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Project Précis: Postconflict Justice and Islam

Indeed, at present, the ‘humanitarian law’ associated with postconflict justice has come to represent the normative threshold associated with global rule of law.²

1.0 Overview: Islamic Law, International Law, and Transitioning Societies

Global conflict paradigms have irretrievably changed in the 21st century in ways that significantly impact the nature of conflict, peace, and stability.³ New actors now operate by different rules that make civilians, societies, and states vulnerable in unprecedented ways. Current conflicts are destabilizing—locally, regionally, and internationally—in ways still not well understood and with important consequences for international security. New interdisciplinary and multi-sector approaches to conflict are thus urgent today, such as integrating civilian and military efforts, prioritizing post-war outcomes in planning (including stabilization in the security realm), improving reconstruction in political and institution building, and advancing peace, reconciliation, and legal reforms.⁴ Yet, while “postconflict reconstruction” approaches to global conflict have now been embraced by government, military, and civil society leaders, as well as international organizations, human rights, and development communities, they have only recently become the subject of rigorous academic study—including the efforts of this Institute.⁵

Postconflict justice, also known as transitional justice, refers to legal and policy reform, institution building, and reconciliation responses during and following armed conflict and political regime change.⁶ This project examines postconflict justice in Muslim-majority nations, where Islamic norms complement and compete with international law, local cultural norms and de facto regimes, and where gaps and vacuums in legal authority have occurred. Globally, international humanitarian law and human rights law offer the fundamental norms and guidelines for designing and implementing policies that

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² Ruti Teitel, Review: *Post-conflict Justice*, ed., M. Cherif Bassiouni (Ardsey NY: Transnational Publishers, 2002), *The American Journal of International Law* 98(4), Oct., 2004: 872-875, 872.

³ Lotta Harbom and Peter Wallensteen (2010), “Patterns of Major Armed Conflict, 2000-2009,” *Sipri Yearbook 2010* (Oxford: Oxford University Press).

⁴ See Ashraf Ghani and Clare Lockhart, *Fixing Failed States: A Framework for Rebuilding a Fractured World* (Oxford University Press, 2008); Richard Caplan, *International Governance of War-Torn-Territories: Rule and Reconstruction* (Oxford University Press, 2005); Carsten Stahn, *The Law and Practice of International Territorial Administration* (Cambridge University Press, 2008); Jane E. Stromseth, David Wippman and Rosa Brook, *Can Might Make Rights? Building the Rule of Law after Military Interventions* (Cambridge University Press, 2006)

⁵ Nicholas J. Armstrong and Jacki Chura-Beaver, “Harnessing Post-conflict Transitions: A Conceptual Primer,” *PKSOI Paper*, Carlisle, PA: U.S. Army War College, Peacekeeping and Stability Operations Institute (PKSOI), <http://www.insct.syr.edu/Projects/PCR/Post-conflict%20Reconstruction.htm>. For empirical assessments of transitional justice mechanisms and programs, see Hugo van der Merwe, Victoria Baxter, and Audrey R. Chapman (2009), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, (Endowment of the United States Institute of Peace, Washington, DC).

⁶ M. Cherif Bassiouni, ed. (2002), *Post-Conflict Justice, International and Comparative Criminal Law Series* (Ardsey, N.Y.: Transnational Publishers). Van der Merwe et al., (2009) define “transitional justice” as the “societal responses to severe repression, societal violence, and systematic human rights violations that seek to establish the truth about the past, determine accountability, and offer some form of redress, at least of a symbolic nature.” They include initiatives to “overcome” or “manage” conflicts “among contending groups,” as well as “rebuild[ing] the institutional and social infrastructure,” and “promoting] a sense of shared commitment to the new political system.” Such societies are also often “moving away from repressive political systems and dictatorial rule” toward “establishing more democratic forms of governance” (1-2).

address past atrocities and ensure fundamental standards of accountability and equity before the law. Indeed, the law plays an often underappreciated role in postconflict reconstruction efforts and in capacity-building initiatives to help challenged states transition to fully functional societies. Law can provide a sound basis for security and government and it may ensure transparent and equitable processes for remedying grievances and past injustices.

Developing postconflict justice norms in international humanitarian and human rights law are particularly urgent in Muslim communities for several reasons. Many of the world's present international conflicts and areas of civil unrest are in Muslim-majority countries: more than half of the International Committee of the Red Cross's (ICRC) current operations are being carried out for conflict victims in the Muslim world—whether prisoners, displaced persons, families of detainees, or other persons requiring aid).⁷ Humanitarian, human rights, and postconflict law are critical instruments for identifying uniform standards for governments and parties to the conflict, for settling disputes, and for undertaking reconstruction efforts. Moreover, Islamic law – with its emphasis on justice – is a cornerstone of Muslim identity and, thus, offers a powerful platform and opportunity for innovating postconflict justice approaches, particularly in areas of the world where they are most needed.

The purpose of this project—and its first scholar-practitioner bridge-building workshop in Washington, DC—is to bring a diverse body of participants together to identify, through engaged discussion, postconflict justice approaches best suited for Islamic legal contexts, Muslim-majority conflict, and postconflict states. In Afghanistan and Iraq the need for such work has been well demonstrated, particularly by practitioners, given the complexities of invasion, occupation, constitutional, and rule of law challenges.⁸ In Afghanistan in particular, accountability for past crimes has been a key demand of the conflict's many victims, and the failure of any comprehensive justice process for past or present violations is a key factor fueling the existing insurgency. Whether in Afghanistan, Iraq, Sudan, Lebanon, or Somalia, the challenges to dealing with mass political violence and human rights abuse in a Muslim context remains a dilemma that must be addressed to promote stability in areas where respect for *Shari'a* is the *sine qua non* of local legitimacy.

A focus on Islamic approaches to postconflict justice is an unexplored subset of the larger analysis that has focused on the role of Islam in the legal, social, and political fabrics of Muslim majority states in the Middle East, East Africa, and Central Asia. In those societies, controversies persist over the substance and interpretation of *Shari'a*, its legal status, scope and territory of authority, its tension with international legal norms and obligations, the increasing centralized control of *Shari'a* by the state, and the fraught status of diverse communities. Those communities that disavow dominant interpretations of *Shari'a*, find themselves excluded from a government's "moral community," or are bound to a religious legal system under which they have no role as participants.⁹ Such issues may become barriers to transitioning from conflict-ridden states to stable regimes and societies. Moreover, analysts have begun to link problems of Islamic legal pluralism or the use of *shari'a* norms as political rather than religious measures to heightened political and social factionalism and even broad-based violence and extremism.

What has yet to be addressed, however, is what Islamic legal principles may offer to aid transitional justice approaches in conflict or postconflict settings, particularly for communities with either strong or longstanding Islamic norms in their legal systems -- especially for governments facing intertwined legal, security, and political challenges. Critical ancillary questions include how to

⁷ International Committee of the Red Cross (ICRC), *Debate on humanitarian law, policy and action: protection of victims of armed conflict under Islamic law and international humanitarian law* (29 Jun 2006), <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/islamic-law-ihl-feature-010606?opendocument>

⁸ Mashood A., Baderin (2009) '9/11, The US-Led War on Iraq and the Future of Collective Security Law: With an Insight from Islamic Law.' In: Morgan, M J, (ed.), *The Impact of 9/11: The Day that Changed Everything?* Palgrave Macmillan. See programmatic work at the International Human Rights Law Institute (IHRLI) at DePaul University College of Law

⁹ See Christopher Ford, "Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis," *International Law and Islamic Law*, ed., Mashood Baderin (Aldershot: Ashgate, 2008): 19-54;

incorporate bottom-up approaches to transitional justice that have cultural, historical, and political relevance to local populations, with top down approaches focused on imported legal and procedural norms that lack local ‘context.’ Likewise, if human rights law in particular is moving towards uniform standards, are these standards compatible with Islamic law?

Addressing these questions in this project will involve working through several analytical issues:

- Developing an integrated approach to postconflict justice measures, such as special tribunals or truth commissions
- Comparing those mechanisms to other PCR solutions, including better integration of civil-military relations and political power-sharing mechanisms
- Articulating why the law, including Islamic law, is pivotal to states transitioning from war to peace and understanding the situation-specific interdependence of transnational justice programs, domestic legal reform, and security infrastructure
- Moving beyond anecdotal literature toward empirical models for evaluating postconflict legal reform efforts by identifying the core questions to ask and the factors affecting outcomes, as recent work has done at the United States Institute for Peace (USIP) Rule of Law Center¹⁰
- Redressing the gap in research contemplating the challenges for diverse Muslim communities and governments attempting to conduct postconflict justice reform within an Islamic legal framework
- Overall, the approach will be to identify key gaps in postconflict societies that are a legacy of past violence and abuse, identify and explain how Islamic justice principles would suggest filling these gaps, compare these approaches with the current “toolkit” of transitional justice and governance mechanisms and, based on this comparison, propose new methods and approaches that synthesize Islamic legal norms and current practice.

2.0 Program Priorities for the Scholar-Practitioner Workshop (Fall 2010, Washington, DC)

2.1 Defining Topics: The research team will bring together scholars and practitioners on the issue of *Postconflict Justice in Islam* for a day-long workshop in Washington, DC in the fall 2010. Several problems for discussion include:

1. Defining postconflict justice for Islamic legal contexts: contributions from Islamic jurisprudence
2. Opportunities in postconflict justice and transition: the special role of law in Islam
3. Integrating legal reform with security sector infrastructure in Muslim majority conflict and postconflict settings
4. Balancing domestic and international legal obligations: *Shari’a* in domestic, regional, and international legal contexts.

2.2 Orienting Questions: We identify several common questions consistently raised by practitioners in the process of developing transitional justice programs on the ground and by researchers undertaking scholarly and evaluative inquiry of these regions and programs. We have tried to prioritize questions that

¹⁰ See the Margarita S. Studemeister Digital Collections in International Conflict Management at USIP <<http://www.usip.org/library/truth.html>> and the Transitional Justice Data Base Project at the University of Wisconsin-Madison <<http://sites.google.com/site/transitionaljusticedatabase/home>>. Hugo van der Merwe, Victoria Baxter, and Audrey R. Chapman, *Assessing, The Impact of Transitional Justice: Challenges for Empirical Research* (USIP Press Books, 2009). Debate over “transitional” or “post-conflict” justice terminology hinges on the concern that “transitional” presumes a progressive teleology, the assumption that “countries moving away from a problematic past will necessarily make the transition toward democracy and stability, when in fact few actually do so” (van der Merwe et al., 2009: 2). Also see Thomas Carothers (2002), “The End of the Transition Paradigm,” *Journal of Democracy* 13(1): 5-21.

go to the core of expert and stakeholder concerns, represent abiding issues, apply to multiple locations, and shape a baseline set of approaches relevant for creative and critical discussion.

1. Are the standard tools of the postconflict justice “toolkit,” such as the truth commission or vetting mechanisms, Islamic? Is the postconflict transition rubric suitable to Muslim communities and Islamic norms?
 - How do local applications of *Shari’a* law bear on postconflict justice uses of evidence, testimony, truth-telling, amnesty, and victimhood?
 - What does justice mean under Islamic law? Is it compatible with international notions of justice?
 - Are there particular legal complexities in postconflict Muslim states, and are their available best practices or lessons learned for dealing with these?
2. In the absence of government mechanisms for resolving disputes, do local practices and existing cultural frameworks, including Islamic norms, provide usable methods and models?
 - Is it possible to develop local control over dispute and justice mechanisms without ceding more power and influence to local rivals or warlordism?
 - Numerous recent examples, especially in Afghanistan, show that widely-recognized international human rights norms play almost no role in guiding government decision-making and policy processes particularly in the critical postconflict arena of setting up effective governance systems, whether choosing accountable cabinet members to institutionalizing a functional judiciary. Is humanitarian law an alternative? Is Islamic law of war principles more suitable for rebuilding Muslim-majority postconflict states?
 - How do the presence/absence, legacy, and variation/fragmentation of older or religious-based institutions of justice or tribal/customary legal principles challenge the implementation of Islamic legal norms to address humanitarian law violations?
3. Do transitional justice initiatives depend upon political will in the Muslim world? Where do individuals in a Muslim community go to register their grievances in Islamic legal terms? Are political authorities responsive or accountable to these venues?
 - Where are the special inquiries within Islamic legal institutions investigating Muslim on Muslim violence, such as in Darfur, Sudan?
 - Is there public support in Muslim societies for enforcing international norms, including IHL and postconflict tribunals?
 - Are Muslim states and organizations willing to enforce Islamic norms and rules?
 - Are there strategies and means for promoting compliance that have worked? Does the impetus for compliance need to come from Muslim sources (not the international community)?
 - Tensions in integrating Islamic and international norms, tribal justice procedures with established legal systems?
4. Do Islamic legal principles recognize or imply a tradeoff between peace and justice in the context of postconflict reconciliation? How do rights of individuals compare with rights of communities in addressing questions of redress? What obligations do states and governments have in Islamic societies to address the needs of both?
 - Does this initiative help to contemplate culturally-inflected approaches in implementing the rule of law more generally? Does it suggest methods for factoring in culture and religion in political and government institution building, legal and security sector reform?

- What defines progress in integrating cultural awareness into postconflict strategies and legal reform? What available models are being used, for instance, at the Center for Law and Military Operations (CLAMO), Center for Army Lessons Learned (CALL), etc.?¹¹

2.3 Approach and Methodology: Defining Postconflict Justice beyond the Five Pillars Approach

We also intend to advance postconflict justice methodologies by bringing together respective academic research and practitioner strengths and experiences. This means, first and foremost, critically reflecting on the received wisdom of the five pillars approach—security, governance, rule of law, economics, and social well-being—for defining success, resource allocation, and organizational planning in postconflict reconstruction operations.¹² In many respects, Muslim-majority conflict and postconflict contexts and Islamic legal norms expose the limits of this dominant methodological approach and challenge the assumption of separate state, social, and cultural functions, including religion. Afghanistan, Iraq, and many Sub-Saharan nations, for instance, likewise, challenge the virtue of prioritizing traditional truth and reconciliation processes over and above, for instance, legal and security sector reform and infrastructure development.

¹¹Anthony Cordesman, *The Afghan War: Metrics, Narratives, and Winning the War*, CSIS, 7 Jun 2010, <http://csis.org/publication/afghan-war-metrics>; Center For Law And Military Operations, *Legal Lessons Learned From Afghanistan And Iraq: VII, Full Spectrum Operations*, (2 May 2003 – 30 June 2004); *CALL Handbook 09-37, Small-Unit Operations in Afghanistan: Tactics, Techniques, and Procedures* (2009); Special Inspector General for Afghanistan Reconstruction (SIGAR) to the United States Congress, *April 30, 2010 Quarterly Report to Congress*.

¹²Lora M. Carroll, John V. Farr, and Timothy A. Trainor, “Weighted Scoring Model for Resource Allocation in Post-conflict Reconstruction,” *Journal of Infrastructure Systems* 14(3): 169-177 (September 2008).