.

I think it also shows that we need to start thinking about arrest strategies that we can develop at the Court. With Bosco Ntaganda, there had been a lot of background messaging sent to some of the entities that we could reach, to encourage them to surrender the suspect to the ICC. And we have worked with many international organizations, many States Parties, and even non-Party States. We have worked with them, and while we cannot say that Ntaganda's surrender was a direct result of what was going on in the background, we certainly think that it made an impact for him to get the right message and to surrender himself to the ICC. So this is important, especially for the victims of the crimes that he is alleged to have committed. At least the victims will see that the person who is alleged to be responsible for those crimes will be held accountable at the ICC. I think that is also important.

I just want to mention Mali as a third example. One month after I was sworn into office, in July 2012, the Mali authorities came to my office and referred yet another African situation to the ICC for investigations and prosecutions. My office took the time to look into all the elements of why the ICC should open investigations. In fact, as soon as we received the referral, I opened a preliminary examination to collect information and

analyze it in my office and see the possibility of opening investigations. It is not an easy situation in Mali. I have been able to put together a team. We have started investigations, but there was all this insecurity in Mali. We have been able to engage with organizations such as UNESCO, ECOWAS, and the African Union, as well as the UN Stabilization Mission in Mali. We are working very closely with them, where we need to get into agreement. We are doing that to be able to start our investigations properly and see how they can assist us in that regard.

Kenya is another example that I can give. Kenya held some very important elections this year, but elections that I think were very different from what happened previously that led to the ICC cases. While I cannot say that the ICC was directly responsible for that, I do believe that history will judge the ICC as having probably contributed to the different type of elections that Kenya has just conducted earlier on this year.

But the Kenya cases remain very challenging. We face immense witness protection issues. Great efforts are being made to reach our witnesses, to bribe our witnesses, and to try to apply pressure on our witnesses not to testify before the ICC. The fact that now those who are wanted by the ICC are the President, Deputy President, and Joshua Sang, is not making things easier. It is extremely difficult to find out who will ultimately be held responsible for interfering with the witnesses because, as you know, whatever is being done is done in a very organized and covert way that is making it difficult for us to know exactly why some witnesses are asking not to be witnesses any longer. So we are having these difficulties.

But the trials will go on. The *Ruto and Sang* trial will begin on September 10, and in November, the trial against President Kenyatta is scheduled to start.

MICHAEL P. SCHARF: Now let us turn to Serge at the Yugoslav Tribunal. Serge, I have to tell you, 20 years ago when I was at the U.S. State Department as part of the team that drafted the statute and rules for your tribunal, we did not think it would still be going 20 years on. And yet things are as exciting as ever up in The Hague. You have Judge Harhoff accusing President Meron of improprieties. You have surprising acquittals on appeal. So I am really curious as to what you will say was the most important development of the year.

SERGE BRAMMERTZ: Thank you very much, Mike, and good morning, everybody. Indeed, I also have the pleasure and privilege of having been here in Chautauqua for the last five years. Every year, when I give my update, I say we are moving close to the end, and I am saying the same today.

We celebrated our twentieth anniversary this year. It was a very strange feeling for an ad hoc institution to have a twentieth anniversary, but one of the main reasons is because it took so long to have all the remaining fugitives arrested. As Fatou said, the non-arrest of an indicted person is, I think, the biggest challenge for international justice today, and it has been the biggest challenge for our tribunal. It took 15 and 17 years, respectively, to have Karadžić and Mladić arrested. And Hadžić, the last fugitive, was also only arrested in 2011.

I also agree with what Prince Zeid said earlier that in the field of international justice, we have to define delayed justice in a different way, because the timing factor is very important. By choosing the wrong moment to indict or try to arrest, you can have an extremely negative impact and be unsuccessful. So I think timing is a factor, unfortunately, which is of importance to us.

But we are at this time entering the real final phase of our court, because the last trial, the *Hadžić* trial, has begun. Interestingly, Hadžić, who was the political leader of the Serbs in Croatia, committed his crimes in 1991, so the last trial is in relation to crimes that were committed in the early days of the first war in Croatia. The trial is moving on. Trial proceedings should be over in the middle of next year, as should trial activities in *Karadžić* and *Mladić*, which are cases involving two of our main accused. I think it is quite interesting to note that the two most important trials since the Tribunal's establishment—in addition to the *Milošević* trial—are taking place at the very end of the Tribunal. Both cases are proceeding well, and trial activities should be over somewhere in the middle of next year with some additional time for a judgment.

For those who are not so familiar with the war in the former Yugoslavia, there were wars in Croatia, Kosovo, and the most important one, if I may say, was in Bosnia and Herzegovina where from 1992 and 1995, more than 100,000 people lost their lives. Very often, a comparison is drawn with what is happening today in Syria in terms of the number of victims. Karadžić was the political leader of the Serbs in Bosnia, and as such, we consider him to be the political

architect of the campaign of ethnic cleansing and genocide in Srebrenica, where more than 7,000 people were killed in just a few weeks. And Mladić, Karadžić's highest officer, was the military leader of the forces there.

Our last trial started in 2012. All trials should be over somewhere in 2014, with judgments expected in 2015. We also started the last appeals proceeding, *Prlić et al*, where the notice of appeal was given two days before the start of the Residual Mechanism. As of the Residual Mechanism's start date, which was the first of July this year, all new proceedings would go through the Mechanism and not the ICTY, but those initiated before that date would stay with the ICTY. So because two out of six accused gave notice of appeal two days before the start of the Mechanism, this multi-accused case will stay with the ICTY. The Security Council will not be very happy about this. The judgment is 2,600 pages in French, which has to be translated over the next ten months. It will probably be 2017 before this case is concluded.

Which brings me back to the beginning of my comments. As I say every year, we are getting close to the end, but two months ago we were all thinking that this appeal proceeding would go to the Residual Mechanism, in which case, we could have closed the Tribunal by the end of 2015. Now with this change in proceedings, I will be reporting for the next three or four years about moving closer to the end. Thank you.

MICHAEL P. SCHARF: It strikes me, hearing all of you seriatim like this, that you really were well picked because you are a bunch of upbeat people dealing with horrible crimes, and yet you have such optimism. But I want to push you a little

bit. As a vehicle for that, I want to use this new issue of the *Journal of International Criminal Justice*, which has a symposium that is called, “Recent Setbacks for International Criminal Justice Put into Perspective.” So your rosy portrait is apparently not being shared by these academics.

Let me quote a couple of the things written in the journal. The first article says, “Ten years after the establishment of the ICC, it is difficult to deny that the project of international criminal justice is increasingly coming under pressure.” Well, pressure, I guess, is not so bad.

David Luban discusses “the dismal proposition that the momentum for international criminal law seems to be gone, and its success story—starting with the creation of the Military Tribunals at Nuremberg and Tokyo and culminating in the adoption of the Rome Statute—has come to a close.” Well, that is quite a depressing way to put it. Diane Orentlicher, an old friend and colleague of many of ours, writes, “A series of developments, both doctrinal and political, seem to signify a retreat from earlier innovations in the law and practice of international justice.” And then we have Payam Akhavan, who used to work at the Yugoslavia Tribunal, writing, “The era of romanticization of international criminal justice, ushered in during the 1990s, is over.”

So what is going on that is creating all of this negativity? What was the most controversial development related to your tribunal in the past year? Andrew?

ANDREW CAYLEY: The most controversial development is actually a headache for a lot of people,

including Ambassador Stephen Rapp. I was actually discussing this with him this morning. The case that we are dealing with at the moment, *Case 002*, was a massive case in terms of the number of crimes. It dealt with a three-and-a-half-year period. It dealt with many, many crimes, not just killing: forcible transfer of the population, forced marriage. People were forced into marriage. The regime decided that. As a policy, there was a lot of destruction of religious and cultural property. Because of the age of the accused—all of them are in their late 80s—the judges realized that we would never finish the trial if we dealt with all of the crimes with which they had been charged in one trial. We would be involved in literally a seven- or eight-year trial of very elderly people who were likely to die before its conclusion. The judges decided to “sever the case,” which means to divide it up into smaller chunks, so that we would get through a small part of the case, hopefully get a conviction at the end of it, and not have spent five years doing so.

Well, we have actually just spent two years dealing exclusively with the issue of forced transfer. At the beginning of the Khmer Rouge regime it decided that it would forcibly move the population from the urban centers into the countryside to work principally in work cooperatives. Now, the problem is that one of the principles in this field of law is that you address the most serious crimes first. The forcible transfer was a serious crime, but it was not the most serious crime when you consider that nearly two million people either died through overwork or starvation or were murdered.

What I tried to do during this first segment of the case was to convince the judges to include some killings within that first

part. Then at least if we got to the end of the first part of *Case 002*, and the accused all lived long enough—although now we know we only have two left—we would not just have a conviction for forcible transfer, but we would also have convictions for murder.

The judges did not follow the applications that we, the prosecution, made. We appealed their decision. I will not go into all of the details of the appeals because it would take too long, but a very controversial decision was recently made by the Appeals Chamber essentially advising the administration of the Court to look into the prospect of setting up a second Trial Chamber to deal with other, more serious crimes whilst the judges in the first Trial Chamber are still deliberating on this first case involving forced transfer.

Unfortunately, this brings enormous problems. The Court is running out of money. It means that one would have to redeploy judges within the Court and recruit new international judges to start this second trial. It also means starting a second trial of the same subject matter, perhaps before you even have a judgment in this first section on forced transfer and certainly before you even have an appeal on this first section of the case. That is probably the most controversial area.

Equally, if you look at the agreement that was signed between the United Nations and the Cambodian government, and if you look at the domestic legislation that created the Court, it is not very clear whether a second Trial Chamber was ever envisaged. So we are running against this tension of wanting to try to address the more serious crimes with very elderly accused—I mean, these people are dying—without a

real legal basis. Perhaps it is arguable. Some people say maybe you can have a second Chamber; some people say you cannot. We certainly cannot wait until the appeal is finished in this first section on forced transfer because that will probably be 2015, 2016, by which time these accused will be dead. So that perhaps echoes some of the problems that these scholars are writing about.

I do not know how this will play out in the end, but I do believe it would be a very, very great shame if these two senior leaders were never confronted with the most serious crimes that were committed during their tenure.

MICHAEL P. SCHARF: Thank you for your candid assessment. I think that gives us all some pause, and our hopes are with you, both that the defendants will live for another trial and that there will be the political will and the funding. Because, boy, it would be awful if the only thing they were ever convicted of was transfers, not even killing, after setting up this entire tribunal, which most people call the “Genocide Tribunal.”

Brenda, things have been going a little bit better, I think, at the Special Court for Sierra Leone. Tell us about the most controversial development related to your tribunal.

BRENDA J. HOLLIS: We will see how much better in a month. Actually, the most controversial development for us was not in our court but rather in the ICTY with the Appeals Chamber decision relating to aiding and abetting. In our court, Mr. Taylor was convicted of aiding and abetting throughout the entire indictment period and also of planning an operation

that took place in the middle of the indictment period. So the aiding and the abetting is the bread and butter of the conviction, and the case at the ICTY, the *Perišić* case, and other cases that may flow from it directly impact what is required to prove someone guilty of aiding and abetting. That is the most controversial development for us, and I would imagine that Serge will talk about that, as well.

But before I make any more comments about that, I think that we really, really do have to congratulate the ICTY on the ingenuity of celebrating a twentieth anniversary of a court that had a three-year mandate. That is well done, Serge, and we are moving forward. Maybe in the next three years, it will end, so they will meet that three-year mandate.

SERGE BRAMMERTZ: Brenda, you worked there before.

BRENDA J. HOLLIS: Yes, exactly. We indicted all those people they would not hand over. Yes.

I do think that is an important point, though, for international justice. I think there is a bit of hypocrisy in the international community. They talk about the life of these courts, but we do not have a police force. We do not have a territory. And if states do not turn over the people that we rightly indict based on our jurisdiction and jurisprudence, then we cannot try them. So it is really put up or shut up for the international community. If you want it done, hand them over, and if you do not want it done, be courageous enough to say you do not want it done, but do not blame the courts for things they have no power to do. I think that is very important.

So I think that our most controversial development is the *Perišić* case. In January of this year, we had oral arguments in the *Taylor* appeal. The judges, quite rightly, gave us questions they wanted answered. I always like that because then we know what their concerns are, and we have the opportunity to address them. I think there were seven or eight questions, four of which were directly related to the *Perišić* appeal at the ICTY, which was decided completely against our position on aiding and abetting, and so we are very concerned about that.

The *Perišić* decision was basically that the assistance you give must be specifically directed to the crimes. I think it was a very confused and illogical decision. There were three separate opinions; two of the judges joined in one and another judge in the majority wrote a separate opinion. We must specifically address the required assistance to the crime. At least two of the majority seemed to say that it is a separate element. They then said, however, “But, you know, you do not always have to prove that element separately. Sometimes it can be presumed to exist.” Well, Criminal Justice 101 says if you have an element of a crime, you must always prove it beyond a reasonable doubt. Nonetheless, the judges said it is a separate element, and if you have remote actors—which most of these high-level accused are going to be—then you definitely have to prove it.

They also justified their overturning the conviction for aiding and abetting by saying, “You know, this Perišić guy, he was part of the military in Serbia, and he was giving aid to a group that was not 100 percent criminal,”—well, even the mafia is probably not 100 percent criminal—“and you could not tell that the bullets he gave them actually were used for

those crimes.” So now I guess to get a conviction for a remote actor you have to prove that the assistance had written on it “use this for crimes,” or “do not use this for crimes.” The logic, I think, was a little interesting.

Mr. Taylor, of course, is a remote actor. But our trial judges said specific direction is not a separate element; rather it could go to prove whether the assistance substantially contributed to the crime. So the issues we have in *Taylor* are the same as those in *Perišić*, with our trial judges and—apparently—the majority of the *Perišić* appeals judges taking different positions.

The one saving thing for us in *Taylor* is that Mr. Taylor testified for seven months. He liked to hear himself talk. His attorney liked to hear himself talk as well, and so it went on for seven months. During that time, Mr. Taylor said things he probably should not have said, and one of the things he said was that as of April 1998, anyone giving assistance to the Revolutionary United Front would know they were giving assistance to a group engaged in terror. Now, hopefully, that will get us over the hump even if our appeals judges go along with the majority decision in the *Perišić* appeal.

Why are we so concerned about an appeal from another court? First of all, in my view, international crimes are supposed to be uniformly viewed, with one set of laws that is applicable, no matter what court is trying these international crimes. As an aside, that is one of the concerns I have about the ICC. I think it has deviated a bit from the body of jurisprudence developed by the non-permanent international

courts in reliance on customary law. However, I think I am a lone voice for that concern.

But Article 20 of our statute, quite rightly, I think, says that our Appeals Chamber shall be guided by the decisions of the Appeals Chamber of the ICTY and the ICTR. So that is why we are so concerned about that majority decision in *Perišić*. Given that statutory provision, what we wanted to point out to our appeals judges is, “Yes, you should in general be ‘guided’ by those other decisions, but as for this *Perišić* decision: number one, we think it is wrong on the facts, and number two, it is so confused on the law that it has very little precedential value.”

So far and away, I think that the majority decision in *Perišić* is the most controversial development impacting us over the last year.

MICHAEL P. SCHARF: Since you picked that, Brenda, let me jump over to Serge and ask if he has anything to add to that discussion, since the decision came from his tribunal.

SERGE BRAMMERTZ: I would like to make a number of comments in this regard too. But if you ask me more generally what has been the most difficult over the last year, I go back to what you initially said about a number of acquittals which have quite shaken, I would say, the Tribunal. And of course, as a prosecutor, I am very unhappy about these decisions, but it is much broader than *Perišić*, I would say. I have never been as frustrated as a prosecutor in all of my career as I have been over the last ten months.

As a prosecutor, you can, of course, live with acquittals. As a prosecutor, I have even asked a number of times in the courtroom for the acquittal of an accused. But in relation to a number of the acquittals we had at the Tribunal, knowing the evidence, knowing the legal framework in which we are functioning, and, I think, knowing what is right and wrong intuitively somehow, I feel extremely disappointed by a number of the judges' decisions. At the same time, as a party to the proceedings, we have no other choice, as frustrated as we are, but to accept these decisions and to limit ourselves to the use of all legal means to challenge these decisions.

We first had the acquittal of Gotovina, who arranged Operation Storm, followed very quickly by the *Perišić* acquittal, which very much surprised us because of the introduction of this new element, the specific direction requirement, which has never been present in our jurisprudence of the past 15 years. It is really a new element that was introduced. General Perišić was in Belgrade. He was Chief of Staff of the Serbian army, and he was providing support to the Serbian forces in Bosnia. The judges in the first instance who convicted him by a majority made very, very clear in their judgment that, yes, he provided substantial support, which was also used to commit crimes. And, yes, he was aware that crimes were committed. This was in accordance with our usual jurisprudence—substantial support and knowledge about the crimes committed was sufficient for a conviction. Now this new element is being introduced which almost destroys the entire concept of aiding and abetting, because if there is an element that almost reaches intentionality by requiring that the defendant specifically directed the crimes, then he is becoming a kind of co-perpetrator.

Also, the Appeals Chamber created a remoteness issue by saying that if an aider and abettor is close to the crime scene, a conviction is still possible, but if he is remote, then you need this kind of specific direction. If I am providing weapons of support to, let us say a terrorist group in Afghanistan, what is the difference if I am dealing the weapons here to be used in Afghanistan or if I travel to Afghanistan and provide support there?

The potential negative development for international justice is quite huge, and of course, we are arguing that in our other cases—we have two other ongoing appeals proceedings where the Appeals Chambers are differently composed—where we are asking the judges not to follow this appeals jurisprudence and where we put forward a number of arguments saying that the decision is not supported by the jurisprudence of our own tribunal. It is not supported by international justice principles in general.

So we will see what the decisions in those two other cases will be by the end of the year, but we already see the direct impact of this jurisprudence in a more recent acquittal in *Stanišić* and *Simatović*. *Stanišić* and *Simatović* were acquitted a few months ago. They were the number one and number two leaders in the intelligence service in Belgrade, and during the war, they put in place special units like Arkan's Tigers and others, which were mainly composed of hooligans who were hired for the specific purpose of participating in ethnic cleansing campaigns in Bosnia.

When we were watching the judges pronounce the judgment, we were absolutely convinced that it was going to

be a conviction because the judges started by saying, “Yes, they created special forces. Yes, they armed those special forces. Yes, they controlled the special forces. But we acquit because there was no evidence that all the support was specifically directed to the commission of those crimes.” I am simplifying the issues a little bit, of course, but again, in a case where I never, ever would have had doubts about a conviction, we already have an acquittal based on this new appeals jurisprudence.

But Mike, you started by saying that we are believers and optimistic people, so I very much hope that the other appeals judges in those other cases will have a very, very close look at this jurisprudence and that they will not follow this precedent. Thank you.

MICHAEL P. SCHARF: If one was a conspiracy theorist, they might be tempted to connect the dots between what is going on in this line of cases and, to make it relevant to our theme of this year’s Dialogs, the possibility of intervention in Syria. The theory is that if the United States and other countries give aid and support to the rebels in Syria and then those rebels do bad things, the U.S. government and the people who gave the aid and support do not want a precedent that would put them in the dock or even cast them in a bad light. And this, I believe, is what is going on in the very public spat between judges Frederik Harhoff and Theodor Meron about these decisions. Is that public dispute affecting the Prosecutor’s Office at all, or are you just sort of ignoring it?

SERGE BRAMMERTZ: Of course, we are fully aware that there is a big debate ongoing, but the Office of the

Prosecutor in our tribunal, which has, I think, despite this discussion, achieved a lot over the last years, will not participate in any conspiracy theory debates. We remain concentrated on our remaining defendants, Karadžić, Mladić, and Hadžić, because the victim community is expecting that we bring those cases to a good end.

In relation to jurisprudence, we absolutely dislike what has been decided, and we profoundly think that it is wrong. We will challenge it through the legal ways, but I do not think it is helpful to have all this debate now in addition to conspiracy theories. I think that is not for us to deliberate.

MICHAEL P. SCHARF: Let us go back to Hassan. Things are comparatively quiet and going well as you are wrapping up. Is that correct? What is the most controversial thing that you have been facing lately?

HASSAN B. JALLOW: We have had successes, but we have also had setbacks in the past 12 months, and it is fair to say that, as prosecutors, we have to take the setbacks too. In the past 12 months, we have had one case, what we call the *Government II* case, in which two former senior cabinet ministers of the interim government were acquitted. They had been convicted by the Trial Chamber of conspiracy to commit genocide, as well as direct and public incitement to commit genocide based on their involvement in the removal of the prefect of Butare and the installation of a new prefect. On appeal there were no issues of fact. There was no divergence on facts, and there was no question of law involved. It all turned on the interpretation of the facts as established by the Trial Chamber. The Trial Chamber went one way for a certain

consequence from the facts, but the Appeals Chamber went the other way.

Basically, Butare was one of the last places where killings of Tutsis took place during the genocide, because at the time when the genocide commenced, Butare had a Tutsi prefect. Prefects are like governors of American states. The Tutsi prefect of Butare fought hard against the killings of Tutsis. He was criticized by the interim government as being inactive, and of course, being inactive at that time in Rwanda had a certain connotation, because the killings of Tutsis were referred to as work. If you were said to be inactive, it meant you were not involved in the killings. So he was officially criticized by the government for being inactive. Because of this criticism, the government took the position that he had to be removed and replaced. The President of the interim government, together with these two accused who were cabinet ministers, went to Butare and attended a public ceremony organized for the purpose of criticizing him and having him removed. Then two days later, they came and installed a new prefect, who was not a Tutsi but who was a Hutu. Then the killings started and accelerated. So the question in the case was, was the removal of the prefect and the installation of a new one part of the strategy of ensuring that the genocide took place in Butare, or was it just a simple administrative measure of changing prefects?

The Trial Chamber took the position that looking at all these facts together, which were not disputed on appeal, that this was clearly a strategy by the government to make sure that killings took place—that the door to killings was opened in Butare, and that the genocide was implemented. Because in

that particular place, the massacre started as soon as the Tutsi prefect was removed and replaced by a Hutu.

The other possibility—that he was removed simply as an administrative measure—had not been ruled out, but the Trial Chamber had specifically alluded to that possibility, explored and discounted it, and said that it was unbelievable that he could simply have been removed for administrative reasons. Looking at all the facts, it seemed it was clear that the intention was to make sure the genocide took place.

But the Appeals Chamber acquitted both of them of conspiracy to commit genocide. It was a big setback for us, because the defendants were senior people, cabinet ministers in the government, the kind of people who do not go down to the streets to wield machetes or guns but who take decisions in the cabinet about removals and who work in very indirect sorts of ways.

From the legal perspective, this meant that the Appeals Chamber was not deferring to the Trial Chamber in terms of its inference. The inference is to be drawn from the facts that had been established. What we would like to see clearly is the Appeals Chamber deferring more to the Trial Chamber in terms of findings of facts, in terms of inferences that should be drawn from the facts which have been proven. This is particularly important because the Trial Chamber takes years to try a case. It sees all the witnesses and reads the record many, many times, and probably has a better grasp of the witnesses, their credibility, and the nuances and context of the case, et cetera.

It was a setback for us, but we hope that in the future the Appeals Chamber will give more deference to the Trial Chamber, and then we may not have this kind of acquittal.

MICHAEL P. SCHARF: That is part of the hybrid nature of the tribunals. In the civil law approach, there is much less deference to the Trial Chamber than in the common law approach. Were the judges in this case from civil law countries?

HASSAN B. JALLOW: It was a mix.

MICHAEL P. SCHARF: It was a mix. And you see that playing out. There is a Darwinian struggle going on in your courtroom there.

Let us go over to Fatou. There are so many things going on. I am very curious to see what you pick as the most controversial issue this year.

FATOU BENSOUDA: Really, I could pick them all.

I think that the confirmation of charges decision in the *Laurent Gbagbo* case is one of those controversial issues that we have at the Court at this time. In June of this year, two out of the three judges comprising the chamber seized of the matter decided that my office had to present further evidence at this early stage of the proceedings and adjourned the decision on the confirmation of charges until we provide that evidence or conduct further investigations.

If this standard is allowed to stand, it could potentially be very serious and has implications for all other cases coming before the ICC. I immediately sought leave to appeal, mainly so the judges of the Appeals Chamber could examine and decide what the correct evidentiary standard is at the confirmation of charges stage of the proceedings.

I also want the Appeals Chamber to decide whether we have to prove each incident that underlies the contextual elements of the crimes against humanity, because this is what two out of the three confirmation judges said, and also whether the Pre-Trial Chamber judges can actually ask the Prosecutor to amend the factual elements of our charges. I think this is important to go forward with, and we were a bit apprehensive that we would not get the leave to appeal, but we did. We have the leave to appeal, so we will put these issues before the judges of the Appeals Chamber.

Importantly, one of the judges, Judge Fernández, dissented from the decision that was taken by the two others. The request for leave to appeal the decision was only partially granted, not even fully, but I think it is fine. We can go ahead with the issues that we want to present before the judges of the Appeals Chamber.

So for me, that is quite important, but the matter has also created a lot of controversy.

MICHAEL P. SCHARF: Sometimes as an academic, this seems to be all in the abstract. But Ambassador Stephen Rapp had sent Paul Williams and me with the Public International Law and Policy Group into Côte D'Ivoire a

couple of years ago to do a needs assessment, and from talking to literally hundreds of people about the situation, I can tell you that the outcome of this case could have a profound impact on peace and justice in that country.

FATOU BENSUDA: Absolutely. Absolutely.

MICHAEL P. SCHARF: So let us cross our fingers on that.

FATOU BENSUDA: Yes. Presently, my office is engaged in looking at our strategies, especially whether we have to be as trial-ready as possible before we seek confirmation of charges. This is also one of the issues emerging at a time when we think that we can address it more closely than before.

The other thing that I wanted to mention, which has created a lot of controversy, is the question in the Kenya situation of whether to hold the trials in The Hague or in Nairobi. Fortunately, the judges have now decided that they should be held in The Hague, which I think is good under the circumstances. As much as we want these cases to get as close to the communities as possible, we also need to be realistic. It would have presented tremendous challenges for the Office of the Prosecutor, and even for the Government of Kenya, for these trials to be held in Nairobi. We are talking about the President and the Deputy President of their country, so I think it would have been very difficult for us as an office to do that.

There is another issue regarding the Kenya cases. It concerned Deputy President Ruto's presence at trial. We had a majority decision from the Trial Chamber saying that Ruto can be excused from physically attending the trials and only needs to be present for the opening and closing statements. Maybe he will be required to be present during the delivery of judgment and maybe sentencing, but otherwise, he does not have to be present in The Hague. I immediately requested leave to appeal this decision, and now we are before the Appeals Chamber. Just a few days ago, the Appeals Chamber granted us the suspensive effect that we requested for that decision, because the trial is starting on the tenth of September. And the Appeals Chamber decision will have an impact on the trial. So we have suspensive effect for the Trial Chamber's ruling, which means that Ruto will now be present throughout the trial until the Appeals Chamber delivers its final decision. We are waiting, of course, for the final decision of the judges, but I think we have to send a clear message that no one is above the law, regardless of his or her standing or status. The Rome Statute stipulates that accused persons are required to be physically present during the trial at the ICC, and one's status in society should not change that.

MICHAEL P. SCHARF: A few words of conclusion. First of all, if this is your first time here, you have to know how absolutely extraordinary it is to come and see all of the prosecutors on one panel. It does not happen anywhere else. It only happens here because of David Crane who makes it happen. David, thank you for that.

These are the modern day Robert Jacksons, and they are the heroes of international peace and justice, so please give a very, very warm ovation for our panelists.

Legal and Policy Issues Stemming from the Arab Spring

This roundtable was convened at 2:30 p.m., Monday, August 26, 2013, by its moderator, Professor Leila N. Sadat of Washington University School of Law, who introduced the panelists: Professor M. Cherif Bassiouni, DePaul University College of Law; Greta Barbone, No Peace Without Justice; Jamel Bettaieb, Tunisian Human Rights Educator and Activist; and Dr. Roy S. Schöndorf, Department of Special International Affairs at the Ministry of Justice of the State of Israel. An edited transcript of their remarks follows.

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LEILA N. SADAT: Good afternoon. It is wonderful to be back at Chautauqua. I know at Chautauqua there are no strangers, only friends we have not met yet, and the spirit of this place is a tremendous inspiration, both to those working on the macro issues relating to international criminal justice and to those working in the trenches as human rights activists on the ground, who can be uplifted by the general spirit of debate, civility, dialog, and the inspiration of this place. So thank you once again to the Jackson Center, to David Crane, to all our good friends for putting this together, and especially to Chautauqua Institution.

My job as the moderator today is essentially to get out of the way. I will introduce the panel. We have decided upon a slightly different format in order to take advantage of the tremendous expertise of Professor Cherif Bassiouni. He is going to speak for longer to set the stage for what is happening

with the so-called “Arab Spring.” We had a hint of that with Prince Zeid’s remarks this morning, but Professor Bassiouni will go into more depth as to how that relates to our overall topic of legal accountability. Then we will hear from Jamel, from Greta, and from Roy, who will comment on his remarks. Professor Bassiouni may wish to add a few additional notes at the end, and then the audience will be invited to participate.

Let me just say a couple of words about our panelists. You may not know that Professor Bassiouni, who is Professor Emeritus and Head of the Human Rights Institute at DePaul University, also chaired the Commission of Inquiry that examined the atrocities in the former Yugoslavia. So, in a sense, the whole start of this discipline can be traced to the work of Cherif Bassiouni, who went into war zones and actually explored mass atrocities on the ground, not just in an office somewhere in New York or Geneva or Chicago. He served more recently as the UN’s Special Advisor on Human Rights in Afghanistan, and he chaired the Commissions of Inquiry in Libya and Bahrain, so he is well positioned to inform us about the Middle East and the commission of mass atrocities more generally.

Greta Barbone, whom I never had the opportunity and pleasure to meet before, has been coordinating a two-year joint project of No Peace Without Justice and Al-Kawakibi Democracy Transition Center, a Tunisian organization, on transitional justice. If Cherif is flying at 30,000 feet, Greta has been right there on the ground throughout the Middle East and North Africa looking at human rights issues directly.

Jamel Bettaieb, whom I just recently met, is also a Tunisian human rights activist and will speak to exactly what is transpiring on the ground in human rights.

And then we are very delighted to have Dr. Roy Schöndorf from the Israeli Ministry of Justice join us, who is speaking in his personal capacity, not on behalf of his government. He has a distinguished background in international human rights and mass atrocities, and he will comment from that perspective.

I wanted to start with a poem written by a Qatari poet, Mohammed al Ajami, who was arrested for writing this poem, which he dedicated to the activists in Tunisia. I think it fits beautifully with what we just saw from Shabana, and underscores the fact that each individual contributes in her own way to the project of bringing justice and human rights and dignity into conflict situations.

This is an English translation of the poem, and hopefully Jamel will read it for us in Arabic later. It goes like this:

*Knowing that those who satisfy themselves and
upset their people will tomorrow have someone else
sitting in their seat,*

*For those who think the country is in their names
and their children's names, the country is for the
people, and its glories are theirs.*

Repeat with one voice, for one faith:

We are all Tunisia in the face of repressive elites.

We are all Tunisia in the face of repressive elites.

*The Arab governments and who rules them are,
without exception, thieves.*

Thieves!

*The question that frames the thoughts of those who
wonder will not find an answer in any official
channels.*

*As long as it imports everything it has from the
West, why can't it import laws and freedoms?*

Why can't it import laws and freedoms?

This is from a young activist who is currently in jail in Qatar. So, with that introduction to some of the sobering and challenging issues faced by citizens in the Arab world, I turn the podium to my dear friend and colleague from whom I have learned so much over the years and to whom we are so grateful, Cherif Bassiouni. Cherif, you have the floor.

M. CHERIF BASSIOUNI: Thank you, Leila, David, and others who organized this magnificent series of International Humanitarian Law Dialogs at Chautauqua, for organizing them and for inviting me to speak, both today and tomorrow.

Tomorrow I will discuss the generalities of the Arab Spring. Today, I will go into the specificities of accountability. It is a bit of an intellectual challenge to speak about the specificities before the generalities, but I hope you will be able to make the transition.

Let me start by saying that we still call it the Arab Spring, though, as you know, the Arab Spring has quickly moved into

a hot summer, and, without any transitioning through fall, has moved into a bitter winter. We are now living in the bitter winter of the Arab Spring, and it is important to keep in mind certain generalities before going into the specificities. The first generality that most people who are not historians of the Arab world will probably not readily see is that the Arab world has been in a revolutionary fervor since the end of World War I.

I wrote a book in 1973 called *The Arab Revolution*, and Arnold Toynbee was gracious enough to write the Foreword. We were both teaching at Stanford University at the time. I was a very, very modest young man, and he, of course, was an extraordinary luminary, but I had latched onto this idea that the Arab world was truly going through a very deep-rooted revolution. In one of the sentences in my introduction to the book, I said, "If Israel did not exist at all, the Arab world would still be in torment and turmoil because what is happening in the Arab world has nothing to do with this particular factor which may be, like other aggravating factors, a factor, but it is not the central factor."

The Arab world, if you look at its history, was integrated into the Islamic nation as early as about 637: 637 for what is now Palestine; 642 for Lebanon and Syria, and Egypt was in 646. So in 646, it was all of North Africa. By 650, it was Mesopotamia, and then from that point on, the Arab *identities* of each and every Arab country were subsumed in the Islamic identity. But as the Islamic world and its history changed, and the Muslim Ummah converted into a Muslim empire, and the empire in turn broke down into multiple different Muslim regimes, so did the Arab world go through these transformations and convulsions without ever gaining its

identity. Come the Turkish Ottoman Empire in the fifteenth century, and it dominated until the end of World War I. During World War I, you had the beginning of the boiling of the Arab Revolution which manifested in Arab nationalism, and the sense of Arab nationalism that emerged was a very nationalistic sense. You can see a vast difference between the sort of pro-intellectual French influence of the Syrian Lebanese elite in the early 1920s as opposed to the Egyptian anti-colonial, anti-British movement, and other different manifestations of Arab nationalism arising.

The movement resulted in a number of conflicts and finally obtained the independence of these countries. Each one of these countries was seeking its identity, only to discover that it had traded the rulers of the Turkish Ottoman Empire to local dictators, local Ottomans, so to speak. It had moved away from colonialism, only to find itself under the colonial empire of monarchies or military regimes or others.

And then in the 1950s the idea of Arab nationalism came out, a new sort of a union that linked a sense of Arabism and Islamism together, tied in with a portion of a new ideology, which at the time was a mixture of socialism and Marxism arising together. That movement arose once again to find itself fighting the new neo-colonialism, neo-imperialism, and its existing remnants represented by the different tyrannical monarchies and military dictatorship.

That, in a sense, ended with the defeat of Egypt in 1967. The limited military victory of Egypt in 1973 was not an Arab manifestation. It was exclusively an Egyptian manifestation. It remained limited to that. Egypt moved in the direction of

Camp David. The rest of the Arab world did not really follow. From 1978 on, Egypt was the only country, for all practical purposes, to have moved in the direction of peace with Israel. In 1979 Egypt signed a peace treaty with Israel. It was not until 1994 that Jordan followed with its peace treaty. Israel is still not part of the region that it is part of geographically. This is probably for two reasons. One, the Arab world rejects it, and two, I think the Israelis have never really opted for being part of that region. Instead, they see themselves more as an extension of the West.

In the midst of that turmoil, the sense of Arab nationalism, the conceptual idea that ties the Arabs together, sort of broke apart. The Nasserite idea of Arab socialism, of Arab nationalism, quickly disappeared. Local nationalism remained, but it was more sentimental. It is at that point that you have to look at the different revolutionary movements, as I would call them, in each and every Arab country.

Look, for example, at the movement in Algeria. Algeria went through a very difficult revolutionary war, particularly during the period of 1956 in the Battle of Algiers. A country of ten million people lost about one million of its people. There has never been any post-conflict justice in Algeria for the one million people who were lost, and the scars of that remain.

What is it replaced with? A military dictatorship. What did the people gain? The only thing left at that point was the Islamic ideal, and the Islamic ideal manifests itself in the FIS, the Islamic Salvation Front. It won an election, like the Muslim Brotherhood won the election, but maybe more decisively in Algeria. The military did not allow that election

to stand, the FIS was removed from power, and the military took back control, repressing the freedoms of society in the hope of trying to rebuild the society. So the dilemma of Algeria is how to rebuild the economy, how to rebuild the society, and yet at the same time give a little bit of democracy and freedom. The problem is democracy and freedom cannot be given in small pieces. If you are a woman, you cannot be partially pregnant. You are either pregnant or you are not. Similarly, you either have freedom or you do not. You either have democracy or you do not. So the idea of having a military regime doling out bits and pieces of democracy and freedom never works out. It did not work out in Algeria, and it did not work out in other countries.

In Tunisia, there was an extraordinary leader that took Tunisia out of French colonialism. He established himself as President. His name was Habib Bourguiba. At the beginning, he was highly respected and loved by his people, and he established an extraordinary policy. It was the only country in the world that I know of that devoted a substantial portion of its budget to national education and maintained a very small budget for the army. It was a very enlightened approach. But as Abraham Lincoln said, "Power tends to corrupt, and absolute power corrupts absolutely." And so, after a period of time, Bourguiba became old and held too much power, and he too became corrupted and absolutely corrupted, and the people rebelled.

Tunisia demonstrates that an international civil society existed as of the 1950s, and the international civil society rose up, and a lot of very senior intellectuals were part of the movement that removed Bourguiba. Zine el Abidine Ben Ali

took over, and there was this idea then that things were going to change. But Zine Abidine, a former officer, a former Minister of Interior, engaged in the same type of repressions as Bourguiba, but even worse. Corruption is the appendage to repression. Corruption invariably happens whenever you do not have the shining lights of transparency that democracy, with all its faults, usually brings about. So suddenly, the people had to find a way of rebelling against it, and they rebelled. And again, the Islamists won. Why? Because there is no other ideology that can prevail. The pan-Arab ideology failed. The nationalistic ideology failed. The communist ideology failed.

This morning, Prince Zeid was saying that we need to develop a new indigenous ideology. There is no indigenous ideology, so there is a vacuum. The only ideology that prevails is the Islamist ideology. The Islamist ideology is, in a sense, extraordinarily “socialistic.” The Islamic ideology is that everybody in a society is part of a society, and everybody has an obligation to provide for society. So it is a very socialistic approach. You can almost say—and I do not mean to be heretical—that you can see the historic background of the tribalism that existed in the Southern Arabian Peninsula, where everybody in the tribe was concerned about everybody else and where individual rights were not that important, but the tribal societal rights were the most important. As you look at the applicability of this type of doctrine on a nationwide basis, you find it antithetical to individual rights and, therefore, antithetical to the western approach and concept of individualism and individual rights, and of the individual’s freedom within a society, because collective rights always prevail.

This could work very well in a most enlightened society, but in a society—as Prince Zeid was mentioning—which lacks substantially in human development, suddenly the society sinks down to its lowest common denominator. Individuals who could be emerging and who could pull the society upwards are the ones who are submerged and dragged down into the society and prevented from emerging, leading, and moving the society upwards.

So the Tunisian revolution took place—I hope that Greta and Jamel will not find what I say too troublesome. There is a high level of discourse in Tunisia about transitional justice, even of forming a Ministry of Transitional Justice, but that is because Tunisia has always had a civil society and a history in human rights organization and political activism, with a lot of support from the outside. Tunisia has a lot of support in Italy and in France, and that carries with it a certain impetus, but at the governmental level, frankly, nothing is happening. So you have a Ministry for Transitional Justice, but you do not have transitional justice. You have two major assassinations of two major political leaders. Nothing happens. You say, “Well, what are we going to do?” There is one prosecution *in absentia* of the former president, but that is all. What is happening to all of the other people, to all of the people in the military, in the police? Nothing. A lot of talk. Nothing is happening. But at least in Tunisia, you have a voice. You have the activists who are still keeping the idea alive.

Let us move from there to Libya. I had the privilege of serving as the Chair of the UN Commission of Inquiry in Libya. The Chair then passed to a member of the Commission, my colleague, Philippe Kirsch. I remained on the Commission.

We consider ourselves interchangeable because we sort of think alike and work very well together. We went to Libya, and as was said this morning, the International Criminal Court (ICC) is trying to get Saif al-Islam Gaddafi and Ahmed al-Senussi, two fairly bad characters, into its custody. We met with al Senussi. What is the problem? In Libya, the different military groups are holding about 8,000 people in their prisons, and these people have been held for close to a year. They started with about 12,000. They ransomed them. These are their meal tickets, because people joined in the fight, especially in the last two months, when they saw that the fight was going to be a certain success and there was not going to be anything lost. The weapons were just piled up because Gaddafi used to buy all sorts of weapons. You could go into any open depot of weapons in the desert and pick up a Kalashnikov and declare yourself a member of this brigade or that brigade, and people wanted a share of power. At a certain point, Tripoli itself was divided into four zones, other than the government zone, with each brigade controlling access and demanding payment and, on occasion, fighting each other out.

And then suddenly, we discovered that there was a transitional justice law that had been promoted by the Islamists in Libya who wanted to use it as a way of ransoming people out of jail who would then in turn pledge their loyalty to the Islamists. In a tribal society like that of Libya, you get one person out, you have one hundred votes that come with it, and so it became a whole political bag, in addition to something of great financial consideration.

Ideas about prosecutions, of course, fell by the wayside. Nobody is willing to prosecute. There were a lot of violations

committed by the “Thuwar,” as they were called, or the rebels, against a number of people, particularly the Tawarghas who had been moved inland from the Gaddafi regime. These people have been displaced and harshly mistreated. But again, nothing happened there.

On the Egyptian side, the situation is much worse and not likely to get any better. The early beginnings in Egypt were to try to look at the violations committed by the Mubarak regime. That did not work out too well because the people of the Mubarak regime were still in control of the country. Then Attorney General Abdel Meguid Mahmoud, who was appointed by Mubarak and a close friend of his, was the one who was supposed to prosecute him. It was very interesting that Mubarak was prosecuted on a legal theory that did not exist in the Egyptian criminal code, which was basically a theory of command responsibility for failure to act. So while he was convicted at trial, he was acquitted at the Supreme Court level. Nonetheless, he was kept in prison. Now, of course, he was released, rightfully so, because there was no basis for his detention. Nobody really bothered to go after him for the major corruption of his time. His two sons, with all of the corruption they had been involved in, were prosecuted only for having bought two subsidized villas in Sharm el-Sheikh at a reduced price. So for all of their 20 years of corruption and the multi-million dollars they made, this was the only charge brought against them. Of the 22 major corruption cases that were brought by the prosecutors of the former regime, nothing happened, and the whole thing collapsed.

Then there was suddenly this very fast transformation of the elections, the reaction to the elections, and so on, and the

bottom line is this: on August 21, just a few days ago, the cabinet in Egypt decided against having a truth commission or an investigation commission or anything of the sort. There were three plans on the table. One plan was for a national commission. The other plan was for a commission similar to that in Bahrain with mixed international participation. A third was for a commission of inquiry established by the UN Human Rights Council. All three were rejected, and the plan that was approved in paragraph 11 of the decision of the counsel was to establish local committees of reconciliation. Nothing much is going to happen. The Muslim Brotherhood rejects this plan entirely. Instead, the Muslim Brotherhood is mounting an international campaign to seize the ICC on the ground that the killing of a religious group is a form of genocide, and if not genocide, then crimes against humanity. So that is the new external campaign. What you saw in the street is now giving way to a campaign for that justice.

The new regime said, “We will establish a ministry of transitional justice,” and then the judiciary opposed it. So the Minister of Transitional Justice could not become the Minister of Justice as well, and he was shunted aside. It took him three weeks to get three offices in the former Senate building, and for all practical purposes, his entire work is being marginalized.

Egypt and a number of states supporting it are opposed to having a commission of inquiry. They are even opposed to having a special debate on Egypt in the Human Rights Council. There is going to be a general discussion of what is to happen, but it is not likely that anything much will happen.

I will jump from here to Syria. As you know, the Human Rights Council has established a Commission of Inquiry for Syria. First, it had three members. Then it had five members. With the exception of one member, Karen Koning AbuZayd, none of them have any experience in the Middle East nor do they speak the language. They have remained ensconced on the fourth floor of Palais Wilson in Geneva for a good year and a half. Recently, they took a trip to some refugee camps in Jordan and in Turkey, and that is the extent of their fact-finding. Nothing much is likely to come out of that.

There are efforts by some NGOs, including efforts by organizations such as the one led by Mohammed Abdullah and others working out of Washington as well as Lyon, France, who are trying to obtain and collect evidence. Another organization in London is trying to collect the data. There is a plan by these organizations to do transitional justice. There were some thoughts of that, and a plan was submitted to the Gulf Cooperation Council, which unfortunately did not gain much support, so the likelihood that there will be transitional justice at this point, in my opinion, is non-existent. If there is to be a Geneva meeting in September that will start the process of establishing a transition towards non-conflict, the first casualty is going to be transitional justice, because the reaching of a political settlement is necessarily going to involve making sure that Assad, then his family, as well as the Alawites are going to have some type of impunity situation. Memories of the Lomé Agreement will be there, though everybody has learned their lessons. It is not going to be put in writing, but it is going to happen *sub rosa*.

With respect to Yemen, the former President left the presidency on the condition of getting an amnesty law. He obtained the amnesty law. There was some support for it in two resolutions by the United Nations, and everybody is eager to make sure that the amnesty law remains in place, because they do not want to have another sectarian war going on there.

In the up and down of peace versus justice—and instead of calling it “peace versus justice,” let me call it “political settlement” versus justice—this is the time at which, throughout the Arab world, the goal is to reach political settlements, to dampen the violence, to restore normalization. We will talk about justice at another time. The problems in the Arab world are economic. They are social. Their problems of economic development are very serious. These societies are very unstable, and the risk of another revolutionary trend is very probable. This time, it is quite possible that the Islamists will find a way of communicating across all of these countries, so that the next revolutionary wave will not be on a country-by-country basis. It will be a revolutionary wave that will be spurred by the Islamist movements and that will have connections between countries and, thus, will have a much more serious impact geopolitically in the region, and possibly in the Gulf as well, which brings increased geopolitical considerations, particularly for the United States, with the big role played by Iran.

So transitional justice is nonexistent in all of these countries in which you have had a prior accumulation of violations which required some type of transitional justice, no matter what the mechanism. May also I say that, in all of that discourse, the one thing that I find rather deplorable is not

hearing about victims' rights. Nobody speaks of victims' rights, and that is what it is all about. Unless we start putting the victim at the heart of whatever initiative we want to take, it is not going to be enough for us to say, well, let us try to prosecute. Prosecution is only a small part of it, and it cannot be the primary part. Prosecutions do not right the record of history. They do not right the wrongs of those who have been victimized.

Thank you.

LEILA N. SADAT: Thank you so much, Cherif, for that incredible *tour de force* and slightly depressing assessment of the situation.

I do not know if we will be more uplifted or not by our following speakers, but I am going to now ask Greta and then Jamel to speak about their experiences.

GRETA BARBONE: Thank you very much for giving me the floor on this. I want to thank the Jackson Center, particularly David Crane, for inviting me and giving me this opportunity to participate in this really unique event.

First of all, let me say that I am quite nervous because to speak immediately after Professor Bassiouni is quite a difficult task, but I will try to do my best.

I totally agree with his assessment on Tunisia. I think there are a number of factors to analyze, and maybe I can develop a little bit more on what Professor Bassiouni said.

From one side, there is a highly sophisticated discourse on transitional justice and a sophisticated civil society, which is really active in Tunisia. And the government created a Ministry of Human Rights and Transitional Justice immediately after the election in October 2011. So this facilitated, of course, the discussion of creating a movement around transitional justice.

I will speak a little bit more about the Ministry of Human Rights and Transitional Justice's most important endeavors, which will allow me to highlight some positive aspects of the process in Tunisia. Then I will turn to the trials, and then to the actual measures that were implemented in Tunisia that indeed, as Professor Bassiouni already said, show a lack of willingness by the government to actually fight impunity and to provide accountability and redress for the crimes that were committed.

The Ministry of Human Rights and Transitional Justice, together with civil society, launched a national dialog in April 2012 on transitional justice, and that was quite a positive aspect of the whole process. The process itself was positive. It created a commission inside the Ministry which was composed of representatives of the Ministry, as well as five civil society organizations working on transitional justice. So this national dialog was led by civil society together with the government.

This also was a positive aspect because it reinforced civil society in its relations with the government. Of course, under the dictatorship, the government did not maintain relations that would allow civil society to conduct any kind of initiative with the government. So this changed the way civil society saw itself in this role, and it was certainly a positive aspect.

The dialog itself actually was conducted in a positive way. There were some training courses throughout the country for a select number of people who then conducted some consultations with the public, and then, after this consultation with the public, the Commission prepared the first draft of the rationalization on transitional justice, which recommended the establishment of a Commission on Truth and Dignity and also a reparations program.

Of course, this process was not perfect. It had its flaws, and the transitional justice legislation that is now with the Constituent Assembly for analysis was not perfect. But at the same time, I think there was a particular value in the process itself of involving the citizens, the regular population, in the transitional justice discourse. It really helped create the sense of ownership that somehow is necessary for the people to then accept the outcomes of transitional justice.

Now, the acceptance of the outcomes of transitional justice and the success of transitional justice depends on a number of factors that interplay along the old way of the transitional justice process. But I think the creation of stakes in the process itself is already a good basis for the acceptance of the outcomes of transitional justice.

Another positive aspect is that it brought together civil society on transitional justice. It is true that civil society in Tunisia is quite sophisticated, but the first problem I faced when I was in Tunisia was the complete lack of coordination and cooperation, and even the desire to speak with other organizations that belong to different groups. After a dictatorship, you very often encounter the problem that the

secretive environment created by the dictatorship creates suspicion among people, and so it takes some time to overcome it and create a relational trust.

The fact that these five organizations were forced to work together for a number of months made it possible for them then to recognize each other's value and to work together afterwards and to continue working together even after the dissolution of the Commission itself. So I think these were two very positive aspects.

While the Ministry was conducting this national dialog, other parts of the government were implementing a number of other measures. One, for example, was a partial dismissal of the judiciary. Basically without any process of transparency, without any prior notice, and without any due process at all, one day in spring 2012 the government came up with a list of judges that were dismissed from their position. They were not allowed to defend themselves or even access their files or know why they were being dismissed. This, of course, created the perception in the population that there were not enough measures.

Something similar is being tried by the government in relation to the politicians. The government has presented the exclusion law, which is being analyzed by the Constituent Assembly, and if adopted in its original text, would exclude thousands of people from political life, just because they held certain positions in Ben Ali's governments or political party. And again, those to be excluded do not have the possibility to actually contest this exclusion.

The third measure that has been implemented is reparations to victims. I think this is the worst example in the experience of transitional justice in Tunisia. A number of reparations were provided to victims of the revolution and to victims of the previous regime, but the selection of the victims was totally arbitrary. It was made by the government, and because a great part of the people belonging to Islamist parties were oppressed during the Ben Ali regime, almost only victims belonging to the Islamist party received compensation. This created a huge problem with all the other groups of victims.

As many of you know, it is very difficult in any country in transition to work with victims because there are many different groups, and it is not always easy to find an agreement. Certainly, at the beginning of the transition, it is very difficult to put together different groups of victims. They all have legitimate claims, but it takes time to recognize the victimization of somebody else. So this situation really created tension between the various groups of victims. We have found it very difficult to try to create a coalition or the networks that are absolutely necessary to help victims participating in transitional justice processes, not only in the preparation phase of the transitional justice process, but then later on, when the transitional justice process is actually being implemented, to participate with the various commissions.

Unfortunately, it is quite true that on the side of trials, the government has not done much. Since the revolution in Tunisia, it has been a place of recurring violence, which has not reached the level of other countries, but it is definitely a worrying and a dangerous moment for Tunisia.

The assassination of Chokri Belaid and Mohamed Brahmî and the killing of soldiers by a terrorist attack at the border with Algeria are examples of this increase in violence. I think part of this is due to the real lack of governmental willingness to provide any real form of accountability for past and present crimes.

There was only one trial convicting one former Minister of Interior and his subordinates for torture, even though torture was one of the common practices of the police under the Ben Ali regime. Then we have the military tribunals and a couple of trials in El Kef and in Tunis for the killing of civilians in December 2010 and January 2011. I will not cite all the trials and the convictions, but overall, it was important that there was the conviction of former President Ben Ali for complicity in the killings.

But then the Interior Minister and the other high-ranking officials were only sentenced to ten to twelve years. Many of the defendants were convicted, including the Director General of the Presidential Guard and a number of commanders in Tala and Kasserine, which were the regions where there were the largest number of killings during the revolution. This was really a shock for Tunisians.

The other problem is a legal challenge, which is the lack of some basic concepts in the framework of the legal legislation that would allow courts to actually provide accountability. One of these is command responsibility. I think the role of the Rome Statute and the ICC, which Tunisia ratified immediately, is to support this transition by serving as a model to provide the legal reform. Thank you.

LEILA N. SADAT: Thank you so much.

Jamel has received several awards and has met President Obama as a result of his activism. Jamel, do you want to speak to what it has been like to be a human rights activist on the ground and comment on what you have already heard?

JAMEL BETTAIEB: So, as you like to begin with poetry, I would like to begin my speech with poetry. There is a part of a poem by the Palestinian poet, Mahmoud Darwish, that I find describes very well the Arab Spring. I will read it in Arabic and then translate.

*Whom has the bloody hands and feet,
the night will be over.
Either the torture room,
never the chains will stay.
Neron is tried,
but Rome still is fighting.*

On Friday, December 17, 2010, there was a small crowd in front of the Governor of Sidi Bouzid's office. A fruit vendor set himself on fire as a reaction against repression and corruption.

Some activists and I joined him in the hospital, and then they moved him to another city because the hospital did not have enough equipment. When we got back to the city, we found an even bigger crowd, and it began with peaceful, spontaneous protests. It was not begun by political party

movement. People went into the street. We, as activists, did not protest, and we wanted it to stay peaceful. We cared about keeping it peaceful. Then we used social media, especially Facebook, to make the story known and to move other people in other regions to protest. On January 14, 2011, the dream became a reality, and the dictator left the country. And it began like a wave of freedom.

But the problem is that the political class which remained after Ben Ali did not understand the demands of the population very well. There were two major slogans during the revolution. The first slogan was for jobs—employment is a human right—and second was for political freedom—freedom now, freedom forever.

Only a small minority thinks in the right way—that the political class should make changes to the constitution through our experts and hold elections as soon as possible to guarantee stability, because our economy is based on tourism and on foreign investment. You need political stability to guarantee development. But a larger part of the political class wanted a constitutional council. We wrote a new constitution in one year. The same council voted for a transitional government.

On October 23, 2011, they voted for that council and the Islamic party, Ennahda, and the two secular parties got power and they elected a government. But the problem is this council played the role of parliament. The constitution was not yet written, and the government behaved like it had voted for ten years. And that was very bad, especially for the economy.

Now the major problem that Tunisia is facing that Greta told about is the political violence. Political violence is practiced by the radical Islamist groups and by a party calling itself, “The Revolution Protection League.” And the two manifestations of that political violence were political assassinations.

The problem is that groups using violence were never investigated so there was no trial. The justice system did not play its role in stopping them and neither did the government. So, for example, in September 2012, they attacked the American embassy and burned cars. When that happened for the first time, it was a big story that a diplomatic mission was attacked, but only two or three people were deemed responsible.

So it looks like the government is encouraging people to engage in violence, and there were not two but three political assassinations. So I think that is the major problem now.

Concerning transitional justice, nothing happened. Nothing. They just detained some people from the former regime for two years without a trial, which is illegal even under Tunisian law. It is illegal to detain people without a trial for more than 14 months. And then they liberated 95 percent of them. And many corrupt businessmen or politicians actually became more influential than they were before, because they got closer to the ruling parties.

LEILA N. SADAT: Thank you, Jamel.

I am very grateful, and I know the rest of your listeners are as well, for the courage of all three of our speakers, and to you, Jamel and Greta for being on the ground where these things are happening. And, Cherif, you have been on the ground almost everywhere where these things are happening.

Roy, you have the final word, and then we will come back to Cherif and open it up to the audience.

DR. ROY S. SCHÖNDORF: It is a great honor to be here and to speak to this distinguished audience and to the distinguished prosecutors. I will try to be brief in the interest of giving the audience the opportunity to also ask questions and interact with us.

One of the things that I think is evident from all the excellent presentations we have heard today is the extent to which issues of accountability and transitional justice are a part and parcel of, and are actually a major theme in, what is happening today in Arab countries. I think this is a very encouraging sign.

I think it is obvious that accountability and the rule of law should be a key component in the transition of states away from oppressive regimes, and I think the fact that we see this happening in the Arab world is very important.

I will try to offer five points that I think are important with respect to accountability in the context of the Arab Spring. But before I do that, I want to also acknowledge what Prince Zeid said this morning—and we heard it from Professor Bassiouni

as well—that it is obvious that each Arab country has its own specific history, its own special circumstances, and its own culture. Each Arab country is currently in a different phase of transition. In different countries, we have seen different types of human rights violations. So it is obvious that there is no one solution or one-size-fits-all approach to exactly what type of accountability mechanism should be designed.

But having said that, I do think it is worthwhile to consider five points when we think about transitional justice in the context of post-conflict situations, and specifically in the context of the Arab Spring.

One issue, a first point that I cannot resist making, is the importance of recognizing the progress that has already been made. I have listened to my colleagues. I think it is only natural that all of us working in the field of international criminal justice always want to achieve more, and we always want to have everything perfect. There is never enough justice. You always want to have all the justice that we can achieve. That is of course important and commendable, but it is important at the same time not to forget that these processes take a long time, and we are living through these processes. It is true that in the era of the internet and Facebook, we expect things to happen very quickly. We can be very impatient, but that is not the nature of how these social processes happen.

The fact that today in Arab countries, issues of accountability and transitional justice are an important part of the conversation—and that in some of the Arab Spring countries, we actually think we see things actually happening on the ground—is very significant. It is not something that we

could see happening five years ago, and so I do not think we should leave here with only a pessimistic sense that the situation is terrible. Yes, there is a lot that still needs to be done. Yes, there are many problems on the ground. But there is also progress in the sense of the consciousness that exists and the conversation in these countries.

I think the second important point to be made when we approach issues of international criminal justice and transitional justice is to have realistic expectations about what we hope to achieve through accountability mechanisms. I think it is very important to remember that accountability mechanisms and international criminal law cannot be expected to solve political conflict. It can be part of a political solution. It can work in parallel to a political solution, but we cannot put on international criminal justice the expectation that it will solve a political process.

Sometimes we have to raise the question—and this brings me to my third point—of what is the most appropriate time to engage accountability mechanisms. When will it be most effective to actually establish a particular mechanism? Again, sometimes we feel it is very important that this will happen very quickly or as soon as possible, but many of us also believe that these mechanisms are most effective when they are accepted by the national system or by the local community. So we want to build these mechanisms on some cooperation with the local government or national society. There is also something to be said for the accountability mechanisms following a certain political settlement. This is not to say that this should always be the case. There can certainly be situations where it is necessary to have accountability

mechanisms operating in parallel to situations of conflict, but it is not always very easy to have these mechanisms operating in such an atmosphere. I think an important question to ask is, what is the appropriate moment.

The fourth point—and again, I think it is connected—is the question to what extent we want these mechanisms to be based on domestic processes and to what extent we feel a mechanism should be international or operated at the international level. Again, there is no single solution here. There is no right answer.

There are arguments why local mechanisms or mechanisms that are based on domestic law have some advantages. They certainly have the advantage of capacity-building, and they would normally enjoy a greater national legitimacy. But again, it is not always possible, and so we are always considering possibilities between a national mechanism, an international mechanism like the ICC, or some solution in between of national tribunals or mechanisms that are supported by strong international components or an international mechanism that has significant national participation. Of course, the question of what is possible or feasible in terms of the design of such a mechanism really depends on the political situation on the ground and what would fit any specific society.

I think the last point to make is the idea that it is not all about criminal accountability. Many times when we speak about accountability mechanisms, we speak about them having in mind criminal accountability. And of course, we are sitting here with all the prosecutors. But criminal accountability can

only be part of a solution. Professor Bassiouni mentioned this as well. It is not possible through a criminal trial to bring about all the things that we hope to get in a process of transition of a society from a period of oppression. Criminal trials have their difficulties. They normally involve a relatively small number of individuals. They tend to not always cover the entire history, and they cannot deal with all types of abuses that happened during a previous regime. Therefore, I think it is very important to look in parallel to criminal accountability mechanisms, to other forms of accountability, whether truth commissions or commissions of inquiry, or even other processes of political accountability.

So, to sum up, I think the issue of designing accountability mechanisms can be complex. I think there are important questions of timing and of what we really want, of our ability to achieve things through national processes. I think we are facing some of these questions, even in these days, with respect to some of the situations in Arab Spring countries.

Thank you.

LEILA N. SADAT: I think we have heard from all the panelists that the conversation has changed from what it might have been ten years or twenty years ago, that the ICC has made a difference, and that there is at least a conversation that maybe would not have been held prior to the ICC.

Cherif, maybe the first question for you is, has the ICC changed the equation? Would Egyptian ratification of the ICC change the equation? Have we made some progress? And conversely, did the, perhaps negative, experience of the Iraqi

High Tribunal sour the Arab world a little bit to that kind of traditional transitional justice mechanism?

M. CHERIF BASSIOUNI: Obviously, what we refer to as transitional justice has to be taken in its local cultural context. It means so many things to so many different people, and within the cultural context of different societies, it means different things.

So let me say something that will be somewhat provocative. The term “transitional justice” has been discredited in the Arab world, notwithstanding all of the efforts of the NGOs and others, for two reasons. First, the word “transitional” modifies the word “justice” in Arabic, and that automatically rings wrong. There is no such thing as a justice that is transitional, meaning exceptional, meaning special, meaning between two different things. Second, because it connotes the importation of an idea from the West, it is not an indigenous idea. The terminology is not an indigenous terminology.

So while you will see a certain constituency for it, a constituency that comes from civil society, NGOs, and human rights organizations that have particular links with the outside world, it does not ring right. If you go to a Muslim fundamentalist society such as in Upper Egypt and you talk about transitional justice, it does not make any sense.

Justice makes sense. Justice is innate. It is part of Arabic culture, of Islamic culture. It is part of human culture. It is something to which people can relate. But things are not advanced in those simple terms. It suddenly gets complicated

once you start talking about the mechanisms of transitional justice.

You might remember that in Rwanda, there was this move for the popular *gacaca*, and a notion of justice that is more tribal, more family based. It is more locally oriented. To me, if we have to accomplish what we believe is transitional justice in the Arab world, it has to start with the victim. It has to be victim-oriented because that depoliticizes the whole issue, and it is not because we are after so and so or so and so, because there is another cultural factor which is very important in the Arab world. The Arab world is essentially conspiratorially-minded.

This is an intellectual deformation. In Syria and among Syrian expatriates and the coalition, there is a conspiracy theory every day. You wake up with a conspiracy theory. You meet somebody, and the first question is, what happened? And then somebody says, “Oh, you know . . . I read in the paper . . . somebody told me . . .” There is always somebody who called me and told me something, and on that something, a whole story is built. You would be surprised. I periodically write reports on Egypt called *Egypt Updates*, and in a recent issue, I listed 14 different conspiracy theories, and they vary enormously. And they are frequently totally contradictory.

So you talk about this type of transitional justice. It is foreign. It has a different name. What do you talk about? What sort of mechanism? Who is foreign? Who is internal? Who is going to appoint it? Before you know it, all sorts of conspiracy theories are built up on it. So you have got to make a *tabula rasa* and start very basically. We are here because we are

concerned about the victims. See if you can start something on a victim basis, and then build confidence from there.

One of the reasons why the three options proposed to the Egyptian cabinet were rejected was very simple. The cabinet met and discussed the proposals, and the first question there was—and this would have been the first question in every Arab country—who are the members of the commission going to be? The question was not what will the process be, how is it going to work? It was, who is going to be on it? Who is going to be the judge? And immediately, everybody is thinking of who is going to be represented, and then comes the conspiracy theory, what is behind it, who wants what. Within six months of the January revolution in Egypt, there were 26 political parties. There were 26 candidates for the presidency. This is the type of context that you have to deal with, and that is why the cabinet question in Egypt was, who would be members, how would it be structured, how would it work? After four hours of debate, the conclusion was that it would never work. Forget about it. Put it aside. Let us have these local committees, et cetera.

This is unfortunately the contextual reality. We have to approach the Arab World in a much more imaginative way than we would approach another society.

LEILA N. SADAT: I have to say, as most of you know, I am Arab-American, and what you say about the conspiracy theories is totally true.

Alright, I believe our time together has come to an end; ladies and gentlemen, please join me in thanking our panelists.

Conclusion

Conclusion

Elizabeth Andersen*

The 2013 International Humanitarian Law Dialogs (IHL Dialogs) focused on the unfolding developments in the Middle East and North Africa: the “Arab Spring” and its aftermath, the role of accountability in the multiple transitions underway in the region, and the implications of these developments for the international justice field. It was a challenging theme and marked a significant turning point in this annual gathering of the world’s international prosecutors—moving the discussion from what had been a predominantly retrospective celebration of justice achievements since Nuremberg to an honest and often contested appraisal of the role that international justice can play in the complex contemporary environment. This shift secures the Dialogs as an important forum for advancing the field, an annual arena in which the leading international justice practitioners and scholars can take stock, debate contemporary challenges, and engage in creative problem solving. And as this volume well reflects, it makes for a terrifically stimulating conference.

The 2013 Dialogs underscored several important aspects of international justice. First, perhaps more than any of the previous six Dialogs, the 2013 discussions highlighted the complexity of international justice: that it is not just about investigating facts and developing and applying the law, but

* Executive Director, American Society of International Law.

also about politics, economics, and history; that there is no one-size-fits-all solution; and that there are extremely difficult questions about timing, location, and institutional design that need to be addressed. Second, the Dialogs probed the multifaceted relationship between international justice on the one hand and reconciliation, reconstruction, and the rule of law on the other. Finally, the Seventh Dialogs highlighted the contested nature of the field, even among those committed to the cause of international justice, with divergence in the jurisprudence emanating from the various international courts and difference of opinion among experts about the best course for accountability in various contexts. The conference saw a rich conversation about these issues develop in the formal panel discussions and lectures, at the ever-popular porch sessions, and more informally and spontaneously around the dinner table or along the pathways skirting beautiful Lake Chautauqua.

The complexities of the accountability project in the Arab world were emphasized again and again by the assembled experts. Professors Bassiouni and Bennoune, Ambassador Aharoni, Prince Zeid, and Prosecutor Brammertz, among others, urged that any prescription for accountability take into account the particular historical, political, and economic factors of each country. And this is no mean feat, requiring a historical understanding stretching at least to World War I, insight into the diversity of tribal, religious, and political factions in each country, and appreciation of the cultural associations with certain words, institutions, and actors. As Prince Zeid cautioned at the outset, “When you look at the five countries most affected by the Arab Spring—Tunisia, Egypt, Libya, Yemen, and Syria—each contains within it so many moving parts. We almost do not have enough mental power to

process and understand everything that is happening within each country. . . ”

While a II underscored the importance of historical understanding in designing accountability mechanisms, Professor Drumbl reminded us that history is itself often contested and indeed, an important role for international courts may be to provide a forum in which divergent histories can be told. And even as we grappled with the constraints imposed by history, culture, and politics, the conference offered many poignant reminders of the capacity of individuals to stand up to these systemic forces and change everything: 2013 Joshua Heintz Humanitarian Achievement Award Winner Shabana Basij-Rasikh’s campaign to educate Afghan girls, Jamel Bettaieb’s firsthand account of Tunisia’s people’s revolution, and the tales of dozens of embattled but determined activists beautifully captured in Karima Bennouné’s *Your Fatwa Does Not Apply Here: Untold Stories from the Fight Against Muslim Fundamentalism*.

The 2013 Dialogs also highlighted the complex relationship between accountability and reconciliation, reconstruction and rule-of-law development in countries emerging from conflict and transition. Prince Zeid urged the development of processes that encompass a meaningful expression of perpetrator remorse, an admission of wrongdoing as a critical step to national reconciliation. The seasoned international prosecutors did not offer much hope for such remorse emanating from the existing tribunals. Various discussants remarked that few Rwanda defendants had expressed contrition, while the vast majority consider themselves as victims, not victimizers, and they recalled

defendant Biljana Plavšić's cynical expression of remorse, offered to obtain a lesser sentence and swiftly retracted upon her return to Bosnia. A number of speakers noted that while the Yugoslavia Tribunal has been enormously successful in the prosecution and conviction of indictees and the development of international humanitarian law, it has not necessarily resonated in the Balkans, where "revisionist approaches" abound and those prosecuted in the Hague are often hailed as local heroes. Turning to current challenges, several speakers urged a national or hybrid process for Syria, one that would have local credibility and impact. At the same time, Prosecutor Bensouda acknowledged the benefits, in principle, of a criminal process that is locally situated, locally owned, but, reflecting on the Kenya situation, she concluded that many contexts requiring justice are simply not suitable for such process.

Participants also emphasized the importance of timing accountability efforts to maximize their impact on the ground in societies in transition. But again here we saw a diversity of views, with some clinging to the notion that "justice delayed is justice denied," while others urged caution and patience, lest accountability efforts undermine peace processes and exacerbate instability. Prince Zeid summarized the difficulty with which the international justice movement is grappling in the Middle East and beyond:

. . . [W]e really need to be very careful here. Many of us have been very passionate supporters of the earliest intervention by courts into events where a tremendous amount of blood has been spilled. I think we have to revisit this. Not that we should in

any way downgrade our support for the Rome Statute of the ICC, but we need to develop a more nuanced feel.

Related, many speakers underscored that accountability—in the formal, international criminal trial sense—needs to be but one element of a complex and long-term strategy aimed at fostering reconciliation and the rule of law. Professor Bassiouni reminded us that “those of us who are advocates and proponents of international criminal justice are perhaps losing track of the fact that international criminal justice is a component of a wider strategy. If we lose track of that, we can sometimes do more harm than good.”

Thus in 2013, the Dialogs came of age, moving beyond triumphalist accounts of génocidaires nabbed and justice done, to a sober, realistic assessment of the very real challenges presented by contemporary contexts, the difficult choices to be made in responding to them, and a robust and critical debate about how to proceed—through accountability processes among many other means—to build a lasting rule of law. In these Dialogs we will not always find agreement. As we saw at the Seventh Dialogs, current challenges invite a range of responses and competing views as to both substance and process. But this is precisely the value in the Dialogs, providing a forum to illuminate these differences and articulate options.

The international justice field needs this forum, and the American Society of International Law—dedicated to fostering international relations on the basis of law and justice—is

privileged to play its co-sponsoring role and to publish these *Proceedings*. We could not do so without the assistance of ASIL International Law Fellow Shannon Powers and ASIL Director of Education and Research Wes Rist. We are also grateful to the co-sponsoring organizations for their generous support for the event, and as always, to the inspirational leader who established and nurtures this important forum, David Crane.

I hope that readers will enjoy the discussions captured in this volume and be inspired to join in the dialog—at Chautauqua and beyond—to find solutions to today’s most troubling justice challenges and build the rule of law.

Appendices

Appendix I

Agenda of the Seventh International Humanitarian Law Dialogs

Sunday, August 25 through Tuesday, August 27, 2013

Sunday, August 25

Arrival of the Prosecutors & Participants

2:00 p.m. **Screening of the film “500 Years”** at the
Chautauqua Cinema.

Monday, August 26

7:30 a.m. **Breakfast.** Athenaeum Hotel.

9:00 a.m. **Welcome** by James C. Johnson (President of
the Robert H. Jackson Center) and Thomas
M. Becker (President of Chautauqua
Institution).

9:15 a.m. **Impunity Watch Essay Contest Award
Ceremony** presented by Andrew Beiter and
Alexandra Sandacz.

9:20 a.m. **Introduction of the Keynote Speaker** by
David M. Crane, Chairman of the Board,
Robert H. Jackson Center.

- 9:25 a.m. **Keynote Address** by H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein.
- 10:00 a.m. **Break.**
- 10:30 a.m. **Update from the Current Prosecutors.** Moderated by Professor Michael Scharf. Fletcher Hall.
- 12:15 p.m. **Lunch.** Athenaeum Hotel.
- 1:30 p.m. **Second Annual Clara Barton Lecture** by Shabana Basij-Rasikh, introduced by Eric C. Sigmund.
- 2:30 p.m. **Panel on the Legal/Policy Issues Stemming from the Arab Spring.** Moderated by Leila N. Sadat. (Panelists: Greta Barbone, M. Cherif Bassiouni, Jamel Bettaieb, Roy S. Schöndorf.) Fletcher Hall.
- 4:00 p.m. **Break.**
- 4:15 p.m. **Clayton Sweeney Porch Session:** A conversation with the Prosecutors and students, moderated by Andrew Beiter and Joseph Karb. Athenaeum Hotel.
- 5:45 p.m. **Reception.** Athenaeum Hotel.
- 6:30 p.m. **Dinner.** Athenaeum Hotel.

7:30 p.m. **Third Annual Katherine B. Fite Lecture** by Karima Bennoune, introduced by Diane Marie Amann.

Tuesday, August 27

7:00 a.m. **Breakfast with the Prosecutors.** Athenaeum Hotel.

7:45 a.m. **Breakfast Address** by Ambassador Ido Aharoni, introduced by Mark Quarterman.

9:00 a.m. **Drafting of the Seventh Chautauqua Declaration.** (Private – Prosecutors only.)

9:00 a.m. **Year in Review** presented by Mark A. Drumbl. Presbyterian Church.

10:30 a.m. **Break.**

11:00 a.m. **Porch Sessions with the Prosecutors:** Israel and the Arab Spring with Roy S. Schöndorf and Michael A. Newton; ICC/Libya with William A. Schabas and Jennifer Trahan; Responsibility to Protect and the Arab Spring with Michael Scharf and Paul Williams; Gender/Women's Rights/Children's Issues with Leila N. Sadat and Diane Marie Amann.

12:30 p.m. **Lunch.** Athenaeum Hotel.

1:00 p.m. **Luncheon Address** by M. Cherif Bassiouni,
introduced by Michael S. Greco.

2:00 p.m. **Break.**

2:30 p.m. **Issuance of the Seventh Chautauqua
Declaration.** Moderated by Elizabeth
Andersen of the American Society of
International Law. Athenaeum Hotel.

Appendix II

The Seventh Chautauqua Declaration August 27, 2013

In the spirit of humanity and peace the assembled current and former international prosecutors and their representatives here at the Chautauqua Institution . . .

Recognizing the continuing need for justice and the rule of law as the foundation to international peace and security, and cognizant of the legacy of all those who preceded us at Nuremberg and elsewhere:

Commending Ms. Shabana Basij-Rasikh as the fifth recipient of the Joshua Heintz Humanitarian Award for her important and impressive work in Afghanistan;

Noting with grave concern the recent developments in the Middle East and North Africa and the need for compliance with international humanitarian law and for accountability for crimes committed against civilians and non-combatants, particularly, in light of the alleged use of chemical weapons in Syria;

Urging states and the international community to end impunity for the gravest crimes by refusing to include or accept amnesty or immunity clauses in their peace agreements and calling on mediators and peace negotiators to integrate the international criminal justice dimension in their activities;

Noting that trials can only proceed with the arrest of fugitives and further noting the need for all states to cooperate with courts and tribunals by devising tangible efforts and effective strategies to ensure the location, arrest and transfer of fugitives;

Noting the conclusion of the trials of the International Criminal Tribunal for Rwanda and of the judicial mandate of the Special Court for Sierra Leone and the commencement of the last trial of the International Criminal Tribunal for the Former Yugoslavia, and being aware of the commencement of the residual mechanisms of these courts;

Now do solemnly declare and call upon states and the international community to keep the spirit of the Nuremberg Principles alive by:

Preventing and condemning the use of weapons of mass destruction, including chemical weapons, and ensuring accountability for all those who use such weapons;

Ensuring accountability for the perpetrators of all crimes and recognizing all victims, in particular, the most vulnerable, i.e., women and children;

Providing sufficient resources for all international criminal courts, tribunals and residual mechanisms to achieve their mandates, in particular, to continue to protect and support witnesses and those made vulnerable by their cooperation;

Fulfilling their obligations to locate, arrest and transfer all fugitives from international justice, to include Omar al-Bashir, Ahmad Harun, Ali Kushayb, Abdel Raheem Muhammad Hussein, Joseph Kony, Okot Odhiambo, Dominic Ongwen, Felicien Kabuga, Protais Mpiranya, and Augustin Bizimana.

Signed in Mutual Witness:

Fatou Bensouda
International Criminal Court

Serge Brammertz
International Criminal Tribunal for
the Former Yugoslavia

David Crane
Special Court for Sierra Leone

Brenda Hollis
Special Court for Sierra Leone

Hassan Jallow
International Criminal Tribunal
for Rwanda

Appendix III

Biographies of the Prosecutors and Participants

Ambassador Ido Aharoni

Ambassador Aharoni assumed the post of Consul General of Israel in New York after serving as Acting Consul General since August 2010. Prior to his arrival in New York, Aharoni served as a Policy Advisor to the Director-General of the Ministry of Foreign Affairs in Jerusalem. In the spring of 2006, he was appointed to serve as a Senior Advisor to Israel's Foreign Minister and Vice Prime Minister, in charge of media and public affairs. Between 2001 and 2005, Ido Aharoni served as Consul for Media and Public Affairs at the Consulate General of Israel in New York. Previous positions include Consul for Communications and Public Affairs at the Consulate General of Israel in Los Angeles, and Policy Assistant to Israel's Chief negotiator with the Palestinians under Foreign Minister Shimon Peres. In addition, Ambassador Aharoni served in the Israel Defense Forces as a company commander in the infantry during the first Lebanon war.

Diane Marie Amann

Professor Amann is currently the Emily and Ernest Woodruff Chair in International Law at the University of Georgia School of Law and is an expert in the interaction

of national, regional, and international regimes in efforts to combat atrocity and cross-border crime. She is also the founder of *IntLawGrrls* blog, which blogs about international law, policy, and practice.

Elizabeth Andersen

Ms. Andersen is Executive Director of the American Society of International Law (ASIL), a position she has held since 2006. She serves on the governing boards of the Friends of the Law Library of Congress, the International Law Institute, the American Bar Association Rule of Law Initiative, and Williams College, and she is an adjunct professor of law at American University Washington College of Law. She has served as Executive Director of the American Bar Association's Central European and Eurasian Law Initiative, as well as Executive Director of the Europe and Central Asia Division of Human Rights Watch. Ms. Anderson has served as a law clerk to Judge Georges Abi-Saab of the International Criminal Tribunal for the Former Yugoslavia and to Judge Kimba M. Wood of the U.S. District Court of the Southern District of New York.

Greta Barbone

Since September 2011, Ms. Barbone has been based in Tunis, on secondment from No Peace Without Justice (NPWJ) to Al-Kawakibi Democracy Transition Centre

(KADEM). Prior to her current post, she worked as Program Associate at NPWJ since January 2009, conducting advocacy and implementing program activities. Before joining NPWJ, Barbone interned at Human Rights Watch (HRW) and worked as an associate at Bonelli Errede Law Firm 2005-2007. Previously, she worked as Research Assistant of Public International Law at Universita Cattolica del Sacro Cuore.

M. Cherif Bassiouni

Professor Bassiouni is a distinguished research Professor of Law Emeritus at DePaul University College of Law where he taught from 1964-2012. He is a founding member and President Emeritus of the University's International Human Rights Law Institute. Mr. Bassiouni is also a founder and President of the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy. He has served as Honorary President of the International Association of Penal Law in Paris, France, and was instrumental in the creation of the International Criminal Court, for which he was nominated for the Nobel Peace Prize in 1999.

Andrew Beiter

Mr. Beiter, a Social Studies educator, serves as Director of Youth Education at the Robert H. Jackson Center, as well as Director of the Summer Institute for

Human Rights and Genocide Studies in Buffalo, NY. He also serves as co-Director of the Educators' Institute for Human Rights, which recently led a conference for Rwandan teachers in Kigali. A Regional Education Coordinator for the United States Holocaust Memorial Museum, Mr. Beiter also serves as a Teacher Fellow for the Lowell Milken Center for Tolerance in Kansas, and as a consultant for the Holocaust Resource Center of Buffalo and Buffalo for Africa.

Karima Bennoune

Professor Karima Bennoune currently teaches at the UC Davis University School of Law, where she was the 2011 recipient of the Chancellor's Distinguished Research Award. Professor Bennoune teaches a variety of courses on international law and human rights, and in 2012 created a new course called "Law and the Arab Spring," drawing from fieldwork in North Africa. She has been a visiting scholar/professor at the University of Michigan Law School, where she won the L. Hart Wright Award for Excellence in teaching. In 2007, Professor Bennoune became the first Arab-American to win the Derrick Bell Award. Currently serving on the Board of the Network of Women Living Under Muslim Laws, she has also served as a member of the Executive Council of the American Society of International Law and on the board of directors of Amnesty International USA. Professor Bennoune has served as a human rights issues consultant for the International Council on Human Rights Policy, the Soros Foundation, the Coalition to Stop the Use of Child Soldiers, and for the United

Nations Educational, Scientific and Cultural Organization (UNESCO). She recently authored and published a new book entitled *Your Fatwa Does Not Apply Here: Untold Stories from the Fight Against Muslim Fundamentalism*.

Fatou Bensouda

On June 15, 2012, Ms. Bensouda was sworn into office as the Prosecutor of the International Criminal Court, becoming the first African woman to assume the top job at an international tribunal. Previously, she was elected Deputy Prosecutor on August 8, 2004 and served until May 2012. Ms. Bensouda also served as a Legal Adviser and Trial Attorney at the International Criminal Tribunal for Rwanda (ICTR), and as the Senior Legal Advisor and the Head of the Legal Advisory Unit.

Jamel Bettaieb

Mr. Bettaieb, one of the first youth Arab Spring leaders, has served as a high school German teacher since 2007 at Tunisia High Schools. He has been an active member of the Teachers Union, a part of UGTT, the Tunisian General Labor Union, and founding member of many nongovernmental human rights organizations. Mr. Bettaieb was a 2011 recipient of a National Endowment for Democracy (NED) Award, and the 2011 OXI DAY Foundation Award, and met President Obama in the Oval Office. He is also a former

fellow of the American Federation of Teachers (AFT), and of the U.S. Holocaust Memorial Museum.

Serge Brammertz

Mr. Brammertz is the Prosecutor for the International Criminal Tribunal for the former Yugoslavia. He previously served as Deputy Prosecutor (Investigations Division) of the International Criminal Court, and Commissioner of the United Nations International Independent Commission into the Assassination of former Lebanese Prime Minister Rafik Hariri.

Andrew T. Cayley

Mr. Cayley worked in private practice prior to serving as a Legal Officer for the British Army. He then served as Prosecuting Counsel and Senior Prosecuting Counsel in the Office of the Prosecutor in the International Criminal Tribunal for the former Yugoslavia. He also served as Senior Prosecuting Counsel at the International Criminal Court, and as a defense attorney before the Special Court for Sierra Leone and the International Criminal Tribunal for the former Yugoslavia. In 2009 Mr. Cayley was appointed Co-Prosecutor for the Extraordinary Chambers in the Courts of Cambodia.

David M. Crane

Professor Crane is a professor of practice at Syracuse University College of Law. In 2002 he was appointed Chief Prosecutor of the Special Court for Sierra Leone, a position he served in through 2005. Professor Crane was the first American Chief Prosecutor at an international war crimes tribunal since Justice Robert H. Jackson at Nuremberg in 1945. Professor Crane is also the creator and advisor for the Syracuse University College of Law online publication *Impunity Watch*.

Mark A. Drumbl

Professor Drumbl is the Class of 1975 Alumni Professor at Washington & Lee University, School of Law, where he also serves as Director of the Transnational Law Institute. He has held visiting appointments with Oxford, Paris II (Pantheon-Assas), Trinity College-Dublin, Melbourne, Sydney, and Ottawa. Mr. Drumbl recently published *Reimagining Child Soldiers in International Law and Policy* and his 2007 book *Atrocity, Punishment, and International Law* has been widely reviewed and has earned critical acclaim. Professor Drumbl's research has received scholarly excellence commendations from the American Society of International Law, and his work has been cited by courts in the United States, United Kingdom, and Canada. He formerly served as a law clerk to Justice Frank Iacobucci of the Supreme Court of Canada.

Michael S. Greco

Mr. Greco is a commercial litigator, arbitrator, mediator, and appellate lawyer with nearly 40 years of experience representing a wide range of clients both nationally and internationally in complex business and other disputes involving financial institutions, national accounting firms, bio-technology firms, architects, engineers, insurers, professional sports and athletes, intellectual property firms, consulting firms, contractors, real estate developers, national airlines, and corporations and key executives in governmental and internal investigations. He is former President of the American Bar Association, and served as a law clerk to the Hon. Leonard P. Moore of the U.S. Court of Appeals and as a Fellow at the Institute of Comparative Law, University of Florence, Italy.

Brenda J. Hollis

Ms. Hollis has served as the Prosecutor for the Special Court for Sierra Leone since February 2010, having previously served as Principal Trial Attorney. In her prior work as an Expert Legal Consultant on international and criminal procedure, Mrs. Hollis trained judges, prosecutors, and investigators for International Criminal Tribunal work. She served as Senior Trial Attorney from 1994 until 2001 at the International Criminal Tribunal for the former Yugoslavia, and assisted the Office of the Prosecutor at the International Criminal Tribunal for Rwanda.

Hassan Jallow

Mr. Jallow is currently serving as the Prosecutor of the International Criminal Tribunal for Rwanda, a position he has held since 2003. Mr. Jallow previously worked in The Gambia as the State Attorney from 1976 until 1982, when he was appointed Solicitor General. In 1984, Mr. Jallow served as Attorney General and Minister of Justice for the Gambia, then, in 1994, he was appointed as a justice of the Supreme Court of the Gambia. From 2002 until 2003, Mr. Jallow served as a Judge in the Appeals Chamber of the Special Court for Sierra Leone.

Joseph Karb

Mr. Karb is a middle school Social Studies educator who also serves as Director of Teacher Initiatives at the Robert H. Jackson Center. Recently selected as the National School Social Studies Teacher of the Year, Mr. Karb is a national teacher fellow with C-SPAN, and facilitator for the statewide “NYSUT/Speak Truth to Power” video contest. His work has also been featured nationally in social studies research studies, PBS Newshour and Britannica Online.

Michael A. Newton

Professor Newton is a professor of the practice of law at Vanderbilt University and is an expert in

international law, international criminal law, terrorism and counterterrorism, and special tribunals. He helped to establish the Iraqi Special Tribunal, co-authored the book *Enemy of the State: The Trial and Execution of Saddam Hussein*, served as Senior Advisor to the U.S. Ambassador-at-Large for War Crimes Issues in the U.S. State Department, and had a distinguished military career as an armor officer and a Judge Advocate General. He has also negotiated the Elements of Crimes document for the International Criminal Court (ICC) as part of U.S. delegation, and coordinated the interface between the FBI and ICTY while deploying into Kosovo to do the forensics fieldwork to support the Milosevic indictment. Additionally, he was the U.S representative on UN Planning Mission for the Sierra Leone Special Court and currently serves on the Advisory Board of the ABA International Criminal Court Project.

Gregory L. Peterson

Gregory L. Peterson is a partner at Phillips Lytle LLP and is Office Leader of the Chautauqua County office. Mr. Peterson's focus is in all areas of real estate, including development and financial transactions, areas of corporate counseling including acquisitions, administration and strategic planning, not-for-profit corporate formation, tax exemption and qualification with New York State administrative areas. He is the founder and former Board Chairman of The Robert H. Jackson Center. Mr. Peterson is admitted in New York, Pennsylvania and to the U.S. Supreme Court. He is a

member of the American, New York State and Jamestown Bar Associations.

Mark Quarterman

Mr. Quarterman currently serves as the Research Director for the Enough Project, where he creates the center's policy prescriptions to end genocide and crimes against humanity. Mr. Quarterman was the Senior Advisor and Director of the Program on Crisis, Conflict and Cooperation at the Center for Strategic and International Studies (CSIS). He has also served in a variety of positions for the United Nations, as a staff member of the Africa Subcommittee of the Foreign Affairs Committee of the U.S. House of Representatives, and as a director of a foreign NGO electoral observation project during South Africa's first non-racial elections in 1994.

Ambassador Stephen J. Rapp

Stephen Rapp currently serves as Ambassador-at-Large, heading the Office of Global Criminal Justice in the U.S. Department of State. Previously, Ambassador Rapp served as the Prosecutor of the Special Court for Sierra Leone, where his office won the first convictions in history for recruitment and use of child soldiers, sexual slavery, and forced marriage as crimes under international humanitarian law. Ambassador Rapp worked as Senior Trial Attorney and Chief of

Prosecutions at the International Criminal Tribunal for Rwanda 2001-2007, and as a U.S. Attorney in the Northern District of Iowa 1993-2001.

Leila Nadya Sadat

Professor Leila Nadya Sadat is the Henry H. Oberschelp Professor of Law at Washington University School of Law and Director of the Whitney R. Harris World Law Institute. She is an award-winning scholar with more than 75 articles and books and was named Special Adviser to ICC Prosecutor Fatou Bensouda for Crimes against Humanity in December 2012. She is the Director of the Crimes against Humanity Initiative, a multi-year project to study the problem of crimes against humanity and draft a comprehensive convention addressing their punishment and prevention. Sadat teaches public international law, international criminal law and human rights and is considered one of the world's leading experts on the International Criminal Court. From 2001-2003 Congress appointed Professor Sadat to the nine-member U.S. Commission for International Religious Freedom. Sadat often lectures and teaches abroad, and in 2011 held the Alexis de Tocqueville Distinguished Fulbright Chair. Professor Sadat is a member of the Council on Foreign Relations, and holds many leadership positions in professional associations and learned societies.

William A. Schabas OC MRIA

Professor Schabas is professor of international law at Middlesex University in London. He is the editor-in-chief of *Criminal Law Forum*, a quarterly journal of the International Society for the Reform of Criminal Law, and President of the Irish Branch of Criminal Investigation. From 2002-2004 he served as one of three international members of the Sierra Leone Truth and Reconciliation Commission. Professor Schabas served as a consultant on capital punishment for the United Nations Office of Drugs and Crime, and drafted the 2010 report of the Secretary-General on the status of the death penalty. He was named an Officer of the Order of Canada in 2006, and elected a member of the Royal Irish Academy in 2007. He was awarded the Vespasian V. Pella Medal for International Criminal Justice of the Association Internationale de Droit Pénal, and the Gold Medal in the Social Sciences of the Royal Irish Academy. Professor Schabas has authored more than 20 books dealing with international human rights law and has published more than 300 articles in academic journals.

Michael P. Scharf

Professor Michael P. Scharf is the John Deaver Drinko – Baker & Hosteler Professor of Law and Associate Dean for Global legal Studies at Case Western Reserve University School of Law. He is President of the Hague-based International Criminal Law Network (ICLN). In 2005, Scharf and the Public International

Law and Policy Group, a NGO he co-founded and directs, were nominated for the Nobel Peace Prize by six governments and the Prosecutor of an International Criminal Tribunal for the work they have done to help in the prosecution of major war criminals. Professor Scharf served in the Office of the Legal Adviser of the U.S. Department of State, where he held the positions of Attorney-Adviser for Law Enforcement and Intelligence, Attorney-Adviser for United Nations Affairs, and delegate to the United Nations Human Rights Commission. In 2008, he served as Special Assistant to the Prosecutor of the Cambodia Genocide Tribunal. He is the author of 75 scholarly articles and 16 books. Scharf is also the first professor in the world to offer an international law MOOC.

Dr. Roy S. Schöndorf

Dr. Roy S. Schöndorf is the Director of the Department of Special International Affairs at the Ministry of Justice of the State of Israel, with responsibility within the State Attorney's Office for public international law and litigation, including matters involving international humanitarian law and international criminal law. In previous roles for the Israeli government, Dr. Schöndorf served as a legal advisor to Israeli delegations for peace negotiations with Syria, Lebanon, Jordan and the Palestinians and was also a member of Israel's delegation to negotiations with respect to the International Criminal Court. Prior to his current position, he was a senior associate and legal consultant for the International Dispute Resolution

Group at Devoise & Pimpton LLP, as part of which he advised and represented governments, companies, and NGOs with respect to litigation and arbitration matters before foreign and international courts and tribunals.

Eric C. Sigmund

Mr. Sigmund, Esq. is the legal advisor for the International Humanitarian Law Dissemination at American Red Cross National Headquarters in Washington, D.C. He graduated *cum laude* from Syracuse University College of Law, where he focused primarily on the study of international law and national security law. He also earned a Masters in International Relations from the Maxwell School of Citizenship and Public Affairs at Syracuse University. Mr. Sigmund is a member of the Maryland State Bar Association.

Jennifer Trahan

Professor Trahan is the Associate Clinical Professor of Global Affairs at New York University, where she teaches a number of courses on international law, justice and human rights, and a field intensive on “War Crimes Prosecutions in the Former Yugoslavia” that travels to The Hague, Bosnia and Serbia. She has served as counsel and of counsel to the International Justice Program of Human Rights Watch; Iraq Prosecutions Consultant to the International Center of Transitional Justice; and worked on cases before the Special Court

for Sierra Leone and the International Criminal Tribunal for Rwanda. She has served as an observer for the Association of the Bar of the City of New York to the International Criminal Court's Special Working Group on the Crime of Aggression, as Chairperson of the American Branch of the International Law Association's International Criminal Court Committee, member of the American Bar Association 2010 ICC Task Force, and as a member of the New York City Bar Association's Task Force on National Security and the Rule of Law. She was a NGO observer at the ICC Review Conference in Kampala, Uganda, and lectured at Salzburg Law School's Institute on International Criminal Law.

Dr. Paul R. Williams

Dr. Paul R. Williams is the Rebecca Grazier Professor of Law and International Relations at American University. Dr. Williams is also the President and co-founder of the Public International Law & Policy Group (PILPG). Since 1995, PILPG has provided *pro bono* legal assistance to governments involved in peace negotiations, drafting post-conflict constitutions, and prosecuting war criminals. In 2005, Dr. Williams, as an Executive Director of PILPG, was nominated for the Nobel Peace Prize by half a dozen of his *pro bono* government clients. During the course of his legal practice, Dr. Williams has assisted over a dozen clients in major international peace negotiations, including serving as a delegation member in the *Dayton* negotiations, *Lake Ohrid* negotiations, and the *Doha* negotiations. He also advised parties to the *Key West*

negotiations, the *Oslo/Geneva* negotiations, the *Georgia/Abkhaz* negotiations, and the Somalia peace talks. Previously, Dr. Williams served in the Department of State's Office of the Legal Advisor for European and Canadian Affairs, as a Senior Associate with the Carnegie Endowment for International Peace, and as a Fulbright Research Scholar at the University of Cambridge. He is a member of the Council on Foreign Relations and the American Society of International Law.

H.R.H. Prince Zeid Ra'ad Zeid Al-Husseini

Prince Zeid is currently the Ambassador and Permanent Representative of the Hashemite Kingdom of Jordan to the United Nations. Jordan's Permanent Representative to the United Nations (UN) is a position he held previously from 2000-2007. From 2007-2010, he was Jordan's Ambassador to the United States of America and a non-resident Ambassador to Mexico. He has served as Jordan's Deputy Permanent Representative at the United Nations from 1996-2000. An expert in international justice, Prince Zeid played a major role in the establishment of the International Criminal Court (ICC). From 2002 to 2005, he was the elected first president of the governing body of the ICC, and was the first of two UN ambassadors to chair the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel. Early in 2004, he was chosen to chair the "Panel of Experts for the UN Secretary-General's Trust Fund to Assist States in the Settlement

of Disputes through the International Court of Justice,” in the matter regarding the boundary dispute between Benin and Niger. In 2005, he produced a report which provided for the first time a comprehensive strategy for the elimination of Sexual Exploitation and Abuse in UN Peacekeeping Operations, which was later endorsed by 191 Heads of State and Government. From 2004-2007 Prince Zeid was the chair of the Consultative Committee for the United Nations Development Fund for Women (UNIFEM).