

3-26-2013

Beyond Revolution: Ending Lawlessness and Impunity During Revolutionary Periods

Vanessa A. Arslanian

Boston College Law School, vanessa.arslanian@bc.edu

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>

 Part of the [International Law Commons](#), [Military, War, and Peace Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

Vanessa A. Arslanian, *Beyond Revolution: Ending Lawlessness and Impunity During Revolutionary Periods*, 36 B.C. Int'l & Comp. L. Rev. 121 (2013),
<http://lawdigitalcommons.bc.edu/iclr/vol36/iss1/3>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

BEYOND REVOLUTION: ENDING LAWLESSNESS AND IMPUNITY DURING REVOLUTIONARY PERIODS

VANESSA A. ARSLANIAN*

Abstract: In early 2011, mass protests erupted throughout Libya, political elites defected to form the resistance National Transitional Council, and the international community eventually intervened in the conflict. The result was the ouster of long-ruling leader Muammar Gaddafi and the beginning of considerable political change in Libya. Following the Gaddafi regime's overthrow, the regional militias that displaced Gaddafi refused to surrender arms to the interim government and continued to perpetrate illegal detentions, displacements, rapes, and summary executions. This Note assumes that events in Libya constitute an ongoing revolution, and places the violent episodes associated with it in a historical tradition of violence inherent in revolutionary periods. While revolutionary violence may be politically justifiable ex post, it is no longer legally justifiable given the network of international and regional law. Given this, interim Libyan leaders and their successors should ensure that both revolutionaries and former Gaddafi supporters are held accountable for their crimes. A hybrid approach, starting with a truth commission with eventual limited prosecutions, is the best way to bring a stable peace to Libya.

INTRODUCTION

On October 20, 2011, Colonel Muammar el-Gaddafi,¹ Libya's self-designated "leader of the revolution," became the victim of a different revolution: the Libyan revolutionaries that ousted him from power also

* Vanessa A. Arslanian is a Managing Editor for the *Boston College International & Comparative Law Review*. She would like to thank Prof. Paulo Barrozo, Paul Caligiuri, Samantha Miko, and Rebecca Maret for their insight and assistance. She would also like to thank her parents, Dr. and Mrs. Vasken Arslanian, for their limitless support.

¹ Zoe Fox, *How Do You Spell 'Gaddafi'? The Linguistics Behind Libya's Leader*, TIME (Feb. 23, 2011), <http://newsfeed.time.com/2011/02/23/how-do-you-spell-gaddafi-the-linguistics-behind-libyas-leader/>. Due to discrepancies in translation, Muammar el-Gaddafi's name is notoriously difficult to spell; approximately 112 different spellings exist. *Id.* This Note adopts the spelling "Gaddafi," as used in prior issues of the *Boston College International & Comparative Law Review*. See, e.g., Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT'L & COMP. L. REV. 145, 145 (2012).

ended his life.² Many Libyans rejoiced at the prospect of a new beginning after Gaddafi's oppressive forty-two-year reign.³ Western leaders, including U.S. President Barack Obama, also welcomed his downfall.⁴ Some, however, voiced concern.⁵ Official reports from the National Transitional Council (NTC) initially stated that Gaddafi had been killed in cross-fire, an assertion belied by the videos and photographs that would surface in the hours following his death.⁶ Videos depicting Gaddafi at the time of his capture by militants, bleeding and apparently beaten, later showed him dead with a close-range bullet wound.⁷ The NTC now faces crucial choices about how to come to terms not only with the Gaddafi regime's crimes, but also subsequent acts attributable to anti-Gaddafi revolutionaries.⁸

Part I of this Note provides a background on the conditions in Libya during the conflict. Part I also tracks events leading up to the present, outlining Libya's continued revolution, in which it experiences spasms of violence similar to other modern revolutions. Part II examines relevant international and regional law in the context of the Libyan revolution. Part III argues that while ex post political justifications for anomic revolutionary behavior—the idea “that all must be permitted to those who act in the revolutionary direction”⁹—may still exist, a legal justification does not, given established regional and international law. Part III concludes that Libya and the international community

² Neil MacFarquhar, *Muammar el-Qaddafi, 69, an Erratic, Brutal and Defiant Leader*, N.Y. TIMES, Oct. 21, 2001, at A16; Liesl Gerntholtz, *The Women's Lib Movement in Libya Sees a Surprising Twist*, HUM. RTS. WATCH (Nov. 24, 2011), <http://www.hrw.org/news/2011/11/24/womens-lib-movement-libya-sees-surprising-twist> (referring to the events in Libya as a “revolution”); *Libya: Investigate Deaths of Gaddafi and Son*, HUM. RTS. WATCH (Oct. 22, 2011), <http://www.hrw.org/news/2011/10/22/libya-investigate-deaths-gaddafi-and-son>.

³ See Omar Abulqasim Alkikli, Op-Ed., *In Tripoli, Blaring Horns and Shouts of Joy*, N.Y. TIMES, Oct. 21, 2011, at A35; MacFarquhar, *supra* note 2.

⁴ Kareem Fahim et al., *Qaddafi, Seized by Foes, Meets a Violent End*, N.Y. TIMES, Oct. 21, 2011, at A1.

⁵ See *id.*; *Libya: Investigate Deaths of Gaddafi and Son*, *supra* note 2.

⁶ See Fahim et al., *supra* note 4. The NTC is Libya's interim government. CNN Wire Staff, *U.N. Calls for Gadhafi Death Investigation*, CNN (Oct. 21, 2011), <http://edition.cnn.com/2011/10/21/world/africa/libya-main/>.

⁷ Fahim et al., *supra* note 4; CNN Wire Staff, *supra* note 6; *Libya: Investigate Deaths of Gaddafi and Son*, *supra* note 2.

⁸ See Sarah Leah Whitson, Op-Ed., *In Libya, Building the Rule of Law*, INT'L HERALD TRIB., Dec. 30, 2011, at 6.

⁹ HANNAH ARENDT, ON REVOLUTION 87 (Greenwood Press 1982) (1963) (internal marks omitted). NTC Law number 38 grants amnesty for all acts pursuant to the February 2011 revolution. See Chris Stephen, *Libya's New Penal Code: Same Old Story*, RADIO NETH. WORLD WIDE (May 10, 2012, 1:07 PM), <http://www.rnw.nl/international-justice/article/libyas-new-penal-code-same-old-story>; *infra* text accompanying note 36.

should hold both sides of the Libyan conflict accountable for their actions. They can best do so through a hybridized truth commission¹⁰ and trial approach, as has been used in other settings.

I. BACKGROUND

A. *Conditions in Libya During the Conflict and Immediately Following Gaddafi's Death*

1. Conditions During the Conflict Prior to Gaddafi's Death

February 17, 2011 marked Libya's "day of revolt," in which large-scale protests erupted throughout the country.¹¹ Gaddafi's forces responded to these protests by using snipers, helicopters, and artillery on the crowds.¹² Amid the protests, rebel fighter militias began to advance, only to be repelled by the Libyan military and Gaddafi's threat to root out protesters "alley to alley, house to house."¹³ Concerned with the Gaddafi regime's gross human rights violations against civilians, the United Nations (UN) Security Council adopted a resolution imposing a no-fly zone over Libya.¹⁴ Fighting continued for months, with rebels advancing throughout the country, taking Tripoli in August 2011, and going on to attack the pro-Gaddafi strongholds of Bani Walid and Surt.¹⁵

¹⁰ Eric Wiebelhaus-Brahm, *Truth Commissions*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 369, 372 (William A. Schabas & Nadia Bernaz eds., 2011). A Truth Commission has been defined as:

An *ad hoc*, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention.

Id.

¹¹ See *Battle for Libya: Key Moments*, AL-JAZEERA (Nov. 19, 2011, 1:47 PM), <http://www.aljazeera.com/indepth/spotlight/libya/2011/10/20111020104244706760.html>.

¹² Nick Meo, *Gaddafi Sends in Snipers to Silence the Dissent*, SUNDAY TELEGRAPH (London), Feb. 20, 2011, at 25, available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocan/libya/8335934/Libya-protests-140-massacred-as-Gaddafi-sends-in-snipers-to-crush-dissent.html>.

¹³ See *Battle for Libya: Key Moments*, *supra* note 11 (internal quotation marks omitted).

¹⁴ S.C. Res. 1973, pmb., ¶¶ 6–8, U.N. Doc. S/RES/1973 (Mar. 3, 2011).

¹⁵ Kareem Fahim, *Rebels Pour into Central Tripoli Square, Declaring Victory: Instead of Bloody Struggle, a Headlong Rush into a Cheering but Wary Capital*, N.Y. TIMES, Aug. 22, 2011, at A1; Rod Nordland, *Qaddafi Strongholds Are Attacked*, N.Y. TIMES, Sept. 10, 2011, at A4. See generally *Battle for Libya: Key Moments*, *supra* note 11 (detailing the events of seven months of conflict between the initial uprising and the fall of Tripoli).

The rebels then reportedly arrested, detained, and tortured African migrants and dark-skinned Libyans alleged to be Gaddafi supporters, and systematically drove them out of cities such as Tawergha.¹⁶

2. Gaddafi's Death and Ensuing Conditions

Sources indicate that militia brigades from the city of Misrata are responsible for Gaddafi's death and the execution of fifty-three of his supporters in mid-October 2011.¹⁷ Immediately following Gaddafi's death, UN High Commissioner for Human Rights Navi Pillay, Human Rights Watch, and Amnesty International all called for an investigation into the matter.¹⁸ Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court (ICC), stated in December 2011 that the manner of Gaddafi's death may have constituted a war crime; Moreno-Ocampo is also investigating allegations that anti-Gaddafi forces and NATO committed war crimes during the conflict.¹⁹

The NTC agreed to investigate Gaddafi's death²⁰—though it has since focused on prosecuting Saif al-Islam el-Qaddafi, Muammar Gaddafi's son, and Abdullah el-Senussi, Libya's former intelligence chief²¹—and announced its intention to create an investigative committee tasked with exploring and eventually prosecuting Gaddafi-era crimes.²² Yet Libya has no effective justice system, and militia councils have revoked their pledge to lay down weapons until a new constitution is ratified, thereby entrenching themselves as *de facto* local governments in Misrata, Tripoli, and other cities.²³ As a result, militias are essentially un-

¹⁶ Kareem Fahim & Adam Nossiter, *In Libya, Massacre Site is Cleaned Up, Not Investigated*, N.Y. TIMES, Oct. 25, 2011, at A4; Whitson, *supra* note 8; Daniel Williams, *The Murder Brigades of Misrata*, HUM. RTS. WATCH (Oct. 28, 2011), <http://www.hrw.org/news/2011/10/28/murder-brigades-misrata>.

¹⁷ Williams, *supra* note 16; *Libya: Apparent Execution of 53 Gaddafi Supporters*, HUM. RTS. WATCH (Oct. 23, 2011), <http://www.hrw.org/news/2011/10/24/libya-apparent-execution-53-gaddafi-supporters>.

¹⁸ Kareem Fahim & Richard Gladstone, *U.S. and U.N. Demand Details from Libyan Leaders on How Qaddafi Died*, N.Y. TIMES, Oct. 22, 2011, at A6.

¹⁹ *Gaddafi's Death May Be a War Crime*, REUTERS (Dec. 16, 2011, 12:10 AM), <http://www.reuters.com/article/2011/12/16/us-libya-icc-idUSTRE7BF08820111216>.

²⁰ *Id.*

²¹ Marlise Simons, *At Hague, Libya Insists It Should Try Qaddafi Son*, N.Y. TIMES, Oct. 10, 2012, at A8, available at <http://www.nytimes.com/2012/10/11/world/africa/libya-insists-on-trying-scif-al-islam-el-qaddafi.html>.

²² See Adam Nossiter, *On Road to Reconciliation, Libya Meets Trail of Anguish*, N.Y. TIMES, Nov. 4, 2011, at A4.

²³ See David D. Kirkpatrick, *In Libya, Fighting May Outlast the Revolution*, N.Y. TIMES, Nov. 2, 2011, at A4; David D. Kirkpatrick, *Libya Begins Plan to Elect Assembly*, N.Y. TIMES, Jan. 3, 2012, at A8; Nossiter, *supra* note 22; Simons, *supra* note 21 ("But if [Libya] wants to abide

constrained, and the likelihood of additional atrocities remains high.²⁴ Allegations of arbitrary arrest and detention, torture, and displacement continue, leading NTC Chairman Mustafa Abdel-Jalil to warn that the lack of control over rival militias could lead to civil war.²⁵

In January 2012, Abdel-Jalil's warnings began to crystallize: protesters ransacked the NTC's main offices in Benghazi following the publication of a draft election law.²⁶ The protesters accused the interim government of lacking transparency and having past ties to the Gaddafi regime.²⁷ In early February 2012, approximately 100 western Libyan militias united in a federation with the aim of pressuring the NTC to continue reform.²⁸ In light of the NTC's inability to control these militias, they maintain custody of three-quarters of war detainees,²⁹ refuse to bring some to trial,³⁰ and continue using torture and other abusive practices.³¹ In March 2012, militia and tribal leaders in the oil-rich eastern region declared their intention to establish their own government.³² These leaders seek a return to pre-Gaddafi federalism, and demand their own legislature, courts, and police.³³ Such increased demand for regional autonomy threatens the NTC's plan to form a constituent assembly,³⁴ especially because the NTC is seemingly unwilling and unable to use force against unified eastern leaders.³⁵ On May 3, 2012, the NTC legislatively granted amnesty to rebels for revolutionary

by rules of the international court and the will of the Security Council, it must first convince the judges that Libya is willing and able to hold fair trials.”)

²⁴ See *Libya: Make Urgent Justice System Reforms*, HUM. RTS. WATCH (Dec. 22, 2011), <http://www.hrw.org/news/2011/12/22/libya-make-urgent-justice-system-reforms> (highlighting continued abuse of detainees and the NTC's lack of control over militias).

²⁵ J. David Goodman, *Libyan Leader Says Militia Clashes Could Create Civil War*, N.Y. TIMES, Jan. 5, 2012, at A10; Whitson, *supra* note 8.

²⁶ See Liam Stack, *Libya Protests Spur Shake-Up in Interim Government*, N.Y. TIMES, Jan. 23, 2012, at A8.

²⁷ *Id.*

²⁸ *Libya: Western Militias Unite, Posing Challenge to Transitional Government*, N.Y. TIMES, Feb. 14, 2012, at A8.

²⁹ See *Libya: Former Rebels Retain Prisoners*, N.Y. TIMES, Mar. 1, 2012, at A8.

³⁰ *Delays in a Trial Show Libya's Legal Disarray*, N.Y. TIMES, Feb. 16, 2012, at A10.

³¹ *Libya: 'Out of Control' Militias Commit Widespread Abuses, a Year on from Uprising*, AMNESTY INT'L (Feb. 15, 2012), <http://www.amnesty.org/en/news/libya-out-control-militias-commit-widespread-abuses-year-uprising-2012-02-15>.

³² Suliman Ali Alzway & David D. Kirkpatrick, *Eastern Libya Demands Measure of Autonomy in a Loose National Federation*, N.Y. TIMES, Mar. 7, 2012, at A6.

³³ *Id.*

³⁴ *Id.*

³⁵ *Libya: Leader Says Force Against Tribal Leaders Isn't Possible*, N.Y. TIMES, Mar. 7, 2012, at A6.

acts.³⁶ As of October 2012, Libya had dismissed the prime minister elected less than a month earlier,³⁷ again attempted to dissolve unauthorized militias,³⁸ and witnessed an armed assault on the U.S. diplomatic mission which resulted in the killing of Ambassador J. Christopher Stevens and three members of his staff.³⁹

B. *Is Libya Mid-Revolution?*

Commentators have used several terms to refer to the Libyan conflict, including: uprising,⁴⁰ revolt,⁴¹ rebellion,⁴² civil war,⁴³ and revolution.⁴⁴ Categorizing the ongoing social and political change in Libya is important to analyze its future implications or compare it with previous conflicts.⁴⁵ Among the terms used, the Libyan conflict most likely seems to be a “revolution,” which has been defined as “[a]n overthrow of a government, usu[ally] resulting in fundamental political change; a successful rebellion.”⁴⁶ “Revolution,” however, is often used liberally,

³⁶ Stephen, *supra* note 9.

³⁷ David D. Kirkpatrick, *Libya's Prime Minister Is Dismissed*, N.Y. TIMES, Oct. 7, 2012, at A8, available at <http://www.nytimes.com/2012/10/08/world/africa/libyas-prime-minister-is-dismissed.html>.

³⁸ David D. Kirkpatrick, *Government Issues Order to Disband Libya Forces*, N.Y. TIMES, Sept. 23, 2012, at A8, available at <http://www.nytimes.com/2012/09/24/world/africa/libya-orders-unauthorized-militias-to-disband.html>.

³⁹ David D. Kirkpatrick & Steven Lee Myers, *Libya Attack Brings Challenge for U.S.*, N.Y. TIMES, Sept. 12, 2012, at A1, available at <http://www.nytimes.com/2012/09/13/world/middleeast/us-envoy-to-libya-is-reported-killed.html>.

⁴⁰ E.g., Peter Kenyon, *In Post-Gadhafi Libya, Enmities Continue to Smolder*, NPR (Nov. 9, 2011, 12:01 AM), <http://www.npr.org/2011/11/09/142100954/in-post-gadhafi-libya-enmities-continue-to-smolder>; *Timeline: Libya's Uprising Against Muammar Gaddafi*, REUTERS (Aug. 22, 2011, 9:01 AM), <http://www.reuters.com/article/2011/08/22/us-libya-events-idUSTRE77K2QH20110822>.

⁴¹ E.g., Lourdes Garcia-Navarro, *As Tide Turns, Rebels' Dream of Free Libya Dims*, NPR (Mar. 16, 2011, 2:52 PM), <http://www.npr.org/2011/03/16/134594253/as-tide-turns-rebels-dream-of-free-libya-dims>.

⁴² E.g., *Leaders of the Libyan Rebellion*, N.Y. TIMES, <http://www.nytimes.com/interactive/2011/08/21/world/africa/leaders-of-the-libyan-rebellion.html> (last updated Aug. 22, 2011).

⁴³ E.g., *Timeline: Libya's Uprising Against Muammar Gaddafi*, *supra* note 40.

⁴⁴ E.g., Gerntholtz, *supra* note 2.

⁴⁵ See L. Christian Marlin, *A Lesson Unlearned: The Unjust Revolution in Rwanda, 1959–1961*, 12 EMORY INT'L L. REV. 1271, 1294, 1296–99 (1998) (determining that Rwandan political and social change from 1959–61 was a revolution rather than a civil war in order to further analyze the change itself).

⁴⁶ BLACK'S LAW DICTIONARY 1435 (9th ed. 2009); see also David Kirkpatrick, *Libya Begins to Elect Assembly*, N.Y. TIMES, Jan. 3, 2012, at A8 (demonstrating Libya's fundamental political change through new laws establishing democratic procedures).

applied to everything from the “Social Media Revolution”⁴⁷ to the “Sexual Revolution.”⁴⁸ In a political and legal context, revolution is defined in varying ways, and with more nuance than in the mainstream definition.⁴⁹

In politics or law, classifying an event as a revolution is not a straightforward task: “[a]fter the big two—the French Revolution and the Russian Revolution—social scientists find it hard to agree on others.”⁵⁰ For example, some would include the American Revolution but not the Glorious Revolution of 1688.⁵¹ Despite such disagreement on classification, many revolutionary scholars agree on five necessary elements of a successful revolution: “(1) mass frustration resulting in popular uprisings among urban or rural populations; (2) dissident elite political movements; (3) unifying motivations; (4) a severe political crisis paralyzing the administrative and coercive capabilities of the state; and (5) a permissive or tolerant world context.”⁵² Together, these five elements combine to create what Samuel Huntington describes as “a rapid, fundamental, and violent domestic change in the dominant values and myths of a society, in its political institutions, social structure, leadership, and government activity and policies.”⁵³

Historian Parviz Daneshvar, determining whether the 1979 Iranian Revolution qualified as a revolution, provides a comprehensive survey of revolutionary theory, divided into three general schools of thought: The first theory, which includes Huntington’s definition, emphasizes that a revolution transforms a state’s social, political, and value structure.⁵⁴

⁴⁷ E.g., Sara Toth, *Social Media Revolution*, BALT. SUN, Dec. 12, 2011, http://articles.baltimoresun.com/2011-12-12/explore/bs-exho-social-media-revolution-20111212_1_social-media-facebook-and-twitter-facebook-users.

⁴⁸ E.g., Lawrence L. Shornack & Ellen McRoberts Shornack, *The New Sex Education and the Sexual Revolution: A Critical View*, 31 FAM. REL. 531, 531 (1982).

⁴⁹ See, e.g., Marlin, *supra* note 45, at 1294–97.

⁵⁰ See JAMES L. GELVIN, *THE MODERN MIDDLE EAST: A HISTORY* 286 (2d ed. 2008).

⁵¹ *Id.*

⁵² Marlin, *supra* note 45, at 1295 (citing several scholars as the source of this test).

⁵³ SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 264 (1968).

Notably, Huntington states that revolutions are

distinguished from insurrections, rebellions, revolts, coups, and wars of independence. A coup d’etat in itself changes only leadership and perhaps policies; a rebellion or insurrection may change policies, leadership, and political institutions, but not social structure and values; a war of independence is a struggle of one community against rule by an alien community and does not necessarily involve changes in the social structure of either community.

Id.

⁵⁴ PARVIZ DANESHVAR, *REVOLUTION IN IRAN 178–79* (1996).

Marxist theory fits within this tradition; it attributes revolution-induced societal changes to class struggle and the resultant shift from “an existing mode of production to a new one.”⁵⁵ Other scholars who endorse a class-based definition of revolution note a distinction between social revolution and merely political revolution.⁵⁶ They argue that social revolutions entail unique factors, including overlaps between political change, social transformation, and class upheaval.⁵⁷ In this view, class-based revolts from below drive social revolutions to ultimately result in the “rapid, basic transformation of a society’s state and class structure.”⁵⁸

Daneshvar’s second category of revolutionary theory grounds revolutions’ seismic shifts in nations’ political and legal contexts.⁵⁹ Within this theory, some scholars state that while revolutions generate societal upheaval, they are nonetheless “regular political activity . . . subject to certain general rules about the amount and quantity of force employed on each side.”⁶⁰ Others argue, however, that rather than being “regular political activity,” revolutions are special social changes, but still “must be studied within the context of the social systems in which they occur.”⁶¹

Daneshvar’s third category of revolutionary theory is rooted predominantly in the work of Hannah Arendt.⁶² Arendt’s definition of revolution recognizes the “basic ingredients of revolution” that other scholars do, but goes further by requiring freedom as a revolutionary goal.⁶³ Arendt notes that revolutions are conceptually distinct from “successful insurrections.”⁶⁴ Civil wars, factional strife, and coups d’état, among other phenomena, are often associated with revolution because their common denominator is the violence that accompanies them.⁶⁵ Arendt asserts that violence is no more appropriate an indicator of revolution than is change; in order to qualify as a revolution, the goal of such violence must be freedom:

[O]nly where change occurs in the sense of a new beginning, where violence is used to constitute an altogether different

⁵⁵ *Id.* at 178.

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *Id.*

⁵⁹ *See id.* at 178–79.

⁶⁰ DANESHVAR, *supra* note 54, at 178–79.

⁶¹ *See id.* at 179.

⁶² *See, e.g., id.* at 179–80.

⁶³ *See* ARENDT, *supra* note 9, at 25–28; DANESHVAR, *supra* note 54, at 179.

⁶⁴ *See* ARENDT, *supra* note 9, at 27.

⁶⁵ *Id.* at 27–28.

form of government, to bring about the formation of a new body politic, where the liberation from oppression *aims at least at the constitution of freedom* can we speak of revolution.⁶⁶

The term “revolution” appropriately describes Libya’s current situation, given the term’s basic requirements and the above scholarly definitions.⁶⁷ First, mass uprisings and fighting by the numerous anti-Gaddafi militias tore through the country, starting in February 2011.⁶⁸ Second, NTC members were former Gaddafi-regime elites that defected once the revolution began.⁶⁹ Third, the goals of ending Gaddafi’s rule and creating a free Libya unified the Libyan people.⁷⁰ Finally, the combination of the broader context of the “Arab Spring,”⁷¹ international political pressure, and armed intervention all hindered Gaddafi’s government and fostered the necessary “permissive” context that enabled anti-Gaddafi forces to succeed.⁷²

C. *The Tradition of Revolutionary Violence*

Libya’s turmoil—if indeed a revolution⁷³—joins the ranks of revolutions preceding it that have been lawless and violent, with significant risk that current conditions may descend into further chaos.⁷⁴ Most scholars agree on one point: violence is inseparable from the general

⁶⁶ *Id.* at 28 (emphasis added).

⁶⁷ See *id.* at 27–28; HUNTINGTON, *supra* note 53, at 264; Marlin, *supra* note 45, at 1295–96 (highlighting the five factors necessary for a successful revolution); *supra* notes 53, 66 and accompanying text.

⁶⁸ See Marlin, *supra* note 45, at 1295 (“(1) mass frustration resulting in popular uprisings”); *Battle for Libya: Key Moments*, *supra* note 11.

⁶⁹ See Marlin, *supra* note 45, at 1295 (“(2) dissident elite political movements”); *Leaders of the Libyan Rebellion*, *supra* note 42 (“The Libyan rebels fighting to topple Col. Muammar el-Qaddafi are led by longtime opponents of the Qaddafi government as well as officials who defected once the rebellion began.”).

⁷⁰ See Marlin, *supra* note 45, at 1295 (“(3) unifying motivations”); Garcia-Navarro, *supra* note 41 (“[The rebels’] strength . . . lie[s] in their diversity, in their willingness to fight and to die for the right to live outside of Gadhafi’s brutal autocratic grip.”).

⁷¹ Craig Whitlock, *Libyan Rebels Renew Hopes of Arab Spring*, WASH. POST, Aug. 23, 2011, at A09.

⁷² See S.C. Res. 1973, *supra* note 14, pmb., ¶¶ 6–8 (authorizing the use of force against Libya); Marlin, *supra* note 45, at 1295–96 (“(4) a severe political crisis paralyzing the . . . state; and (5) a permissive or tolerant world context”); *Leaders of the Libyan Rebellion*, *supra* note 42.

⁷³ See *supra* Part I.B.

⁷⁴ See ARENDT, *supra* note 9, at 87, 111; Goodman, *supra* note 25. Arendt notes that the American Revolution is a conspicuous exception to this general rule. See ARENDT, *supra* note 9, at 87, 114–15.

concept of revolution.⁷⁵ Indeed, a brief sample of universally recognized revolutions verifies this observation and provides perspective on events in Libya.⁷⁶

1. The French Revolution

The French Revolution is considered one of the paradigmatic revolutions in recent history.⁷⁷ In 1788, amid a crumbling economy and withering government authority, the first spasms of revolutionary violence broke out in France as protesters demanded a representative assembly known as the Estates-General be convened.⁷⁸ Tension surrounding the economic crisis and the Estates-General's elections catalyzed widespread riots and insurrections throughout the country.⁷⁹ This social agitation culminated in the storming of the Bastille, a fortress and prison in Paris, on July 14, 1789.⁸⁰ The crowd lynched military officials and "[t]heir severed heads were carried through the streets in a gory celebration of the popular victory."⁸¹

After the storming of the Bastille, the "Great Fear" ensued as peasants killed nobles and burned *châteaux*.⁸² France instituted political change in the months and years following, including the Declaration on the Rights of Man and the Citizen,⁸³ but revolutionary violence still persisted.⁸⁴ In October 1789, female marchers seized cannons to march on Versailles, killing several palace guards.⁸⁵ In 1791, the military shot approximately sixty demonstrators in the massacre of the Champs-de-Mars.⁸⁶ Domestic social unrest continued, France engaged in war, and revolutionary militants created *ad hoc* tribunals and summarily exe-

⁷⁵ See DANESHVAR, *supra* note 54, at 179–80.

⁷⁶ See 1 EDWARD HALLETT CARR, *THE BOLSHEVIK REVOLUTION: 1917–1923*, at 99 (1951); DANESHVAR, *supra* note 54, at 101–02, 111, 131–32; ROBERT V. DANIELS, *RED OCTOBER: THE BOLSHEVIK REVOLUTION OF 1917*, at 189, 201–03 (1967); GELVIN, *supra* note 50, at 286; JEREMY D. POPKIN, *A SHORT HISTORY OF THE FRENCH REVOLUTION* 30–34, 43 (5th ed. 2010).

⁷⁷ See GELVIN, *supra* note 50, at 286 (referring to the French and Russian Revolutions as the "big two").

⁷⁸ POPKIN, *supra* note 76, at 24–25.

⁷⁹ *Id.* at 30–31.

⁸⁰ *Id.* at 31–32.

⁸¹ *Id.* at 32.

⁸² See *id.* at 33–34.

⁸³ See *id.* at 37. The Declaration on the Rights of Man and the Citizen, adopted by the National Assembly on August 26, 1789, set forth "the fundamental principles of a new society based on equality and individual rights." *Id.* at 37.

⁸⁴ See POPKIN, *supra* note 76, at 43, 56.

⁸⁵ *Id.* at 42–43.

⁸⁶ *Id.* at 56.

cuted about 1300 people.⁸⁷ In 1792, the revolutionary government executed the King by guillotine as a rebellion in the rural west grew into a “veritable civil war, waged with unrelenting cruelty on both sides.”⁸⁸ The “Great Terror” then took root and remained until 1794, when Maximilien Robespierre and his followers were led to the guillotine.⁸⁹

2. The Bolshevik (Russian) Revolution

The Bolshevik (Russian) Revolution of 1917 is also widely recognized as a revolution,⁹⁰ and though the transfer of power between the Provisional Government⁹¹ and the Bolsheviks⁹² was unexpectedly “almost bloodless,” fighting between the sides still occurred.⁹³ Bolshevik leader Vladimir Lenin believed that violence in the form of an armed insurrection was necessary to effectuate the Bolsheviks’ desired changes;⁹⁴ accordingly, the Bolsheviks’ storming of the Winter Palace⁹⁵ required hours of artillery attack.⁹⁶ In response, the Provisional Government’s former prime minister instigated a counterrevolutionary revolt, resulting in a battle “with many more casualties than occurred in the capture of the Winter Palace.”⁹⁷

Although violence during the Bolshevik Revolution was limited, “[d]ecades of bloodshed, labor and suffering lay ahead for the Russian people,” beginning with violent contests between the powerful forces opposing the Bolsheviks.⁹⁸ The drive to consolidate authority throughout Russia sparked prolonged violence: in Moscow, Bolsheviks massacred Kremlin soldiers during the fight for the city, while the Ukraine, Tiflis, and Russian-speaking Cossack regions fiercely resisted Bolshevik

⁸⁷ *Id.* at 66, 68.

⁸⁸ *Id.* at 73–75.

⁸⁹ *Id.* at 89–91.

⁹⁰ See GELVIN, *supra* note 50, at 286; HUNTINGTON, *supra* note 53, at 264.

⁹¹ CARR, *supra* note 76, at 70. The Provisional Government took power after the overthrow of the Romanov Dynasty in February 1917 (the “February revolution”). *Id.*

⁹² Robert Service, *The Bolshevik Party*, in CRITICAL COMPANION TO THE RUSSIAN REVOLUTION: 1914–1921, at 231, 231 (Edward Acton et al. eds., 1997) (“The Bolsheviks were the political party that triumphed in the October revolution of 1917. They founded a Soviet state and announced that the era of European socialist revolution had arrived.”).

⁹³ See CARR, *supra* note 76, at 86, 98–99 (highlighting the Bolsheviks’ military preparation and expectation that they would assume power only after a violent struggle).

⁹⁴ See *id.* at 86.

⁹⁵ DANIELS, *supra* note 76, at 42. Petrograd’s Winter Palace was previously the Tsar’s official residence and became the seat of the Provisional Government. *Id.*

⁹⁶ *Id.* at 189 (chronicling the bombardment of the Winter Palace, starting at approximately 9:30 PM and ending at approximately 2:00 AM the following day).

⁹⁷ See *id.* at 201–05.

⁹⁸ *Id.* at 201, 203; see CARR, *supra* note 76, at 99.

dominance in what became a three-year civil war.⁹⁹ By 1920, 700,000 Russians were listed as dead or missing, 250,000 of whom were confirmed as killed in the course of combat.¹⁰⁰ The Revolution and its after-effects thus entailed significant bloodshed, even though the initial power transfer required little physical force.¹⁰¹

3. The Iranian Revolution

The Iranian Revolution of 1979 also provides an illustrative example of revolutionary violence.¹⁰² In 1978, Iran saw drastic inflation, water and electricity shortages, heightened economic inequality, and a monarchy that insisted on ruling with absolute power.¹⁰³ Citizens took to the streets, and the Shah's security forces responded with brutality, often firing on protesters.¹⁰⁴ After a lull in violence, an explosion killing 400 people in a movie theatre with locked emergency exits spurred widespread riots and street protests.¹⁰⁵ By December 1978, thousands of Iranians had been killed in the protests.¹⁰⁶

Even after the Shah transferred power to an interim government led by resistance leader Shapour Bakhtiar, strikes and protest marches continued, resulting in more deaths.¹⁰⁷ Upon Ayatollah Ruhollah Khomeini's celebrated return to Iran and his naming of a new government, the Iranian Air Force, "[s]upported by thousands of armed anti-government civilians," fought pro-Shah forces.¹⁰⁸ The Iranian military then declared neutrality and its command disintegrated.¹⁰⁹ The revolutionaries seized power shortly thereafter.¹¹⁰

Similar to France and Russia, Iranian revolutionary forces began consolidating authority throughout the country immediately after the change in power.¹¹¹ They established the Revolutionary Courts, Revolu-

⁹⁹ DANIELS, *supra* note 76, at 207–208.

¹⁰⁰ See Evan Mawdsley, *The Civil War: The Military Campaigns*, in CRITICAL COMPANION TO THE RUSSIAN REVOLUTION: 1914–1921, *supra* note 92, at 93, 102.

¹⁰¹ See CARR, *supra* note 76, at 99; DANIELS, *supra* note 76, at 201, 203.

¹⁰² See DANESHVAR, *supra* note 54, at 180.

¹⁰³ *Id.* at 97; AMIN SAIKAL, *THE RISE AND FALL OF THE SHAH 186–88* (1980).

¹⁰⁴ See DANESHVAR, *supra* note 54, at 101–02.

¹⁰⁵ See *id.* at 105, 107–08.

¹⁰⁶ *Id.* at 111.

¹⁰⁷ *Id.* at 114, 116.

¹⁰⁸ *Id.* at 124–25.

¹⁰⁹ See *id.* at 125.

¹¹⁰ See DANESHVAR, *supra* note 54, at 125.

¹¹¹ See *id.* at 128; DANIELS, *supra* note 76, at 201, 203, 207–208; POPKIN, *supra* note 76, at 66, 68; Mawdsley, *supra* note 100, at 102.

tionary Guard, and Revolutionary Council.¹¹² The Council was vested with both supreme executive and legislative authority.¹¹³ Additionally, Revolutionary Committees—akin to small militias led by individual mullahs—emerged throughout the country, including over 1500 in Tehran alone.¹¹⁴

Iran was overtaken by lawlessness, as civilian militias seized over 300,000 small arms and roamed the country, capturing and killing suspected counter-revolutionaries or members of the old regime.¹¹⁵ The Revolutionary Courts carried out spontaneous trials, charging and eventually executing many innocent individuals for crimes such as “war against God” and “corrupt[ion] on earth.”¹¹⁶ In the months and years following the revolution and consolidation, the government purged the Iranian armed forces, the Iran-Iraq war plunged the country into military conflict for almost a decade, and hundreds of thousands of refugees fled Iran.¹¹⁷

4. Is There Law During a Revolution?

Commentators have come to accept that pervasive violence is a necessary factor of revolution¹¹⁸—the violent revolt against the existing legal and political order, geared toward the establishment of an entirely new order.¹¹⁹ It is therefore necessary to determine what law, if any, governs actors when a revolution occurs, or whether the opposite is true, and the repudiation of *l'ancien régime* coupled with the idea that all “must be permitted to those who act in the revolutionary direction” suspends legal constraints on actors in the revolutionary context.¹²⁰

¹¹² DANESHVAR, *supra* note 54, at 128.

¹¹³ *Id.* at 133.

¹¹⁴ *Id.* at 134 (“The Revolutionary Committees (the *Komeetehs*), were an extension of the local committees that had been formed around district mosques throughout 1978–9 to organize protests . . .”).

¹¹⁵ *Id.* at 131–32.

¹¹⁶ *Id.* at 134–35.

¹¹⁷ *See id.* at 128–29, 153.

¹¹⁸ *See, e.g.*, DANESHVAR, *supra* note 54, at 179–80 (presenting several scholars’ assertions that violence is inherent to revolution). For Hannah Arendt, violence is not just a frequent externality of revolution; it is in fact constitutive of the new order and required for a revolution to succeed. *See* ARENDT, *supra* note 9, at 28.

¹¹⁹ ARENDT, *supra* note 9, at 27–28; *see* HUNTINGTON, *supra* note 53, at 264. This definition borrows most heavily from Arendt’s view, which appears to require conflicts to meet more specific conditions in order to qualify as a “revolution,” excluding the requirement of class struggle in Marxist theory. *See* DANESHVAR, *supra* note 54, at 178–80.

¹²⁰ ARENDT, *supra* note 9, at 87; *see* HUNTINGTON, *supra* note 53, at 266; *cf.* FRITS KALSHOVEN & LIESBETH ZEGVELD, INT’L COMM. OF THE RED CROSS, CONSTRAINTS ON THE

II. DISCUSSION

A. *International Humanitarian Law*

The body of international humanitarian law is an important constraint on the waging of armed conflict.¹²¹ There are two main branches of international humanitarian law: the law of The Hague¹²² and the law of Geneva.¹²³ In the area most applicable to revolutions, the 1949 Geneva Convention set forth rules for internal armed conflict.¹²⁴ Article 3 therein defines internal armed conflict as “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”¹²⁵ The Convention prohibits the mistreatment of “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*¹²⁶ by sickness, wounds, detention, or any other cause.”¹²⁷ It also proscribes the following acts: murder, mutilation, torture, hostage-

WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 11 (3d ed. 2001) (showing international humanitarian law’s applicability to armed conflict).

¹²¹ KALSHOVEN & ZEGVELD, *supra* note 120, at 11.

¹²² *Id.* at 19. The law of The Hague includes the 1899 First Hague Peace Conference Convention with Respect to the Laws and Customs of War on Land, with Annexed Regulations. *Id.* at 21. This Convention and associated regulations set forth rules governing several situations that arise in land warfare, including discerning who qualifies as a combatant, safeguarding civilians, and “the treatment of prisoners of war.” *Id.* The 1907 Second Hague Peace Conference dealt with advances of wartime techniques and naval warfare. *See id.* at 23.

¹²³ *Id.* at 19. The first Geneva Convention in 1864 set forth rules applying to medical personnel on the battlefield. *See id.* at 27. These rules included a requirement that medical personnel be distinguished by a uniform with a white cross on a red background and that they be treated as neutral parties. *See id.* Subsequent treaties broadened the categories of individuals entitled to these protections. *Id.* The 1929 Geneva Conventions adopted a separate treaty dealing with the treatment of prisoners of war in order to improve upon the regulations from the 1899 Hague Conference. *Id.* This treaty added an outright prohibition “on reprisals against prisoners of war.” *Id.* at 28.

¹²⁴ *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 287 U.N.T.S. 1950 [hereinafter 1949 Geneva Convention].

¹²⁵ *Id.*

¹²⁶ INT’L COMM. OF THE RED CROSS, GLOSSARY: TERMS USED IN EHL 7 (2009), available at <http://ehl.redcross.org/resources/downloads/glossary.pdf>. *Hors de combat*, literally meaning “out of the fight” . . . describes combatants who have been captured or wounded or who are sick or shipwrecked, or who have laid down their arms and surrendered, and thus are no longer in a position to fight.” *Id.*

¹²⁷ 1949 Geneva Convention, *supra* note 124, art. 3(I).

taking, “outrages upon personal dignity,” and summary executions.¹²⁸ On May 22, 1956, Libya acceded to the 1949 Geneva Convention.¹²⁹

B. International Criminal Law

Beyond international humanitarian law, the ICC’s jurisdiction may also extend to the revolutionary context.¹³⁰ The Rome Statute establishing the ICC sets forth the conditions to the court’s exercise of jurisdiction in prosecuting war crimes and atrocities.¹³¹ The court may exercise its jurisdiction over states that ratify or accede to the Rome Statute, and over situations that have been referred to the court.¹³² State parties (pursuant to Article 14 of the Rome Statute), the UN Security Council (acting under Chapter VII of the UN Charter), and the Prosecutor, acting *proprio motu*, can each make referrals to the ICC.¹³³

Libya is not currently among the 121 states party to the Rome Statute,¹³⁴ but on February 26, 2011, the UN Security Council acted under

¹²⁸ *Id.* art. 3(I) (a)–(d). A summary execution is one “conducted without the customary legal formalities.” See THE NEW OXFORD AMERICAN DICTIONARY 1702 (2001). In 1982, the UN Commission on Human Rights established the mandate of the Special Rapporteur for Summary and Arbitrary Executions, renewing and broadening the scope of the mandate in 1992 to include extrajudicial executions, thereby encompassing “all violations of the right to life as guaranteed by a large number of international human rights instruments.” *Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UNITED NATIONS OFFICE HIGH COMM’R FOR HUM. RTS., <http://www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx> (last visited Mar. 4, 2013).

¹²⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Libya Accession, May 22, 1956, 247 U.N.T.S. 391. Libya’s obligations under the Convention took effect on November 22, 1956. *Id.*

¹³⁰ See Rome Statute of the International Criminal Court art. 8(2)(c), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute] (War crimes include “serious violations of article 3 common to the four Geneva Conventions of 12 August 1949.”); see also David Scheffer, *The International Criminal Court*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW, *supra* note 10, at 67, 72; cf. KALSHOVEN & ZEGVELD, *supra* note 120, at 11 (noting that several types of law apply to internal armed conflicts).

¹³¹ Rome Statute, *supra* note 130, arts. 8, 12–15 (defining war crimes and setting out the bases for jurisdiction, referral, and prosecution, respectively); Scheffer, *supra* note 130, at 73.

¹³² Rome Statute, *supra* note 130, arts. 12(1), 13–14.

¹³³ *Id.* arts. 13–15; Scheffer, *supra* note 130, at 73; ICC: *Situations and Cases*, INT’L CRIM. CT., http://www.icc-cpi.int/EN_Menus/ICC/Pages/default.aspx (follow the “Situations and Cases” hyperlink on the left side of the screen) (last visited Mar. 4, 2013). The Prosecutor can initiate an investigation *proprio motu*, or *motu proprio*, Latin meaning “on one’s own initiative” and derived from papal action, in which the Pope signs a document personally to indicate his special interest in a subject. Rome Statute, *supra* note 130, art. 15; *Motu Proprio*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/394457/motu-proprio> (last visited Mar. 4, 2013).

¹³⁴ See *The State Parties to the Rome Statute*, INT’L CRIM. CT., http://www.icc-cpi.int/en_menus/asp/Pages/asp_home.aspx (follow the “States Parties” hyperlink on the left side of the screen) (last visited Mar. 4, 2013).

Chapter VII to refer the situation in Libya to the court.¹³⁵ After an investigation, the Prosecutor issued warrants on June 27, 2011, for Muammar Gaddafi, Saif Al-Islam Gaddafi (then the *de facto* Prime Minister), and Abdullah Al-Senussi (then the head of Military Intelligence).¹³⁶

The ICC has subject-matter jurisdiction over several crimes that may occur during a revolution, including genocide, crimes against humanity, and war crimes.¹³⁷ The definitions of these crimes encompass many individual acts, such as torture, killing a prisoner of war, or denying prisoners their right to a fair trial.¹³⁸

Under the Rome Statute, any grave breach of the Geneva Convention is a war crime.¹³⁹ The two treaties, however, are distinct: whereas the Geneva Convention focuses on individual combatant behavior, the Rome Statute is primarily geared toward “leadership crimes of significant magnitude.”¹⁴⁰ Article 8(1) of the Rome Statute sets forth the “particularity requirement,” stating that “[t]he Court shall have jurisdiction in respect of war crimes *in particular* when committed as part of a plan or policy or as a part of a large-scale commission of such crimes.”¹⁴¹ As a result, the particularity requirement is a frequent anchor of the court’s jurisdiction.¹⁴²

C. Other International Law and Regional Law

While the UN Security Council possesses the “primary responsibility for the maintenance of international peace and security,” its past practice demonstrates direct involvement in domestic conflicts.¹⁴³ The

¹³⁵ S.C. Res. 1970, pmbL, ¶¶ 4–8, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

¹³⁶ Press Release, Int’l Criminal Court, Pre-Trial Chamber I Issues Three Warrants of Arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi, ICC-CPI-20110627-PR689 (June 27, 2011). The court terminated the case against Muammar Gaddafi on November 22, 2011, following his death. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi (Nov. 22, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1274559.pdf>.

¹³⁷ See Rome Statute, *supra* note 130, arts. 5–8.

¹³⁸ *Id.* art. 8(2)(c).

¹³⁹ *Id.* art. 8(2)(a).

¹⁴⁰ See Scheffer, *supra* note 130, at 72.

¹⁴¹ Rome Statute, *supra* note 130, art. 8(1) (emphasis added); Scheffer, *supra* note 130, at 72.

¹⁴² See Scheffer, *supra* note 130, at 72 (“This particularity requirement . . . has become the standard for war crimes prosecutions before the Court.”).

¹⁴³ U.N. Charter art. 24(1); see M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 801–02 (2008) (stating that the Security Council is “completely free to decide” if and when to intervene in “conflicts . . . of a non-international character.”); Marc M. Boutin, Note, *Somalia: The Legality of U.N. Forcible Humanitarian Intervention*, 16 SUFFOLK TRANSNAT’L L.

Security Council has taken several steps to affect events in Libya.¹⁴⁴ These steps include referring the situation to the ICC, enforcing an arms embargo, imposing a no-fly zone and asset freeze, subjecting specified individuals to travel restrictions, and authorizing military intervention.¹⁴⁵ The Security Council has also worked closely with other organizations in this case, particularly the African Union (AU) and the League of Arab States (Arab League), and has established the UN Support Mission in Libya to assist the country's post-conflict phase.¹⁴⁶ The Security Council can create an *ad hoc* international criminal tribunal if it decides the action is warranted, as it did with the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).¹⁴⁷

Libya is a member of the Arab League and the AU.¹⁴⁸ Arab states created the Arab League, in part, to “draw closer the relations between [them] and co-ordinate their political activities with the aim of realizing a close collaboration.”¹⁴⁹ The League's policy coordination emphasizes

REV. 138, 147–51 (1994) (noting the Security Council's shift in the early 1990s from non-forcible to forcible humanitarian intervention, despite concerns over violations of national sovereignty).

¹⁴⁴ See, e.g., S.C. Res. 2022, ¶¶ 1–2, U.N. Doc. S/RES/2022 (Dec. 2, 2011) (“extend[ing] the mandate of the United Nations Support Mission in Libya . . . until 16 March 2012” and broadening it to include assistance in preventing arms proliferation); S.C. Res. 2016, ¶¶ 5–6, U.N. Doc. S/RES/2016 (Oct. 27, 2011) (revoking and terminating certain provisions of Security Council Resolution 1973); S.C. Res. 2009, ¶¶ 12, 14–15, U.N. Doc. S/RES/2009 (Sept. 16, 2011) (establishing the mandate for the UN Support Mission in Libya “for an initial period of three months” and ending the asset freeze on the Libyan National Oil Corporation and several Libyan banks); S.C. Res. 1973, *supra* note 14, ¶¶ 4, 6, 13, 19, 22, annexes I–II (imposing a no-fly zone, arms embargo, travel ban and asset freeze for certain government officials, and authorizing member states to “take all necessary measures . . . to protect civilians”).

¹⁴⁵ See S.C. Res. 1973, *supra* note 14, ¶¶ 4, 6, 13, 19, 22; S.C. Res. 1970, *supra* note 135, pmb., ¶¶ 4–8.

¹⁴⁶ S.C. Res. 2009, *supra* note 144, pmb., ¶ 12; S.C. Res. 1973, *supra* note 14, pmb., ¶ 5 (citing the initial involvement of these regional organizations in taking action against the Gaddafi regime).

¹⁴⁷ See WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE 48 (2006). Given the referral of the situation in Libya to the ICC, and the fact that the ICC was established to create a more permanent justice system for international war crimes, creation of a Libya tribunal is unlikely, though still possible. See S.C. Res. 1970, *supra* note 135, pmb., ¶¶ 4–8; SCHABAS, *supra*, at 48.

¹⁴⁸ *Member States*, LEAGUE ARAB STATES, http://www.lasportal.org/wps/portal/las_en/home_page/ (select “About LAS” from the left menu; then select “Member States”) (last visited Mar. 8, 2013) [hereinafter *Member States: League of Arab States*]; *Member States*, AFR. UNION, http://www.au.int/en/member_states/countryprofiles (last visited Mar. 8, 2013) [hereinafter *Member States: African Union*].

¹⁴⁹ Pact of the League of Arab States art. 2, Mar. 22, 1945, 70 U.N.T.S. 237.

economic and financial policy, communications, nationality issues, health problems, and social affairs.¹⁵⁰ Each state has one vote on the League Council, which “realiz[es] the purpose of the League and . . . supervis[es] the execution of [its] agreements.”¹⁵¹ Under Article 7 of the Pact of the Arab League, the organization’s founding treaty, unanimous Council decisions are binding on all member states.¹⁵² Majority decisions of the Council are binding only on those states that voted in favor of them.¹⁵³ All decisions of the Council are enforced “in each member state according to its respective basic laws.”¹⁵⁴

The Arab League contributed to the course of the Libyan conflict.¹⁵⁵ It suspended Libya’s membership and began communicating with the NTC—rather than the Gaddafi regime—soon after hostilities began in early 2011.¹⁵⁶ Additionally, the League recommended the no-fly zone over the country, paving the way for Security Council Resolution 1973.¹⁵⁷ The uniqueness and force of the Arab League’s decision carried particular weight with other nations and the UN Security Council.¹⁵⁸

The AU, has goals similar to those of the Arab League.¹⁵⁹ Among the AU’s stated objectives are achieving “greater unity . . . between the African countries,” safeguarding sovereignty, and “[p]romot[ing] democratic principles and institutions.”¹⁶⁰ Other objectives include “promot[ing] peace, security, and stability on the continent; . . . promot[ing] and protect[ing] human and peoples’ rights in accordance

¹⁵⁰ *Id.* art. 2(a)–(f).

¹⁵¹ *Id.* art. 3.

¹⁵² *Id.* art. 7.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See Ethan Bronner & David Sanger, *Arab League Endorses No-Flight Zone over Libya*, N.Y. TIMES, Mar. 13, 2011, at A1.

¹⁵⁶ See *id.*

¹⁵⁷ See S.C. Res. 1973, *supra* note 14, pmbl., ¶¶ 6–12; Bronner & Sanger, *supra* note 155.

¹⁵⁸ See S.C. Res. 1973, *supra* note 14, pmbl.; S.C. Res. 1970, *supra* note 135, pmbl.; Bronner & Sanger, *supra* note 155 (The League’s decision to recommend a no-fly zone was an “extraordinary move by the 22-nation bloc—an extremely rare invitation for Western military forces on Arab territory . . .”).

¹⁵⁹ Compare The Constitutive Act of the African Union art. 3(a)–(b), (g), July 11, 2000, 2158 U.N.T.S. 3 [hereinafter AU Constitutive Act] (The AU seeks to “[a]chieve greater unity and solidarity between the African countries and . . . [d]efend the sovereignty, territorial integrity and independence of its Member States . . .”), with Pact of the League of Arab States, *supra* note 149, pmbl. (stating an intention “to strengthen the close relations and numerous ties which bind the Arab States, [a]nd . . . respect . . . the independence and sovereignty of these States”).

¹⁶⁰ AU Constitutive Act, *supra* note 159, art. 3(a)–(b), (g).

with . . . relevant human rights instruments;” and “encourag[ing] international cooperation, taking due account of the UN Charter and the Universal Declaration of Human Rights.”¹⁶¹

The AU is not as clear as the Arab League regarding the extent to which decisions bind member states.¹⁶² The AU’s Constitutive Act does note, however, that a member state may be subject to sanctions should it refuse to comply with the AU’s policy decisions.¹⁶³ While its decisions may not necessarily bind member states, the AU still wields influence and has the potential to affect actors in Libya.¹⁶⁴ The AU has been a focus of several Security Council resolutions, including those pertinent to the Libya situation; additionally, its Peace and Security Council has created a “High-Level *ad hoc* Committee on Libya.”¹⁶⁵

In addition to regional organizations, Libya is also a member of the Organisation of Islamic Cooperation (OIC).¹⁶⁶ The objectives set forth in the OIC’s Charter include “promot[ing] and protect[ing] human rights and fundamental freedoms including the rights of women, children, youth, elderly and people with special needs as well as the preservation of Islamic family values,” and “reaffirm[ing] its support for the rights of peoples as stipulated in the UN Charter and international law.”¹⁶⁷ The OIC, endowed with a Permanent Mission to the UN, can make itself heard at the Security Council and among other mem-

¹⁶¹ *Id.* art. 3(e)–(f), (h).

¹⁶² Compare Pact of the League of Arab States, *supra* note 149, art. 7 (“The decisions of the Council taken by a unanimous vote shall be binding on all the member States of the League; those that are reached by a majority vote shall bind only those that accept them.”), with AU Constitutive Act, *supra* note 159, arts. 7, 11 (failing to indicate that “Decisions of the Assembly” are binding on any or all member states and not specifying whether “Decisions of the Executive Council” are binding).

¹⁶³ AU Constitutive Act, *supra* note 159, art. 23. Such sanctions include “the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.” *Id.*

¹⁶⁴ See S.C. Res. 1973, *supra* note 14, pmbl. (citing the AU’s condemnation of human rights violations in Libya as a basis for further Security Council action); Afr. Union [AU], *Decision on the Situation in Libya*, ¶¶ 1–2, 5, 7, Assembly/AU/Dec.385(XVII) (July 1, 2011) [hereinafter *Decision on the Situation in Libya*], available at [http://www.au.int/en/sites/default/files/Assembly_AU_Dec_363-390_\(XVII\)_E.pdf](http://www.au.int/en/sites/default/files/Assembly_AU_Dec_363-390_(XVII)_E.pdf).

¹⁶⁵ See S.C. Res. 1973, *supra* note 14, pmbl.; *Decision on the Situation in Libya*, *supra* note 164, ¶¶ 1–2, 5, 7; see, e.g., S.C. Res. 2033, pmbl., U.N. Doc. S/RES/2033 (Jan. 12, 2012).

¹⁶⁶ *Member States*, ORG. ISLAMIC COOPERATION, http://www.oic-oci.org/member_states.asp (last visited Mar. 8, 2013). In 2011, the OIC used to be known as the Organisation of the Islamic Conference. See *About OIC*, ORG. ISLAMIC COOPERATION, http://www.oic-oci.org/page_detail.asp?p_id=52 (last visited Mar. 8, 2013).

¹⁶⁷ Org. of Islamic Cooperation [OIC] Charter art. 1, paras. 7, 14, available at <http://www.oic-oci.org/english/charter/OIC%20Charter-new-en.pdf>.

ber states, as evidenced during the international community's reaction to the situation in Libya.¹⁶⁸

D. *Libyan Domestic Law and Custom*

The NTC adopted the transitional Constitutional Declaration on August 3, 2011; its principles currently govern Libya.¹⁶⁹ The Declaration guarantees the following to all Libyans:

Libyans shall be equal before the law. They shall enjoy equal civil and political rights, shall have the same opportunities, and be subject to the same public duties and obligations, without discrimination due to religion, doctrine, language, wealth, race, kinship, political opinions, and social status, tribal or eminent or familial loyalty.

....

Human rights and . . . basic freedoms shall be respected by the State. The state shall commit itself to join the international and regional declarations and charters which protect such rights and freedoms. The State shall endeavor to promulgate new charters which shall honor the human being as being [Allah]'s successor on Earth.¹⁷⁰

Over the past several decades, Libya has acceded to several treaties and made certain legislative changes that could demonstrate state practice and custom in conformity with international norms respecting human rights.¹⁷¹ According to the International Committee of the Red

¹⁶⁸ See S.C. Res. 1973, *supra* note 14, pmb.; S.C. Res. 1970, *supra* note 135, pmb.; *OIC Delegation*, PERMANENT MISSION ORG. ISLAMIC CONF., http://www.oic-un.org/oic_delegation.asp (last visited Mar. 8, 2013).

¹⁶⁹ See INTERIM TRANSITIONAL NAT'L COUNCIL, THE CONSTITUTIONAL DECLARATION pmb. (2011) (Libya) [hereinafter LIBYA CONST. DECLARATION 2011], *available at* http://www.mpil.de/shared/data/pdf/libya_interim_constitution_august_2011.pdf.

¹⁷⁰ *Id.* arts. 6–7.

¹⁷¹ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (Libya acceded May 16, 1989); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73 (Libya acceded May 16, 1989); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (Libya acceded May 15, 1970); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (Libya acceded May 15, 1970); Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (Libya acceded May 16, 1989); International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (Libya acceded July 3, 1968); *Libyan Arab Jamahiriya: Military Penal Code*, INT'L HUMANITARIAN L., <http://www.icrc.org/ihl-nat.nsf/WebLAW!OpenView> (click the arrow next to "Libyan Arab Jamahiriya (the)"; then click next to "Military Penal Code (extracts)");

Cross, Libya recently made legislative changes that further improved its conformity with such norms.¹⁷² According to Article 56 of the Libyan Military Penal Code, “[a]nyone who abandons kills or harms a wounded under his custody, shall be punished by death.”¹⁷³ Outside the military realm, the Gaddafi regime claimed that its “Criminal Code guarantees respect for the human person and prohibits all forms of physical and mental torture.”¹⁷⁴ Several state laws aimed to guarantee the right to a fair trial.¹⁷⁵ Article 60 of the Libyan Code of Criminal Procedure for Armed Personnel states that “after hearing prosecution witnesses, the [court] shall hear defense witnesses, followed by the defendant and the prosecution.”¹⁷⁶ The defendant is entitled to examine said witnesses once again to clarify the facts subject of their testimony.¹⁷⁷ Under Article 64 of the same Code, a defendant is also entitled to an interpreter if he or she does not understand Arabic.¹⁷⁸

In addition to the preceding indicators of custom, the Libyan Arab Jamahiriya¹⁷⁹ signed on to several treaties.¹⁸⁰ These include the Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social, and Cultural Rights, the International Covenant on Civil and Political Rights and its Optional Protocol, the Convention on the Non-Applicability of Statutory Limita-

then click next to “Introduction”; then follow “(Extracts in English and Arabic)” hyperlink (last visited Mar. 8, 2013) [hereinafter Libyan Military Penal Code Extracts] (translating Article 56 of the Libyan Military Penal Code of 1974); *Libyan Arab Jamahiriya: Codes of Criminal Procedure*, INT’L HUMANITARIAN L., <http://www.cicr.org/ihl-nat.nsf/0/8D54246E98A0C046C12576B2003254F3> (last visited Mar. 8, 2013) [hereinafter Libyan Codes of Criminal Procedure Extracts] (translating Articles 60 and 64 of the Code of Criminal Procedure).

¹⁷² See Libyan Codes of Criminal Procedure Extracts, *supra* note 171; Libyan Military Penal Code Extracts, *supra* note 171.

¹⁷³ Libyan Military Penal Code Extracts, *supra* note 171.

¹⁷⁴ Libyan Arab Jamahiriya, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, ¶ 25, U.N. Doc. CCPR/C/LBY/4 (May 10, 2007).

¹⁷⁵ Libyan Codes of Criminal Procedure Extracts, *supra* note 171.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *U.S. Relations with Libya*, U.S. DEP’T STATE, <http://www.state.gov/r/pa/ci/bgn/5425.htm#history> (last updated Jan. 15, 2013). Italy invaded the territory containing Libya and colonized it in 1911, choosing the name “Libya,” which the Greeks had used to refer to most of North Africa. *Id.* Italy would later relinquish the colony, leaving a monarchy in place. *Id.* When Gaddafi’s Revolutionary Command Council abolished the monarchy in 1969, it changed the name of the country to the Libyan Arab Republic. *Id.* On March 2, 1977, Gaddafi changed the country’s name to the Socialist People’s Libyan Arab Jamahiriya. *Id.* Its official name is once again Libya. See LIBYA CONST. DECLARATION 2011, *supra* note 169, art. 1; see also *U.S. Relations with Libya*, *supra*.

¹⁸⁰ See *supra* note 171 (listing relevant treaties to which Libya has acceded).

tions to War Crimes and Crimes Against Humanity, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁸¹

E. Islamic Law

Both Gaddafi-era and revolutionary actors have utilized Islamic law in developing their respective laws and policies.¹⁸² Libya's 1951 Constitution, establishing the country as a constitutional monarchy under King Idris, declared Islam to be the state religion and stipulated that only Muslims could serve as deputies or regents to the king.¹⁸³ Under Gaddafi's Libya, religion played a different role, as Gaddafi encouraged ordinary Libyans to learn the Quran rather than cede legitimacy to religious scholars.¹⁸⁴ The NTC's transitional constitutional proclamation, which revokes prior constitutional documents, likewise emphasizes Islamic jurisprudence (Sharia) as a source of law and Islam as the national religion.¹⁸⁵

While much of the scholarship pertaining to Islamic law of war focuses on *jihad* as it applies to non-believers,¹⁸⁶ some also addresses the question of whether Islamic law of war applies to rebellions or revolutions.¹⁸⁷ Based on general scholarly consensus and interpretations of *hadith*,¹⁸⁸ Islamic law largely prohibits rising up against a political ruler at all, but it is not completely prohibited: traditional Islam requires an uprising against a leader who openly declares or acts in a way that undeniably confirms his *kufir*, or "unbelief" in Islam.¹⁸⁹ *Kufir* consists of a complete repudiation of Islam, one of Islam's fundamental pillars, or of the integrity of the Prophet, but is not to be confused with a sin such as "being too lazy to pray."¹⁹⁰

¹⁸¹ See sources cited *supra* note 171.

¹⁸² See LIBYA CONST. DECLARATION 2011, *supra* note 169, art. 1; NICHOLAS HAGGER, THE LIBYAN REVOLUTION 101 (2009).

¹⁸³ See *Libya's Constitution*, LIBYAN CONST. UNION, <http://www.libyanconstitutionalunion.net/constitution%20of%20libya.htm> (last updated June 14, 2012) (arts. 5, 51).

¹⁸⁴ HAGGER, *supra* note 182, at 101.

¹⁸⁵ See LIBYA CONST. DECLARATION 2011, *supra* note 169, pmbl., arts. 1, 34.

¹⁸⁶ See, e.g., ROYAL AAL AL-BAYT INST. FOR ISLAMIC THOUGHT, *JIHAD AND THE ISLAMIC LAW OF WAR* 9–11 (2009).

¹⁸⁷ See *id.* at 47.

¹⁸⁸ M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E. L. 135, 150–52 (2002). *Hadith* is a subset of Sharia law, second in authority to the Quran, which is comprised of the Prophet Muhammad's sayings and acts. *Id.*

¹⁸⁹ ROYAL AAL AL-BAYT INST. FOR ISLAMIC THOUGHT, *supra* note 186, at 48, 50, 52.

¹⁹⁰ *Id.* at 48–49.

In contrast, according to the same interpretation, Muslims should not rise up against a political ruler who does not declare his *kufri*, regardless of his conduct.¹⁹¹ The reasoning behind this prohibition lies in the notion that revolutions bring about more “resulting strife, bloodletting, and corruption,” than that which they seek to end.¹⁹² Instead, Muslims are instructed to obey: in one *hadith*, the Prophet says, “[e]ven if they beat you and take your wealth, listen and obey.”¹⁹³

Other scholars contend that only a war with an “ultimate religious purpose” is permitted.¹⁹⁴ Correcting a violation of Islamic law or enforcing that law is one such purpose.¹⁹⁵ According to Muslim thinker Ibn Khaldun, only *jihads* and wars against rebels are justified.¹⁹⁶ In any case, Islamic law of war prohibits unjustified aggression or attacks against non-combatants, and emphasizes the protection of innocent people.¹⁹⁷ If a rebellion against a government, sometimes known as *baghi*, takes place between two groups of Muslims, the retreating party may not be killed; this does not apply to *baghi* when only one side is Muslim.¹⁹⁸

III. ANALYSIS

A. *Libya in Revolution*

As noted earlier, Libya is likely mid-revolution:¹⁹⁹ it is currently undergoing the aftermath of a violent revolt against the existing legal and political order, geared toward the establishment of an entirely new order.²⁰⁰ Although the revolution’s success is wavering as the NTC fails to effectively consolidate power throughout the country,²⁰¹ the ensuing

¹⁹¹ See *id.* at 50–52.

¹⁹² *Id.* at 50, 52.

¹⁹³ *Id.* at 50–51.

¹⁹⁴ E.g., MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 69, 71 (1955).

¹⁹⁵ *Id.* at 69.

¹⁹⁶ *Id.* at 70–72.

¹⁹⁷ See ROYAL AAL AL-BAYT INST. FOR ISLAMIC THOUGHT, *supra* note 186, at vi, 61, 64.

¹⁹⁸ RAJ BHALA, UNDERSTANDING ISLAMIC LAW (*SHARI’A*) 1336–37 (2011).

¹⁹⁹ See *supra* text accompanying notes 52–72.

²⁰⁰ See ARENDT, *supra* note 9, at 27–28; HUNTINGTON, *supra* note 53, at 264. As previously discussed, this definition borrows most heavily from Arendt’s view, which appears to require conflicts to meet more specific conditions to qualify as revolutions. DANESHVAR, *supra* note 54, at 178–80; *supra* notes 63–66 and accompanying text.

²⁰¹ See Alzway & Kirkpatrick, *supra* note 32; Stack, *supra* note 26; *Libya: Leader Says Force Against Tribal Leaders Isn’t Possible*, *supra* note 35; *Libya: Western Militias Unite, Posing Challenge to Transitional Government*, *supra* note 28.

political and legal instability in Libya mirrors that of other revolutions.²⁰²

B. *Resolution and Reconciliation*

Despite the historical tradition of violence associated with revolutions, it is clear that a number of international, regional, and religious norms are in place to discourage the use of indiscriminate force that many Libyan revolutionaries currently employ.²⁰³ Given that severe violations of human rights and international humanitarian law have occurred throughout the Gaddafi regime's rule and in the wake of the revolution, how Libya addresses these crimes is of the utmost importance.²⁰⁴

Commentators have identified several reasons to support the administration of "transitional" or "post-conflict justice," terms used "to denote the range of judicial and non-judicial mechanisms aimed at dealing with a legacy of large-scale abuses of human rights and/or violations of international humanitarian law."²⁰⁵ Transitional justice thus "contribute[s] to the restoration and maintenance of peace" in a number of ways.²⁰⁶

Transitional justice promotes stability by establishing a "norm of accountability," thereby deterring repeat offenses.²⁰⁷ Transitional justice also generates a record of human rights violations, which helps to prevent "collective amnesia and . . . the possibility for revisionism."²⁰⁸ Though post-conflict justice can take several forms, reparations constitute a concrete improvement in victims' lives and foster the rule of law

²⁰² See DANESHVAR, *supra* note 54, at 131–32 (highlighting the "lawlessness," "chaos," and independent revolutionary groups that "created a climate of fear and uncertainty" in post-revolution Iran); DANIELS, *supra* note 76, at 207–08 (noting "atrocit[ies]" and "bloody contest[s] for power" during the consolidation phase of the Bolshevik Revolution); POPKIN, *supra* note 76, at 42–43, 56, 89 (noting "bloody clashes," "violent episodes," a "massacre" and the "Great Terror" during the French Revolution).

²⁰³ See *supra* Part II.

²⁰⁴ RACHEL KERR & EIRIN MOBEKK, *PEACE & JUSTICE: SEEKING ACCOUNTABILITY AFTER WAR* 3–4 (2007) (highlighting "the need for accountability, . . . justice and to foster reconciliation in societies in transition from authoritarian to democratic rule or from war to peace."); see Whitson, *supra* note 8 (noting the need for the NTC to address both Gaddafi-era and revolutionary war crimes).

²⁰⁵ KERR & MOBEKK, *supra* note 204, at 3.

²⁰⁶ *Id.* at 4.

²⁰⁷ See *id.* at 4–5; see also U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 4, U.N. Doc. S/2011/634 (Oct. 12, 2011) [hereinafter 2011 Secretary-General Report] (noting the UN's emphasis on accountability in establishing the rule of law in post-conflict societies).

²⁰⁸ KERR & MOBEKK, *supra* note 204, at 5.

by reducing community resentment toward other transitional programs such as disarmament and reintegration.²⁰⁹ Transitional justice also bolsters stability and the rule of law by creating reliable judicial institutions and preventing perpetrators from retaining power.²¹⁰ For these reasons, the NTC and its eventual permanent successor should utilize transitional justice mechanisms in order to contribute to a stable, enduring peace in the aftermath of Libya's revolution.²¹¹

The question remains as to what form of post-conflict justice is best suited to Libya.²¹² The following sections address three broad options for Libya: judicial national responsibility,²¹³ judicial international responsibility,²¹⁴ and truth commissions.²¹⁵ The final subsection further argues that rather than any one solution in isolation, a contextualized, multifaceted approach involving international assistance and emphasizing the role of national stakeholders would be ideal.²¹⁶

1. National Responsibility

The ultimate responsibility for prosecuting Gaddafi-era and revolutionary crimes falls with Libya itself.²¹⁷ The Rome Statute and the UN

²⁰⁹ 2011 Secretary-General Report, *supra* note 207, ¶ 26; U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, summary, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter 2004 Secretary-General Report]; see, e.g., Lilian A. Barria & Steven D. Roper, *Mechanisms of Transitional Justice, in THE DEVELOPMENT OF INSTITUTIONS OF HUMAN RIGHTS* 3, 5–8 (Lilian A. Barria & Steven D. Roper eds., 2010) (surveying several different types of transitional justice).

²¹⁰ See 2011 Secretary-General Report, *supra* note 207, summary (emphasizing the importance of building confidence in judicial institutions); 2004 Secretary-General Report, *supra* note 209, ¶ 52 (noting the importance of “vetting” perpetrators from public service and governmental positions specifically, removing them by due judicial procedure rather than by “wholesale purges”); KERR & MOBEKK, *supra* note 204, at 7–8.

²¹¹ Compare 2011 Secretary-General Report, *supra* note 207, ¶ 5 (highlighting Libya as an opportunity for the U.N.'s transitional justice regime), with KERR & MOBEKK, *supra* note 204, at 3–4 (noting that transitional justice mechanisms contribute to sustainable peace in post-conflict societies).

²¹² See 2011 Secretary-General Report, *supra* note 207, ¶ 5; KERR & MOBEKK, *supra* note 204, at 10.

²¹³ See YVES BEIGBEDER, *INTERNATIONAL CRIMINAL TRIBUNALS: JUSTICE AND POLITICS* 2–3 (2011); Barria & Roper, *supra* note 209, at 5–6; discussion *infra* Part III.B.1.

²¹⁴ See BEIGBEDER, *supra* note 213, at 3–4; Barria & Roper, *supra* note 209, at 6–7; discussion *infra* Part III.B.2.

²¹⁵ See Barria & Roper, *supra* note 209, at 8–9; discussion *infra* Part III.B.3.

²¹⁶ See 2004 Secretary-General Report, *supra* note 209, ¶¶ 23–26; KERR & MOBEKK, *supra* note 204, at 10; *infra* text accompanying notes 257–268.

²¹⁷ See Rome Statute, *supra* note 130, pmb.; BEIGBEDER, *supra* note 213, at 2 (indicating that it is traditionally the province of states to prosecute crimes within their borders); Barria & Roper, *supra* note 209, at 5–6.

Security Council strongly encourage states to prosecute war criminals themselves and end impunity.²¹⁸ In November 2011, the NTC announced plans to investigate and potentially prosecute Gaddafi-era crimes, which include rapes, “mass murders, disappearances and public executions,” among other offenses.²¹⁹

Interim Justice Minister Mohammad al-Alagi expressed the NTC’s intention to “emphasize[] fact-finding and accountability rather than punishment.”²²⁰ With the hope of employing institutional models like those used in Chile and Argentina, and specifically the South African Truth and Reconciliation Commission, the NTC aims “to show the public what happened, the reality.”²²¹ Al-Alagi indicated that these eventual institutions would pursue fair trials, particularly for higher-level Gaddafi-era officials.²²² For those not identified as central criminal figures, al-Alagi seemed to suggest that a law of forgiveness, or amnesty, may be considered.²²³ In his comments, al-Alagi focused particularly on Gaddafi-era officials, and non-governmental organizations such as Human Rights Watch have pointed out that there is no evident investigation into crimes committed by anti-Gaddafi fighters.²²⁴

Though it remains to be seen how the reconciliation will progress, any attempt by the NTC to follow through on plans to create an investigative committee will face significant obstacles because Libya’s court system needs significant reform and militias still retain power in most of the country.²²⁵ Instead of channeling national reconciliation through a carefully-planned and executed truth commission or similar institution, Libyans have pursued a similar revolutionary path to Iran, charging and trying individuals for arbitrary crimes like “treason against the revolution.”²²⁶ Additionally, the NTC has been incapable of extending control over either prisoners—housed in various detention facilities throughout

²¹⁸ See Rome Statute, *supra* note 130, pmbli.; see, e.g., S.C. Res. 1674, ¶ 8, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

²¹⁹ See Nossiter, *supra* note 22.

²²⁰ *Id.*

²²¹ *Id.* (internal quotation marks omitted).

²²² See *id.*

²²³ See *id.*

²²⁴ See *id.*; *Libya: Make Urgent Justice System Reforms*, *supra* note 24.

²²⁵ See Nossiter, *supra* note 22; *Delays in a Trial Show Libya’s Legal Disarray*, *supra* note 30; *supra* text accompanying notes 23–39.

²²⁶ Compare *Delays in a Trial Show Libya’s Legal Disarray*, *supra* note 30 (noting the crime of “treason against the revolution” as one of the shortcomings of Libya’s justice system), with DANESHVAR, *supra* note 54, at 134–35 (highlighting the activity of Iranian Revolutionary Courts, which charged numerous individuals with crimes like “war against God”).

the country—or the militias.²²⁷ With multiple challenges to its dominance, it is unclear if the NTC will be able to retain control over Libya in a way that would lead to effective national reconciliation.²²⁸

Libya's current political and legal challenges exemplify many of the shortcomings associated with relying solely on national courts to administer post-conflict justice.²²⁹ Such challenges generate “unrealistic” expectations for national courts to meet in prosecuting war crimes.²³⁰ Domestic courts are often influenced by concerns of state as well as political pressures when attempting to judge their own citizens.²³¹ Often, justice is limited to the trial of the “losers” by the “winners” in a civil war or similar conflict.²³² In other instances, the judicial system may cease to function independently of an oppressive regime, and is thus incapable of administering appropriate transitional justice.²³³

Although national courts in Libya may not currently provide the best option for post-conflict reconciliation, the importance of national involvement in any reconciliation process is crucial.²³⁴ In a 2004 report to the UN Security Council, then-Secretary-General Kofi Annan emphasized the need for “active and meaningful participation of national stakeholders,” including political leaders, legal officials, and “key groups” such as displaced persons and women.²³⁵ The Secretary-General also suggested that the UN should leave decision-making to these domestic stakeholders and carefully consult atrocity victims in

²²⁷ *Libya: Make Urgent Justice System Reforms*, *supra* note 24.

²²⁸ See Alzway & Kirkpatrick, *supra* note 32; Stack, *supra* note 26; *Delays in a Trial Show Libya's Legal Disarray*, *supra* note 30; *Libya: Leader Says Force Against Tribal Leaders Isn't Possible*, *supra* note 35; *Libya: Western Militias Unite, Posing Challenge to Transitional Government*, *supra* note 28; *Libya: Make Urgent Justice System Reforms*, *supra* note 24; cf. 2011 Secretary-General Report, *supra* note 207, ¶¶ 6–8 (“For societies emerging from conflict, weak justice and security institutions struggle to manage the wider socio-economic and political challenges inherent in recovery processes.”).

²²⁹ Compare BEIGBEDER, *supra* note 213, at 2–3 (noting requirements for successful national justice, such as judicial independence and separation of powers), with Nossiter, *supra* note 22 (noting that Libya's court system needs a “top-to-bottom overhaul”), and 2009 Human Rights Report: *Libya*, U.S. DEP'T STATE (Mar. 11, 2010), <http://www.state.gov/j/drl/rls/hrrpt/2009/nea/136074.htm> (stating that Libya's judiciary was not independent under the Gaddafi regime).

²³⁰ See BEIGBEDER, *supra* note 213, at 2–3.

²³¹ *Id.* at 3.

²³² *Id.*

²³³ See Barria & Roper, *supra* note 209, at 5–6; 2009 Human Rights Report: *Libya*, *supra* note 229.

²³⁴ See 2004 Secretary-General Report, *supra* note 209, ¶¶ 14–18; Barria & Roper, *supra* note 209, at 6; Nossiter, *supra* note 22; *Delays in a Trial Show Libya's Legal Disarray*, *supra* note 30.

²³⁵ 2004 Secretary-General Report, *supra* note 209, ¶ 15.

designing any transitional justice mechanism.²³⁶ Even if national institutions are presently inadequate to effectuate post-conflict justice, Libyan stakeholders should play a central role in shaping any reconciliation model.²³⁷

2. International Responsibility: International Criminal Tribunal or Hybrid Criminal Tribunal?

As previously discussed, the UN Security Council referred the situation in Libya to the ICC on February 26, 2011.²³⁸ The ICC Prosecutor opened cases against top officials of the Gaddafi regime only: the *de facto* Prime Minister, the then-head of military intelligence, and Gaddafi himself.²³⁹ While the ICC is primarily designed to prosecute leadership crimes, it also has jurisdiction to try any grave breach of the Geneva Convention.²⁴⁰ The Prosecutor could initiate further investigations of the events in Libya, including the apparent summary execution of Gaddafi, which the Prosecutor stated may have been a war crime.²⁴¹ Given the Rome Statute's "particularity" requirement, however, it is more likely that the Prosecutor will only pursue those "war crimes . . . committed as part of a plan or policy or as a part of a large-scale commission of such crimes."²⁴²

Reliance on the ICC or *ad hoc* international criminal tribunals for administering post-conflict justice may raise significant issues.²⁴³ Though not subject to identical domestic pressures as state or national courts, international tribunals operate under other influences, such as international politics.²⁴⁴ International tribunals "are dependent on states for their creation, their staffing, their financing and their legal, logistical and administrative support,"²⁴⁵ and function at the juncture of

²³⁶ See *id.* ¶¶ 15–16, 18; Donald L. Hafner & Elizabeth B.L. King, *Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability Can and Should Work Together*, 30 B.C. INT'L & COMP. L. REV. 91, 94, 104 (2007).

²³⁷ See 2004 Secretary-General Report, *supra* note 209, ¶¶ 14–18; KERR & MOBEKK, *supra* note 204, at 10; Nossiter, *supra* note 22; *Delays in a Trial Show Libya's Legal Disarray*, *supra* note 30.

²³⁸ See *supra* text accompanying note 135.

²³⁹ See Press Release, Int'l Criminal Court, *supra* note 136.

²⁴⁰ Rome Statute, *supra* note 130, arts. 5, 8(2)(a), 12–15; Scheffer, *supra* note 130, at 72.

²⁴¹ Scheffer, *supra* note 130, at 73; *Gaddafi's Death May Be a War Crime*, *supra* note 19.

²⁴² Rome Statute, *supra* note 130, art. 8(1); Scheffer, *supra* note 130, at 72; see *supra* text accompanying notes 139–142.

²⁴³ See, e.g., BEIGBEDER, *supra* note 213, at 3–4.

²⁴⁴ *Id.* at 4.

²⁴⁵ *Id.*

law and international politics.²⁴⁶ Such influence was clear in the Nuremberg and Tokyo military tribunals, as both “exercised victors’ justice” against the respective German and Japanese defendants, but not against members of the Allied forces.²⁴⁷ Later tribunals such as the ICTR still tend to focus disproportionately on the crimes of the vanquished, rather than the victorious.²⁴⁸

Another possibility for Libya is to create a hybrid criminal tribunal akin to those used in East Timor, Cambodia, and Sierra Leone.²⁴⁹ Because these tribunals require financing and administration by both national and international actors, states and the international community are less likely to raise objections over sovereignty and financing, respectively.²⁵⁰ These hybrid courts utilize both domestic and international judges, laws, and lawyers.²⁵¹ In theory, hybrid tribunals also help reconstruct the post-conflict society’s judicial branch: they “provide greater educational and training benefits than international tribunals, and also offer local ownership of the judicial process while . . . ensuring international standards of justice.”²⁵² As a result, hybrid tribunal participants can use their experience to establish new, more sound judicial institutions.²⁵³

In his 2004 report to the Security Council, the Secretary-General noted that in certain situations, mixed tribunals have been beneficial: they “have helped bring justice and hope to victims, combat the impunity of perpetrators and enrich the jurisprudence of international criminal law.”²⁵⁴ The Secretary-General also noted, however, that both mixed tribunals and international criminal tribunals like the ICTY and ICTR are costly and have failed to support long-term institutional justice administration in post-conflict countries.²⁵⁵ As a result, such tribunals, standing alone, will be unlikely to promote sustainable peace in Libya.²⁵⁶

²⁴⁶ MADOKA FUTAMURA, WAR CRIMES TRIBUNALS AND TRANSITIONAL JUSTICE: THE TOKYO TRIAL AND THE NUREMBERG LEGACY 19 (2008).

²⁴⁷ BEIGBEDER, *supra* note 213, at 4.

²⁴⁸ *See id.*

²⁴⁹ *See* Barria & Roper, *supra* note 209, at 7; *cf.* Nossiter, *supra* note 22 (discussing several options for Libyan transitional justice mechanisms, including truth commissions and trials).

²⁵⁰ *See* Barria & Roper, *supra* note 209, at 7.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *See id.*

²⁵⁴ 2004 Secretary-General Report, *supra* note 209, summary.

²⁵⁵ *Id.*

²⁵⁶ *Compare* 2011 Secretary-General Report, *supra* note 207, ¶ 5 (indicating that events in Libya pose significant challenges to ensuring the rule of law), *with* 2004 Secretary-

3. Truth Commissions or Amnesties and Rule of Law Reform

Another option for Libyan post-conflict reconciliation is for the NTC to grant amnesty to individuals or groups implicated in Gaddafi-era and revolutionary crimes.²⁵⁷ Numerous post-conflict governments have used amnesties.²⁵⁸ It is unclear, however, whether states can legally grant amnesty for crimes against humanity, given the nature of these crimes and states' affirmative responsibility under international law to prosecute war criminals.²⁵⁹ Additionally, revolutionary groups can ignore amnesties as they did in Iran, and incoming regimes can grant them merely to avoid challenges to their legitimacy.²⁶⁰

In light of the challenges inherent in international and mixed tribunals, the Secretary-General emphasized the importance of considering truth commissions as a legitimate alternative.²⁶¹ A truth commission has been defined as:

an *ad hoc*, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict,

General Report, *supra* note 209, summary (emphasizing that transitional justice that focuses on only one institutional mechanism will not be effective), and Hafner & King, *supra* note 236, at 91 (noting that "tribunals alone cannot bear the full burden of doing justice and stitching politics back together," and exploring the potential use of different types of transitional justice mechanisms in tandem).

²⁵⁷ See Barria & Roper, *supra* note 209, at 8; Nossiter, *supra* note 22 (noting that the NTC is considering an amnesty law).

²⁵⁸ Barria & Roper, *supra* note 209, at 8; Emily H. McCarthy, *South Africa's Amnesty Process: A Viable Route Toward Truth and Reconciliation?*, 3 MICH. J. RACE & L. 183, 200–01 (1997) (pointing out that amnesties have been used in post-apartheid South Africa, as well as in Chile, El Salvador, and Argentina).

²⁵⁹ BEIGBEDER, *supra* note 213, at 2; Barria & Roper, *supra* note 209, at 8; Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 177 (2002) ("[T]o date there is only one amnesty that comes close to qualifying [as just]: the 1995 South African amnesty.").

²⁶⁰ See DANESHVAR, *supra* note 54, at 135 (highlighting that Iranian revolutionary tribunals ignored an amnesty decree); Barria & Roper, *supra* note 209, at 8 (pointing out that new democratic regimes, "fearful that criminal prosecutions could undermine [their] legitimacy," have employed amnesties to avoid such undermining).

²⁶¹ 2004 Secretary-General Report, *supra* note 209, summary.

and (2) making recommendations for their redress and future prevention.²⁶²

Unlike tribunals, truth commissions have none of the trappings of a court: their crucial functions include finding and reporting facts, assessing origins of the conflict, and “dignify[ing] victims through victim-centered public hearings;” they cannot impose penalties on individuals.²⁶³ In a truth commission’s final report, however, it can recommend future action, “including the prosecution of individuals, judicial reform, and changes within the military and law enforcement.”²⁶⁴

A truth commission and its resultant recommendations closely match the NTC’s ideas for post-revolution reconciliation, and provide an opportunity to eventually hold both pro-Gaddafi and revolutionary fighters accountable for their actions.²⁶⁵ According to the Secretary-General, the search for appropriate transitional justice mechanisms, like those required in Libya today, must look beyond international or hybrid tribunals.²⁶⁶ Truth commissions, complemented by later tribunals and accompanying rule of law reforms,²⁶⁷ provide more promise than international or hybrid tribunals alone, which would be “distant from the citizenry” and the goals of establishing a long-term, healthy judicial system.²⁶⁸

CONCLUSION

Libya erupted in conflict in early 2011, culminating with the overthrow and eventual death of Muammar Gaddafi. Yet that conflict is on-

²⁶² MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS 18 (2006).

²⁶³ *Id.* at 71–72.

²⁶⁴ Barria & Roper, *supra* note 209, at 9.

²⁶⁵ See 2004 Secretary-General Report, *supra* note 209, ¶¶ 23–27 (emphasizing the need of consulting with national stakeholders in shaping any transitional justice mechanism); KERR & MOBEKK, *supra* note 204, at 10 (repudiating “a one-size-fits-all approach to transitional justice” and noting the importance of considering national context); Barria & Roper, *supra* note 209, at 9; Nossiter, *supra* note 22 (indicating the NTC’s intention to model post-conflict justice mechanisms after institutions such as South Africa’s Truth and Reconciliation Commission).

²⁶⁶ Compare 2011 Secretary-General Report, *supra* note 207, ¶ 5 (highlighting challenges to building the rule of law in Libya), with 2004 Secretary-General Report, *supra* note 209, ¶¶ 25–26 (stressing the importance of focusing exclusively on international or mixed tribunals as a transitional justice mechanism), and Whitson, *supra* note 8 (emphasizing Libya’s need to come to terms with both Gaddafi-era and revolutionary crimes).

²⁶⁷ Barria & Roper, *supra* note 209, at 9.

²⁶⁸ See 2004 Secretary-General Report, *supra* note 209, summary, ¶¶ 25–26; Barria & Roper, *supra* note 209, at 7–8; Hafner & King, *supra* note 236, at 104 (“Tribunals are too remote from the people to accomplish all that has been expected of them.”).

going at the time of this writing, as militias illegally detain suspected Gaddafi supporters, and torture, rape, forcibly displace, and execute non-combatants. Assuming for the purposes of this Note that the Libyan conflict is a revolution, the turbulence in Libya can be located within an established tradition of revolutionary violence. Scholars have accepted violence as an inevitable facet of revolution, but few have addressed the idea that individuals engaging in anomic revolutionary behavior should be held accountable for their crimes.

Multitudes of laws and influences operate on actors in the Libyan context, from international humanitarian law to Islamic law, and despite the abrogation of the Gaddafi-era legal order, law still governs these actors. Because Libyan revolutionaries are not outside the law, it is imperative to creating a sustainable peace in Libya that these actors—whether pro- or anti-Gaddafi, pro- or counter-revolution—be held accountable for their actions.

Among the options for holding these actors accountable, a multifaceted approach would be best to ensure peace in post-conflict Libya. An initial step in doing so would be creating a mandate for a truth commission, whose recommendations would eventually lead to individual prosecutions and to simultaneous strengthening of the rule of law in the country.