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RE-THINKING TRANSITIONAL JUSTICE:
THE PROSECUTION OF POLITICAL LEADERS IN THE ARAB REGION
A comparative case study of Egypt, Libya, Tunisia and Yemen

Noha Aboueldahab

Abstract

The dramatic uprisings that ousted the long-standing leaders of several countries in the Arab region have set in motion an unprecedented period of social, political and legal transformation. The Arab Spring uprisings saw criminal prosecutions in the Arab region take centre stage in the pursuit of transitional justice. Through a comparative case study of Egypt, Libya, Tunisia and Yemen, this thesis presents a critique of mainstream transitional justice theory. This theory is built on the underlying assumption that transitions constitute a shift from non-liberal to liberal democratic regimes, where measures – often legal – are taken to address atrocities committed during the prior regime. By examining the factors that triggered, drove and shaped decisions regarding the prosecution of political leaders in the four case studies, this thesis will enhance our understanding of how transitional justice is pursued in varied contexts. The findings of this research therefore build on the growing literature that claims that transitional justice is an under-theorised field and needs to be developed to take into account non-liberal and complex transitions.

I argue that transitional justice in the Arab region presents the strongest challenge yet to the transitional justice paradigm, which presumes a shift from violent, non-liberal rule to peaceful, liberal-democratic rule. There are four parts to

this argument. First, the non-paradigmatic nature of the Arab region transitions, whereby a renewed form of repressive, non-liberal rule has largely taken shape, warrants a re-thinking of transitional justice and its pursuit in various contexts. Second, the Arab region cases demonstrate that both domestic and international actors pursue competing accountability agendas, thereby weakening claims of a global accountability norm. Third, the emphasis these cases place on accountability for corruption and socio-economic crimes as opposed to civil and political rights violations underline the need to develop transitional justice theory. The limited content and extent of the investigations and prosecutions in the four case studies are driven by the controlled nature of the transitions and point to a practice of scapegoating certain high-level officials and a certain set of crimes to show that there has been a break with the former regime. Finally, a re-thinking of transitional justice needs to take into account the absence of pre-existing democratic structures and what this means for criminal accountability prospects in non-paradigmatic transitional contexts.

RE-THINKING TRANSITIONAL JUSTICE:

THE PROSECUTION OF POLITICAL LEADERS IN THE ARAB REGION

A comparative case study of Egypt, Libya, Tunisia and Yemen

Noha Aboueldahab

Durham Law School

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This thesis is submitted in partial fulfilment of the requirements for the qualification of Doctor of Philosophy.

2015

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List of Abbreviations

ACLU	**American Civil Liberties Union**
ANHRI	**Arabic Network for Human Rights Information**
AQAP	**Al Qaeda in the Arabian Peninsula**
CIA	**Central Intelligence Agency**
CICC	**Coalition for the International Criminal Court**
CNLT	**Conseil National pour la Liberté des Tunisiens**
CONADEP	**National Commission on the Disappeared**
ECESR	**Egyptian Center for Economic and Social Rights**
EIPR	**Egyptian Initiative for Personal Rights**
EMG	**East Mediterranean Gas Company**
EU	**European Union**
FIDH	**Fédération Internationale des Ligues des Droits de l'Homme**
GICDF	**Gaddafi International Charity and Development Foundation**
GCC	**Gulf Cooperation Council**
GPC	**General People's Congress**
IACtHR	**Inter-American Court of Human Rights**
ICC	**International Criminal Court**
ICG	**International Crisis Group**
ICTJ	**International Center for Transitional Justice**
LTDH	**Ligue Tunisienne des Droits de l'Homme**
MEDOR	**Middle East Oil Refining Company**
NATO	**North Atlantic Treaty Organisation**
NDP	**National Democratic Party**
NGO	**Non-Governmental Organisation**
NPWJ	**No Peace Without Justice**
OHCHR	**Office of the High Commissioner for Human Rights**
OCTT	**Organisation Contre la Torture Tunisienne**
OMCT	**Organisation Mondiale Contre la Torture**
TDC	**Truth and Dignity Commission**
UGTT	**Union Générale Tunisienne du Travail**
UN	**United Nations**
UNSMIL	**United Nations Support Mission in Libya**
YCTJ	**Yemen Center for Transitional Justice**

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The copyright of this thesis rests with the author. No quotation from it should be published without the author's prior written consent and information derived from it should be acknowledged.

For my father, Dr. Hamed Aboueldahab

And

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CHAPTER 1 | INTRODUCTION AND LITERATURE REVIEW

The dramatic uprisings that ousted the long-standing leaders of several countries in the Arab region have set in motion an unprecedented period of social, political and legal transformation. Prosecutions of former leaders and other high-ranking government officials have emerged as the single most pursued route of transitional justice - something which was almost non-existent prior to the uprisings in the Arab region.[1] Hosni Mubarak and other officials of his regime were tried for corruption and human rights violations in Egypt, Zine El Abidine Ben Ali and other former regime members were tried for similar charges in Tunisia, and Libya issued its first verdicts in July 2015 for the trial of thirty-seven former regime officials including Saif al-Islam Gaddafi, son of former Libyan leader Muammar Gaddafi.[2] Yemeni activists have been struggling to reverse – or work around - the immunity law passed to protect former president Ali Abdallah Saleh and his aides from prosecution.[3]

Globally, the number of prosecutions of political leaders has increased significantly in the last two decades. Between 1990 and 2008, sixty-seven heads of state from forty-three countries were charged or indicted with serious criminal offenses.[4] Political and military leaders in Latin America, Europe, Africa, and Asia have been put on trial for massive human rights violations and for corruption. Latin America in particular has seen leaders in Argentina, Chile, and Peru face prosecutions.

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[1] Exceptions include the trial of former Iraqi president Saddam Hussein.
[2] To avoid confusion, I will refer to both Saif al-Islam Gaddafi and Muammar Gaddafi by their full names throughout this thesis.
[2] To avoid confusion, I will refer to both Saif al-Islam Gaddafi and Muammar Gaddafi by their full names throughout this thesis.
[3] Law No. 1 of 2012 Concerning the Granting of Immunity from Legal and Judicial Prosecution,
[3] Law No. 1 of 2012 Concerning the Granting of Immunity from Legal and Judicial Prosecution, translated from Arabic to English by Amnesty International in *Yemen's Immunity Law – Breach of International Obligations* (March 2012) <www.amnesty.ca/sites/default/files/2012-03-30mde310072012enyemenimmunitylaw.pdf> accessed 10 July 2015.
[4] Ellen L. Lutz and Caitlin Reiger (eds), *Prosecuting Heads of State* (CUP 2009) 12.

This phenomenon has been described as a "justice cascade" that largely originated in Latin America and reverberated worldwide, leading to an increase in universal jurisdiction laws.[5] This wave of trials and legal transformations is also referred to as the 'Pinochet Effect,' following one of the most notorious attempted prosecutions of former political leader, General Augusto Pinochet, who led Chile from 1973-1990.[6] The emergence of the prosecution of political leaders in the Arab region, however, remains a largely unexplored area of this rising trend of individual criminal accountability for political leaders.

The Arab Spring saw criminal prosecutions in the Arab region take centre stage in the pursuit of transitional justice, albeit to varying degrees in every country.[7] Through a comparative case study of Egypt, Libya, Tunisia and Yemen, this thesis presents a critique of mainstream transitional justice theory. This theory is built on the underlying assumption that transitions constitute a shift from non-liberal to liberal-democratic regimes, where measures – often legal – are taken to address atrocities committed during the prior regime.[8] The findings of this research therefore build on the growing critical literature that claims that transitional justice is an under-theorised field and needs to be developed to take into account non-liberal and complex transitions.[9] The ways in which criminal prosecutions of former political leaders have been used in Egypt, Libya, Tunisia and Yemen provide insight that has an important bearing on the predominantly liberal understandings of transitional justice.

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[5] Ellen Lutz and Kathryn Sikkink, 'Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America' (2001) 2 Chicago Journal of International Law 1, 5.

[6] Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press 2005).

[7] The term 'Arab Spring' refers to the mass anti-government uprisings that took place in 2010 and 2011 in Tunisia, Egypt, Libya, Yemen, Bahrain and Syria.

[8] See, for instance, Ruti G. Teitel, *Transitional Justice* (OUP 2000) and Ruti G. Teitel, *Globalizing Transitional Justice: Essays for the New Millennium* (OUP 2014).

[9] I review the critical transitional justice scholarship in the Literature Review section of this chapter.

Summary of Arguments

I argue that transitional justice in the Arab region presents the strongest challenge yet to the transitional justice paradigm, which presumes a shift from violent, non-liberal rule to peaceful, liberal-democratic rule. There are four parts to this argument. First, the non-paradigmatic nature of the Arab region transitions, whereby a renewed form of repressive, non-liberal rule has largely taken shape, warrants a re-thinking of transitional justice and its pursuit in various contexts. Second, the Arab region cases demonstrate that both domestic and international actors pursue competing accountability agendas, thereby weakening claims of a global accountability norm. Third, the emphasis on accountability for corruption and socio-economic crimes as opposed to civil and political rights violations underline the need to develop transitional justice theory. The limited content and extent of the investigations and prosecutions in the four case studies are driven by the controlled nature of the transitions and point to a practice of scapegoating certain high-level officials and a certain set of crimes to avoid the prosecution of others and to show that there has been a break with the former regime. Finally, a re-thinking of transitional justice needs to take into account the absence of pre-existing democratic structures and what this means for criminal accountability prospects in non-paradigmatic transitional contexts.

The term 'transitional justice' is used in this thesis to describe the processes that actors take to address past atrocities. Actors include the state, civil society, victims, the military, individual lawyers, politicians, and the judiciary.[10] Transitional

[10] Chapters 3 and 4 contain a more detailed explanation of the various actors involved in driving and shaping transitional justice processes.

justice processes include a range of mechanisms, such as domestic and international prosecutions, institutional reform, vetting, reparations and truth commissions. This thesis, however, focuses on decisions regarding the prosecution of political leaders in order to ensure a focused comparison between the four country case studies. The focus on prosecutions is also driven by the centrality of prosecutions in the pursuit of transitional justice in the Arab region. Together with domestic prosecutions, this thesis also takes into account the role of international actors in shaping transitional justice decisions, especially within the context of the International Criminal Court's (ICC) involvement in Libya and the role of international actors in negotiating an immunity law in Yemen.

This thesis, then, does not aim to define what is meant by the term 'justice.' Instead, the term 'transitional justice' is used primarily in reference to the tools pursued by various actors in the four case studies with a view to establishing criminal accountability for past atrocities. It is important to note, however, that this thesis does not seek to determine whether certain transitional justice mechanisms such as prosecutions or truth commissions should or should not be implemented. Rather, this thesis provides a critical inquiry of the liberal assumptions of the transitional justice paradigm and calls for a re-thinking of transitional justice theory and practice.

Research Questions

This thesis addresses two interrelated questions. First, it examines the factors that led to decisions regarding the prosecution of political leaders in Egypt, Libya, Tunisia and Yemen. The term 'political leaders' here includes heads of state, former

ministers, and other high-ranking government officials.[11] Second, the thesis considers why there has been an emphasis on corruption and socio-economic crimes over civil and political rights crimes in the investigations and trials that have already taken place. The thesis addresses the first question by examining the *trigger* and *driving* factors that led to the decision to prosecute and not to prosecute. It addresses the second question by exploring the *shaping* factors that affect the content and extent of decisions regarding prosecution. By *content* I mean the types of charges and accusations in the investigations and trials. By *extent* I mean the selection of individuals who were prosecuted and/or investigated.

Significance of the Thesis

The significance of this research is five-fold. First, this thesis provides a critique of transitional justice literature that is overwhelmingly based on the understanding that transitional justice occurs in liberalising contexts. Laurel E. Fletcher and Harvey Weinstein note that the most influential transitional justice scholarship tests, applies, evaluates or theorises the "accepted transitional justice paradigm" and largely falls short of questioning the "foundational assumptions of the field."[12] This thesis aims to address this shortcoming of the field. It does so through a critique largely based on findings from field interviews on the prosecution of political leaders in Egypt, Libya, Tunisia and Yemen between 2012 and 2014 and on scholarly texts. Most criminal prosecutions in the Arab Spring countries have dealt almost exclusively with crimes *of* the transition as opposed to crimes during the

[11] See Methodology section in Chapter 2 for an explanation for why the term 'political leaders' encompasses these individuals.
[12] Laurel E. Fletcher and Harvey M. Weinstein, 'Writing Transitional Justice: An Empirical Evaluation of Transitional Justice Scholarship in Academic Journals' [2015] Journal of Human Rights Practice 1 <http://jhrp.oxfordjournals.org/content/early/2015/05/17/jhuman.huv006.abstract> accessed 15 July 2015.

decades of repressive rule prior to the political transitions. Moreover, most of the complaints and charges to date have had to do with corruption and financial crimes, as opposed to human rights violations. The reasons behind this duality of charges are unclear in the literature on the prosecution of political leaders. Scholars such as Ellen Lutz and Caitlin Reiger have flagged this as an area that requires closer attention.[13]

Most scholarly research focuses on the *outcome* of the decision to prosecute and not to prosecute, without examining the *shape* that these decisions take as a result of the processes they emerge from and the contexts within which they unfold. The emphasis on corruption and socio-economic crimes in the investigations and trials that have taken place in the Arab region therefore warrants a closer examination. These practices have profound implications for the study of transitional justice because they weaken long-standing scholarly assumptions of the liberalising directions of transitions and of transitional justice.

Second, an inquiry into efforts to prosecute in the past – before the 2010/2011 Arab Spring uprisings – is necessary in order to understand the development and execution of the prosecutorial strategy in the four countries after the uprisings. Such an inquiry provides insight into the formative stages of these decision-making processes. Instead of judging the prosecutions and the decisions related to them solely on their outcome, the trigger-driving-shaping prism serves to explain the data collected and ensures a focus on the very making of these decisions.[14] For example, while many would label the Mubarak and Ben Ali trials in Egypt and Tunisia as show trials or politicised trials that fell short of ensuring justice, this conclusion does not take into account the complex factors and the relationship between these factors that formed the processes leading up to the prosecutions. An inquiry into the

[13] Lutz and Reiger (n 4) 280-282.
[14] The trigger-driving-shaping mechanism is derived from process tracing and is explained in the Methodology section in Chapter 2.

formative stages of decisions regarding prosecutions, then, reveals that a variety of factors and actors shaped the decisions. As a result, attributing unfair trials to one factor such as a politicised and weak judiciary falls short of a more comprehensive explanation. Such simplistic inferences fail to take into account other significant factors such as the nature of the transition, civil society, the role of international actors, legal challenges, and so on that shaped transitional justice across the four countries. It is these factors that the research conducted for this thesis aims to identify and explain.

Third, the four case studies are examples of the need to examine *whose interests* transitional justice serves and what these interests are, as Thomas Obel Hansen suggests.[15] Such an analysis is important for the deconstruction of the use and abuse of transitional justice in varied political contexts. The role of the judiciary, the military, civil society, and of interim governments is taken into account when addressing the use of transitional justice mechanisms. By examining the factors that triggered, drove and shaped decisions regarding the prosecution of political leaders in the four case studies, this thesis will enhance our understanding of how transitional justice is pursued in such non-paradigmatic contexts. The findings of this research therefore build on the growing literature that claims that transitional justice is an under-theorised field and needs to be developed to take into account non-liberal and complex transitions.

This thesis does not attempt to propose a new theory of transitional justice. Rather, it seeks to challenge the predominant transitional justice paradigm, generally understood as a set of mechanisms to address past atrocities through the use of judicial and non-judicial measures, by arguing that it falls short in explaining non-

[15] Thomas Obel Hansen, 'Transitional Justice: Toward a Differentiated Theory,' (2011) 13 Oregon Review of International Law 1, 2-3.

paradigmatic transitions. The Arab region case studies herein present a strong challenge to the existing theory of transitional justice, which is rooted in liberal and hence non-universal values.

Fourth, the timing of this research and of the questions asked in every interview conducted across the four countries is crucial. This thesis analyses the details of the early stages of decisions regarding prosecution from actors who were directly and indirectly involved in the prosecutions. As time passes, memory of such details will wane, as was the case in Latin America and other parts of the world. I refer to what Kathryn Sikkink coins as the "frailties of human memory":[16]

> When I first started the research for this book, I wracked my brains for a memory of the first time one of the activists from Argentina or Uruguay mentioned the possibility of prosecuting state officials for human rights violations, and I could not pinpoint the moment. Surely Emilio Mignone or Juan Mendez, each immersed in the human rights legal culture of the time, was already talking about prosecutions in 1981? Emilio Mignone died in 1998, and I can no longer rely on his impeccable memory. Juan Mendez can't pinpoint the moment, either…For almost two years I was part of a network that later became a main advocate for individual criminal prosecution, and yet I cannot identify the instant when the idea first appeared and started to flourish. So, my research began as a kind of detective work to locate the sources of the ideas and practices that I would later call the "justice cascade."[17]

By conducting this research shortly after the investigations and trials began, I avoided having to pick at the vague memories of those I interviewed. Instead, I was able to draw a clearer and more accurate picture of what happened while the memories were still fresh. The novelty of the trials, then, serves as an advantage for valuable research into the emergence of individual criminal accountability in a region that is new to it.

Finally, the context of the Arab countries and their transitions are fundamentally different from previous studies on countries in other regions. Factors

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[16] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World* Politics (WW Norton 2011) 11.
[17] ibid 10-11.

that have played an important role in countries in Latin America, such as international and regional human rights mechanisms and the use of universal jurisdiction laws may not be as relevant to the Arab region.[18] Moreover, transitional justice literature traditionally regards a transition as one that constitutes a shift from an authoritarian regime to a liberal-democratic regime.[19] The case studies analysed by this thesis challenge these presumptions of paradigmatic liberal transitions, as serious questions regarding the absence of a liberal change are ubiquitous in the analyses of the Arab Spring.

Structure of the Thesis

This chapter has introduced the research objectives of this thesis and has explained their significance. The next section provides an overview of the relevant literature within which the thesis is situated. Chapter 2 will then explain the methodology and case selection. It will also introduce the case studies by presenting the status of prosecutions in each country. Chapter 3 will present the findings from the interviews conducted across the four case studies. It is organised by country and themes and sub-themes within each case study. The chapter concludes with a summary of the key triggers, drivers and shapers that impacted decisions regarding prosecution. It therefore lays the foundation for the subsequent chapter, which reflects on these findings. Chapter 4, then, provides a critique of mainstream transitional justice theory with a focus on prosecutions. Using scholarly literature and the findings generated from interviews in each of the four case studies as presented in Chapter 3, this chapter challenges the predominant understanding that

[18] Tunisia, however, benefited significantly from universal jurisdiction laws in pre-transition prosecution efforts, as explained in Chapter 3.
[19] Ruti G. Teitel, *Transitional Justice* (OUP 2000).

transitional justice uniformly occurs in liberalising contexts.[20] The findings of this research therefore build on the growing literature that claims that transitional justice is an under-theorised field and needs to be developed to take into account non-liberal and complex transitions. The concluding chapter summarises the findings and analyses of the thesis and identifies areas for further research.

Literature Review

Introduction

The practice of transitional justice includes a number of judicial and non-judicial measures, usually in the form of criminal prosecutions, vetting, truth commissions, reparations and other national reconciliation methods. Kirsten J. Fisher and Robert Stewart define transitional justice as "the study and practice of trying to establish principled justice after atrocity by employing a range of approaches, including both judicial and non-judicial measures, to help address a legacy of mass human rights abuses."[21] Trials are usually at the forefront of transitional justice mechanisms and serve as a strong symbol of a break with the former regime. Some argue that transitional justice is under-theorised, as it is increasingly unable to explain its divergent objectives in varied contexts.[22] Others, such as Paige Arthur, argue that there is no single theory or definition of transitional justice.[23] In their

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[20] As I explain shortly in the literature review, the predominance of this understanding is starting to diminish with the emergence of the critical scholarship on transitional justice. However, the classical transitional justice paradigm, which assumes a shift from authoritarian to liberal democratic rule, still holds significant ground and remains the principal point of reference from which analyses of varied transitional contexts are formed.

[21] Kirsten J. Fisher and Robert Stewart (eds), *Transitional Justice and the Arab Spring* (Routledge 2014) 1.

[22] See Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth (eds), *Transitional Justice Theories* (Routledge 2014).

[23] Paige Arthur, 'How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 Hum. Rts. Q. 321, 359.

analysis of transitional justice scholarship between 2003 and 2008, Fletcher and Weinstein highlight that transitional justice is interdisciplinary and note that:

> Law, political science, and sociology are the disciplines that dominated the field as reflected in academic journals. The most influential transitional justice articles in the social sciences and law suggested that readers were drawn to scholarly treatments that theorized the field or were analytical in nature. Scholars were wrestling with basic questions with regard to what transitional justice is and how it works.[24]

Few scholars, then, have questioned the foundational assumptions of transitional justice.[25]

This section presents a literature review of transitional justice scholarship since the early 1990s, when the field came to fruition following the fall of military dictatorships in Latin America. Given the research objective of this thesis, the review of the literature focuses on the role of criminal prosecutions and does not delve into commentary on the various other mechanisms of transitional justice, such as truth commissions, reparations, and vetting. I first provide an overview of the tenets of mainstream transitional justice theory. This is followed by the corresponding critiques of this theory. Third, I review the discussions and debates on accountability for socio-economic and corruption crimes. Fourth, I analyse the accounts of the role of international and domestic factors as drivers of decisions regarding the prosecution of political leaders. Finally, I include a brief review of the emerging scholarship on transitional justice in the Arab region. Reflections on how my findings from the Arab region case studies challenge, confirm, and build upon the existing literature are presented in Chapter 4.

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[24] Fletcher and Weinstein (n 12) 1.
[25] ibid.

Mainstream Transitional Justice Theory: A liberalising process

Transitional justice scholarship is a rapidly evolving field that has become increasingly interdisciplinary, drawing contributions from legal scholars, political scientists, historians, sociologists and practitioners. The term 'transitional justice' was coined in the early 1990s during discussions regarding post-conflict justice following the fall of the Soviet Union and the transitions to democracy in Latin America in the 1980s.[26] Neil J. Kritz's three volumes on transitional justice, published in 1995, in many ways set the stage for further scholarship on the dilemmas of what became known as transitional justice in various parts of the world.[27] Ruti Teitel's seminal work on transitional justice in 2000 laid the foundations of transitional justice theory and highlighted it as a process of liberalisation.[28] Here, I outline the tenets of mainstream transitional justice theory as presented by Teitel and other prominent transitional justice scholars, followed by critiques of the transitional justice paradigm.

Teitel's account of transitional justice is built on the underlying assumption that transitions constitute a shift from authoritarian, non-liberal regimes to liberal-democratic regimes.[29] Measures – often legal – are taken to address atrocities

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[26] William Schabas, 'Transitional Justice and the Norms of International Law' (Annual meeting of the Japanese Society of International Law, Kwansei Gakuin University, 8 October 2011) <www.jsil.jp/annual_documents/2011/fall/schabas_trans_just911.pdf> accessed 15 July 2015. Teitel explains when she first coined the term: "…during the late eighties, at the time of the Soviet collapse, I introduced the term 'transitional justice' on the heels of the Latin American transitions away from military rule. In proposing this term, my aim was to account for the self-conscious contingent construction of a distinctive conception of justice associated with periods of radical political change after past oppressive rule." Ruti G. Teitel, *Globalizing Transitional Justice: Essays for the New Millennium* (OUP 2014) xii.

[27] Neil J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Vols. 1-3 USIP 1995).

[28] Teitel, *Transitional Justice* (n 19).

[29] ibid; Ruti Teitel, *Globalizing Transitional Justice: Essays for the New Millennium* (OUP 2014).

committed during the prior regime.[30] Recognising the extraordinary role of law in transitions and the thin line between fair prosecutions and politicised justice, Teitel describes transitional justice as:

> [C]ontextualized and partial: It is both constituted by, and constituted of, the transition. What is 'just' is contingent, and informed by prior injustice….While the rule of law ordinarily implies prospectivity, transitional law is both backward-and forward-looking, as it disclaims past illiberal values and reclaims liberal norms.[31]

Teitel attributes criminal justice to this "liberalizing ritual" of states undergoing political transition and explains that criminal proceedings affirm "the core liberal message of the primacy of individual rights and responsibilities."[32] She emphatically denotes the significant role of criminal prosecutions as the "leading transitional response" that is able to publicly and authoritatively convey "the political differences that constitute the normative shift from an illiberal to a liberal regime."[33] While Teitel begins with a caveat mentioning that her book rejects "the notion that the move toward a more liberal democratic political system implies a universal or ideal norm," she provides no explanation for how transitional justice operates in non-paradigmatic, illiberal transitions. Instead, she provides an analysis of the role of law in transitions, or in times of political change:

> The aim here is to shift the focus away from the traditional political criteria associated with liberalizing change to take account of other practices, particularly the nature and role of legal phenomena. The constructivist approach proposed by this book suggests a move away from defining transitions purely in terms of democratic procedures, such as electoral processes, toward a broader inquiry into other practices signifying acceptance of liberal democracy and the rule-of-law.[34]

Teitel's point of departure, then, is rooted in transitions constituting a shift from authoritarian rule to liberal democratic rule.

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[30] ibid.
[31] Teitel, *Transitional Justice* (n 19) 96.
[32] ibid 30.
[33] ibid 104.
[34] ibid 5.

The Necessity of Pre-Existing Democratic Institutions

Teitel underlines the necessity of already existing democratically functioning institutions in order to avoid politicised justice and unfair trials during a transition.[35] Similarly, Lutz and Reiger argue that "accountability, by itself, is neither sufficient nor possible absent other functioning democratic institutions, including an independent judiciary…"[36] Luc Huyse argues that the democratic institutions that existed prior to the four years of repressive rule in Belgium, France and the Netherlands were able to survive and were not completely eliminated following World War II. This meant that "four years of occupation and collaboration were insufficient time for the authoritarian regime's legal culture and codes to take root."[37] This may, as Huyse suggests, explain the speed with which prosecutions were initiated.[38] In contrast, communist regimes in Czechoslovakia, Hungary and Poland had lasted for 40 years after World War II. This meant that decision-making on crime and punishment was much slower and "[t]he legal culture created by communism was firmly established and [proved] hard to eradicate."[39]

Related to this argument is whether prosecutions strengthen or weaken fragile transitions to democracy. Many of the discussions in Kritz's volume question whether democratic consolidation is best pursued through reconciliation and amnesty laws as opposed to prosecutions, given the potentially "destabilizing effects of politically charged trials."[40] This, however, assumes that the intention in both

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[35] ibid 30.
[36] Lutz and Reiger (n 4) 4.
[37] Luc Huyse, 'Justice After Transitions: On the Choices Successor Elites Make in Dealing with the Past' in Neil J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Vol. 1 USIP 1995) 111.
[38] ibid.
[39] ibid.
[40] Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' in Neil J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Vol. 1 USIP 1995) 379.

scenarios is *democratic* consolidation, which as will be discussed in Chapter 3 and in the context of the Arab region, is not necessarily the case.

As a result of these dilemmas, prosecutions take time. Elin Skaar's nuanced account of the developments within the Argentinian judiciary and their relation to the variations in trials over time is helpful in understanding the role of institutional reform in facilitating fair criminal prosecutions.[41] In the case of Argentina, Skaar argues that the initial absence of trials in the immediate aftermath of the transition was in part due to the ruling elite's preferences, but also to politically biased courts. There was a failure on the part of executives to address human rights violations for fear of military retaliation or for lack of political will, which played an important part in the absence of trials. However, as Skaar explains, "the lack of justice at the time of transition [is also a result of] weak and often partisan courts that favored whoever was in power, including the military."[42] As the judiciary in Argentina became increasingly independent, the number of prosecutions of former leaders also increased.

Transition Type and the Likelihood of Prosecutions

One of the arguments scholars often make regarding the relationship between the type of transition and the likelihood of prosecutions concerns 'ruptured' versus 'pacted' or 'negotiated' transitions.[43] The argument goes that in ruptured transitions, where dramatic coups and mass demonstrations succeed in overthrowing the regime, prosecutions are more likely to take place than in transitions that are carefully

[41] Elin Skaar, *Judicial Independence and Human Rights in Latin America* (Palgrave MacMillan 2011).
[42] ibid 11.
[43] See Neil J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Vol. 1 USIP 1995); Alexandra Barahona De Brito, Carmen Enriquez, and Paloma Aguilar (eds) *The Politics of Memory and Democratization* (Oxford Scholarship Online 2001); Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World* Politics (WW Norton 2011).

negotiated, such as the *ruptura pactada* in Spain and the pacted transitions of Uruguay and Brazil. This is because in negotiated transitions, bargaining is likely to take place between the outgoing elites (usually a military dictatorship) and the incoming elites, who often negotiate agreements on amnesties or other ways of barring prosecution. Ruptured transitions, on the other hand, leave less room for such negotiation and result in a more drastic change in the political scene.[44]

Samuel Huntington breaks down these types of transitions further by placing them in three categories: transformations, replacements and transplacements. Transformations occur when the authoritarian regime in power wields great control in its transformation toward a democratic system, as in the case of Brazil.[45] Prosecutions are unlikely in this kind of transition. Transplacements occur when the outgoing government negotiates with the opposition the terms of the transition, making prosecutions only slightly more likely. Replacements, on the other hand, are ruptured transitions whereby the old regime is replaced through a coup or civil war, resulting in a much higher possibility for prosecutions to take place.

Differences between negotiated and ruptured transitions and the resulting decisions regarding the prosecution of former leaders are striking in the cases of Spain, Portugal and Greece. Sikkink compares these three countries, as does Antonio Costa Pinto with Spain and Portugal. Spain, where General Francisco Franco's

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[44] See Samuel Huntington, 'The Third Wave: Democratization in the Late Twentieth Century' in Neil J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Vol. 1 USIP 1995); Antonio Costa Pinto, 'Settling Accounts with the Past in a Troubled Transition to Democracy: The Portuguese Case' in Alexandra Barahona De Brito, Carmen Enriquez, and Paloma Aguilar (eds) *The Politics of Memory and Democratization* (Oxford Scholarship Online 2001); Alexandra Barahona De Brito, 'Truth, Justice, Memory and Democratization in the Southern Cone,' in *The Politics of Memory and Democratization,* in Alexandra Barahona De Brito, Carmen Enriquez, and Paloma Aguilar (eds) *The Politics of Memory and Democratization* (Oxford Scholarship Online 2001); Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World* Politics (WW Norton 2011).

[45] Samuel Huntington, 'The Third Wave: Democratization in the Late Twentieth Century' in Neil J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Vol. 1 USIP 1995).

regime did not collapse with his death in 1975 but instead went through a negotiated transition to democracy, has experienced no trials to this day despite large-scale atrocities committed during Franco's rule. Portugal and Greece, on the other hand, experienced ruptured transitions that saw some trials take place in the immediate aftermath of the overthrows.[46] As Pinto points out, "Portugal and Spain are two paradigmatic cases of transition to democracy in the 1970s. The presence in the former and absence in the latter of transitional justice measures is doubtless linked to the nature of the process of rupture in Portugal and of *ruptura pactada* in the case of Spain…"[47]

In the case of an overthrow of a leader, then, the likelihood of prosecutions is high. Huyse argues that in such cases, "[a]lmost no political limits exist. Full priority can be given to the thirst for justice and retribution."[48] On the other hand, prosecutions are unlikely to take place where a compromise-based transition has unfolded. This, Huyse continues, is largely because former regime members and forces still hold enough power and control to be able "to dictate the terms of the transition," which often includes an amnesty law.[49] "The need to avoid confrontation," Huyse observes, "becomes the rationale for exchanging criminal prosecution and severe lustration for a policy of forgiveness."[50]

The absence of any substantial discussion in the literature on the role of geopolitics in shaping domestic decisions regarding prosecution is noteworthy. Given that Huyse and others' observations are largely based on the experiences of Latin America and Central and Eastern Europe, this is perhaps not surprising. The

[46] Sikkink, *The Justice Cascade* (n 16).
[47] Antonio Costa Pinto, 'Settling Accounts with the Past in a Troubled Transition to Democracy: The Portuguese Case' in Alexandra Barahona De Brito, Carmen Enriquez, and Paloma Aguilar (eds) *The Politics of Memory and Democratization* (Oxford Scholarship Online 2001).
[48] Huyse (n 37) 114.
[49] ibid.
[50] ibid.

Arab region cases and the role of geopolitics in certain countries there, however, present questions that diversify the 'nature of transition type' discussions in the existing literature.[51]

Skaar contributes to the debate on transition type in her observations on amnesty laws and the pursuit of non-judicial measures in various transitions. She argues that negotiated transitions often result in amnesty laws that prevent the prosecution of political leaders and instead result in truth commissions and other non-legal measures. Skaar adds that, "Only where there was an explicit military defeat – in Argentina – was it considered politically possible to even suggest holding the military to account…"[52] Par Engstrom and Gabriel Pereira make a similar observation, while also underlining the role of the gradual return of the military to the barracks. They contend that the changing character of civil-military relations shaped transitional justice in Argentina.[53] The gradual retreat of the military from political power "provided a propitious context for ambitious attempts to hold military and police personnel accountable for their crimes. The contrast with other regional countries, such as Brazil for example, is striking in this regard."[54] Thus, the case of Argentina illustrates that even in situations where a ruptured transition took place, time is needed for the consolidation of the political transition itself and, as Skaar outlines, for the judiciary to establish its independence in order to adequately carry out prosecutions.

Despite, or perhaps in response to, the dichotomous approach in the early transitional justice literature that contrasts ruptured and negotiated transitions,

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[51] The role of geopolitics in the decisions regarding prosecution in the Arab region is discussed in Chapters 3 and 4.
[52] Skaar (n 41) 11.
[53] Par Engstrom and Gabriel Pereira, 'From Amnesty to Accountability: The Ebbs and Flows in the Search for Justice in Argentina' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012) 120.
[54] ibid.

commentary on prosecution decisions in transitions that do not neatly fall within those two categories almost simultaneously began to emerge. Jose Zalaquett, for example, points to lingering political constraints, even in cases where a democratic election has taken place. In his discussion on Argentina, he contends that "[T]he government may have had the legitimacy of a democratic election, but the military remained a cohesive force with control over the weapons."[55] Zalaquett attributes this to the initial failure of the Argentinian authorities to continue to carry out prosecutions of military chiefs. It points to an ethical dilemma undergirding decisions regarding prosecution. Zalaquett quotes Max Weber in his explanation of this dilemma:

> In ambiguous transitional situations, dealing with past human rights violations is indeed a wrenching ethical and political problem…The approach of democratic leaders in such difficult transitional situations should, then, be based on the ethical maxim that Max Weber lucidly characterized in his famous lecture, *Politics as a Vocation:* Political leaders should be guided by the ethic of responsibility, as opposed to the ethics of conviction…He stressed the fundamental difference between acting according to an ethical precept regardless of the outcome, and acting while considering the predictable consequences of one's action. In Weber's view, politicians must always be guided by an ethic of responsibility.[56]

Ambiguous transitions, then, are not a new phenomenon that arose out of the Arab Spring experiences. The classic case of Argentina and several other Latin American countries point to the shortcomings of the ruptured versus negotiated transition argument. This is especially the case when analysing the course of decisions regarding prosecution over time. Sikkink correctly notes that as the examples of Guatemala, Chile and Uruguay show, "a ruptured transition was no longer a precondition for prosecutions."[57] In fact, it may have never been a precursor to prosecutions, as the case of Argentina in the early post-transition period shows.

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[55] Jose Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations' in Neil J. Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Vol. 1 USIP 1995) 205.
[56] ibid.
[57] Sikkink, *The Justice Cascade* (n 16) 83.

Moreover, countries that underwent heavily pacted or negotiated transitions began to pursue prosecutions, especially since the 1990's. This, Sikkink argues, illustrates that "the political world is not static."[58] The dichotomy of ruptured versus negotiated transitions and their impact on the prosecution of political leaders is therefore no longer sufficient to explain decisions regarding criminal accountability for crimes of the former regimes. This point, however, has not been sufficiently developed in the literature, as the reflections on the Arab region in Chapter 4 will discuss.

Limited Criminal Sanction: A strategy to preserve a democratic transition

If the purpose of prosecutions is to ensure some form of accountability while facilitating a transition to democracy, then as some scholars argue, prosecutions need to be strategically limited. Teitel's explanation of the limited criminal sanction is useful here. She states that both prosecutions that do not result in full punishment and prosecutions of a select number of individuals is what distinguishes transitional criminal justice from criminal justice in ordinary times.[59] Teitel explains that selective prosecutions are a pragmatic strategy to ensure "the return to a liberal state":[60]

> The limited criminal sanction offers a pragmatic resolution of the core dilemma of transition; namely, that of attributing individual responsibility for systemic wrongs perpetrated under repressive rule. The basic transitional problem is whether there is any theory of individual responsibility that can span the move from a repressive, to a more liberal, regime. Indeed, the emergence of the limited sanction suggests a more fluid way to think about what punishment does. In fact, there has been a rethinking of the theory of punishment: wrongdoing can be clarified and condemned without necessarily attributing individual blame and penalty... In the extraordinary circumstances of radical political change, some of the purposes that

[58] ibid.
[59] Ruti G. Teitel, *Globalizing Transitional Justice: Essays for the New Millennium* (OUP 2014) 99. Teitel cites several historical examples where such a limited form of criminal sanction was pursued. See Ruti G. Teitel, *Globalizing Transitional Justice: Essays for the New Millennium* (OUP 2014) 99-100.
[60] ibid 102.

> ordinarily are advanced by the full criminal process can be advanced instead by the sanction's more limited form.[61]

Diane Orentlicher echoes this view and argues for the prosecution of a select, high-level set of individuals to avoid a backlash from the military, as happened in Argentina in the early post-transition period.[62] She points, however, to the challenge in identifying "appropriate" criteria for this limited selection of defendants.[63] The risk of arbitrariness, she adds, can be minimised by developing criteria that closely reflect distinctions based on degrees of culpability.[64] I will revisit this discussion on the limited criminal sanction and its relevance to the Arab region case studies in Chapter 4.

Critical Transitional Justice Literature

The above section reviewed the literature on transitional justice from the early 1990s, with reference to the influential works of Kritz's edited volumes, Teitel's theorising of transitional justice in 2000, and others.[65] Since then, the proliferation of transitions that do not follow the path from dictatorship to constitutional and civilian democracy have prompted some scholars to re-examine the principles and objectives of transitional justice. Cases such as Uganda, Colombia, Sudan and Morocco illustrate that transitional justice takes place in situations where there has been no fundamental transition, or where human rights abuses continue to be perpetrated.[66] Mainstream transitional justice theory, which

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[61] ibid 100, 101.
[62] Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (n 40) 404-405. However, Orentlicher and others in this volume were writing in 1995, before the second wave of prosecutions of military chiefs in Argentina took place.
[63] ibid 408-409.
[64] ibid.
[65] Krtiz (n 27); Teitel, *Transitional Justice* (n 19).
[66] Thomas Obel Hansen, 'The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field' in Susanne Buckley-Zistel, Teresa Koloma

operates on the assumption that transitional justice occurs in liberalising contexts, has thus come under increasing scrutiny in recent scholarship.

For example, Obel Hansen, Hannah Franzki and Maria Carolina Olarte critique the limitations of this liberal conception of transitional justice by pointing to the simple fact that "transitional justice occurs in radically different contexts."[67] Cases displaying varied, non-liberal transitions where transitional justice is actively pursued cannot, then, be explained by the mainstream theory of transitional justice. As Obel Hansen observes, transitional justice takes place in cases that are "fundamentally different from the type of cases around which the field was formed."[68] The cases around which the field was formed are largely drawn from Latin America, where the transitions from military dictatorships to civilian democracies contrast with the varied transitions that unfolded in the Arab region.[69] The emergence of literature that is critical of the explanatory power of mainstream transitional justice theory is, then, crucial for our understanding of transitional justice as both a field of research and of practice. I will expand on how the Arab region case studies challenge the mainstream assumptions, several of which have been critiqued by Obel Hansen and others, in Chapters 3 and 4. Here, I review the critiques of mainstream transitional justice theory as presented by Obel Hansen, Franzki and Olarte.

Using examples such as Chad, Rwanda, Haiti and Uganda, Obel Hansen illustrates that transitional justice takes place in transitions to non-liberal, non-

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Beck, Christian Braun and Friederike Mieth (eds), *Transitional Justice Theories* (Routledge 2014) 109. See also Naomi Roht-Arriaza, 'Editorial Note' (2013) 7 IJTJ 383.

[67] Thomas Obel Hansen, 'The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field' in Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth (eds), *Transitional Justice Theories* (Routledge 2014).

[68] ibid 109.

[69] The transitional justice field is also largely formed around the experiences of Central and Eastern Europe. See Neil J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Vols. 1-3 USIP 1995).

democratic and repressive regimes. Moreover, transitional justice in such cases is used to consolidate repressive rule in the new regime. While he notes the diversity of non-liberal transitions and the consequent difficulty in theorising about them, he presents three questions that arise from the cases of transitional justice in non-liberal transitions.[70] First, what types of crimes were committed and what is the time span of the crimes that transitional justice mechanisms are expected to address? Second, how does ongoing violent conflict impact the pursuit of transitional justice? Do security and stability take precedence over the consolidation of liberal democratic rule? Third, how does a country's level of poverty affect its ability to pursue transitional justice? In other words, without effective judicial institutions in place, can transitional justice be pursued?

Despite his critiques of mainstream transitional justice theory, Obel Hansen echoes the views of Teitel, Skaar and Lutz and Reiger regarding the necessity of functioning judicial institutions. Obel Hansen suggests that socio-economically poorer societies tend to suffer from the absence of well-functioning state institutions that are needed in order to pursue a transitional justice that furthers liberal democratic rule.[71] He observes that the so-called liberal and wealthier societies that experienced transitional justice also possess well-functioning state institutions and are therefore in a better position to pursue a liberalising transitional justice than their poorer counterparts. However, Skaar's analysis of the decades it took for prosecutions to become full-fledged in Argentina demonstrates that the wealth of a country is but one of several factors, not least of which is an independent judiciary,

[70] Obel Hansen, 'Transitional Justice: Toward a Differentiated Theory' (n 15) 22.
[71] ibid 21.

that plays a part in ensuring adequate prosecutions that move transitional justice in a liberalising direction.[72]

Given that transitional justice can limit liberalisation and democratisation, it is important, as Obel Hansen argues, to examine *whose interests* transitional justice serves:

> [M]ost observers think of transitional justice as something that is inherently "good," at least to the extent it preserves the rights of victims and perpetrators…there is a need for more rigorous scrutiny of the intentions behind establishing transitional justice mechanisms and, in particular, at the level of the general scholarship, a need for adjusting the perception that transitional justice generally aims at, and achieves, liberalization and democratization.[73]

Rather than conforming to a blueprint that was developed in Latin America, Eastern Europe, or by international non-governmental organisations (NGOs), prosecutions and other transitional justice mechanisms, then, are pursued for various reasons in various contexts. Obel Hansen cites, among others, the example of Chad, where a truth commission was set up as a political move to defame former President Hissène Habré (1982-1990).[74] In Rwanda, the new regime pursued prosecutions while it continued to commit human rights atrocities, but not at the level of genocide. The case of Rwanda also illustrates that despite flawed prosecutions that often contravened human rights standards, restrictions on freedom of expression regarding 'genocide ideology,' and the projection of a particular Rwandan history at the expense of other historical accounts, a process of transitional justice still took place. It did not conform to the orthodox liberalising process that unfolded in most transitions in others parts of the world, but a form of transitional justice nevertheless emerged. Obel Hansen, therefore, urges an inquiry into what "other ends" are pursued in such cases and argues that transitional justice should be evaluated

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[72] See Skaar (n 41).
[73] Obel Hansen, 'Transitional Justice: Toward a Differentiated Theory' (n 15) 18.
[74] ibid 17.

according to those ends.[75] He contends that a context-specific understanding of such goals is important and that scholars should "consider more rigorously how tensions between various claims of transitional justice should be dealt with" so that an "updating" of transitional justice theory can take hold.[76]

On a theoretical level, critics of mainstream transitional justice theory point to its inherently political and liberal values, despite marketing by its proponents as a universal phenomenon that could and should apply across states.[77] Franzki and Olarte, for instance, provide an engaging discussion on transitional justice as part of a "demo-liberal project."[78] They go further and attribute transitional justice to the broader neo-liberal socio-economic order. They charge transitional justice with falling short of addressing and even enabling structural inequalities:

> [T]ransitional justice seeks to establish liberal democratic orders, marginalizing other, wider notions of democracy which put stronger emphasis on democratic control of the economy and/or social equality. In solving the 'problematic' of liberalizing transitions, transitional justice scholarship is value-bound not only in that it militates for (an idealized) liberal democracy, but also in that it contributes to the delegitimation of the economic counterpart of actually existing liberal democracies, that is, market economics, mostly in a neo-liberal variant…Transitional justice's uncritical embracing of the aim of liberal democracy speaks of the success of political liberalism to present itself as post-political, that is, as a political order that is acceptable to everyone…If we accept that political liberalism is not *only* political (as opposed to cultural, economic) but *already* political, 'transitional justice' has to be considered part of this politics in so far as it seeks to legitimize liberal democratic institutions.[79]

Transitional justice, then, is a highly political project that aims to strengthen liberal democracy and market economy. As a result, it perpetuates social inequality in certain contexts, exacerbating injustices that the 'demo-liberal' project proclaims to address.

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[75] ibid 20.
[76] ibid 22, 41.
[77] See, for example, the International Center for Transitional Justice <www.ictj.org> and the Coalition for the International Criminal Court <www.coalitionfortheicc.org>.
[78] Hannah Franzki and Maria Carolina Olarte, 'The political economy of transitional justice. A critical theory perspective' in Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth (eds), *Transitional Justice Theories* (Routledge 2014) 202.
[79] ibid 202, 206.

Paul Gready and Simon Robins similarly discuss the "foundational limitations" of transitional justice.[80] They describe two principal limitations: the pursuit of liberal democracy as the endpoint of transitional justice and the overly state-centric approach to transitional justice processes. They argue for a transformative justice that places an emphasis on process rather than on predetermined outcomes.[81] This, they contend, should be done by involving victims and survivors as agents of change and through less top-down approaches whereby the state drives the transitional justice process.[82] They add that, "In addition to the transitional justice agenda being externally driven in many contexts, the state-centric focus it brings to examining violent pasts discourages the engagement of affected populations."[83] While Gready and Robins are critical of the overbearing role of external actors in local transitional justice processes, they note that certain types of external intervention can facilitate these processes. These external interventions, however, should take on a multi-dimensional approach that incorporates anthropology, social science, development, and human rights. Finally, they argue that reparations are the best mechanism for addressing socio-economic grievances as they offer "both corrective and distributive justice."[84]

Socio-Economic Accountability and Transitional Justice

Accountability for corruption and economic crimes and their role in prosecutions vis-à-vis human rights violations have important implications for transitional justice research. One debate centres on whether or not transitional justice

[80] Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice (2014) 8 IJTJ 339, 341.
[81] ibid 352, 358.
[82] ibid 360.
[83] ibid 343.
[84] ibid 347.

mechanisms, including prosecutions, should expand to address corruption and socio-economic crimes. Dustin N. Sharp, for example, argues that economic violence has been the "blind spot of transitional justice" as it is rarely scrutinised in comparison with human rights violations.[85] Others question why trial charges are heavy on one set of crimes at the expense of the other. Lutz and Reiger emphasize that trends to prosecute perpetrators who engage in corruption have been "largely unremarked by the international justice movement" and should be explored.[86] They cite the Asian examples of South Korea, India, Pakistan, Nepal, the Philippines and Indonesia, where senior officials were tried for corruption and financial crimes, but not for human rights crimes. They posit that reasons for why this is so include: the lower costs of trying former leaders for financial crimes than for human rights crimes (as a lower number of people are usually implicated in economic crimes), resource allocation, and political will. Significantly, they note that popular opinion may find a government official's involvement in corruption and financial crimes more disturbing than that official's perpetration of human rights crimes such as murder and torture.[87] Still others critique the transitional justice project itself for enabling socio-economic inequalities, making it difficult to seek accountability for such crimes, as Franzki and Olarte explain.[88] I will review these main questions on socio-economic accountability in turn.

In her account of the status of transitional justice in Egypt, Reem Abou-El-Fadl argues that conventional transitional justice falls short of addressing two key areas that are relevant to Egypt. First, the culpability of foreign actors, such as the Central Intelligence Agency (CIA), in supporting the former regime and its

[85] Dustin N. Sharp, 'Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice' (2012) 35 Fordham International Law Journal 780, 782.
[86] Lutz and Reiger (n 4) 10.
[87] ibid 281.
[88] Franzki and Olarte (n 78).

atrocities, and secondly, the former regime's violation of social and economic rights – neither of which, she argues, is adequately addressed in the transitional justice literature. She observes that stolen public funds and related crimes were a core focus of the 2011 uprising in Egypt and their articulation in the demands of the protesters played a key role in bringing former state officials to trial. She concludes that, as the Egyptian example shows, it is important that transitional justice practitioners take historical context into account to ensure a more comprehensive implementation of justice measures that better suits the needs of Egypt.[89] The slogan of the Egyptian uprising, 'Bread, Freedom, Social Justice,' attests to the importance Egyptians attached to ensuring that both their socio-economic and human rights are respected.

The invisibility of the economic dimension of transitional justice is further highlighted by Zinaida Miller, who argues that its inclusion would help ensure a more comprehensive accountability that would prevent renewed violence and inequality. She also cites the role of multinational corporations and other external actors in perpetuating socio-economic crimes at the domestic level:

> In one sense, this might simply echo the limitations of human rights discourse more generally, in which questions of socioeconomic rights are consistently underplayed while those of civil and political rights are emphasized, or where redistribution is generally backgrounded for the sake of punishing clearly defined crimes under a standard of individual accountability…By removing economic questions from transitional justice, the literature and institutions make invisible both the economic causes of conflict and the effects of the post conflict economic situation on the possibility for renewed violence related to past grievances or current experiences of maldistribution. In addition, they may erase from consideration the role in conflict of powerful outside states or multinational corporations, making transnational structural imbalances seem irrelevant with regard to internal violence or repression[90]

Habib Nassar similarly raises the problem of crony capitalism in his account of transitional justice and the Arab Spring and references the role of international

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[89] Reem Abou-El-Fadl, 'Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will' (2012) 6 (2) IJTJ 318.

[90] Zinaida Miller, 'Effects of Invisibility: In Search of the 'Economic' (2008) 2 (3) IJTJ 266, 268, 287.

financial institutions in supporting socio-economic rights violations.[91] As Franzki and Olarte argue, socio-economic accountability has been absent from transitional justice because it has wrongly been relegated to "an allegedly non-political economic realm."[92] They add that this is not a coincidence, but a consequence of the legacy of the transition to democracy scholarship, which falls short of structural analysis:

> In embracing the notion of liberal democracy as the only possible meaning of democracy, [transitional justice literature] fails to reflect on the fact that transitologists, concerned above all with political stability, favoured this constitutional arrangement precisely because it would *not* put in danger the economic interests of pre-transition elites…we suggest that rather than merely making normative arguments for the inclusion of social and economic rights into existing transitional justice mechanisms and research, critical studies should provide analyses of why those dimensions have been excluded so far, and to what extent this exclusion is due to the very normative preference for 'transitions' (i.e. gradual and stable change).[93]

Accountability for socio-economic crimes is not, then, simply one of the "blind spots of the field of transitional justice."[94] It is, according to Franzki and Olarte, part and parcel of the demo-liberal transitional justice project and a wider neo-liberal socio-economic project that perpetuates inequalities.[95] In a similar vein, Paul O'Connell deems the prospects for socio-economic accountability far from promising. A political preference for neo-liberal globalisation, he argues, means that it is unlikely that socio-economic rights will be legally protected. He refers to domestic courts' "tacit and implicit acceptance of neo-liberal orthodoxy" which makes the judicial protection of socio-economic rights unlikely.[96]

Darren Hawkins argues that a focus on economic and social rights generally yields less successful results than advocacy for civil and political rights. He makes

[91] Habib Nassar, 'Transitional Justice in the Wake of the Arab Uprisings: Between Complexity and Standardisation' in Kirsten J. Fisher and Robert Stewart (eds), *Transitional Justice and the Arab Spring* (Routledge 2014). See also Reem Abou-El-Fadl's discussion on the role of external actors and socio-economic crimes in Egypt in Reem Abou-El-Fadl, 'Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will' (2012) 6 (2) IJTJ 318.
[92] Franzki and Olarte (n 78) 207-208.
[93] ibid 213-214.
[94] Sharp, 'Addressing Economic Violence in Times of Transition' (n 85) 780, 786.
[95] Franzki and Olarte (n 78) 216, 217.
[96] Paul O'Connell, 'The Death of Socio-Economic Rights' (2011) 74 (4) MLR 532, 552.

this argument in the context of the role of international and domestic networks that partner together to bring cases forward. In his discussion on the Chilean network, he contends that its success is owed to the fact that human rights norms are better established internationally than other kinds of rights. Hawkins continues, "…it is difficult to imagine that a network focusing on economic and social rights would have had the same level of success as the Chilean network. In fact, some Chilean and international NGOs did focus on the individual costs to the poor of Pinochet's neoliberal economic program, but without much success."[97]

Scholars and practitioners have thus been consumed with the tendency of transitional countries to include human rights crimes at the expense of socio-economic rights crimes in their transitional justice mechanisms.[98] As a result, two discernable attributes of the existing literature on this issue emerge. First, much of the literature on transitional justice is prescriptive and makes the case for how socio-economic rights *should* be included in transitional justice mechanisms.[99] A stronger account for the few yet significant cases in which corruption and socio-economic crimes *were* the focus of prosecutions, as in the Asian examples cited by Lutz and Reiger and others, should therefore take hold.[100] Second, several explanations for

[97] Darren Hawkins, 'Human Rights Norms and Networks in Authoritarian Chile' in Sanjeev Khagram, James V. Riker, and Kathryn Sikkink (eds), *Restructuring World Politics: Transnational social movements, networks and norms* (University of Minnesota Press 2002) 68.
[98] See discussion above in Literature Review section. See also Gready and Robins (n 80) 339, although they argue that socio-economic crimes are best addressed through reparations, which can offer both "corrective and distributive justice." Gready and Robins (n 80) 347, 356.
[99] See Louise Arbour, 'Economic and Social Justice for Societies in Transition' (Second Annual Transitional Justice Lecture hosted by the Center for Human Rights and Global Justice at New York University School of Law and by the International Center for Transitional Justice, New York University School of Law, 25 October 2006); Lars Waldorf, 'Anticipating the Past? Transitional Justice and Socio-Economic Wrongs' (2012) 21 (2) Social and Legal Studies 171; Lisa LaPlante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2008) 2 (3) IJTJ 331.
[100] Lutz and Reiger (n 4). Also, General Augusto Pinochet was charged with corruption in Chile, including tax evasion and holding secret bank accounts abroad worth more than USD25 million. See Transparency International, 'Chile Sets Precedent for Holding Dictators Accountable for Corruption' (Press Release, 25 November 2005).

why socio-economic rights have not been included have been proposed. For example, transitional justice is largely drawn from international human rights law, which has traditionally viewed economic and social rights as entitlements rather than rights.[101] Other explanations include the difficulty to ascribe responsibility to individuals for socio-economic crimes and that social justice is a longer-term political process that short-term transitional justice mechanisms cannot fully take into account.[102] Moreover, scholarly discussions on the inclusion of economic and social rights in transitional justice mechanisms focus on their place in truth commissions and reconciliation deals, with limited discussion on their place in criminal prosecutions.

The link between socio-economic rights violations and civil and political rights violations is, as some scholars observed, often and wrongly overlooked. For example, Kora Andrieu explains that corruption is often motivated by the opportunity it serves for perpetrators to maintain impunity for human rights violations. By addressing corruption and grand scale socio-economic crimes, Andrieu continues, justice mechanisms will more effectively address atrocities and will contribute to successful democratic transitions.[103] Corruption and socio-economic crimes are often cited as a background against which human rights violations occur. This reflects, in part, a significant shortcoming of international criminal justice in particular, which is preoccupied with individual criminal accountability as opposed to structural causes. As Lars Waldorf observes:

<www.transparency.org/news/pressrelease/chile_sets_precedent_for_holding_dictators_accountable_for_corruption> accessed 21 July 2015.

[101] Louise Arbour, 'Economic and Social Justice for Societies in Transition' (Second Annual Transitional Justice Lecture hosted by the Center for Human Rights and Global Justice at New York University School of Law and by the International Center for Transitional Justice, New York University School of Law, 25 October 2006).

[102] Lars Waldorf, 'Anticipating the Past? Transitional Justice and Socio-Economic Wrongs' (2012) 21 (2) Social and Legal Studies 171.

[103] Kora Andrieu, 'Dealing With a "New" Grievance: Should Anticorruption be Part of the Transitional Justice Agenda?' (2012) 11 (4) JHR 537, 541.

> Not surprisingly then, there have been very few prosecutions under international criminal law for massive violations of ESC rights…Other truth commission reports (e.g. Guatemala, Peru and Sierra Leone) addressed the socio-economic factors behind the conflicts, including dispossession, inequality, exclusion, and even the colonial legacy. Yet, socio-economic factors were mostly relegated to the sections on historical background, where they could be more easily ignored.[104]

Ruben Carranza also warns that, "impunity for economic crimes reinforces impunity for human rights violations."[105] He illustrates that corruption is often used not just to amass wealth, but also to avoid criminal accountability. Leaders such as Pinochet, Ferdinand Marcos of the Philippines (1965-1986) and Suharto of Indonesia (1967-1998) used their illicit gains and "financed destabilization and intimidation, stifled investigations, delayed trials, fought extradition and sponsored political proxies to counter attempts at holding them accountable for human rights violations."[106]

Even classic transitional justice cases such as Argentina reveal that where human rights violations were systematically reported and investigated, some of their economic root causes were left unaccounted for. Susan Marks provides the example of Amnesty International's human rights report on Argentina in 1976, in which it details systematic torture and disappearances without mentioning the military's "restructuring [of] the country's economy along radically neo-liberal lines."[107] She adds, "The report contains long lists of decrees that violated civil liberties, but makes no reference to the laws that led wages to be lowered and prices increased, no reference to the abrupt abrogation of social protection and redistributive schemes, or to the deepening poverty of ordinary Argentinians that was the result of these

[104] Waldorf (n 102) 173, 176. ESC here stands for economic, social and cultural rights.
[105] Ruben Carranza, 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?' (2008) 2 IJTJ 310, 314.
[106] ibid 314.
[107] Susan Marks, 'Human Rights and Root Causes' (2011) 74 (1) MLR 57, 58.

measures."[108] Marks concludes that the tendency to document human rights abuses without explaining them "meant that human rights became a set of blinders."[109]

Carranza cites the example of Mobuto Sese Seko, former President of the Democratic Republic of Congo (1965-1997), whose USD12 billion of embezzled funds went largely unaddressed by transitional justice:

> In the Democratic Republic of Congo (DRC), the legacy of Mobuto Sese Seko remains unaddressed, including the estimated $12 billion in funds he embezzled. By leaving unexamined the relationship between Mobuto's economic crimes and the enduring violence in the DRC, transitional justice has been boxed into a small corner, dwelling on the violent consequences of an unresolved past while mostly ignoring its structural causes.[110]

There is an overwhelming consensus in the literature, then, that socio-economic rights violations can and must be addressed by transitional justice mechanisms, including but not only through prosecutions.

Andrieu stresses the importance of accountability for corruption and socio-economic crimes in the Arab region because of its ability to delegitimise the previous regime. She also refers to Chile, where Pinochet was investigated and arrested for financial crimes, the revelations of which as Andrieu argues, were significantly more damaging for Pinochet's image and legacy.[111] Others caution against emphasising one set of rights over the other, as this leads to impunity for massive human rights violations. Former Philippine President Joseph Estrada (1998-2001), for example, was charged with corruption in 2007 and subsequently pardoned by President Gloria Macapagal-Arroyo (2001-2010), despite the Estrada regime's role in the perpetration of massive human rights violations.[112] Similarly, former president Suharto in Indonesia was charged with embezzling USD570 million, but

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[108] ibid.
[109] ibid 59.
[110] Carranza (n 105) 312.
[111] Andrieu (n 103).
[112] For example, attacks against Muslim separatists resulted in 400,000 civilians' displacement, among other human rights violations. See Lutz and Reiger (n 4) 18.

not with massive human rights abuses during his three decade long rule.[113] Other examples displaying a similar trend of prosecutions for corruption crimes, but not for human rights crimes include South Korea, India, Pakistan and Nepal.[114] Yet, the reasons why some countries choose to prosecute for one set of crimes rather than the other have remained unclear. The Arab country case studies, which will be discussed in the next chapter, will help provide some explanations for such limited prosecutions.

The Drivers of the Prosecution of Political Leaders: The role of international and domestic actors

The difference in the decisions states make on whether or not to pursue the prosecution of their leaders has and continues to be the subject of much debate in transitional justice literature. David Pion-Berlin usefully identifies six factors that may explain the divergence in decisions regarding trials: 1.) The legacy of human rights abuse: did the nature, scope and intensity of repression vary sufficiently between the countries to make the difference? 2.) The balance of power that emerged through the transition between the armed forces and the civilian authorities; 3.) Elite preferences; 4.) Organised interest group pressures: "Irrespective of leadership preferences, was the human rights movement better organized, more vocal, and more persuasive in Argentina than elsewhere?" 5.) Strategic calculation: "What were the potential costs and benefits to avenging the victims?" 6.) Contagion effect: "What influence did human rights decisions in Argentina have on later decisions made by the Uruguayan and Chilean heads of state?"[115] Pion-Berlin, however, notes that

[113] ibid 17.
[114] For an account of the prosecution of political leaders in those countries, see Lutz and Reiger (n 4).
[115] David Pion-Berlin, 'To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone' in Neil J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Vol. 1 USIP 1995) 83-84.

interest groups – also known as civil society actors – had little influence on decisions regarding prosecution. This section further explores the role of such domestic actors and international actors as drivers of decisions regarding prosecution.

The pursuit of accountability for past atrocities in transitional justice contexts often draws the involvement of international actors. Much has been discussed about the role of international NGOs such as Amnesty International and Human Rights Watch, regional bodies such as the Inter-American Court of Human Rights (IACtHR), international tribunals such as the ICC and intergovernmental bodies such as the United Nations and its various agencies as some of the key international actors that work to promote accountability for past human rights violations. This promotion is often conducted through transnational networks made up of these actors and that work to ensure accountability at the domestic level where possible, or at the international level where necessary. The prevailing assumption is that international – or 'transnational' – actors actively seek the fulfillment of a shared global norm – that of individual criminal accountability.[116]

Transnational Advocacy Networks: Contrasting accounts from Latin America

Margaret E. Keck and Sikkink describe a transnational advocacy network as one that includes "actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information

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[116] See Cath Collins, 'Grounding Global Justice: International Networks and Domestic Human Rights Accountability in Chile and El Salvador' (2006) 38 Journal of Latin American Studies 711; Margaret E. Keck and Kathryn Sikkink, 'Transnational Advocacy Networks in International and Regional Politics' (1999) 51 (159) International Social Science Journal 89; Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 Hum. Rts. Q. 321; Kathryn Sikkink, 'Patterns of Dynamic Multilevel Governance and the Insider-Outsider Coalition' in Donatella Della Porta and Sidney Tarrow (eds), *Transnational Protest and Global Activism: People, Passions and Power* (Rowman & Littlefield 2005); Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change,' (1998) 42 (4) International Organization 887; Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012).

and services…At the core of the relationship is information exchange."[117] These networks are often in the form of collaboration between domestic actors such as civil society, and international NGOs such as Human Rights Watch and Amnesty International, whose reports on human rights violations are disseminated internationally to strengthen campaigns to change repressive governments' behaviour. Transnational networks play a vital role in the initial stages of the "socialization of human rights norms" because they help draw international attention to the practices of repressive regimes, they start a process of shaming, and they empower and strengthen the weak domestic opposition.[118] The IACtHR continues to play this role in countries that have experienced a long delay in holding former regime officials to account, such as in Brazil. In the case of Peru, the rich synergy between domestic and international actors in efforts to prosecute former President Alberto Fujimori (1990-2000) is a testament to the importance of cooperation between the domestic and the international.[119]

Similarly, Beth Simmons contends that the ratification of international human rights treaties influences the probability of mobilisation in two ways. Individuals begin to place greater value on the right in question, which, in effect, increases the likelihood of successful mobilisation to gain that right. She also observes that, following ratification, civil society is more empowered to achieve the goals promised in the human rights treaties that their governments have signed, making the impact of international human rights treaties on domestic politics at the

[117] Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 1998) 89.
[118] Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (CUP 1999) 33-34.
[119] Jo-Marie Burt, 'Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations' (2009) 3 International Journal of Transitional Justice 384.

mass level significant.[120] The implications of this argument are that in countries where key international human rights instruments are ratified, the likelihood that prosecutions will take place increases as opposed to countries that have not ratified the relevant international human rights treaties. Sikkink, for example, notes that the justice cascade was bolstered by norm entrepreneurs, or "small groups of public interest lawyers, jurists and activists."[121] These norm entrepreneurs are supportive of such international human rights treaties and form an important part of the web of domestic actors that drive and shape prosecutions.

Furthermore, the interaction of international actors with domestic actors depends, according to Sikkink, on the nature of opportunity structures. She argues that institutions offer "international opportunity structures" which interact with domestic political opportunity structures.[122] This means that activists navigate these two structures depending on the context within which they are working – if working from within a repressive, closed society, they are likely to reach out to international venues as a means of gaining access to institutions necessary to support their cause. Alternatively, activists may close themselves off to international opportunity structures such as international institutions or third-country courts because they regard them as invasive – this is what Sikkink labels as "defensive transnationalism."[123]

The collaboration between domestic and international actors in efforts to prosecute Fujimori is, as Jo-Marie Burt argues, a testament to the importance of the

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[120] Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP 2009).
[121] Sikkink, *The Justice Cascade* (n 16) 24.
[122] Kathryn Sikkink, 'Patterns of Dynamic Multilevel Governance and the Insider-Outsider Coalition' in Donatella Della Porta and Sidney Tarrow (eds) *Transnational Protest and Global Activism: People, Passions and Power* (Rowman & Littlefield 2005) 152.
[123] ibid 171.

beneficial relationship between the domestic and the international.[124] She contends that together with international demands for accountability, domestic civil society groups in favour of accountability created the pressure that was necessary to bring to justice those responsible for past atrocities.[125] Similarly, in their account of the impact of the justice cascade and foreign human rights trials in Latin America, Lutz and Sikkink identify the "intensity of the determination of domestic human rights advocates and victims, amply supported by their international counterparts, to pressure their government to realize justice for past wrongs" as one of the factors that led to decisions to prosecute.[126]

Cath Collins challenges Burt, Sikkink, and Simmons' observations on the impact of international law on domestic politics and human rights practices. In her discussion on the impact of transnational networks, Collins warns that we should be skeptical about the extent to which these transnational networks actually impact accountability at the national level.[127] Collins defines transnational networks as constituting lawyers, victims, activists, and international human rights organizations with the aim of overriding domestic judicial processes by pushing for legal action in third-country courts. She uses the case of El Salvador as an example to show that third-country litigation against Salvadorian perpetrators was not followed by visible domestic change in El Salvador, as happened with Chile after the Pinochet case was triggered in Spain.[128] Furthermore, Collins points to empirical evidence from Chile and El Salvador, which reveals that there was often a clash between outside activists and domestic justice efforts. Such a clash existed, for example, between Spanish and

[124] Burt (n 119) 384.
[125] ibid 395.
[126] Lutz and Sikkink (n 5) 31.
[127] Cath Collins, 'Grounding Global Justice: International Networks and Domestic Human Rights Accountability in Chile and El Salvador' (2006) 38 Journal of Latin American Studies 711, 712.
[128] ibid.

Chilean lawyers over the Pinochet case - they "disagreed violently…over the legal strategies which ought to be adopted."[129] Collins concludes that, in light of the Salvadorian case study, domestic law and politics are more reliable indicators of progress towards accountability than is the influence of external actors.[130]

While she does not explicitly address the role of civil society in driving human rights prosecutions, Naomi Roht-Arriaza lends significance to civil society networks as key actors in facilitating access to information that *can be* used for criminal sanctions for past rights violations.[131] The implication is that even if civil society networks are initially powerless in the face of international politics, their work could – and often has - served to advance accountability in the future. Pion-Berlin, however, is more critical of the role of civil society and places more emphasis on the role of governmental politics. In his analysis of the role of mass pressures by civil society groups in Argentina, Chile and Uruguay, he concludes that the role of civil society in shaping the decision to prosecute was weak, whereas strategic calculations made by those countries' leaderships was strong and decisive. He explains:

> The human rights lobbies of the Southern Cone had a negligible impact on government policy. Their pleas for the wholesale punishment of those involved in acts of state terror went unanswered. Each president chose measures that were more restrained than those preferred by the human rights advocates. In Uruguay, their demands were ignored entirely.[132]

Huyse, on the other hand, regards the prospect of membership at the Council of Europe as a "strong motive" that drove prosecution decisions in Czechoslovakia, Hungary and Poland, each of which "regularly invoked international conventions on

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[129] ibid 715.
[130] ibid 712.
[131] Naomi Roht-Arriaza, 'Civil Society in Processes of Accountability' in Cherif Bassiouni (ed), *Post-Conflict Justice. International and Comparative Law Criminal Series* (Transnational Publishers 2002).
[132] Pion-Berlin (n 115) 100.

human rights when preparing or reviewing criminal or lustration laws."[133] It is clear, then, that scholars differ on the extent to which domestic and international actors drove decisions regarding prosecution, particularly in the Latin American cases.

Consequently, Obel Hansen rightly points out that the diversification of transitional justice actors should be taken into account when analysing which actors had a significant impact on driving decisions regarding prosecution and other transitional justice decisions. He notes that the literature has traditionally placed emphasis on political leadership as the leading factor that drove decisions regarding prosecution:

> [T]he focus in the early literature was primarily on how various forms of political transitions would impact the new leadership's approach to transitional justice, as opposed to how different actors could shape or take control of transitional justice solutions devoid of potential political restraints arising out of the particular nature of the transition.[134]

Such an analysis is important for the deconstruction of the use and abuse of transitional justice in certain political contexts. The role of socio-political context and the nature of transitions are important considerations, but insufficient on their own. An examination of the conflicting roles of influential actors in the decisions regarding prosecution provides useful insight into the dilemma of transitional justice in non-liberal transitions. The role of, *inter alia*, the judiciary, the military, civil society, and of interim governments and elites should therefore be taken into account for a fuller picture of how – and why – transitional justice is practiced differently.

[133] Huyse (n 37).
[134] Obel Hansen (n 67) 107.

A Tenuous Global Accountability Norm?

The increasingly dominant role of international actors and of international law in transitional justice is a trend that has emerged over the last twenty years.[135] Hugo van der Merwe is critical of the role of the transitional justice industry in pushing for the application of a set of predefined instruments to various transitional contexts. He remarks that transitional justice has been unfolding within highly contested transitions that "remain subject to passionate debate and violent confrontations over the fundamental shared basis of the society."[136] Van der Merwe is also critical of the culpability of international actors, which is largely unaddressed in transitional justice. He refers to Nassar's discussion on whether and how international financial institutions can be held to account for their role in supporting socio-economic rights violations.[137]

A closer look at the role of international and domestic actors in driving decisions regarding the prosecution of political leaders reveals, in certain cases, the strength of domestic resistance to the so-called global accountability norm. Jelena Subotic argues that domestic elites not only represent a challenge to international pressure to pursue transitional justice, but they form part of a complex political web of internal opposition. She explains that these domestic and largely governmental elites "use transitional justice projects as a domestic wedge issue to score quite localized political points," thereby ignoring international pressure to pursue a certain type of transitional justice that conforms to international standards.[138] The case of

[135] Hugo van der Merwe, 'Transitions in the Middle East and North Africa: New trajectories and challenges for transitional justice?' in Kirsten J. Fisher and Robert Stewart (eds), *Transitional Justice and the Arab Spring* (Routledge 2014) 228.
[136] ibid 231.
[137] See also Abou-El-Fadl (n 89) and Andrieu (n 103).
[138] Jelena Subotic, 'Bargaining Justice: A Theory of Transitional Justice Compliance,' in Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth (eds), *Transitional Justice Theories* (Routledge 2014) 134-135.

Uruguay is quite useful in highlighting the significant role of domestic politics and of domestic civil society actors in driving decisions regarding prosecution. Burt, Francesca Lessa and Gabriela Fried Amilivia's study of Uruguay's transitional justice decisions strongly urges a closer examination of the role of such domestic actors and developments "to understand shifts in transitional justice processes" and the need for more grounded analyses of "the relative weight of international/transnational initiatives on the transitional justice process and the relationship between domestic actors and international/transnational networks or bodies."[139]

Subotic discusses instances where both international pressure for transitional justice and domestic opposition to transitional justice are strong, causing a clash of goals. She does not, however, consider scenarios where both international and domestic support for transitional justice is strong, but in different ways; for example, where domestic support for prosecutions is vengeful and selective, reflecting the highly political transition against which the trials take place. Conversely, what are the implications of scenarios where domestic pressure for prosecutions is strong, but international pressure is not? How do such scenarios impact the status of transitional justice and of prosecution decisions in particular? This scenario is in many ways relevant to the case of Yemen, where domestic demands to prosecute the former president have been crushed by regional and international actors who sought an immunity law as a political solution to the crisis.

Still, domestic civil society activism is, as several scholars have argued, insufficient on its own to drive decisions regarding prosecution. The post-transition presidential leaderships of Raúl Alfonsin (1983-1989), Carlos Menem (1989-1999)

[139] Jo-Marie Burt, Gabriela Fried Amilivia, and Francesca Lessa, 'Civil Society and the Resurgent Struggle against Impunity in Uruguay (1986-2012)' (2013) 7 IJTJ 306, 325-326.

and Nestor Kirchner (2003-2007) in Argentina have each shaped decisions regarding prosecution differently.[140] President Alfonsin, for example, revoked the military's self-amnesty law in 1983 and created the National Commission on the Disappeared (CONADEP).[141] The CONADEP helped establish the responsibility of military leaders in its final report, "Nunca Más" in 1984. The trial of 9 members of Argentina's military junta took place in Buenos Aires and verdicts were issued in December 1985. The trial took 7 months, during which hundreds of witnesses testified about torture, disappearances, and other crimes. Almost 300 officers faced prosecution in civilian courts. However, there was a military backlash against Alfonsin's government and strong pressure from the military eventually led to the 1987 amnesty law, which ended the prosecutions. The subsequent government of Menem (1989-1999) pardoned the convicted military officers who had been serving life sentences in prison.[142] However, under Kirchner (2003-2007), Argentina's Supreme Court ruled that the amnesty law was unconstitutional, paving the way yet again to prosecutions of former military leaders in Argentina.

This succession of governments in Argentina and its impact on the ebbs and flows of amnesties and prosecutions points to the significance of the political leadership's influence on decisions regarding prosecution. This again does not diminish the role of domestic actors, such as mass protests and civil society pressure, in pushing for such decisions. As Gary Bass notes, this has been the case for a long time:

[140] Engstrom and Pereira (n 53) 120.

[141] This revocation, as Sikkink notes, came soon after 40,000 people marchedin the streets of Buenos Aires on 19 August 193 to protest the military's self-amnesty law, protecting itself from future prosecution. Sikkink, *The Justice Cascade* (n 16) 70.

[142] Generals Jorge Rafael Videla and Roberto Eduardo Viola were sentenced to life in prison, which marked the first time ever in Latin America that heads of state were convicted for human rights violations. See Lutz and Reiger (n 4) and Sikkink, *The Justice Cascade* (n 16).

> Of course, the decision about whether to seek punishment is not always entirely in the hands of elite decision makers. Public opinion weighs in powerfully. Even Castlereagh could not afford to shrug off popular outcry for the punishment of Bonapartists in 1815; even Prussian and Soviet leaders had to take into account punitive pressures from below.[143]

In Uruguay, the installation of two left-wing governments is regarded as having provided little more than "a more permissible opportunity structure" within which domestic civil society groups took the lead in strengthening the anti-impunity struggle.[144]

Finally, the role of international and domestic actors in driving decisions to enact amnesty laws presents important questions regarding the tenacity of a global accountability norm. Scholars observe that despite an increasing number of prosecutions of political leaders, amnesty law enactment has not declined. Some argue that the continued adoption of amnesty laws is an indication that "cultures of impunity persist even during the age of accountability."[145] Others contend that amnesties increase in response to the increased demand for accountability.[146] Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter describe the increase in both amnesties and prosecutions as a "justice balance" rather than a justice cascade:

> Underlying the justice balance approach is the notion that trials and amnesties together contribute to improvements in human rights and democracy, with or without truth commissions. We consider this crucial combination of trials and amnesties as a balance between accountability provided by trials and stability guaranteed by amnesty. Accountability without stability simply cannot advance human rights and democracy objectives. Similarly, stability without accountability also fails to achieve those goals. Truth commissions do not get in the way of the justice balance, nor do they contribute to it by reinforcing accountability and stability. It is the balance provided by these two or three mechanisms in combination that

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[143] Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals.* (Princeton University Press 2009) 279.
[144] Burt, Amilivia and Lessa (n 139) 306.
[145] Francesca Lessa and Leigh A. Payne, 'Introduction' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012) 3.
[146] Kathryn Sikkink, 'The Age of Accountability – The Global Rise of Individual Criminal Accountability' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012) 90-91.

> is essential to success.[147]

Both trials and amnesties, then, are essential to the improvement of human rights and democracy, as Olsen, Payne, Reiter and others have argued.

Of particular note is Louise Mallinder's analysis of amnesty law enactment:

> [W]hen states enact amnesty laws for serious human rights violations today, they rarely acknowledge the existence of a global accountability norm. Instead they argue that the amnesty is necessary to bring peace and promote reconciliation. These rationales are often echoed by international actors who support and fund amnesty processes. This therefore casts doubt on the extent to which a global accountability norm has emerged.[148]

Mallinder adds that the global accountability norm is further weakened by the diplomatic and financial support from international organisations and donor states for the enactment of amnesty laws.[149] This international support for amnesty laws is, for example, very much the case in Yemen, where regional and international actors clearly supported immunity from prosecution for the former president in exchange for a peaceful transition. The decision not to prosecute, as Mallinder concludes, "suggests that despite the development of international criminal law and transitional justice, a belief persists within states and the international community that in times of extreme violence, amnesty may be a necessary compromise to achieve peace."[150] The international support for amnesty laws, however, is not consistent across states even when they share similar degrees of 'extreme violence.' This is evident when comparing Libya and Yemen, as will be discussed in the next chapter.

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[147] Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy.' (2010) 32 (2) Hum. Rts. Q. 980.
[148] Louise Mallinder, 'Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment' in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012) 94.
[149] ibid 95-96.
[150] ibid.

Transitional Justice and the Arab Spring: Emerging scholarship[151]

A small body of literature on transitional justice in the Arab region has emerged since the emergence of criminal prosecutions there along with efforts to establish truth commissions and to draft transitional justice laws. One recent work is Fisher and Stewart's edited volume *Transitional Justice and the Arab Spring*, which examines the unique features of transitional justice in the Arab Spring and presents questions for how the Arab Spring is shaping the theory and practice of transitional justice more broadly.[152] Given the volume's strong relevance to the subject of this thesis, I provide a critical review of its content here, particularly as it relates to the challenges of mainstream transitional justice theory and to accountability for socio-economic rights violations.

Fisher and Stewart point to the tension between a "fundamentally liberal process" and a society driven by illiberal socio-political actors, which they identify as the Islamists.[153] This tension is a central challenge for transitional justice in the Arab Spring. They question whether, as a result, transitional justice will move away from its liberal roots. This remains an open question throughout the book. In their discussion and in subsequent chapters, international actors are understood as consistently promoting liberal norms, therefore advocating for accountability and justice globally. However, painting the role of international actors with one brush – i.e. 'liberal' – falls short of explaining the contradictory roles of external actors in

[151] This section focuses on the largest volume to date that addresses transitional justice and prosecutions in the Arab region. This, however, is not to say that there is no other literature on transitional justice in the Arab region. Sahar Aziz (2015), for instance, has written on the role of the judiciary and prosecutions in Egypt. Her work is referred to in Chapters 3 and 4 as it directly relates to points made with regards to the Egyptian case study. Judy Barsalou (2012) has written on perceptions of transitional justice in Egypt. I have not, however, included a review of her work here as it does not specifically relate to prosecutions. Kora Andrieu has also discussed transitional justice in the Arab region, with specific references to accountability for corruption. See Andrieu (n 103).
[152] Fisher and Stewart (n 21).
[153] ibid 6.

both Libya and Yemen. Nassar briefly alludes to this contradictory role of international actors in his chapter.[154]

Line Khatib's chapter provides a damning critique of the rise of political Islamists in the Arab Spring countries and charges them with harming the transitional justice process. She describes the tensions between Islamists, whom she deems as inherently illiberal, and the liberal goals of transitional justice. "Islamists," she argues, "incorporate 'traditional' elements that are at odds with the values fundamental to liberal democracy."[155] Khatib then makes references to the "universality" of human rights and Islamism's difficulty in navigating between tradition and liberal democracy, making it difficult for transitional justice to achieve its liberal goals.[156] This presents a number of questions regarding Khatib's theoretical framework, which places international law, democracy and transitional justice in a coherent liberal boat in opposition to Islamists, who are inherently illiberal.

First, her analysis contrasting Islamism and liberal democracy falls short of explaining how Islamism works in other democracies that are not necessarily liberal and that have undergone transitional justice processes. It does not explain the Islamist-dominated governments such as Indonesia, Malaysia and Turkey, understood in many aspects to be democratically functioning states.[157] This perhaps means that the tensions Khatib refers to are better described as secular-religious

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[154] I compare and contrast the role of international actors in Libya and Yemen in Chapter 4.
[155] Line Khatib, 'Challenges of Representation and Inclusion: A Case Study of Islamist Groups in Transitional Justice' in Kirsten J. Fisher and Robert Stewart (eds), *Transitional Justice and the Arab Spring* (Routledge 2014) 132.
[156] ibid.
[157] While Khatib mentions that she does not aim to argue whether Islam is anti-democratic or pro-democratic, she clearly attempts to make the case that Islamists pursue anti-democratic policies that "[hinder] the process of transitional justice because their specific conservative and 'cultural' Islamic interpretation of human rights discriminates between women and men and between the different religious sects." She also argues that Islamists have recently "committed themselves to liberal democracy as a conceptual and institutional necessity," even though this commitment has not been adhered to, as in the case of the Muslim Brotherhood's rule in Egypt. ibid 133.

tensions regarding the basis of society rather than a conflict between undemocratic, illiberal Islamists and secular, liberal democrats. A discussion on how the Egyptian and Tunisian constitution-drafting processes addressed these fundamental tensions would have been useful here. Second, Khatib's analysis falls short of addressing the role of the secularist military regime in Egypt in thwarting a democratic transition and transitional justice.[158] With this in mind, the problem for transitional justice in the Arab Spring is perhaps better explained as one of continued authoritarianism, in all its religious, military and secular manifestations. Moreover, one could argue that it was the Islamists in Tunisia who sought transitional justice the most, given that they were heavily repressed under Ben Ali's regime.[159]

Some important questions thus emerge from Khatib's chapter: what does the rise of Islamism in the Arab Spring reveal about the shortcomings of transitional justice, or even of international human rights? How should we understand the tensions between "communal forms of justice," as promoted by the Islamists Khatib examines, and individual freedoms in the context of transitional justice and political Islamism?[160] Khatib's chapter seems to solely explore whether Islamism is an appropriate political ideology for the pursuit of transitional justice, while being largely uncritical of the so-called universal concepts of justice and of transitional

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[158] Examples include the military's controversial protest law, which places severe restrictions and harsh punishments that curb freedom of expression and the right to assemble. See Human Rights Watch, 'Egypt: Deeply Restrictive New Assembly Law' (26 November 2013) <www.hrw.org/news/2013/11/26/egypt-deeply-restrictive-new-assembly-law> accessed 26 July 2015. See also Human Rights Watch, 'All According to Plan. The Raba'a Massacre and Mass Killings of Protesters in Egypt' (12 August 2014) <www.hrw.org/report/2014/08/12/all-according-plan/raba-massacre-and-mass-killings-protesters-egypt> accessed 26 July 2015. This report documents the mass and arbitrary arrests of human rights activists and journalists along with the mass death sentences of Muslim Brotherhood supporters in what has largely been deemed a sham trial, and the impunity of those responsible for the largest mass killing in Egypt's modern history, the Raba'a massacre.

[159] Greta Barbone in Noha Aboueldahab, 'Rapporteur's Report: Prosecutions, Politics and Transitions: How criminal justice in the Arab Spring is shaping transitional justice' (Panel discussion, Durham Law School Durham 6 May 2014) <www.academia.edu/8738334/Rapporteurs_Report_Prosecutions_Politics_and_Transitions_-_How_criminal_justice_in_the_Arab_Spring_is_shaping_transitional_justice> accessed 26 July 2015.

[160] Khatib (n 155) 135.

justice itself.[161] Nevertheless, her discussion presents difficult and important questions about the fundamental basis of transitional societies in the Arab Spring and about democracy, all of which strongly warrant further scholarly debate.

Universality Claims and Complex Local Realities: Overlooking variations in transitions

The problem of the presumed 'universality' of justice re-appears in other parts of *Transitional Justice and the Arab Spring*. Similar to Khatib, Elham Manea contends that the fundamental tension between the liberal foundations of transitional justice and non-liberal social actors can and should be resolved by emphasizing the "underlying universality of human rights."[162] This take is again uncritical of the universality debate and of transitional justice more broadly. While Manea remains highly critical of the impact the rise of Islamism has had on gender justice in the Arab Spring, she proposes a focus on the "alternative interpretations" of Islamic theology to address the problem, but stops short of elaborating on this point.[163]

Nassar's chapter presents a strong analysis of the struggle to accommodate the complexity of the Arab Spring contexts while adhering to standardised prescriptions of the global transitional justice industry. He critiques the one size fits all formulas pushed by the industry's advocates in the Arab Spring. He also refers to the "ambiguous transitions" and their impact on justice choices – not all transitions follow a linear shift from authoritarian rule to liberal democratic rule.[164] Furthermore, Nassar highlights the need for socio-economic accountability and for a more inclusive transitional justice process. Nassar contends that the significance of

[161] ibid.
[162] Elham Manea, 'Egypt and the Struggle for Accountability and Justice' in Kirsten J. Fisher and Robert Stewart (eds), *Transitional Justice and the Arab Spring* (Routledge 2014) 168.
[163] Khatib (n 155) 168.
[164] Habib Nassar, 'Transitional Justice in the Wake of the Arab Uprisings: Between Complexity and Standardisation' in Kirsten J. Fisher and Robert Stewart (eds), *Transitional Justice and the Arab Spring* (Routledge 2014) 55.

socio-economic concerns in the Arab Spring means that transitional justice will have a "broadened purview" in comparison with the way in which it has unfolded in other parts of the world.[165] He points to another important difference between the Arab Spring transitions and others that preceded them: the Arab region is dealing with the legacy of atrocities committed under multiple regimes, whereas most transitions in the rest of the world have dealt with the legacy of a single regime or conflict. This, Nassar argues, will require creativity that today's transitional justice models do not offer.[166]

Conclusion

This literature review has highlighted several principal themes of transitional justice scholarship since the early 1990s. Scholars have analysed how the nature of transitions – whether ruptured, negotiated, or a mix of the two – has impacted both the likelihood and the quality of prosecutions. With the benefit of hindsight, scholars have noted that the dichotomous comparisons between ruptured and negotiated transitions no longer sufficiently explain subsequent decisions regarding prosecution. Moreover, the liberal roots of transitional justice fall short of explaining cases where transitional justice is pursued to consolidate non-liberal rule. Pre-existing democratically functioning institutions, in particular the judiciary, is a factor that both mainstream and critical transitional justice scholars claim as necessary in order for adequate prosecutions to take place post-transition. Teitel and Orentlicher outlined the merits of the 'limited criminal sanction' in ensuring a certain level of

[165] ibid 59.
[166] ibid.

accountability without jeopardising the security and stability of the fragile, transitional state.[167]

However, the ebbs and flows of decisions regarding prosecution over decades indicates that additional factors, such as civil society activism, political leadership, the economic well-being of the country, and international actors drive and shape prosecutions in different ways. Franzki and Olarte argue that transitional justice is practiced as part of the 'demo-liberal' project that exacerbates social and structural inequalities.[168] Others argue that insufficient attention has been given to cases where socio-economic and corruption crimes were prosecuted while civil and political rights violations were left unaccounted for. The diversity of the contexts within which prosecutions take place as well as the various actors involved in driving and shaping these decisions requires, then, a more rigorous account of whose interests transitional justice serves and what ends it aims to achieve.[169]

Transitional justice scholarship is under-theorised.[170] There is a need for more nuanced, context-driven theories of transitional justice that take into account its use in non-liberal transitions. Teitel argues that transitional justice has increasingly disassociated itself from "the *politics* of transition," because of its globalised nature.[171] The ways in which a heavily politicised transitional justice have been used to solidify non-liberal transitions and repression, as my analysis of the Arab Spring case studies will demonstrate, challenge this observation. With few exceptions, Latin American countries underwent transitions that pushed the military back to the barracks and brought in civilian, democratic rule. Prosecutions of those responsible

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[167] Teitel, *Transitional Justice* (n 19); Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (n 40).
[168] Franzki and Olarte (n 78).
[169] Obel Hansen, 'Transitional Justice: Toward a Differentiated Theory,' (n 15).
[170] For discussions on the under-theorisation of transitional justice, see Nicola Palmer, Phil Clark and Danielle Grenville (eds), *Critical Perspectives in Transitional Justice* (Intersentia 2012).
[171] Ruti G. Teitel, *Globalizing Transitional Justice* (OUP 2014) xiv.

for the heinous crimes committed there are still ongoing, more than three decades later. But not all transitions occur in liberalising contexts. The Arab Spring thus presents an important opportunity to diversify the theory and practice of transitional justice.

CHAPTER 2 | METHODOLOGY AND INTRODUCTION TO THE CASE STUDIES

This chapter presents the methodology used to conduct the research for the thesis and the challenges faced by this methodology and how these challenges were overcome. It then presents a rationale for the case selection. An overview of the status of prosecutions in each case study follows, providing a transition into the subsequent chapter in which the findings from each case study are presented. Before engaging in a discussion of the methodology, it is worth clarifying what is meant by the term 'political leaders' as it is used in the research questions addressed in this thesis.

In this thesis, the term political leaders is not restricted to heads of state, as in, for example, the work of Lutz and Reiger and others.[172] Instead, in addition to heads of state, it broadens the category of political leaders to include other high-level regime officials, including former ministers, police chiefs and military chiefs. The reasons for the expanded focus on political leaders in this way are four-fold. First, several high-level government officials other than heads of state have been investigated and/or tried, signaling a more extensive criminal accountability strategy than one that solely targets heads of state. A more limited focus on heads of state only would, then, significantly limit the strength of the explanations surrounding the pursuit of transitional justice. Second, scholarly literature on the prosecution of political leaders criticises the shortcomings of analyses focused on the prosecution of one individual, using the argument that the guilty individual (usually a head of state) does not necessarily reflect the wrongdoings of the entire regime. Third, some victims and other justice-seekers prefer to see the prosecution of a particular leader who is not necessarily the head of state. This is because certain individuals, such as the former ministers of interior in all four case studies, are largely regarded as having

[172] Ellen L. Lutz and Caitlin Reiger (eds), *Prosecuting Heads of State* (CUP 2009).

a more direct role in orchestrating the crimes committed, particularly torture. Fourth, the exclusion of certain former high-level officials from prosecution, such as Omar Suleiman and Moussa Kousa, former heads of intelligence in Egypt and Libya respectively, is in and of itself a question that requires examination. The selection of individuals who faced prosecution is a controversial issue in the case studies, revealing that various factors played a role in the inclusion and exclusion of certain individuals from the trials. The expansion of the term political leaders in this way, then, is important for the purpose of addressing one of the thesis's central research questions: what factors shaped the extent of the investigations and trials.

Triggers, Drivers and Shapers: An explanatory mechanism derived from process tracing

The research questions of this thesis played a central role in defining the appropriate methodology this thesis adopted. It is useful, then, to briefly re-visit the thesis's two principal research questions. First, what *trigger* and *driving* factors led to the decision to prosecute and not to prosecute former political leaders? Second, what *shaping* factors affected the content and extent of decisions regarding prosecution? Although not explicitly framed as such, process tracing entails the identification of factors that play a triggering, driving and shaping role in processes. Alexander L. George and Timothy J. McKeown's definition of process tracing is particularly useful here:

> [Process tracing] attempts to uncover what stimuli the actors attend to; the decision process that makes use of these stimuli to arrive at decisions; the actual behavior that then occurs; the effect of various institutional arrangements on attention, processing, and behavior; and the effect of other variables of interest on attention, processing, and behavior.[173]

[173] Alexander L. George and Timothy J. McKeown, 'Case Studies and Theories of Organizational Decision Making' in Robert F. Coulam and Richard A. Smith (eds), *Advances in Information Processing in Organization*s (Vol 2 JAI Press 1985) 35.

This definition sums up the function of and the relation between the trigger (stimuli), driving (decision process responding to stimuli), and shaping (institutional) factors.

I reflect on the material collected for each case study by identifying what factors triggered, drove, and shaped decisions regarding prosecution. I do not claim that the trigger-driver-shaper mechanism, derived from the method of process tracing as described above, explains the process of prosecution from start to finish. Rather, it is a prism through which I make sense of the research collected and by which I develop an explanation of how decisions regarding the prosecution of political leaders emerged and developed before and during the highly contentious period of transition. For instance, the identification of trigger factors provides insight into the formative stages of these decision-making processes. It contributes to an inquiry into efforts to prosecute in the past – before the 2010/2011 uprisings – which is necessary in order to understand the development and execution of the prosecutorial strategy in the four countries after the uprisings. In each case study's conclusion and following a detailed presentation of findings from the interviews, I summarise the key triggers, drivers and shapers based on these findings. I begin with the trigger factors, which pertain to the factors that *led* to decisions to prosecute and not to prosecute. I then discuss the various factors that drove these decisions and pushed and pulled them in different directions. Finally, I discuss the shaping factors that impacted the content and the extent of the prosecutions.

The significance of analysing the data through a trigger-driving-shaping prism lies in its facilitation of an in-depth understanding of the dynamics of the processes within which these factors operate. The primary function of this prism is to make sense of the processes that unfolded over time, while taking into account various contextual factors. This is particularly useful for a comparative case study

and helps prevent false generalisations that do not take case-by-case specificities into account.

Data Collection and Research

The arguments in this thesis are based on both primary and secondary sources. In addition to a critical analysis of the relevant scholarly literature, I relied heavily on national, regional and international media reports to obtain details concerning the status of prosecutions in each country. I built an electronic database that consists of news articles, reports and commentaries by both individual experts and by NGOs for each country throughout the duration of the research – approximately four years. Close monitoring of media reports and of new scholarly literature, particularly in academic journals, was important because of the developing nature of decisions regarding prosecution in the four case studies and the consequent emerging literature on the Arab region.

The core of the data is drawn from interviews I conducted in the four case studies. Between 2012 and 2014, I conducted a total of forty-five interviews with forty-one different interviewees in Egypt, Libya, Tunisia and Yemen. Twelve interviews were conducted in Egypt, seven interviews were conducted in Libya, fifteen interviews were conducted in Tunisia, and nine interviews were conducted in Yemen.[174] The interviews were conducted in Arabic, English and French. I obtained research ethics approval from Durham University to conduct all of the interviews for this thesis. The interviews were with human rights lawyers and activists, independent experts, civil society leaders, national and international NGO officials, United Nations officials, government officials, journalists, and legal professionals including

[174] See Appendix II for a full breakdown of these interviews.

lawyers and one judge. I conducted semi-structured interviews to ensure a focused comparison of data across the cases.[175] This was done through the use of a set of questions asked of each individual, followed by additional questions generated by the responses received and by the particular context of the case study. Certain themes emerged from the interviews, which then helped form the structure of both the presentation of my findings in Chapter 3 and the analysis of their implications for the broader field of transitional justice in Chapter 4. The interviewees do not necessarily share my interpretation of their responses.

Structured interviews that include some open-ended questions are helpful for both within-case analysis and for the comparative case study approach.[176] Open-ended questions allow for the ‘surprising’ stumbling upon causal factors that were not previously anticipated.[177] When interviewing the Ligue Tunisienne des Droits de l’Homme (LTDH)[178], for example, I asked about the history of the organisation. This is how I then learned about the central role of documenting human rights violations by the LTDH and other civil society organisations within a heavily repressive political environment. This in turn led to more specific questions aiming to discover why Tunisian civil society documented human rights violations over several decades, which then revealed that there was the intention to use these documents for prosecutions, if and when the day came when trials of regime leaders would be possible.

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[175] See Appendix I for a sample of the interview questions.

[176] To ensure the evidence collected for this research is replicable, I kept records of detailed field notes and contact information for the interviewees. I have also retained the archive of media sources that I built throughout the duration of the research and for each case study.

[177] Andrew Bennett and Jeffrey T. Checkel, ‘Process Tracing: From Philosophical Roots to Best Practices’ in Andrew Bennett and Jeffrey T. Checkel (eds), *Process Tracing in the Social Sciences: From Metaphor to Analytic Tool* (CUP 2014).

[178] The Tunisian League for Human Rights is Tunisia’s oldest and largest civil society organisation.

Challenges

None of the challenges encountered during the collection of research posed a significant setback for the development of this thesis. However, certain challenges resulted in a limited number of interviews conducted in Libya, in comparison with the other case study countries. This was for four reasons. First, the security situation in Libya was such that the mobility of some interviewees whose offices were difficult to visit was restricted. The first court hearing for Saif al-Islam Gaddafi and the thirty-six other defendants coincided with my visit to Tripoli, which created a mildly precarious security environment. Precautions, then, were understandably taken by certain interviewees and by myself so as to avoid any danger during transport between interviews. Secondly, given the high sensitivity of the Saif al-Islam Gaddafi and Abdullah El Senussi cases and given that there had been several assassinations and death threats targeting lawyers and judges who were potentially involved in their defense, the Libyan human rights lawyers I interviewed refused to discuss the trial of those particular individuals.[179] Where such discomfort arose, I asked no further questions pertaining to those cases and the interviews promptly proceeded to the next question. A third challenge to conducting research interviews in Libya was obtaining a visa to travel there. This challenge was eventually overcome with the help of friends, acquaintances, the Libyan ambassador to Qatar, and the relentless efforts of the Office of the High Commissioner for Human Rights (OHCHR) in Qatar, for which I was conducting a short consultancy at the time. Finally, the general opacity surrounding the legal cases in Libya made it difficult to obtain details on the status of the prosecutions.

[179] Abdullah El Senussi was Muammar Gaddafi's intelligence chief and brother-in-law. His case is discussed in the Status of Prosecutions in the Four Case Studies section in this chapter and again in Chapters 3 and 4.

I faced similar challenges with regards to research interviews in Yemen. Thanks to the help of a friend and former colleague based in Yemen, I was able to obtain a visa and traveled to Sanaa in January 2014. There had been two security incidents involving a small bombing and an assassination on the same morning of my arrival in Sanaa. This meant that I had to forego an afternoon of interviews, as it was safer to stay in the hotel. However, as is often the case in such contexts where there are regular fluctuations in the security situation, things went back to normal the next day and I was able to conduct more interviews than initially anticipated. I was also fortunate to have stayed at the hotel where the final stage of the National Dialogue Conference was taking place, which meant that I had relatively easy interview access to a number of key individuals who were attending the talks.

No significant challenges were encountered during my research in Egypt and Tunisia. There were, however, certain risks in Egypt, such as surveillance by security officers due to the perceived controversial nature of the topic of the interviews. To reduce this risk, I conducted the interviews in safe, public spaces (i.e. an office or a café) and I had a trusted driver with me at all times in Egypt, Libya and Yemen.

Access to prosecutors in Egypt, Libya, Tunisia and Yemen proved difficult. As a result, none of the interviews were conducted with prosecutors. This stemmed from a number of challenges having to do with the ongoing nature of the prosecutions and the general lack of security preventing prosecutors from providing commentary on such issues. With more funding and a significant increase in the amount of time spent conducting field research in each country, I may have been able to interview one or more prosecutors. Unfortunately, however, this was not possible due to time and financial constraints.

A panel I convened at Durham Law School in May 2014 and the subsequent Rapporteur's Report summarising the interventions during the panel also served as a useful source of information for three of the four case studies.[180] Experts on Egypt, Libya and Tunisia participated in the panel and provided up-to-date information on the status of the prosecutions and thoughts on their implications in an environment that was free of the restrictions and security concerns outlined above during travel to the said countries.

Rationale for Case Selection

The Arab region is important for the development of transitional justice research and practice not least because of the varied types of transitions that emerged since 2011 and the divergent transitional justice paths pursued. The cases around which the transitional justice field was formed are largely drawn from Eastern Europe and Latin America, which shaped the "normative assumptions" of the field and represented transitions that resemble "Western liberal market democracy."[181] This contrasts with the varied transitions that unfolded in the Arab region.

Egypt, Libya, Tunisia and Yemen share crucial attributes that make the comparative study possible. In all four countries, massive uprisings within the same time period took place, the leaders were toppled, and a drastic political transition ensued. Almost simultaneously, a flurry of activity surrounding the prosecution of political leaders unfolded in the four case studies. The absence of trials in Yemen did not mean that the question of prosecution was laid to rest definitively. On the

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[180] Noha Aboueldahab, 'Rapporteur's Report: Prosecutions, Politics and Transitions: How criminal justice in the Arab Spring is shaping transitional justice' (Panel discussion, Durham Law School Durham 6 May 2014) <www.academia.edu/8738334/Rapporteurs_Report_Prosecutions_Politics_and_Transitions_-_How_criminal_justice_in_the_Arab_Spring_is_shaping_transitional_justice> accessed 26 July 2015.

[181] Dustin N. Sharp, 'Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice' (2013) 26 Harvard Human Rights Journal 149.

contrary, several large protests in response to the immunity law took place, keeping the issue of accountability in the limelight.

The four case studies, however, are also sufficiently different so as to enable a meaningful comparative study. Egypt and Tunisia prosecuted their political leaders and issued verdicts. Libya's transition emerged from a violent civil war between Gaddafi loyalists and anti-Gaddafi militias and with the aid of the North Atlantic Treaty Organisation's (NATO) military intervention to oust Muammar Gaddafi and his regime. Following arrest warrants issued by the ICC, Libya decided to prosecute its leaders domestically and refused to hand over suspects to The Hague.[182] It also won an admissibility appeal for El Senussi, resulting in the annulment of his ICC arrest warrant in July 2014. Former Yemeni President Saleh negotiated his ouster with heavy regional and international involvement. Geopolitics figured heavily in domestic decisions regarding prosecution in Yemen. The most influential regional players were Saudi Arabia and the Gulf Cooperation Council (GCC) and the international actors were the United States, the European Union (EU), and the United Nations (UN). The Yemeni parliament passed an immunity law, protecting Saleh and his aides from prosecution.[183]

These varied transitions provide an abundance of material for the re-thinking of predominant understandings of transitional justice. From the outset, it is clear that the Arab Spring transitions – many of which are still ongoing – already point to the shortcomings of the prevailing assumptions of the liberal roots of transitional justice.

[182] The ICC arrest warrants were issued for Muammar Gaddafi, Saif al-Islam Gaddafi and Abdullah El Senussi in June 2011. Following the death of Muammar Gaddafi on 20 October 2011, the ICC terminated its case against him.

[183] Law No. 1 of 2012 Concerning the Granting of Immunity from Legal and Judicial Prosecution, translated from Arabic to English by Amnesty International in *Yemen's Immunity Law – Breach of International Obligations* (March 2012) < www.amnesty.ca/sites/default/files/2012-03-30mde310072012enyemenimmunitylaw.pdf> accessed 10 July 2015.

There is a fundamental tension between the paradigmatic 'liberal' transitional justice and the 'illiberal' transitional justice processes that unfolded in the case studies.[184]

Syria and Bahrain are countries whose anti-government mass uprisings in 2011 qualified them as Arab Spring countries. Iraq and Sudan are also countries that have experienced either a trial of a former leader (Iraq) or efforts to prosecute leaders (Sudan) by the ICC. An in-depth study of decisions regarding prosecution in Syria, Bahrain, Iraq and Sudan, however, are beyond the scope of this thesis for several reasons. One question that arises when considering these cases is whether the ouster of political leaders in the Arab region is a necessary condition for any formal decision to be taken on whether to prosecute. Despite the fact that there have been recent efforts geared towards the establishment of human rights tribunals for Syria, access to the necessary data would have been extremely difficult, given the ongoing nature and intensity of the conflict in Syria. Most importantly, the differences in the context within which decisions regarding prosecution have taken place in Bahrain, Syria, Iraq and Sudan are too great to warrant a comparative case study that extends to those countries. Iraq did not experience an 'Arab Spring' uprising that toppled its leader, Sudan's leaders are still very much in power despite the ICC arrest warrants issued against them, and Bahrain and Syria's leaders have not been ousted by the uprisings that took place there.[185]

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[184] Parts of this tension are referred to by several authors in Kirsten J. Fisher and Robert Stewart (eds), *Transitional Justice and the Arab Spring* (Routledge 2014).

[185] Despite the fundamental differences between Bahrain and the four case studies of this thesis, it is important to mention here the Bahrain Independent Commission of Inquiry (BICI), which was established by Royal Order No. 28 by King Hamad bin Isa Al Khalifa on the 29 June 2011. This commission, chaired by Cherif Bassiouni, was tasked with investigating events during the uprising of February and March 2011. The report was issued on the 23 November 2011 and recommended the establishment of a national, independent and impartial mechanism to conduct effective investigations into allegations of torture and into deaths attributed to the security forces. It states that, "These investigations should be capable of leading to the prosecution of those implicated, both directly and at all levels of responsibility, if the conclusion is that there was a breach of the law." Bahrain Independent Commission of Inquiry, 'Report of the Bahrain Independent Commission of Inquiry' (23 November 2011) <http://www.bici.org.bh/BICIreportEN.pdf> accessed 7 December 2015. Morocco

Scholars of transitional justice have pursued a similar comparative case study approach to illustrate their arguments concerning the relation between the nature of transitions and prosecutions. Skaar, for instance, compares Argentina, Chile and Uruguay in her book *Judicial Independence and Human Rights in Latin America*. All three countries suffered brutal military dictatorships in the 1970s and 1980s and the types of crimes – kidnappings and disappearances – were the same. The political leaderships in all three countries issued amnesty laws that initially precluded prosecution of the military for gross human rights violations. Argentina and Chile eventually began to move in similar directions, whereby there was an increased tendency of judges to prosecute military officials. Uruguay lagged behind with no prosecutions before 2002. Argentina and Chile successfully reformed their judicial systems, whereas Uruguay made a series of unsuccessful attempts at judicial reform. This allowed Skaar to examine how judicial reform and judicial activism – and indeed their absence – in the field of human rights may be related. Since the three countries are in the same region, certain key regional and international factors served as a contextual constant within which the judges in all three countries operated.[186]

Still, much of the critical transitional justice scholarship is to a large extent concerned with the tensions between local versions of transitional justice and international toolkits for transitional justice. The tensions between universality claims and local realities are indeed important considerations in critiques of transitional justice, not least because they challenge some of the underlying roots of

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was the first Arab country to establish a fact-finding commission in 2004. The Equity and Reconciliation Commission was established a few years after the death of King Hassan II and during the monarchical transition of power to his son, King Mohammed VI. It investigated disappearances and state-sponsored violence for a period of 43 years and distributed "almost $85 million worth of reparations to 9,799 affected individuals." < http://www.bici.org.bh/indexcdf1.html?page_id=10> accessed 7 December 2015.

[186] Elin Skaar, *Judicial Independence and Human Rights in Latin America* (Palgrave MacMillan 2011) 16.

the broader international human rights field.[187] As Franzki and Olarte note, "mainstream transitional justice scholarship adopts a problem-solving stance in that it does not reflect on social and power relationships that brought about its object of study."[188] A rigorous inquiry into the transitional justice tensions at the domestic level coupled with an in-depth study of the origins of decisions regarding prosecution are therefore important ways to better understand the diverse interests and ends that guide transitional justice decisions. Before I present the findings of this inquiry in Chapter 3, the next section outlines the status of prosecutions in each case study.[189]

Status of Prosecutions in the Four Case Studies

Egypt

The anti-government uprising in Egypt began on the 25 January 2011. Mass demonstrations engulfed the country, when hundreds of thousands of people took to the streets and chanted for the removal of former President Mubarak's regime. Mubarak had been in power for thirty years. On the 11 February 2011, the eighteenth day of the uprising, Mubarak stepped down and the military took over as the governing interim authority until a new president – Mohammed Morsi – was elected in June 2012. Morsi was a member of the Muslim Brotherhood until he took the presidency. In July 2013, he was removed from office following a military coup, which saw the return of military rule in Egypt, this time headed by Abdel Fattah El Sisi, who then became president in June 2014.

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[187] Sharp, 'Interrogating the Peripheries' (n 181) 159-160.
[188] Hannah Franzki and Maria Carolina Olarte, 'The Political Economy of Transitional Justice: A Critical Theory Perspective' in Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth (eds), *Transitional Justice Theories* (Routledge 2014) 217.
[189] The status of prosecutions outlined in this thesis is updated as of July 2015. See Appendix III for an explanation of the procedural laws concerning criminal prosecution in Egypt, Libya, Tunisia and Yemen.

The most high-level prosecution that has taken place in Egypt is that of former President Mubarak, his two sons, and the former Minister of Interior, Habib El Adly. All faced multiple charges of corruption, economic crimes, and human rights violations. The human rights prosecutions were limited to the time period of the eighteen day uprising – specifically, the killing of protesters, whereas the corruption and economic crimes charges included the pre-uprising period.[190]

Mubarak and El Adly were sentenced to life in prison in June 2012 for their role in the killing of protesters during the uprising. They were charged with "complicity in the killing of protesters," while four other high-level interior ministry officials were acquitted.[191] The verdict was appealed and following a re-trial, the charges against Mubarak and El Adly over the killing of protesters were dropped in a controversial verdict in November 2014. This was again appealed and a third and final re-trial will take place in November 2015.

Mubarak and his two sons Gamal Mubarak and Alaa Mubarak were tried in numerous corruption cases.[192] In the *Presidential Palaces* case, Mubarak, his sons and four other defendants were accused of embezzling LE125 million in state funds to adorn their private properties. In a May 2014 verdict, Mubarak was found guilty and sentenced to three years in prison and was fined LE120 million. The verdict was appealed and accepted by the Court of Cassation in January 2015. Mubarak and his sons were released from this case. The charge against Mubarak and his sons of illegal possession of five villas worth LE39 million in Sharm El Sheikh was dropped in November 2014 because of a ten-year statute of limitations. This was known as

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[190] See Chapter 3 for an explanation of the very few human rights prosecutions addressing pre-2011 violations in Egypt.
[191] BBC News, 'Mubarak Sentenced to Jail for Life over Protest Deaths' (2 June 2012) <www.bbc.com/news/world-middle-east-18306126> accessed 26 July 2015.
[192] Gamal Mubarak, who was deputy secretary general of Mubarak's National Democratic Party was active in Egyptian politics and was thought by many to be pushing his way to the presidency, following in the path of his father.

the *Sharm El Sheikh villas* case. In the *Al Ahram gifts* case, Mubarak was accused of illegally receiving gifts worth LE18 million from the state owned media institution Al Ahram. The case was closed, however, in August 2013 following Mubarak's repayment of the value of the gifts. The infamous *Israeli gas deal* case saw the prosecution of Mubarak along with former Petroleum Minister Sameh Fahmy and business tycoon Hussein Salem. They were accused of squandering public funds on a massive scale and of granting the Eastern Mediterranean Gas company (EMG) the right to sell Egyptian gas without a bidding process. They were also charged with failing to include provisions in the deal allowing Egypt to change gas prices in accordance with changes in international market prices. Nadia Ahmed summarises the magnitude of this case: "The 15 year contract with Israel reportedly cost the Egyptian economy LE4.2 billion. Hussein Salem allegedly made LE2 billion in profit from the deal…" The November 2014 verdict acquitted Mubarak and the other defendants on all charges related to this gas deal. While Hussein Salem was acquitted in the *Israeli gas deal* case, he along with his son and daughter were sentenced in absentia to ten years in a maximum security prison for their role in the *Selling Electricity* case. They were also fined LE11.125 million. Through the Middle East Oil Refining Company (MEDOR), which Hussein Salem chaired and on which his son and daughter served as board members, they illegally sold electricity to organisations other than the Egyptian Electricity Authority. Hussein Salem lives in Spain and reportedly offered to donate half his fortune to President El Sisi's Tahya Masr charity fund in exchange for the dropping of all charges against him.[193]

Ahmed Ezz, steel tycoon and former chairman of Mubarak's National Democratic Party (NDP), was also tried in a number of corruption cases. In the

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[193] Nadia Ahmed, 'Show Me the Money: The Many Trials of Mubarak's Men' Mada Masr (25 January 2015) <www.madamasr.com/sections/politics/show-me-money-many-trials-mubaraks-men> accessed 26 July 2015.

Money Laundering case, he was released on a LE100 million bail, “reportedly the highest bail ever set in Egyptian history,” for laundering LE6.4 billion between 2003 and 2011 through deals related to his acquisition of the Al-Ezz Dekhelia Steel Company.[194] In a separate *Steel Licenses* case, Ezz along with the former Trade and Industry Minister Rachid Mohamed Rachid were charged with squandering LE660 million in public funds by obtaining two free licenses to produce steel instead of obtaining the licenses through a public bidding process. In March 2015, Ezz returned the second license to the state. He was released in August 2014 after completing his three-year prison sentence over previous corruption charges.

Several other high-level figures from the former Egyptian regime were tried for corruption. They include former Prime Minister Ahmed Nazif, former Finance Minister Youssef Boutros-Ghali, former Housing Minister Ahmed Al-Maghrabi, former Tourism Minister Zoheir Garana and former Information Minister Anas Al-Fiqqi.

Three fact-finding committees were formed in Egypt since the 2011 uprising. The first was formed in 2011 and was tasked with gathering evidence for crimes committed during the 25 January uprising. Headed by Judge Adel Qoura, the committee issued its report in April 2011, in which it confirmed that Egyptian police used live ammunition against protesters on the 28 and 29 January 2011.[195] Former President Mohamed Morsi formed the second fact-finding committee in July 2012, one month after he took office. This committee consisted of judges, an assistant public prosecutor, an assistant interior minister, the head of national security, human

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[194] ibid.
[195] Ahram Online, ‘Fact-finding committee releases report on the January 25 revolution’ (19 April 2011) <http://english.ahram.org.eg/NewsContent/1/64/10374/Egypt/Politics-/FactFinding-Committee-releases-report-on-the-Janua.aspx> accessed 7 December 2015.

rights lawyers and relatives of victims.[196] The 2012 fact-finding committee's report was never made public, but its confidential findings led Morsi to order the re-opening of the Mubarak trial. Given that the June 2012 Mubarak and El Adly verdicts were appealed in January 2013, a re-trial was set to take place later that year. Following the re-trial, the charges against Mubarak concerning the killing of protesters were dropped in November 2014.

The third fact-finding committee was formed in December 2013 by presidential decree issued by interim President Adly Mansour. Headed by former international judge Fouad Abdel Moneim Riyad, this committee was tasked with investigating crimes committed during and immediately after the 30 June 2013 events, when former President Morsi was overthrown in a military coup backed by a sizeable number of protesters. While only an executive summary of the committee's report was made public, Egyptian civil society provided thorough responses to the published findings. One Egyptian NGO criticised the committee's failure to establish "enforcement and accountability mechanisms to make it binding for state institutions to cooperate with the Commission" as well as its failure to specify whether it has the powers of subpoena, search and seizure.[197] The committee also apparently did not specify which human rights violations fell under its mandate nor did it identify the time frame covered in its investigations.[198]

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[196] Daily News Egypt, 'Morsi expresses gratitude to the army amid demands to release confidential report,' (12 April 2013) < http://www.dailynewsegypt.com/2013/04/12/morsi-expresses-gratitude-to-the-army-amid-demands-to-release-confidential-report/> accessed 7 December 2015.

[197] Egyptian Initiative for Personal Rights, 'The Executive Summary of the Fact-Finding Commission's Report: Falls Short of Expectations' (Press Release, 4 December 2014) <http://eipr.org/en/pressrelease/2014/12/04/2293> accessed 7 December 2015.

[198] ibid.

Libya

The anti-government uprising in Libya began on the 17 February 2011. Fathi Terbil was among the most prominent lawyers who represented the families of the victims of the Abu Salim prison massacre.[199] His arrest on the 15 February 2011 sparked protests in Libya's eastern town of Benghazi, which then grew into a full-fledged massive uprising on the 17 February 2011. Mass demonstrations continued to take place, calling for the ouster of former leader Muammar Gaddafi and his regime. Muammar Gaddafi had been in power for forty-two years. A NATO-led military intervention ensued, backed by the United Nations Security Council. This intervention started on the 19 March 2011 and ended on the 31 October 2011, eleven days after Muammar Gaddafi was captured and killed by Libyan rebels. Gaddafi's son, Saif al-Islam Gaddafi, has since been captured and held by Libyan rebels in Zintan. Former intelligence chief El Senussi has been detained in Al Hadba prison along with over thirty former regime officials.

[199] This massacre and its significance are discussed in Chapter 3. Thousands of political opposition activists were imprisoned in Abu Salim, following orders by Gaddafi and his regime. The following is a description obtained by Human Rights Watch of the Abu Salim massacre: "[O]n the evening of June 28 the prisoners protested over harsh prison conditions and captured two guards, one of whom died. Guards opened fire, killing six prisoners and wounding about 20. The government sent senior officials to negotiate, including Muammar Gaddafi's brother-in-law and intelligence chief, Abdullah Sanussi. Five prisoners met Sanussi to present their demands, including a stop to torture, trials for prisoners, and improved food, health care, and family visits. Sanussi said he would meet the prisoners' demands, except for trials, if the prisoners released the other captured guard, one of the prisoner negotiators told Human Rights Watch. The prisoners agreed and about 120 sick prisoners were taken away, allegedly for medical care. Instead, many of them were shot and killed. The next morning, hundreds of prisoners from different cell blocks were brought into a courtyard in the civilian side of the prison. Between 10 a.m. and 11 a.m., gunmen on the roofs opened fire with automatic weapons for at least one hour. In total over the two days, more than 1,200 prisoners lost their lives." Human Rights Watch, 'Libya: Abu Salim Prison Massacre Remembered' (27 June 2012) <www.hrw.org/news/2012/06/27/libya-abu-salim-prison-massacre-remembered> accessed 24 August 2015.

Despite the arrest warrants that were issued by the ICC for Saif al-Islam Gaddafi and El Senussi on the 27 June 2011, the Libyan authorities insisted that they try them domestically, arguing that its judiciary was capable of trying Libyan nationals for grave human rights violations.[200] The ICC accepted an admissibility challenge for El Senussi, filed by Libyan authorities in April 2013:

> On 11 October 2013, Pre-Trial Chamber I decided that the case against Mr. Al-Senussi was inadmissible before the Court as it was subject to on-going domestic proceedings conducted by the competent Libyan authorities and that Libya was willing and able genuinely to carry out such investigation.[201]

The ICC, however, rejected Libya's admissibility challenge for Gaddafi. Thirty-five other defendants were tried domestically in Libya for charges that include war crimes, the killing of protesters, and corruption. Given that he continues to be held by Zintan militias, the trial of Saif al-Islam Gaddafi was conducted in absentia. Other defendants include former Prime Minister Baghdadi Al-Mahmoudi, former Foreign Minister Abdul Ati Al-Obeidi, and former intelligence chief Bouzid Dorda. The first domestic trial of a former political figure in Libya started in June 2012. In this trial, Dorda faced human rights charges related to the killing of protesters during the Libyan uprising. His trial was suspended at the time for technical reasons.

The trial of the thirty-seven former Gaddafi regime members started in April 2014 and verdicts were issued in July 2015. Saif al-Islam Gaddafi, El Senussi, former Prime Minister al-Mahmoudi and six other defendants were sentenced to death by firing squad for committing war crimes during the 2011 conflict.[202] Seven others

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[200] The ICC had issued an arrest warrant for Muammar Gaddafi as well, but following his capture and death in October 2011, it terminated its case against him.

[201] International Criminal Court, 'Al-Senussi Case: Appeals Chamber Confirms Case is Inadmissible before ICC' (Press Release, 24 July 2014) <www.icccpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1034.aspx> accessed 26 July 2015.

[202] The full list of those sentenced to death is as follows: Saif al-Islam Gaddafi, the colonel's son and right-hand man; Abdullah El Senussi, chief of military intelligence; Baghdadi al-Mahmoudi, former Prime Minister; Mansour Daw, security chief; Abuzeid Dorda, head of foreign intelligence; Milad Salem Daman, head of internal security agency; Brig Gen Mondher Mukhtar al-Gheneimi; Abdul

were given a twelve-year jail sentence each and four defendants were acquitted. According to a BBC report, “The defendants were accused of incitement to violence and murdering protesters during the revolution that eventually toppled Col. Gaddafi.”[203]

The United Nations International Commission of Inquiry on Libya (2011-2012) was established on the 25 February 2011 by the United Nations Human Rights Council. The Commission investigated alleged violations of international human rights law in Libya and produced its first report under the chairmanship of Cherif Bassiouni in June 2011 and the second report under the chairmanship of Philippe Kirsch in March 2012. Both reports are extensive and include clear recommendations calling for accountability for crimes committed during the 2011-2012 conflict in Libya.[204]

Tunisia

The Tunisian anti-government uprising started on the 18 December 2010 and ousted former President Ben Ali on the 14 January 2011. Ben Ali was president of Tunisia for twenty-three years. He fled to Saudi Arabia, where he has lived in exile since January 2011. Calls for his extradition to Tunisia have been repeatedly ignored. As a result, his trials were all conducted in absentia.

The charges in the prosecutions of twenty-two former political leaders are a mélange of corruption, financial, and human rights crimes – with the majority of the latter pertaining to those committed during the uprising. Some verdicts have been

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Hamid Ammar Waheda, Senussi aide; Awidaat Ghandour al-Noubi, responsible for Col Gaddafi's revolutionary committees in Tripoli. Rana Jawad, ‘Libya death sentences cast long shadow over rule of law.’ (BBC News, 12 August 2015) <www.bbc.com/news/world-africa-33855860> accessed 20 August 2015.

[203] BBC News, ‘Libya trial: Gaddafi son sentenced to death over war crimes.’ (BBC News, 28 July 2015) <www.bbc.com/news/world-africa-33688391> accessed 20 August 2015.

[204] The two reports of the Commission can be found here: <http://mcherifbassiouni.com/investigations/libya/> accessed 7 December 2015.

issued, most of which have been light sentences and acquittals, and about forty corruption cases that have been filed since March 2011 are still being investigated. In addition, four hundred and twenty businessmen were banned from traveling outside of Tunisia pending investigation into their alleged involvement in corruption crimes.

Ben Ali was sentenced to sixty-six years in prison for graft and corruption charges and in June 2012, he was sentenced to life imprisonment for his role in the killing of protesters during the uprising. He was convicted of complicity in willful murder and attempted murder in accordance with article 32 of the Tunisian penal code.[205] Moreover, he along with Abdallah Qallel, a former Minister of Interior, were sentenced for the torture of those who participated in the 1991 attempted coup plot – a case that is known in Tunisia as the Baraket Essahel case, named after the town in which the events took place.[206]

Other high-level government officials who were tried and issued prison sentences include former Minister of Interior Rafiq Haj Kacem, former Director General of National Security Adel Tiouiri, former Director of the Anti-Riot Police Jalel Boudrigua, former Director General of Public Security Lotfi Ben Zouaoui, and the powerful former Director of the Presidential Guard, Ali Seriati. However, almost twenty Ben Ali-era senior government officials were set free, following a significant reduction in sentences to time served.[207]

Human Rights Watch estimates that a total of fifty-three former government officials, including police and security officers, were tried in military tribunals in

[205] Human Rights Watch, 'Tunisia: Q&A on the Trial of Ben Ali, Others for Killing Protesters' (11 June 2012) <www.hrw.org/news/2012/06/11/tunisia-qa-trial-ben-ali-others-killing-protesters> accessed 26 July 2015.

[206] See Chapter 3 for more details about this and other cases in Tunisia.

[207] Carlotta Gall, 'Questions of Justice in Tunisia as Ousted Leaders are Freed' New York Times (16 July 2014) <www.nytimes.com/2014/07/17/world/africa/questions-of-justice-in-tunisia-as-ousted-leaders-are-freed.html> accessed 26 July 2015.

Tunisia since late 2011.[208] Tunisia was the first Arab Spring country to pass a transitional justice law in December 2013. Through this law, a Truth and Dignity Commission, covering crimes committed since Tunisia's independence in 1955 through 2013, was established. The first victim testimony was heard at the Truth and Dignity Commission in May 2015.[209] Reparations, vetting, institutional reform and national reconciliation are some of the mechanisms that this law intends to enforce. Moreover, the law establishes "specialized chambers within the court system to try grave abuses committed between July 1955 and December 2013."[210]

Two fact-finding commissions were established in Tunisia in 2011. The first was established by former President Ben Ali on the 13 January 2011 – one day before his ouster. Its purpose was to investigate human rights violations committed during the 2010-2011 uprising. The second commission was established to investigate corruption crimes. According to some interviewees, the capacity of these commissions to carry out investigations was weak and their reports had little influence on the process of prosecution in Tunisia.[211]

Yemen

On the 27 January 2011, Yemenis took to the streets to protest former President Saleh's rule. Violent clashes took place between protesters, security forces, and tribesmen both loyal to and in opposition to Saleh's rule. On the 18 March 2011, forty-five protesters were shot and killed during a mass demonstration. This day

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[208] Human Rights Watch, 'Flawed Accountability: Shortcomings of Tunisia's Trials for Killings during the Uprising' (January 2015) 1 <www.hrw.org/report/2015/01/12/flawed-accountability/shortcomings-tunisias-trials-killings-during-uprising> accessed 26 July 2015.

[209] Agence France Press, 'Tunisia "Truth Commission" hears victim testimony (27 May 2015) <www.dailymail.co.uk/wires/afp/article-3099409/Tunisia-truth-commission-hears-victim-testimony.html> accessed 26 July 2015.

[210] Human Rights Watch, 'Flawed Accountability' (n 201) 1.

[211] Interview with Solène Rougeaux, Director, Avocats Sans Frontières, Tunis Office (Tunis, Tunisia, 25 April 2012); Interview with Anis Mahfoudh, Human Rights Officer, OHCHR, Tunisia (Tunis, Tunisia, 27 April 2012).

became known as the “Friday of Dignity” killings during the uprising. In April 2011, Saleh, while still president, dismissed Attorney General Abdullah al-Olfy shortly after al-Olfy requested the arrests of key suspects, including government officials, for the Friday of Dignity killings.[212] Many suspects were acquitted and the trials were criticised by organisations such as Human Rights Watch for being flawed.

For example, forty-three out of seventy-eight suspects indicted in June 2011 were listed as fugitives from justice. Thirty-one of them were never apprehended and the other twelve disappeared after they were provisionally released pending the outcome of the trial. Twenty-seven defendants were released on bail. In October 2011, victims’ lawyers filed a motion in court demanding the indictment of at least eleven additional government officials for the shootings, including Saleh, his nephew and a former interior minister. This case was sent to the Supreme Court for a decision on its validity in light of the immunity law. The trial was thereafter suspended.

In November 2011, the GCC, a political and economic sub-regional body, negotiated an agreement that resulted in Saleh’s stepping down in return for immunity from prosecution. The Yemeni parliament passed an immunity law for Saleh in January 2012 and power was transferred to his Vice President, Abed Rabbo Mansour Hadi, in February 2012. Despite his stepping down from the presidency, Saleh retained his post as leader of the powerful General People’s Congress Party (GPC).

Following the passing of the immunity law, protests began to re-emerge in Yemen in September 2012. These protests specifically called for the reversal of the immunity law. In response, Yemen’s government ordered an investigation into

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[212] Human Rights Watch, ‘Unpunished Massacre: Yemen’s Failed Response to the “Friday of Dignity” Killings’ (February 2013) <www.hrw.org/report/2013/02/12/unpunished-massacre/yemens-failed-response-friday-dignity-killings> accessed 26 July 2015.

human rights violations that occurred during the uprising and set up an investigative committee to that effect. In September 2012, the new president Hadi signed a decree authorising the creation of a commission of inquiry to investigate human rights violations during the 2011 uprising and to recommend accountability measures, including prosecutions. The Hadi government ordered the investigation of seventy police officers suspected of being responsible for the Friday of Dignity killings during the uprising. A trial commenced on the 29 September 2012 in the First Instance Court for the Western Capital District in Sanaa. However, the trial was ridden with flaws, as Human Rights Watch observed: "The state prosecution's investigation into the Friday of Dignity massacre was marred by political interference a failure to follow leads that might have implicated government officials, and factual errors."[213]

Throughout the National Dialogue Conference talks in Yemen, working groups debated the drafting of a transitional justice law. One of the key questions was whether the law would date back to the beginning of Saleh's rule in 1978 or to the 2011 uprising. Human Rights Minister Hooria Mashhour said that the transitional justice law would encourage families of victims of Saleh's rule since 1978 to prosecute him or others either inside or outside Yemen. She also raised the issue of the need to hold to account those responsible for the forced disappearances in Yemen:

> There were serious violations throughout the president's rule. It was a police-intelligence regime…Revolutionary youth have a list of 129 people who disappeared. Their families are crying and saying if they were tortured (to death), then give us their bodies.[214]

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[213] ibid.

[214] Andrew Hammond, 'Yemen Minister Says Saleh Trying to Spoil Transition' Chicago Tribune (22 September 2012) <www.chicagotribune.com/news/sns-rt-us-yemen-saleh-ministerbre88l06q-20120922,0,5595875.story> accessed 26 July 2015.

In October 2012, lawyers for the Friday of Dignity victims filed a motion to challenge the immunity law and called for a new investigation, seeking to indict former president Saleh and his aides. Judge al-Sanabani, however, decided that the motion conflicted with the immunity law and sent the case to the constitutional division of the Supreme Court for guidance. There was no response.

In the next chapter, I present the findings from the interviews conducted with lawyers, civil society organisations, human rights activists, academics, political experts, judges, international organisations and journalists in the four country case studies. Each country section concludes with a summary of factors that triggered, drove and shaped decisions regarding prosecution in Egypt, Libya, Tunisia and Yemen. An analysis of the implications of these findings for transitional justice theory and practice is presented in Chapter 4.

CHAPTER 3 | PRESENTATION OF FINDINGS

Significance of Pre-Transition Decisions Regarding Prosecution

One of the objectives of this thesis is to explain the factors that led to decisions to prosecute and not to prosecute political leaders. This chapter aims, in part, to explain what, if any, efforts were pursued to prosecute political leaders before, during and shortly after the 2011 uprisings in Egypt, Libya, Tunisia and Yemen. This question regarding pre-transition decisions to prosecute is important for three reasons. First, as explained in the introduction, the timing of this inquiry was crucial, as it allowed for interviews with individuals both directly and indirectly involved in the prosecutions shortly after they had taken place or, as in many cases, while they were still ongoing. This helps to ensure a more accurate explanation of the formative stages of the decisions regarding prosecution, thereby avoiding the tedious detective work that Sikkink referred to.[215]

Second, an inquiry into efforts to prosecute in the past – before the 2011 uprising – is necessary in order to understand the development and execution of the prosecutorial strategies in the four countries after the uprising.[216] It provides insight into the formative stages of these decision-making processes. This is not to say that clear decisions to prosecute political leaders had begun before the ouster of the four leaders in 2011. On the contrary, the interview responses show that for a variety of reasons, very little was done in terms of attempts to hold political leaders accountable in a court of law. However, certain iconic cases that implicated – whether implicitly or explicitly – high-level government officials reveal attempts to achieve some form of accountability within a difficult and opaque judicial environment pre-transition.

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[215] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World* Politics (WW Norton 2011) 11.
[216] The implications of these prosecutorial strategies for transitional justice are discussed in Chapter 4.

Finally, an inquiry into the formative stages of decisions regarding prosecutions reveals that a variety of factors and actors shaped the decisions. As a result, attributing unfair trials to one factor such as a politicised and weak judiciary falls short of a more comprehensive explanation. It fails to take into account other significant factors such as the nature of the transition, the composition of civil society, the role of international actors, legal challenges, and so on that shaped transitional justice across the four countries. It is these factors that the research conducted for this thesis aims to identify and explain. I begin by presenting the findings for Egypt and Tunisia first, followed by Libya and Yemen. This is because Egypt and Tunisia are the two case studies that are the most advanced with regards to the number of prosecutions and verdicts issued for former political leaders. The findings for Libya and Yemen will then demonstrate further similarities with Egypt and Tunisia, but will also highlight significant differences in the factors that triggered, drove and shaped decisions regarding prosecution there.

EGYPT

The Prosecution of Political Leaders in Pre-Transition Egypt

While there were no successful attempts to prosecute political leaders before the 2011 uprising in Egypt, lawyers filed many torture cases with the public prosecution.[217] These cases, however, targeted mid-level police and interior ministry officials and most of them resulted in verdicts based on weak or incomplete evidence and questionable judicial procedures.[218] The public prosecution blocked many other

[217] Interview with anonymous senior expert on transitional justice in Egypt, International Center for Transitional Justice (14 June 2013); Interview with Mohamed Al Ansary, Human Rights Lawyer and Activist, Cairo Institute for Human Rights Studies (Cairo, Egypt, 10 December 2013).
[218] Interview with Mohamed Al Ansary, Human Rights Lawyer and Activist, Cairo Institute for Human Rights Studies (Cairo, Egypt, 10 December 2013); Interview with Mohamed El Shewy, Transitional Justice Programme Officer, Egyptian Initiative for Personal Rights (Telephone interview, 24 November 2013); Interview with anonymous senior expert on transitional justice in Egypt,

cases. Interviewees suggested two main reasons for the weak verdicts and for the large number of cases that were blocked before 2011. First, there was no political will to push the cases forward "because it was the regime that was committing torture."[219] A lack of judicial independence, particularly where the public prosecutor is allied with the ruling political party, was a major obstacle to criminal accountability for both political leaders and mid-level officials. Several interviewees also explained that no one was "bold enough" to pursue cases against high-level government officials and this is largely due to the systematic nature of torture and intimidation tactics employed by *amn el dawlah,* or state security.[220] Human rights lawyer and activist Mohamed Al Ansary recalled some testimonies from torture victims who said that when they attempted to report torture crimes at police stations, state security officials then posed as prosecutors and inflicted torture on them again for reporting the original crime.[221] This of course created a climate of fear, leading an increasing number of victims to refrain from reporting torture crimes. Al Ansary added that the difference between calls for prosecution before 2011 and calls for prosecution post 2011 is that civil society demands were formerly framed as "we need more accountability" rather than the more recent, bolder and specific "Mubarak should be prosecuted." Naming high-level officials was too risky for torture victims in particular because of the systematic and widespread nature of torture practices in Egypt before 2011.

International Center for Transitional Justice (14 June 2013); Interview with Gamal Eid, Human Rights Lawyer, Activist and Director of the Arabic Network for Human Rights Information (Cairo, Egypt, 8 December 2013).

[219] Interview with Gamal Eid, Human Rights Lawyer, Activist and Director of the Arabic Network for Human Rights Information (Cairo, Egypt, 8 December 2013).

[220] Interview with Mohamed Al Ansary, Human Rights Lawyer and Activist, Cairo Institute for Human Rights Studies (Cairo, Egypt, 10 December 2013).

[221] ibid.

Difficult access to concrete evidence is the second major reason for the lack of criminal prosecutions of high-level government officials before 2011.[222] As Judge Adel Maged explained, the problem with the Egyptian criminal system is that it requires 'direct evidence', for example in the form of eyewitnesses, for cases to be successful.[223] Maged explained that "According to the ordinary criminal provisions, many cases both before and after 2011 resulted in acquittals because there was insufficient evidence according to this evidentiary requirement – direct evidence – in the current criminal system."[224] The absence of a provision for command responsibility in the criminal code also makes it difficult, almost impossible, to establish the responsibility of leaders.

Before 2011, there were a few notable prosecution attempts that targeted the president, prime minister, ministers, and intelligence chiefs. For example, a number of prominent human rights lawyers, including Khaled Ali and Ahmed Seif El Dawla, filed complaints against former intelligence chief Omar Suleiman for the 2008 violent crackdown on protesters in Mahalla.[225] The public prosecutor blocked this case from going forward. The high-level corruption cases of *Madinaty* and *Palm Hills* in 2010 were filed against the president, prime minister, and minister of

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[222] Interview with Mohamed El Shewy, Transitional Justice Programme Officer, Egyptian Initiative for Personal Rights (Telephone interview, 24 November 2013); Interview with Judge Adel Maged, Vice President, Court of Cassation, Egypt (Cairo, Egypt, 7 December 2013).

[223] Interview with Judge Adel Maged, Vice President, Court of Cassation, Egypt (Cairo, Egypt, 7 December 2013).

[224] ibid.

[225] Interview with Khaled Ali, Executive Director, Hisham Mubarak Law Center, former presidential candidate (2012), Co-Founder of the Bread and Freedom Party, lawyer and activist (Cairo, Egypt, 9 December 2013). In April 2008, a strike and protest by factory workers in the town of Mahalla was violently repressed by security forces. See Osman El Sharnoubi, 'Revolutionary History Relived: The Mahalla Strike of 6 April 2008' Ahram Online (6 April 2013) <http://english.ahram.org.eg/NewsContent/1/64/68543/Egypt/Politics-/Revolutionary-history-relived-The-Mahalla-strike-o.aspx> accessed 26 July 2015. See also Henri Onodera, 'The *Kifaya* Generation: Politics of Change Within Youth in Egypt' (2009) 34 (4) Journal of the Finnish Anthropological Society 44, 52-61.

investment.[226] Three influential cases, however, stand out in the string of failed attempts at prosecution before 2011. Several interviewees cited the *Khaled Said* case of 2010-2014, the *Emad El Kebir* case of 2007 and the 2005 sexual harassment case, *Egyptian Initiative for Personal Rights and Interights v Egypt* (323/2006). These were relatively successful efforts to prosecute officials within the police and ministry of interior.

Khaled Said was a twenty-eight year old man from Alexandria who was arrested, beaten and tortured for posting a video on the Internet of police officers conducting an illegal drug transaction. Said died as a result of the torture inflicted on him. Images of his mangled body went viral on social media and produced widespread and international outrage. Wael Ghonim, a computer engineer, started a Facebook page called "We Are All Khaled Said" days after Said's death in June 2010. We Are All Khaled Said became a powerful social movement in the lead up to and during the Egyptian uprising in 2011. The two police officers accused of torturing Said to death, Awad Ismail and Mahmoud Salah, were put on trial in July 2010. The trial was delayed until October 2011, when the officers were sentenced to seven years in prison. In March 2014, following a re-trial, the sentence was increased to ten years in prison.[227]

Emad El Kebir is a bus driver who was kidnapped by police officers in Alexandria, Egypt in 2006 and was beaten, raped and tortured while in detention.

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[226] Interview with Khaled Ali, Executive Director, Hisham Mubarak Law Center, former presidential candidate (2012), Co-Founder of the Bread and Freedom Party, lawyer and activist (Cairo, Egypt, 9 December 2013). For more on the Madinaty and Palm Hills cases, see Mahmoud Kassem and Zainab Fattah, 'The Man Behind Egypt's Real Estate Rebellion' (Bloomberg News, 26 May 2011) <www.bloomberg.com/bw/magazine/content/11_23/b4231041996189.htm> accessed 31 July 2015. The Madinaty judgments and case summary are on file with the author.

[227] Hend Kortam, 'Two Sentenced to 10 Years in Khaled Said Murder Retrial' (Daily News Egypt 3 March 2014) <www.dailynewsegypt.com/2014/03/03/two-sentenced-10-years-khaled-said-murder-retrial/> accessed 27 July 2015; Ahram Online, 'Khaled Said: The face that launched a revolution' (6 June 2012) < http://english.ahram.org.eg/NewsContent/1/64/43995/Egypt/Politics-/Khaled-Said-The-face-that-launched-a-revolution.aspx> accessed 27 July 2015.

Videos of police officers beating and torturing El Kebir, recorded by the officers themselves, circulated on the internet and triggered widespread public outrage. The officers were found guilty, jailed for three years, and El Kebir was also offered monetary compensation.[228] Although high-level officials were not implicated in this case, its widespread publicity both within and outside Egypt turned it into an influential case showing that holding the police accountable for their crimes is possible.

In 2013, the African Commission on Human and Peoples' Rights (hereinafter the 'African Commission' or 'Commission') decided that the Egyptian state was in violation of several articles of the African Charter for the infamous harassment case of four women eight years earlier. On 25 May 2005, Shaimaa Abou Al-Kheir, Nawal Ali Mohammed Ahmed, Abir al-Askari and Iman Taha Kamel were beaten and sexually harassed at a demonstration outside the Journalists Syndicate in Cairo. Opposition groups protesting constitutional amendments that were viewed as an attempt to consolidate Mubarak's authoritarian rule led the demonstration. After a series of failed attempts to domestically prosecute those responsible for the harassment, the NGO Egyptian Initiative for Personal Rights and international human rights group Interights filed a complaint with the African Commission in 2006.[229] The Commission's decision in early 2013 and its call for Egypt to investigate, punish the perpetrators, and provide monetary compensation to the victims is largely viewed as a significant victory in the difficult pursuit of

[228] BBC News, 'Egypt Police Jailed for Torture' (5 November 2007) <http://news.bbc.co.uk/2/hi/middle_east/7078785.stm> accessed 27 July 2015. See also Al Ahram Weekly Online, 'El-Kebir Vindicated' (8-14 November 2007) <http://weekly.ahram.org.eg/2007/870/eg8.htm> accessed 27 July 2015.

[229] For details of the case, see 'Communication 323/06: Egyptian Initiative for Personal Rights v INTERIGHTS v Egypt' African Commission for Human and Peoples' Rights <www.achpr.org/files/sessions/10th-eo/comunications/323.06/achpreos10_232_06_eng.pdf> accessed 27 July 2015.

accountability targeting Ministry of Interior officials. It also signified the first time that the Commission issued a decision on the duty of states to protect women from violence.[230] Moreover, human rights lawyers again filed complaints with the African Commission in 2012, this time against the military's use of 'virginity tests' on female protesters in Cairo's Tahrir Square.[231] While the African Commission is not regarded as influential as, for example, the IACtHR is in Latin America, it is a legal avenue that is increasingly used by Egyptian human rights organisations that are unable to effectively pursue criminal justice domestically.[232] That said, the decisions of the African Commission are yet to be implemented in Egypt.

Content and Extent of Prosecutions

Since the 2011 Egyptian uprising, charges related to the embezzlement of state funds, the illegal sale of land, and other illicit gains figured quite heavily in the prosecutions' files. Moreover, these charges dated back to periods from before the 2011 uprising. On the other hand, charges related to torture, arbitrary detention, and other human rights abuses were, with very few exceptions, limited to the eighteen day period of the 2011 uprising, leaving previous decades of perpetual civil and political rights violations unaccounted for. Also, certain high-level government officials were prosecuted, while others were not. The following analysis addresses why the *content* of the prosecutions – i.e. the types of charges – is focused on

[230] Egyptian Initiative for Personal Rights, 'Egypt held to account for failing to protect women demonstrators from sexual assault' (Press Release 14 March 2013) <http://eipr.org/en/pressrelease/2013/03/14/1657> accessed 27 July 2015.
[231] Egyptian Initiative for Personal Rights, 'African Commission Declares "Virginity Tests" Case Admissible: Lack of Accountability for Violations in Military Prisons Addressed in Regional human Rights Mechanism' (Press Release 3 December 2013) <http://eipr.org/en/pressrelease/2013/12/03/1892> accessed 28 July 2015.
[232] Interview with Mohamed El Shewy, Transitional Justice Programme Officer, Egyptian Initiative for Personal Rights (Telephone interview, 24 November 2013); Interview with Gamal Eid, Human Rights Lawyer, Activist and Director of the Arabic Network for Human Rights Information (Cairo, Egypt, 8 December 2013). For more on the role of the African Commission, particularly post-2011, see the section "Role of International Actors" in this chapter.

corruption and economic crimes and on a very limited set of human rights crimes. Using material from interviews with lawyers, activists, judges and civil society organisations, this section also explains the selective *extent* of the trials - why certain leaders were put on trial, while others ran free and even became candidates in presidential elections.

Why did prosecutions place heavy emphasis on corruption crimes as opposed to human rights crimes? One explanation pertains to the controlled nature of the transition that unfolded in Egypt, whereby the military and other state agencies worked to ensure that investigations and trials did not extend 'too far' so as not to harm their political interests and subject themselves to prosecution. Linked to this explanation is the role of a politicised judiciary in blocking certain controversial cases. Third, the victims, activists and lawyers who were active in pursuing prosecutions were preoccupied with the more recent crimes of 2011 because they are 'fresher' and therefore easier to prosecute.[233] Fourth, the absence of an enabling legal framework and other legal challenges such as the requirement of direct evidence have made human rights prosecutions particularly difficult. Fifth, the emphasis on corruption and economic crimes is a means to scapegoat certain high-level individuals to deflect attention from the lack of accountability for a more comprehensive set of human rights violations and their perpetrators. I will take each of these explanations in turn.

A Military-Controlled Transition and a Politicised Judiciary

Many lawyers, activists and NGOs consider the military-controlled transition and a politicised judiciary in Egypt as the two underlying and closely related factors

[233] Interview with Gamal Eid, Human Rights Lawyer, Activist and Director of the Arabic Network for Human Rights Information (Cairo, Egypt, 8 December 2013).

that have shaped the content and the extent of prosecutions.[234] Mohamed El Shewy, programme officer at the Egyptian Initiative for Personal Rights, explains:

> The government – the *feloul*[235] – controls the prosecutions. The military has been trying to control how much is prosecuted, what is prosecuted, how far back and how deep the prosecutions are going.[236]

The focus on crimes *of* the transition is itself also limited in scope. With few exceptions, including the flawed trials of the police officers who shot and killed protesters during the November 2011 Mohamed Mahmoud Street demonstrations against the military, the majority of the human rights trials strictly addressed the eighteen day period of the uprising. This is again attributed to the influential role of the military in limiting the extent of the prosecutions and is facilitated by a complicit judiciary that has loyalties to the Mubarak regime and to the military.

Human rights violations have continued and in some ways even intensified since the overthrow of Mubarak in February 2011, prompting the head of the Egyptian Centre for Economic and Social Rights (ECESR) Nadeem Mansour to sum up the situation as follows: "We have the same courts and the same human rights violations."[237] Mansour's statement points to the military-controlled transition in Egypt where the former regime still wields significant influence on the shape of the transition and its politics. The former regime is often associated with the military

[234] Interview with Khaled Ali, Executive Director, Hisham Mubarak Law Center, former presidential candidate (2012), Co-Founder of the Bread and Freedom Party, lawyer and activist (Cairo, Egypt, 9 December 2013); Interview with Mohamed El Shewy, Transitional Justice Programme Officer, Egyptian Initiative for Personal Rights (Telephone interview, 24 November 2013); Interview with Tamer Wageeh, Director, Economic and Social Justice Unit, Egyptian Initiative for Personal Rights (Cairo, Egypt, 8 December 2013); Interview with Nadeem Mansour, Director, Egyptian Center for Economic and Social Rights (Telephone interview, 13 May 2013); Interview with Gamal Eid, Human Rights Lawyer, Activist and Director of the Arabic Network for Human Rights Information (Cairo, Egypt, 8 December 2013); Interview with Habib Nassar, Former Middle East and North Africa Director, International Center for Transitional Justice (New York City, New York, 18 May 2012).
[235] The Arabic term used in Egypt to describe 'remnants' of the former regime.
[236] Interview with Mohamed El Shewy, Transitional Justice Programme Officer, Egyptian Initiative for Personal Rights (Telephone interview, 24 November 2013).
[237] Interview with Nadeem Mansour, Director, Egyptian Center for Economic and Social Rights (Telephone interview, 13 May 2013).

because many of its leaders, including Mubarak, hailed from the military. Habib Nassar, former director of the Middle East and North Africa programme at the International Center for Transitional Justice (ICTJ) argued that "the army and interim authorities are afraid to open the human rights file." This is because of the military's close ties with the former regime in the decades before the 2011 uprising.[238] Mansour elaborated on the impact of the controlled transition in Egypt on the limited nature of the human rights charges:

> The human rights charges in the prosecutions that have taken place in Egypt only have to do with the uprising because we are operating on the same system as before the revolution. We are dealing with the same system – the military which was part of the same violations is the group that led the so-called transition. It is the same court system that was running under the Mubarak regime. So it is very hard to conduct prosecutions, unlike in Argentina…The human rights charges are also limited because the prosecutions are governed by the prosecutor, who is totally controlled by the regime - whether the former or the current one. The whole system is very controlled in terms of what is prosecuted and what is not. The court system in the last two years has been focusing on resisting this temptation on focusing on before the uprising. The prosecution of old [pre-uprising] human rights violations would have been more radical for them. It would lead to real change in the regime and in the police. The old political violations are still being committed. We did not have a change in the governing elite. The Muslim Brotherhood joined, but they did not shift. And this is because the same political violations still exist.[239]

El Shewy described a very similar situation in his statements on the nature of the transition in Egypt and the consequent ways in which civil society had to adjust their advocacy efforts:

> This has been a controlled transition in the sense that there was a willingness to go after Mubarak and the National Democratic Party – especially the higher echelons of it – but I think that's where it stops and I think there is a lot of unwillingness to go beyond that and into how the 1952 state operated. Now of course, there is a lot of interest in trying Morsi and his people – but the way the transition has gone, it hasn't really been a transition. We've had one leader go, but the whole system is still exactly the same, so it's difficult to talk about a transition. So our belief is that there hasn't really been a transition and so [civil society's] approach is to go from the bottom up so instead of relying on the judiciary, we are attempting to go and archive and

[238] Interview with Habib Nassar, Former Middle East and North Africa Director, International Center for Transitional Justice (New York City, New York, 18 May 2012).
[239] Interview with Nadeem Mansour, Director, Egyptian Center for Economic and Social Rights (Telephone interview, 13 May 2013).

> document things ourselves and try to have a strong series of cases that we can then – when there is political will – use to really have a serious transitional justice programme. We are reverting to the strategy we used to operate on before 2011 since there isn't much political will because there hasn't been much of a change.[240]

Mansour and El Shewy's observations also point to the problem of a non-independent judiciary. While a detailed analysis of the history, functioning and structure of the Egyptian judiciary is beyond the scope of this thesis, its complex role in Egypt's transition and in the shape of the prosecutions is a significant factor.[241] One example of the alliance between parts of the judiciary and the military is the discussions between Tahani el-Gebali, the deputy president of the Supreme Constitutional Court, and the military leadership in 2012. El-Gebali advised the military to delay the transfer of authority to civilians until a constitution is written so that the generals "knew who they were handing power to and on what basis."[242] El-Gebali's advice led the military to dissolve Egypt's first fairly elected parliament.[243] This example is indicative of the controlled nature of the transition in Egypt, whereby the military-led government and a fragmented judiciary worked together to shape key aspects of the transition, including who gets prosecuted and for what. As Tamer Wageeh, the director of the economic and social justice programme at Egyptian Initiative for Personal Rights explained, "The judiciary has loyalties to the old regime and this has adversely affected the comprehensiveness of cases and

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[240] Interview with Mohamed El Shewy, Transitional Justice Programme Officer, Egyptian Initiative for Personal Rights (Telephone interview, 24 November 2013).

[241] For instance, Khaled Ali, the 6 April movement, and the International Center for Transitional Justice explained that there are opposing strands within the judiciary: independent and non-independent, pro-Muslim Brotherhood and pro-military, and so on. For a historical analysis of the Egyptian judiciary, see Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics and Economic Development in Egypt* (CUP 2009). For a contemporary account, see also Sahar Aziz, 'Theater or Transitional Justice: Reforming the Judiciary in Egypt' in Chandra Sriram (ed), *Transitional Justice in the Middle East* (Forthcoming 2015) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2543313> accessed 27 July 2015.

[242] See David D. Kirkpatrick, 'Judge Helped Egypt's Military to Cement Power' (New York Times 3 July 2012) <www.nytimes.com/2012/07/04/world/middleeast/judge-helped-egypts-military-to-cement-power.html?pagewanted=all&_r=0> accessed 27 July 2015.

[243] ibid.

investigations...Previous human rights violations are not accounted for because it is the same regime."[244]

In addition to "rampant nepotism," Sahar Aziz describes the Egyptian judiciary as a "formidable deep state institution."[245] Using the example of the military's ouster of former president Mohamed Morsi – Egypt's first elected president following the 2011 uprising – Aziz explains how the split in the judiciary along political lines was reinforced by a controlling executive:

> At the moment, over sixty judges who condemned the deposal of Morsi as a military coup are being investigated and systematically purged from the judiciary…This explains, in part, why Adly Mansour's military-backed government permitted the ordinary judiciary to prosecute Muslim Brotherhood members, Morsi supporters that were not members of the [Muslim Brotherhood], and youth revolutionaries. The senior judicial leadership's cooperation with the executive's crackdown, coupled with a critical mass of judges that distrusted the [Muslim Brotherhood], transformed the judiciary into a political ally…That the judges would suddenly transform into vanguards of transitional justice was improbable. Likewise, the prosecutors responsible for investigating the facts of prosecutions of Mubarak and his cronies were the same ones who for decades had propped up the Mubarak regime for decades. Indeed, most judges were members of the same political elites that had benefited both financially and politically from the authoritarian state.…More than three years after Egypt's uprising, the judiciary has proven to be a formidable deep state institution, guarding its material interests in the status quo even if it means betraying the rule of law.[246]

The judiciary thus played a significant role in both allowing and blocking prosecutions from taking place without, as Aziz's damning critique of the judiciary shows, any regard for the rule of law. Judicial decisions regarding prosecution were thus very much tied to Egypt's military-controlled transition, fraught with the *feloul*[247] of the Mubarak era.

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[244] Interview with Tamer Wageeh, Director, Economic and Social Justice Unit, Egyptian Initiative for Personal Rights (Cairo, Egypt, 8 December 2013).

[245] Sahar Aziz, 'Theater or Transitional Justice: Reforming the Judiciary in Egypt' in Chandra Sriram (ed), *Transitional Justice in the Middle East* (Forthcoming 2015) 35 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2543313> accessed 27 July 2015.

[246] ibid. Adly Mansour is an Egyptian judge, former head of the Supreme Constitutional Court, and served as interim President of Egypt from July 2013 to June 2014.

[247] The Arabic term used in Egypt to describe 'remnants' of the former regime.

Finally, in activist and writer Wael Eskandar's remarks on the lack of a definitive political transition in Egypt, he distinguishes between social change and political change. He explains:

> How would I describe the transition in Egypt? It's a matter of scapegoating faces of the same regime. Let's compare Egypt to the transitions in Latin America. Well, if Egypt didn't border Israel, things would be different. It would be more like Tunisia. It's too much of an important international actor. The change instead happened inside people. There is too much at stake with Egypt for a real transition to happen. What needs to happen is for there to be a system that reflects the social change that took place on the streets. There has been dramatic social change and without bringing people to account for what they did and do, there is no transition. Real criminal accountability is what is needed in order to have an effective transition.[248]

Of note, here, is Eskandar's reference to Egypt's geopolitical significance as Israel's neighbour, and the negative impact this has had on the emergence of a complete political transition. This in turn has, according to Eskandar, resulted in farcical trials as no genuine reform of the judiciary and the political leadership has taken place.

Popular Demands for Accountability

The focus on crimes of the transition and on corruption crimes dating to periods from before the transition is also a result of the content of the public demands during the uprising. In fact, without the large number of people who took to the streets to demand prosecutions, decisions to prosecute may not have taken place to begin with. Protesters demanded accountability for the killing of demonstrators during the uprising and for the "visible" and rampant corruption that plagued the country for decades.[249] Gamal Eid, lawyer for several victims, and Wageeh both explained that protesters emphasised accountability for corruption and on the limited

[248] Interview with Wael Eskandar, prominent blogger, independent journalist and media commentator; member of Kaziboon campaign, which called for accountability for crimes committed by the Egyptian military (Cairo, Egypt, 8 December 2013).
[249] Interview with Khaled Ali, Executive Director, Hisham Mubarak Law Center, former presidential candidate (2012), Co-Founder of the Bread and Freedom Party, lawyer and activist (Cairo, Egypt, 9 December 2013), during which he attributed daily corruption such as bribes to the visibility of corruption in Egypt and subsequent demands to fight it.

set of human rights violations during the uprising because they are the most recent crimes and are still ongoing. Victims, activists and lawyers are more preoccupied with the recent crimes because "it is more practical to deal with crimes that were committed during and since the uprising."[250] This, coupled with the difficulty in obtaining access to evidence for previous human rights crimes, the lack of an independent judiciary and political will, and the continued perpetration of human rights violations throughout the transition, significantly shaped and limited the content of the prosecutions.

Legal Challenges to Prosecutions of Political Leaders

Moreover, legal challenges further contributed to the limited content and extent of the prosecutions. Individuals who were prosecuted were tried under the regular criminal code for crimes that require a "different set of legislations that could account for this transition."[251] Judge Maged argued that the crimes committed during the eighteen day uprising in 2011 are not "ordinary crimes" such as murder.[252] Rather, they are "serious crimes that require special techniques in investigations and prosecutions. The current criminal justice system cannot address such types of crimes because they are characterised by their systematic and widespread nature – especially if these crimes occurred in accordance with state policy, in which case they can be classified as crimes against humanity."[253] Judge Maged also highlighted

[250] Interview with Tamer Wageeh, Director, Economic and Social Justice Unit, Egyptian Initiative for Personal Rights (Cairo, Egypt, 8 December 2013); Interview with Gamal Eid, Human Rights Lawyer, Activist and Director of the Arabic Network for Human Rights Information (Cairo, Egypt, 8 December 2013).
[251] Interview with Mohamed El Shewy, Transitional Justice Programme Officer, Egyptian Initiative for Personal Rights (Telephone interview, 24 November 2013).
[252] Interview with Judge Adel Maged, Vice President, Court of Cassation, Egypt (Cairo, Egypt, 7 December 2013).
[253] ibid.

that without the inclusion of command responsibility in Egypt's criminal code, it will remain impossible to establish the responsibility of leaders.[254]

As several interviewees explained, access to the evidence necessary to build a strong case in court has been extremely difficult. This is because "Evidence is with the police, the intelligence agencies, and the old regime – and the judiciary has no power to force these actors to submit the evidence they withhold."[255] Judge Maged attributed the series of acquittals pre and post 2011 to the lack of evidence sufficient to meet the evidentiary requirement in Egypt's current criminal system and summarised the legal challenges to the prosecution of political leaders in Egypt as follows:

> The 25 January crimes are grave crimes against protesters - they are not 'regular' crimes – not traditional or classic crimes such as murder, and they therefore require special techniques in investigations and prosecutions. The current criminal justice system cannot address such types of crimes, which are characterised by their systemic and widespread nature – especially if it occurred in accordance with state policy. I argue that these crimes can be classified as crimes against humanity. And the problem with the Egyptian criminal system is that you have to have direct evidence – such as eyewitnesses – to establish that such crimes occurred. To establish the responsibility of high-level officials, you need to incorporate in the criminal justice system new principles of command responsibilities which enable the judiciary to establish the responsibility of leaders….If we had this legal tool, we could prosecute/establish criminal responsibility.[256]

Ali highlighted another challenge regarding the question of direct evidence. He argued that the interior ministry and the public prosecution were unwilling to release evidence because "to hold El Adly responsible would implicate many other people."[257] A strong indication of this deep-seated fear to prosecute is the shredding

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[254] ibid. Maged referred to Article 28 of the Rome Statute on command responsibility and argued that Egypt should implement it in order to prosecute serious crimes. Maged has been active in pushing for a transitional justice law in Egypt that would cover crimes committed from 1981.

[255] Interview with Tamer Wageeh, Director, Economic and Social Justice Unit, Egyptian Initiative for Personal Rights (Cairo, Egypt, 8 December 2013).

[256] Interview with Judge Adel Maged, Vice President, Court of Cassation, Egypt (Cairo, Egypt, 7 December 2013).

[257] Interview with Khaled Ali, Executive Director, Hisham Mubarak Law Center, former presidential candidate (2012), Co-Founder of the Bread and Freedom Party, lawyer and activist (Cairo, Egypt, 9 December 2013). Habib El Adly is the former Minister of Interior (1997-2011) in Egypt.

of thousands of classified documents by intelligence agency officials in March 2011.[258] Ali further explained that as a result, limited prosecutions have taken place and they instead focus on corruption because the military, keen on appeasing public anger, wanted to give the impression that justice is being sought and that there has been a definitive break with the former regime.

Prosecutions: A Scapegoating Strategy

In a similar vein, the emphasis on corruption and socio-economic crimes charges in the trials, is, according to several interviewees, a form of scapegoating.[259] The emphasis on such crimes was a means to shroud the neglect of accountability for widespread torture, killings, and other civil and political rights abuses committed for decades. These corruption cases, Ali observed, often result in acquittals, worsening the problem of impunity in Egypt.[260] Only a select group of individuals were targeted for prosecution and many corruption cases have been stalled.[261] As El Shewy noted, "The corruption cases are politicised in that they have excluded certain individuals from prosecution. The exclusion of the military in particular, among various other elites."[262] El Shewy continued to explain that the emphasis on corruption is "an attempt to individualise what happened rather than look at it as a

[258] William Wan and Liz Sly, 'State Security HQ Overrun in Cairo' (Washington Post 5 March 2011) <www.washingtonpost.com/wp-dyn/content/article/2011/03/05/AR2011030504356.html> accessed 27 July 2015.

[259] It is important to note here that there are additional explanations for the emphasis on socio-economic crimes and corruption in the charges. For example, the prominent role of workers' movements and labour unions before, during and after the uprisings have arguably been successful in ensuring some form of accountability for these crimes. See the section 'Socio-economic Roots' in this chapter for a discussion of these factors.

[260] Interview with Khaled Ali, Executive Director, Hisham Mubarak Law Center, former presidential candidate (2012), Co-Founder of the Bread and Freedom Party, lawyer and activist (Cairo, Egypt, 9 December 2013.

[261] Interview with Nadeem Mansour, Director, Egyptian Center for Economic and Social Rights (Telephone interview, 13 May 2013); Interview with Mohamed El Shewy, Transitional Justice Programme Officer, Egyptian Initiative for Personal Rights (Telephone interview, 24 November 2013).

[262] Interview with Mohamed El Shewy, Transitional Justice Programme Officer, Egyptian Initiative for Personal Rights (Telephone interview, 24 November 2013).

system…There is an attempt to say Mubarak was corrupt, but not necessarily the system he ran."[263]

Mansour, who filed many corruption cases through his organisation ECESR, also pointed to the selectivity of the corruption cases, arguing that individuals such as Mubarak and his two sons could not be spared from corruption prosecutions because "they are highly symbolic individuals."[264] They were convenient scapegoats to serve the purpose of showing a break with the former regime. Mansour cited an example of corruption cases he had been working on involving around fifty ministers, only a handful of which were tried. He also explained that the ECESR has been relatively successful in filing corruption cases because they are filed with the administrative courts, which issue rulings on corrupt decisions rather than against individuals. The cases are then transferred to the criminal courts to identify the individuals who are criminally responsible for the corrupt decisions. However, a politicised public prosecutor's office meant that many of these criminal cases were blocked.[265]

Moreover, reconciliation deals meant that a greater number of individuals implicated in massive corruption crimes escaped prosecution. Given the vast extent of corruption, which involved the embezzlement of tens of millions of Egyptian pounds,[266] the military and other interim authorities decided to settle for reconciliation deals. Business tycoons such as Hussein Salem would pay the state the money they gained illicitly and this money would be used to help re-build Egypt's battered economy. Legal steps were taken to facilitate these reconciliation deals,

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[263] ibid.
[264] Interview with Nadeem Mansour, Director, Egyptian Center for Economic and Social Rights (Telephone interview, 13 May 2013).
[265] ibid.
[266] Nadia Ahmed, 'Show Me the Money: The Many Trials of Mubarak's Men' Mada Masr (25 January 2015) <www.madamasr.com/sections/politics/show-me-money-many-trials-mubaraks-men> accessed 26 July 2015.

particularly the Supreme Council of the Armed Forces (SCAF) Decree No. 4 of 2012, which "gives immunity from criminal prosecution to businessmen accused of corruption under Mubarak and offers them the chance to settle their cases with government commissions."[267] Wageeh explained that the military justified these reconciliation deals as a means to protect capitalism and restore economic security. On the question of holding the same business tycoons criminally accountable, Wageeh responded that the prevailing view of many Egyptians was, "Our economy is in tatters - what will you gain from imprisoning them?"[268]

The extent of the human rights trials has also been selective. For example, despite crimes committed during the interim rule of the SCAF in 2011-2012, no military officials have been prosecuted.[269] Other high-level former regime members also escaped prosecution, which points to a strategy that aims to show only a symbolic 'break' with the former regime, rather than a real effort to achieve justice for past atrocities. Aziz gives an example of the selective extent of the trials:

> [O]nly one police officer is serving a three year sentence for shooting protesters during the bloody Mohamed Mahmoud protests in November 2011 wherein over fifty-one protesters were killed in five days. And only two police officers are serving time for the killing of at least 846 protesters in the protests of January 2011.[270]

In effect, individuals such as Mubarak, his two sons, and former Minister of Interior El Adly were used as scapegoats to appease public demands for accountability. As one interviewee explained, the objective was to "sacrifice a part of the regime to

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[267] Maha Abdelrahman, *Egypt's Long Revolution: Protest Movements and Uprisings* (Routledge 2014) 130.

[268] Interview with Tamer Wageeh, Director, Economic and Social Justice Unit, Egyptian Initiative for Personal Rights (Cairo, Egypt, 8 December 2013).

[269] See Noha Aboueldahab, 'No Generals in the Dock: Impunity Soldiering On in Egypt' (Al Jazeera 19 November 2013) <www.aljazeera.com/indepth/opinion/2013/11/no-generals-dock-impunity-soldiering-egypt-2013111944842917230.html> accessed 27 July 2015.

[270] Sahar Aziz, 'Theater or Transitional Justice: Reforming the Judiciary in Egypt' in Chandra Sriram (ed), *Transitional Justice in the Middle East* (Forthcoming 2015) 18-19 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2543313> accessed 27 July 2015.

save the regime."[271] Ali gave a similar account of the motives behind the selective prosecutions and their link with the controlled nature of the transition:

> We have not taken serious steps in prosecutions because the revolution is not yet over. What is happening now is that the regime is prosecuting symbolic people just to 'show' that they are doing justice. But they are not serious – the regime is not individuals, the regime is a network of economic and social opportunists – and it's the same regime that is ruling. We succeeded in a part and failed in another part. I am not pessimistic; I am being realistic.[272]

Teitel's explanation of the limited criminal sanction is useful here as a point of reflection on the politicised prosecutorial strategy employed in Egypt. The limited criminal sanction provides insight into the exceptional uses of transitional criminal law in classic liberal transitions. It is essentially limited accountability for the sake of political liberalisation, security, and peace.[273] However, this limited content and extent of accountability that has emerged in Egypt has been pursued for safeguarding the political interests of a controlled transition, rather than for the preservation of a secure, peaceful, liberal, democratic transition.[274] I discuss Teitel's limited criminal sanction theory in Chapter 4.

Socio-Economic Roots of the Transition

A common contextual factor that several interviewees mentioned is the significance of the socio-economic roots of the uprising and their impact on the shape of criminal accountability in the transition. Deep socio-economic grievances led to partial socio-economic accountability in Egypt. Judge Maged argued that years of rampant corruption and a poor socio-economic situation in Egypt is a

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[271] Interview with anonymous senior expert on transitional justice in Egypt, International Center for Transitional Justice (14 June 2013).
[272] Interview with Khaled Ali, Executive Director, Hisham Mubarak Law Center, former presidential candidate (2012), Co-Founder of the Bread and Freedom Party, lawyer and activist (Cairo, Egypt, 9 December 2013).
[273] Ruti G. Teitel, *Globalizing Transitional Justice* (OUP 2014) 99-102.
[274] See Chapter 4 for more discussion on Teitel's limited criminal sanction.

significant factor that led to the emphasis on corruption crimes in the trials. Like Wageeh and Eid, he points to the strong demands to end corruption during the mass uprising in 2011 and explained that "corruption means money, resources – people want to remove corruption because they want the money back."[275] This, in part, is what prompted the interim military authority to negotiate reconciliation deals with Egyptian business tycoons implicated in massive corruption cases.[276]

The poor economic health of Egypt, particularly the soaring unemployment rates among youth and significant structural inequalities, have not, then, merely served as context or a background to the political developments of the Egyptian transition. They have been foregrounded as some of the most central concerns of Egyptian society – and this has manifested itself in the trials. The uprising was driven by economic injustices during which years of economic oppression and miserable living standards had no prospect of improving because of a severely corrupt government and the absence of access to the most basic civil and political rights. Here lay the nexus between socio-economic and civil and political rights violations.

Significant socio-economic woes included poverty, high unemployment, lack of access to health services, poor working conditions, lack of job security, and the repression of unions. This dreary state of economic affairs compounded the widespread frustration among Egyptians, which in turn resulted in the outburst of mass revolts that ousted Mubarak. However, this explanation is insufficient because it does not explain the concurrent high demand for human rights accountability and the link between civil and political rights and socio-economic rights that activists

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[275] Interview with Judge Adel Maged, Vice President, Court of Cassation, Egypt (Cairo, Egypt, 7 December 2013).

[276] Daily News Egypt, 'Egypt's Cash-strapped Rulers Woo Former Regime Tycoons' (24 May 2013) <www.dailynewsegypt.com/2013/05/24/egypts-cash-strapped-rulers-woo-former-regime-tycoons/> accessed 27 July 2015.

had been pushing for.[277] The drivers of the uprisings were just as much about socio-economic problems as they were about human rights problems. This explanation is therefore in need of a more comprehensive account that again addresses pre-transition factors that contributed to the shape of post-transition prosecutions in Egypt.

Role of Workers' Movements and Labour Unions

A closer look at the social and political processes that unfolded in Egypt reveal that workers' movements and labour unions played a significant role before, during, and after the uprisings. The general strike led by textile workers in the Egyptian town of Mahalla in 2008, for instance, led to the formation of the 6 April movement, which became an influential workers rights and human rights mobilising force. This movement, along with other similar workers' rights movements, led mass protests during and after the Egyptian uprising. In the lead up to the 2008 general strike in Egypt, the 6 April movement and a number of opposition groups and parties signed this statement:

> All national forces in Egypt have agreed upon the 6th of April to be a public strike. On the 6th of April, stay home, do not go out; Don't go to work, don't go to the university, don't go to school, don't open your shop, don't open your pharmacy, don't go to the police station, don't go to the camp; We need salaries allowing us to live, we need to work, we want our children to get education, we need human transportation means, we want hospitals to get treatment, we want medicines for our children, we need just judiciary, we want security, we want freedom and dignity, we want apartments for youth; We don't want prices increase, we don't want favoritism, we don't want police in plain clothes, we don't want torture in police stations, we don't want corruption, we don't want bribes, we don't want detentions. Tell your friends not to go to work and ask them to join the strike.[278]

This statement clearly lays out the socio-economic and other human rights demands of the Egyptian opposition and workers' movements in 2008 – a year that served as a

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[277] See, for example, the Egyptian Initiative for Personal Rights <www.eipr.org>.
[278] Courtney Radsch, 'April 6th General Strike in Egypt Draws Together Diverse Groups Using Newest Technologies (2 April 2008) <www.radsch.info/2008/04/using-facebook-blogs-sms-independent.html> accessed 27 July 2015.

key turning point in the lead up to the uprising of 2011. What is striking about this statement is that the demands for social justice and for civil and political rights are at par with each other. There is no prioritisation of one set of rights over the other – the 6 April movement and its supporters clearly viewed socio-economic rights as inseparable from civil and political rights. The labour rights movements in Egypt continued to actively challenge government policies in the transitional period. According to the Egyptian International Development Centre, 1,354 social and labour rights protests took place in March 2013 alone, compared to 864 protests during the previous month. This meant an average of forty-four protests per day, or 1.8 protests every hour.[279]

These labour rights movements in Egypt did not operate alone – the Kifaya movement in Egypt, for example, was persistent in its calls for transparent governance and democracy. Kifaya, a coalition consisting of various opposition activists, was established in the run-up to the parliamentary and presidential elections in 2005. It called for free elections, civil and political rights, and an end to authoritarian rule.[280] But the strongest forces of opposition in Egypt were labour rights movements. Those calling for civil and political rights, such as the right to freedom of expression, the right to assemble, and freedom from torture and arbitrary detention, were severely repressed through massive crackdowns led by the police and other state security forces, resulting in a significantly weakened human rights movement in Egypt. In contrast, the labour rights movements were slightly more tolerated.

[279] Salma Shukrallah and Randa Ali, 'Post-revolution Labour Strikes, Social Struggles on Rise in Egypt: Report' (Ahram Online, 29 April 2013) <http://english.ahram.org.eg/News/70384.aspx> accessed 27 July 2015.
[280] Henri Onodera, 'The *Kifaya* Generation: Politics of Change Within Youth in Egypt' (2009) 34 (4) Journal of the Finnish Anthropological Society 44. *Kifaya* is also known as the Egyptian movement for change.

The relative success, then, of the Egyptian labour rights movements in bringing to the fore demands for social justice and an end to corruption impacted the content of the prosecutions. The build-up of their influence over the years played a big role in the consequent emphasis on socio-economic crimes charges in the prosecutions. Workers' movements and labour unions thus served as key drivers in ensuring some form of criminal accountability for socio-economic rights violations. This largely occurred through complaints filed by lawyers working in organisations such as the Egyptian Center for Economic and Social Rights and the Hisham Mubarak Law Center. On the other hand, the harsh crackdowns on civil and political rights activists left a seriously weakened human rights lobby that was largely unsuccessful in ensuring criminal accountability for human rights abuses committed before, during and after the uprisings.

Role of International Actors

What, if any, was the role of international actors in decisions regarding prosecution in Egypt? During the interviews, the term 'international actors' was used to encompass foreign governments and regional and international NGOs. The overwhelming response from the interviewees is that international actors did not have a significant impact in driving prosecutions. Instead, international actors were active in monitoring and raising awareness about human rights violations. Nassar noted that investigations such as those conducted by Human Rights Watch and Amnesty International aided in increasing pressure on governments to improve the human rights situation.[281] But, he continued, "things happened so quickly that we cannot give too much credit to the international human rights movement. Domestic

[281] Interview with Habib Nassar, Former Middle East and North Africa Director, International Center for Transitional Justice (New York City, New York, 18 May 2012).

action was swift regarding the prosecutions."[282] Nassar, however, added that the proliferation of the international criminal justice movement meant that it was more difficult to pass amnesty laws.[283] Activists also pointed to the role of international actors in supporting domestic civil society campaigns in Egypt by making legal and advocacy tools available to support their cause.[284] Overall, international actors did not have much of a role in driving prosecutions, which were "very much a domestically driven process."[285] Regional actors, such as the African Commission, had limited influence, but they nonetheless served a facilitating role when domestic processes were stalled.[286]

For example, Eid explained his organisation's decision to work with the African Commission over a case regarding the cutting of communications in Egypt during the uprising. On the 28 January 2011, the government cut access to most internet and mobile phone services, resulting in a "90 per cent drop in data traffic to and from Egypt."[287] Eid described the gravity of this move and his consequent decision to file a case against the Minister of Communications among others:

> We have a case that we are filing with the African Commission - the communications case. We want to pinpoint the *individual* who took the decision to cut the communications on the 27 January – 551 people died on the 28 January as a result. Between 16-90 individuals died because of inability to contact ambulances. This is [the Arabic Network for Human Rights Information's] estimation. Three communications companies and one internet company were probably responsible – we are filing for murder because of their role in cutting the communications. They keep transferring

[282] ibid.

[283] For developments that contrast with this argument, see the Yemen section of this chapter. See also Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012).

[284] Interview with Gamal Eid, Human Rights Lawyer, Activist and Director of the Arabic Network for Human Rights Information (Cairo, Egypt, 8 December 2013).

[285] Interview with Mohamed El Shewy, Transitional Justice Programme Officer, Egyptian Initiative for Personal Rights (Telephone interview, 24 November 2013).

[286] Interview with Khaled Ali, Executive Director, Hisham Mubarak Law Center, former presidential candidate (2012), Co-Founder of the Bread and Freedom Party, lawyer and activist (Cairo, Egypt, 9 December 2013).

[287] Matt Richtel, 'Egypt Cuts Off Most Internet and Cell Service' (New York Times, 28 January 2011) <www.nytimes.com/2011/01/29/technology/internet/29cutoff.html?_r=0> accessed 20 August 2015.

> the case from this unit of the judiciary to that unit of the judiciary to tire us out. But we don't get tired.[288]

Eid noted that the case was buried by the Morsi government and then stalled with the military prosecution for over two years. "This is why," he said, "we want to take the communications case to the African Commission."[289]

Role of Domestic Civil Society

Civil society documentation of human rights violations repeatedly emerged as a topic of discussion in the interviews. When asked for what purpose civil society organisations documented human rights violations in Egypt, the responses revealed an array of reasons. Many cited the classic reason of raising awareness and putting pressure on the government to change its human rights practices. Eid and El Shewy explained that despite working with a politicised judiciary, the aim of civil society documentation was to have enough evidence so that "one day," when an independent judiciary is in place, "we will be able to prosecute."[290] Eid cited the lack of an independent judiciary as one of the strong motivators for documentation and explained: "We have archives, we have documents, we have testimonies. We need political will and a new government and an independent judiciary willing to prosecute for these crimes for the thirty plus years of Mubarak's rule."[291] El Shewy described documentation as one of the powerful tools of a civil society struggling with authoritarian rule. "Since there has been no real transition," he explained, "our approach is to go from the bottom up. Through victims' families, we are archiving

[288] Interview with Gamal Eid, Human Rights Lawyer, Activist and Director of the Arabic Network for Human Rights Information (Cairo, Egypt, 8 December 2013).
[289] ibid.
[290] Interview with Gamal Eid, Human Rights Lawyer, Activist and Director of the Arabic Network for Human Rights Information (Cairo, Egypt, 8 December 2013); Interview with Mohamed El Shewy, Transitional Justice Programme Officer, Egyptian Initiative for Personal Rights (Telephone interview, 24 November 2013).
[291] Interview with Gamal Eid, Human Rights Lawyer, Activist and Director of the Arabic Network for Human Rights Information (Cairo, Egypt, 8 December 2013).

and documenting things ourselves to try and have a strong series of cases so that we can then – when there is political will – really have a serious transitional justice programme."[292] The 6 April movement said that while civil society documentation does not count as evidence in a court of law, it was a powerful means to mobilise and pressure the government to respond to grievances.[293]

Most civil society documentation in Egypt addressed torture, police abuses, and other civil and political rights violations. However, as El Shewy explained, this changed following the 2011 uprising:

> There was never really a focus on how to document abuses of economic and social justice violations. We at EIPR began that much more strongly after the revolution because we realized [that both sets of rights] were linked – they are not mutually exclusive. They sustained one another. There was a realisation that if you simply went around prosecuting civil and political rights abuses then you wouldn't be getting into the structural reasons for why the revolution happened – and how Mubarak and his aides were able to maintain their power through their system of abuse.[294]

This link between civil and political rights and socio-economic rights, as discussed further in Chapter 4, characterises the transitional justice discourse in Egypt. Unlike its predecessors in other parts of the world, the transitional justice that lawyers and activists sought in Egypt does not make a distinction between the two sets of rights. This is despite the fact that the prosecutions, for the various factors explained above, were heavy on corruption charges.

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[292] Interview with Mohamed El Shewy, Transitional Justice Programme Officer, Egyptian Initiative for Personal Rights (Telephone interview, 24 November 2013).

[293] Interview with Ahmed Abdallah, Human Rights Officer and Lawyer, 6 April Movement (Cairo, Egypt, 4 December 2013). Khaled Ali also mentioned that the courts and the prosecution do not accept civil society documentation as evidence. Interview with Khaled Ali, Executive Director, Hisham Mubarak Law Center, former presidential candidate (2012), Co-Founder of the Bread and Freedom Party, lawyer and activist (Cairo, Egypt, 9 December 2013).

[294] Interview with Mohamed El Shewy, Transitional Justice Programme Officer, Egyptian Initiative for Personal Rights (Telephone interview, 24 November 2013).

Conclusion

As explained in the Methodology section in Chapter 2, I reflect on the material collected for each case study by identifying what factors triggered, drove, and shaped decisions regarding prosecution. I do not claim that the trigger-driver-shaper mechanism, derived from the method of process tracing, explains the process of prosecution from start to finish. Rather, it is a prism through which I make sense of the research collected and by which I develop an explanation of how decisions regarding the prosecution of political leaders emerged and developed before and during the highly contentious period of transition.[295] I begin with the trigger factors, which pertain to the factors that *led* to decisions to prosecute. I then discuss the various factors that drove these decisions and pushed them forward. Finally, I discuss the shaping factors that impacted the content and the extent of the prosecutions.

Triggers

Two cases of police torture, one of which resulted in the victim's death, were repeatedly cited as turning points in calls for accountability in Egypt before the 2011 uprising. The 2006 case of bus driver Emad El Kebir resulted in widespread publicity both within and outside Egypt. Although no high-level government or police officials were implicated, it became an influential case showing that holding the police accountable for their crimes is possible. The torture and killing of Khaled Said in June 2010, who quickly became an iconic figure in Egypt because of his widely publicised fate, was investigated and two police officers were sentenced to 10 years

[295] See Methodology section in Chapter 2.

in a maximum-security prison.[296] The case of Khaled Said is widely regarded as the trigger for the uprising that took place a few months after his death. It became a symbol of police brutality and impunity in Egypt, fuelling public anger and leading to the influential We Are All Khaled Said protest movement that was started by Wael Ghonim.[297] The cases of Emad El Kebir and Khaled Said were thus triggers, or turning points, that opened up the possibility of holding a much feared arm of the Ministry of Interior – the police – criminally accountable. It is far from a coincidence that the Egyptian uprising started on National Police Day – the 25 January.

Prior to the Khaled Said incident, two other significant movements that had been brewing for years also served as turning points in the rise of the anti-Mubarak opposition. These were the Kifaya movement in 2005 and the 6 April movement in 2008.[298] The general strike led by textile workers in the Egyptian town of Mahalla in 2008 was followed by the formation of the 6 April movement, which became an influential workers rights and human rights group. Unlike the Emad El Kebir and Khaled Said incidents, which were shocking incidents that triggered sudden and widespread public anger, the Kifaya and 6 April movements grew over time and were marked by periodic protests – even mini-uprisings – that increasingly drew ordinary Egyptians' attention and attracted widespread support.

Emad El Kebir, Khaled Said, the Kifaya and the 6 April movements thus served as some of the most influential trigger factors that led to the 2011 uprising and stronger demands for criminal accountability. While other factors may have also triggered a process that eventually led to decisions regarding prosecution, these

[296] Hend Kortam, 'Two Sentenced to 10 Years in Khaled Said Murder Retrial' (Daily News Egypt 3 March 2014) www.dailynewsegypt.com/2014/03/03/two-sentenced-10-years-khaled-said-murder-retrial/ accessed 27 July 2015.
[297] See Khaled Dawoud, 'Divided as Ever' (Al Ahram Weekly 7-13 June 2012) <http://weekly.ahram.org.eg/2012/1101/eg4.htm> accessed 27 July 2015.
[298] Onodera (n 271).

triggers were repeatedly cited by interviewees and often emerge in scholarly literature on the origins of the Egyptian uprising.[299] These triggers strongly represent police brutality, impunity, corruption, lack of democratic governance, and economic grievances – all of which arguably led to the 2011 uprising and subsequent demands to hold high-level officials accountable for crimes that fall under each of those categories.

Drivers

Like the trigger factors discussed above, it is not feasible to account for every factor that drove decisions regarding the prosecution of political leaders in Egypt. The interviewees, however, identified two drivers that they argue had the largest impact on decisions regarding prosecution: a.) public pressure, particularly during and immediately after the 2011 uprising, and b.) individual plaintiffs, particularly those working for established NGOs. Together, these drivers pushed the judiciary and interim military authorities to respond by allowing certain prosecutions of high-level government officials. Many cases, however, were blocked - the reasons for which are explained in the subsequent section on shaping factors.

Calls for the 'fall of the regime' during the mass protests in January and February 2011 were quickly followed by calls for Mubarak to face trial. These demands intensified in March and April 2011, when Mubarak's continued exile in the resort town of Sharm El Sheikh angered a public still reeling from the crimes committed during his rule. It is no coincidence, then, that Mubarak and his sons were arrested in April 2011 and subsequently faced a string of trials that began on the 3rd August 2011. El Adly, the infamous former Minister of Interior, had already been

[299] See, for example, Gilbert Achcar, *The People Want: A Radical Exploration of the Arab Uprising* (Saqi Books 2013); Sami Amin, *The People's Spring: The Future of the Arab Revolution* (Pambazuka Press 2012); Henri Onodera, 'The *Kifaya* Generation: Politics of Change Within Youth in Egypt' (2009) 34 (4) Journal of the Finnish Anthropological Society 44.

arrested on charges for the killing of protesters. His trial was then merged with Mubarak and his two sons' trial, where corruption and human rights charges were also merged. This was an ambiguous legal development that was frowned upon by several lawyers.[300] Aziz notes the role of public pressure in driving prosecutions and the role of the public prosecution in shaping them:

> Because the public's demand for the criminal prosecutions of Mubarak-era officials was too great to ignore, [public prosecutor] Mahmoud had no choice but to charge them. However, he sabotaged the trials by assigning junior prosecutors to complex corruption cases, conducting poor investigations that could not withstand judicial scrutiny, and declining to prosecute police and security personnel accused of killing protesters. As a result, Mubarak's conviction and life sentence for complicity in the killings of protesters during the January 25th uprisings were reversed on appeal and on November 29, 2014 the charges were dismissed in their entirety.[301]

Certain individual lawyers who are also veteran human rights activists, such as Eid, Ali, Seif El Dawla and many others, were influential in successfully filing cases against former ministers. Only ten days after the ouster of Mubarak in February 2011, Eid's organisation, the Arabic Network for Human rights Information (ANHRI), filed complaints against Safwat El Sherif (former Minister of Information, former Speaker of the Shura Council and former Secretary General of Mubarak's National Democratic Party), El Fiqqi (former Minister of Information), and Hassan Abdelrahman (Minister of Interior). ANHRI also worked with the American Civil Liberties Union (ACLU) to try and hold Suleiman, former intelligence chief who Mubarak appointed as his first vice president during the uprising, accountable for

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[300] Interview with Gamal Eid, Human Rights Lawyer, Activist and Director of the Arabic Network for Human Rights Information (Cairo, Egypt, 8 December 2013); Interview with Mohamed El Shewy, Transitional Justice Programme Officer, Egyptian Initiative for Personal Rights (Telephone interview, 24 November 2013); Interview with Khaled Ali, Executive Director, Hisham Mubarak Law Center, former presidential candidate (2012), Co-Founder of the Bread and Freedom Party, lawyer and activist (Cairo, Egypt, 9 December 2013); Interview with Mohamed Al Ansary, Human Rights Lawyer and Activist, Cairo Institute for Human Rights Studies (Cairo, Egypt, 10 December 2013).

[301] Aziz (n 261) 18.

torturing Guantanamo Bay detainees.[302] Given the unlikelihood that a prosecution involving Suleiman for crimes committed in Egypt would take place, ANHRI opted to work with ACLU on the Guantanamo Bay case as a means to bring Suleiman to court.[303] Together with Seif El Dawla, Ali also filed complaints against Suleiman for the crackdown on the 2008 Mahalla uprising. The public prosecutor blocked this case and Suleiman died in July 2012.[304]

Shapers

A number of factors shaped the content and the extent of decisions regarding prosecution. First, there were explicit demands for socio-economic accountability by the protesters. Stripped of their resources by a heavily corrupt government, many Egyptians in Tahrir Square foregrounded their socio-economic grievances.[305] Second, a politicised public prosecutor meant that many cases, particularly those targeting human rights violations by high-level government officials, were blocked. The Egyptian judiciary has struggled for independence in the past, most notably in 2005, when some of its senior judges, including Noha El Zeiny, exposed electoral rigging and fraud and demanded independence from the executive.[306] Years later and after the 2011 uprising, the judiciary is still split along several lines, some of which are

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[302] Interview with Gamal Eid, Human Rights Lawyer, Activist and Director of the Arabic Network for Human Rights Information (Cairo, Egypt, 8 December 2013).

[303] ibid.

[304] Interview with Khaled Ali, Executive Director, Hisham Mubarak Law Center, former presidential candidate (2012), Co-Founder of the Bread and Freedom Party, lawyer and activist (Cairo, Egypt, 9 December 2013).

[305] Interview with Judge Adel Maged, Vice President, Court of Cassation, Egypt (Cairo, Egypt, 7 December 2013); Interview with Tamer Wageeh, Director, Economic and Social Justice Unit, Egyptian Initiative for Personal Rights (Cairo, Egypt, 8 December 2013). See also Reem Abou-El-Fadl, 'Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will' (2012) 6 (2) IJTJ 318. As mentioned earlier, these demands went hand in hand with demands for the respect of civil and political rights.

[306] See Human Rights Watch, 'Elections in Egypt: State of Emergency Incompatible with Free and Fair Vote' (2010) <www.hrw.org/sites/default/files/reports/egypt1110WebforPosting.pdf> accessed 28 July 2015. Noha El Zeiny was a senior judge and published a scathing op-ed in the newspaper Al Masry Al Youm on 24 November 2005, describing the electoral rigging she witnessed at a polling station in the city of Damanhour. Noha El Zeiny, 'Rigging Elections Under the Supervision of the Judiciary' (Al Masry Al Youm 24 November 2005).

staunchly loyal to the former regime and to the military. A divided judiciary thus significantly limited the number of human rights cases, the extent of the individuals who faced trial, and contributed to the high number of acquittals.

Third, the weak legal framework within which lawyers must build their cases contributed to the problem of acquittals. Judge Maged and others outlined these legal challenges clearly, citing difficult evidentiary requirements and a lack of provisions for command responsibility as major obstacles to a more comprehensive set of cases. Fourth, a military-controlled transition in Egypt has meant that certain individuals, particularly from the military, are shielded from prosecution while others are scapegoated for the sake of appeasing public anger. The shaping factors affecting decisions regarding the prosecution of political leaders in Egypt are therefore complex: they pertain to deep structural and socio-economic problems as well as lingering problems of the 'deep state,' whereby powerful actors in the military, the judiciary, and state security agencies mould transitional justice to protect their interests.

TUNISIA

The Prosecution of Political Leaders in Pre-Transition Tunisia

In Tunisia, domestic efforts to prosecute political leaders from before the uprising that began on 17 December 2010 were almost non-existent.[307] However, through universal jurisdiction laws, two cases targeted former interior ministers Abdallah Qallel and General Habib Ammar in Switzerland in 2001 and 2003, respectively. A third case in 2001 targeted Khaled Ben Said, a police superintendent in Jendouba who later became Vice Consul for Tunisia in the French city of Strasbourg.[308] Severe repression, widespread torture by security forces, and a "judiciary strangled by the regime"[309] meant that domestic efforts to prosecute political leaders were "impossible."[310] Similar to Egypt, there were calls by well-known individual human rights activists such as Moncef Marzouki and Hamma Hammami for "accountability" rather than for holding specific individuals accountable.[311] These calls, however, did not materialise into legal cases, they were not organised, and those who called for accountability were severely repressed by Ben Ali's regime.

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[307] Interview with Messaoud Rhomdani, Vice President, Ligue Tunisienne des Droits de l'Homme (Tunis, Tunisia, 25 April 2012); Interview with Amor Safraoui, Coordinator, National Coalition for Transitional Justice and Head, Groupe de 25 (Tunis, Tunisia, 25 April 2012); Interview with Solène Rougeaux, Director, Avocats Sans Frontières, Tunis Office (Tunis, Tunisia, 25 April 2012); Interview with anonymous senior employee, Office of the High Commissioner for Human Rights (24 April 2012); Interview with Habib Nassar, Former Middle East and North Africa Director, International Center for Transitional Justice (New York City, New York, 18 May 2012).

[308] Jendouba is a city in Northwestern Tunisia. Habib Nassar brought my attention to this case, the details of which can be found here: Fédération Internationale des Ligues des Droits de l'Homme, 'The Conviction of Khaled Ben Said: A Victory Against Impunity in Tunisia' (Report 550a November 2010) <www.fidh.org/IMG/pdf/Bensaid550ang2010.pdf> accessed 28 July 2015.

[309] Interview with Amna Guellali, Tunisia and Algeria Researcher, Human Rights Watch (Telephone interview, 23 April 2012).

[310] Interview with Solène Rougeaux, Director, Avocats Sans Frontières, Tunis Office (Tunis, Tunisia, 25 April 2012).

[311] Interview with Amor Boubakri, Lawyer and Professor, University of Sousse; UNDP Consultant (Tunis, Tunisia, 26 April 2012).

Baraket Essahel Case: The Prosecution of Abdallah Qallel

The case of Abdallah Qallel, former Minister of Interior from 1991 to 1995, is one of the most well known cases targeting a Tunisian high-level government official before the 2010 uprising. While Abdallah Qallel was in a Geneva hospital for heart surgery in February 2001, Abdennacer Naït-Liman filed a complaint with the prosecutor of the Geneva canton. Naït-Liman was tortured in a Ministry of Interior detention cell in Tunisia in 1992, following a violent crackdown by security forces on an alleged coup plot in 1991.[312] Over 200 members of the Tunisian military suspected of ties with the Islamist opposition party Ennahda were detained and tortured by interior ministry officials, who claimed that the military was planning a coup to overthrow Ben Ali and his regime. This case became known as Baraket Essahel, named after the town in which the alleged coup plot took place in 1991. The Swiss prosecutor cited the Convention Against Torture, under which any person, including foreigners, suspected of the crime of torture must be investigated and prosecuted. Following Naït-Liman's legal complaint, Abdallah Qallel fled Switzerland before the police were able to arrest him.

The Baraket Essahel case remained dormant until 2011, when several victims in Tunisia filed a case against Abdallah Qallel and other government and security officials for their alleged role in the torture of those detained in Baraket Essahel. The Permanent Military Court of Tunis sentenced Abdallah Qallel, along with Mohamed Ali Ganzoui, the interior ministry's Director of Special Services from 1990 to 1995 and security officials Abderrahmen Kassmi and Mohamed Ennacer Alibi to four years in prison in November 2011. In April 2012, the Court of Appeal of the Military

[312] REDRESS, 'Reparation for Torture: A Survey of Law and Practice in 30 Selected Countries (Switzerland Country Report)' (May 2003) 18-19 <www.redress.org/downloads/country-reports/Switzerland.pdf> accessed 28 July 2015.

Tribunal of Tunisia reduced these sentences by half.[313] Moreover, these officials were charged with "violence against others either directly or through others" as opposed to torture.[314] This is in part because, as Human Rights Watch argues, the crime of torture was not incorporated into Tunisian law (Law No. 89/2 August 1992) until 1999, eight years after the Baraket Essahel incident took place. Abdallah Qallel was also charged with embezzlement in 2011. He, along with Ali Seriati, former Director of Presidential Security Service, and Rafiq Haj Kacem, former Minister of Interior in 2010, were freed in 2014 when an appeals court reduced their sentences to time served.[315]

The Case of General Habib Ammar

The case of General Habib Ammar, Commander of the Tunisian National Guard from 1984 to 1987 and Minister of Interior in 1987, did not proceed as far as that of Baraket Essahel. Ammar was infamous for turning the offices of the interior ministry into "centres of detention and torture."[316] As a result, in September 2003, TRIAL and the Organisation Mondiale Contre la Torture (OMCT) filed a criminal complaint against Ammar with the attorney general of Geneva. As a member of the Tunisian delegation to the International Telecommunications Union, however, the attorney general stated that Ammar benefited from immunity.[317]

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[313] Human Rights Watch, 'Tunisia: Reform Legal Framework to try Crimes of the Past: First Torture Trial Shows Need to Remove Obstacles to Accountability' (3 May 2012) <www.hrw.org/news/2012/05/03/tunisia-reform-legal-framework-try-crimes-past> accessed 28 July 2015.

[314] ibid.

[315] Carlotta Gall, 'Questions of Justice in Tunisia as Ousted Leaders are Freed' New York Times (16 July 2014) <www.nytimes.com/2014/07/17/world/africa/questions-of-justice-in-tunisia-as-ousted-leaders-are-freed.html> accessed 26 July 2015.

[316] TRIAL, 'Habib Ammar (Tunisia)' (8 April 2015) <www.trial-ch.org/en/activities/litigation/trials-cases-in-switzerland/habib-ammar-tunisia-2003.html> accessed 28 July 2015.

[317] ibid.

The Khaled Ben Said Case

A third Tunisian case – that of Khaled Ben Said – took place years before the 2010 uprising and again through the mechanism of universal jurisdiction laws, this time in France. As a police superintendent in the Tunisian town of Jendouba, Ben Said allegedly beat and tortured Zoulaikha Gharbi, a Tunisian lady, in October 1996. Gharbi was detained for questioning with regards to her husband and several others, who were suspected of having Islamist affiliations. Gharbi's husband, Mouldi Gharbi, had suffered a similar fate at the same Tunisian police station in 1991, after which he became a political refugee in France in May 1996. The Fédération Internationale des Ligues des Droits de l'Homme (FIDH) provides a concise summary of the ensuing legal saga that led Gharbi to make use of France's universal jurisdiction laws to attempt to prosecute Ben Said:

> In October 1997, Mrs. Gharbi decided to leave Tunisia and went to the police station in order to get her passport. On this occasion, she recognised Khaled Ben Saïd, who was delivering her passport.
>
> On October 22, 1997, Mrs. Gharbi left Tunisia with her children in order to join her husband and settle in France.
>
> On May 9, 2001, having learned that Khaled Ben Saïd was on French soil in the capacity of Vice-Consul at the Tunisian Consulate in Strasbourg, Mrs. Gharbi, with her lawyer, Eric Plouvier, decided to file a complaint against him.
>
> A preliminary enquiry was initiated following this complaint, after which the superintendent in charge of the investigation contacted Khaled Ben Saïd on November 2, 2001 in order to inform him that a complaint had been filed against him and to summon him to a hearing. Khaled Ben Saïd never complied.
>
> In February 2002, the FIDH and its member ogranisation in France, the *Ligue des droits de l'Homme* (LDH), represented by Patrick Baudouin, lawyer and Honorary President of the FIDH, became *parties civiles* in the proceedings.
>
> On February 14, 2002, the judge in charge of the preliminary investigation attempted to contact Khaled Ben Saïd and was told by the Tunisian Consulate in Strasbourg that the Vice-Consul had returned to Tunisia.
>
> That same day, the judge issued an international arrest warrant against

> Khaled Ben Saïd, which was never enforced, similarly to the letter […] issued a few weeks later.
>
> In spite of these obstacles, and after seven years of investigation, the indictment before the Criminal Court was finally issued on February 16, 2007.[318]

In December 2008, the Strasbourg Criminal Court found Ben Said guilty of torture and sentenced him to eight years in prison. The decision was appealed shortly thereafter and in September 2010, the Criminal Court of Nancy confirmed Ben Said's conviction, increased his sentence to twelve years imprisonment, and issued an international arrest warrant against him.[319]

Of the three cases outlined above, the Baraket Essahel case against Abdallah Qallel seems to have had the largest impact on the pursuit of high-level government officials in Tunisia following the 2010 uprising. The initiation of the case in Switzerland in 2001, followed by its revival ten years later in Tunisia, is a strong indication of the case's importance for the victims and its symbolic value for many Tunisians, particularly during the transition. This is likely because of the terrible reputation of the Ministry of Interior and the highly symbolic value in targeting its chief. Recent judicial decisions, however, have undermined the momentum to prosecute political leaders in Tunisia: "Of the approximately 20 former senior officials detained in the aftermath of the uprising, almost all are now free."[320]

Content and Extent of Prosecutions

As in the case of Egypt, there was a significant emphasis on corruption and socio-economic crimes in Tunisia and a much more limited focus on human rights crimes in the investigations and prosecutions that took place. Corruption charges spanned a period dating back to years before the uprising, while the human rights

[318] Fédération Internationale des Ligues des Droits de l'Homme, 'The Conviction of Khaled Ben Said' (n 298).
[319] ibid.
[320] Gall (n 305).

trials were mostly limited to crimes committed during the uprising in December 2010 and January 2011. This is of course with the important exception of the Baraket Essahel case explained above. What explains this limited content and extent of the trials? Why were most high-level officials released? A number of explanations reveal a combination of the relative success of workers' movements, a history of a very visible and rampant corruption, specific public demands for prosecution, a weak judiciary and legal framework, and the anticipation of a truth and reconciliation commission that would address a more comprehensive set of crimes. A pre-occupation with political stability immediately following the uprising also stalled decisions regarding the prosecution of political leaders for human rights violations.

Workers' Movements and Labour Unions: The Leading Role of the UGTT

The social and political processes that unfolded in Tunisia point to the significant role workers' movements and labour unions played before, during, and after the uprising. Prior to the eruption of the Tunisian uprising in December 2010, the General Union for Tunisian Workers (UGTT) played a leading role in challenging government policies for years. It was the country's strongest opposition.[321] The mass revolt against unemployment and economic inequality in the Tunisian town of Gafsa in 2008, which resulted in several deaths and many injured, is widely seen as a turning point in the lead up to the uprising two and a half years later.[322] "This six month revolt," Messaoud Rhomdani explained, "may have opened

[321] Héla Yousfi, 'Ce syndicat qui incarne l'opposition tunisienne' (Le Monde Diplomatique November 2012) <www.monde-diplomatique.fr/2012/11/YOUSFI/48348> accessed 28 July 2015.
[322] Interview with Messaoud Rhomdani, Vice President, Ligue Tunisienne des Droits de l'Homme (Tunis, Tunisia, 25 April 2012); Interview with Amor Boubakri, Lawyer and Professor, University of Sousse; UNDP Consultant (Tunis, Tunisia, 26 April 2012); Interview with anonymous senior employee, Office of the High Commissioner for Human Rights (24 April 2012). See also Gilbert Achcar, *The People Want: A Radical Exploration of the Arab Uprising* (Saqi Books 2013).

the door to what happened in Sidi Bouzid."[323] Gafsa and its aftermath helped chip away at the fear barrier that prevented many Tunisians from challenging the regime's repressive policies. It also demonstrated the strength of mobilisation in the face of an often brutal police force. The UGTT led a general strike during the uprising and oversaw the sit-ins at the Casbah thereafter, all of which strengthened their influence and stature as the government's most serious opposition. The fight against economic injustice in Tunisia was therefore well established from before the outbreak of the mass uprising of 2010 and was led by the UGTT and other workers' movements during and in the aftermath of the uprising.

These labour rights movements in Tunisia did not operate alone – human rights activists such as Moncef Marzouki, Sihem Bensedrine, Hama Hammami and others were persistent in their calls for democracy and respect for human rights. But the strongest forces of opposition in Tunisia were labour rights movements, at the head of which was the UGTT. Those calling for civil and political rights, such as the right to freedom of expression, the right to assemble, and freedom from torture and arbitrary detention, were severely repressed through massive crackdowns led by the police and other state security forces, resulting in a significantly weakened human rights movement in Tunisia. In contrast, the labour rights movements were slightly more tolerated. The UGTT's complicated relationship with the Ben Ali regime, for instance, often meant that the union's executive office was staffed with individuals loyal to the regime.[324]

The relative success, then, of the Tunisian labour rights movements in

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[323] Interview with Messaoud Rhomdani, Vice President, Ligue Tunisienne des Droits de l'Homme (Tunis, Tunisia, 25 April 2012). Sidi Bouzid is in reference to the town in which the self-immolation of Mohammed Bouazizi, the fruit-seller whose act ignited the Tunisian revolution of 2010/2011, took place.

[324] Interview with Anis Morai, Lawyer, Professor, Columnist and Host of 'Dans le Vif du Sujet' (Telephone interview, 2 May 2013).

bringing to the fore demands for social justice and an end to corruption impacted the content of the prosecutions. The build-up of their influence over the years played a big role in the consequent emphasis on socio-economic crimes charges in the prosecutions. Like Egypt, workers' movements and labour unions thus served as one of the drivers that ensured some form of criminal accountability for socio-economic rights violations. On the other hand, the harsh crackdowns on civil and political rights activists left a seriously weakened human rights lobby that has been largely unsuccessful in ensuring criminal accountability for human rights abuses committed both before and during the uprisings.

Rampant Corruption and Socio-Economic Grievances

The visibility of corruption throughout Ben Ali's reign is, as several interviewees explained, a major factor that fuelled public demands for prosecution.[325] Abderrahman El Yessa argued that the demography of the protesters during the uprising directly impacted the content of the demands for prosecution:

> The human rights charges are limited to the period of the revolution because the demands of the protesters were limited in this way. This is because most of the protesters were young and leftist and they see themselves as the owners of the revolution. Their vision is therefore limited to the violations that they faced during 'their' uprising.[326]

As a result, the demands for human rights prosecutions were largely focused on the killing of protesters during the uprising, whereas demands for socio-economic justice spanned the twenty-three years of Ben Ali's rule.

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[325] Interview with anonymous senior employee, Office of the High Commissioner for Human Rights (24 April 2012); Interview with Abderrahman El Yessa, Democratic Governance Advisor, UNDP, Tunisia (Tunis, Tunisia, 26 April 2012); Interview with Amor Boubakri, Lawyer and Professor, University of Sousse; UNDP Consultant (Tunis, Tunisia, 26 April 2012); Interview with Anis Mahfoudh, Human Rights Officer, OHCHR, Tunisia (Tunis, Tunisia, 27 April 2012).

[326] El Yessa, however, added that the Youssefists – or the Islamists – played a significant role in pushing for an expansive time period for Tunisia's Truth and Dignity Commission. The "young and leftist" protesters, then, did not apply pressure alone: "These [justice] demands were made by everyone – ordinary citizens, political activists, Islamists and non-Islamists." Interview with Abderrahman El Yessa, Democratic Governance Advisor, UNDP, Tunisia (Tunis, Tunisia, 26 April 2012).

El Yessa added that the poor economic situation in Tunisia also prompted jurists to propose reconciliation deals with hundreds of business tycoons banned from traveling, as a way to help improve the country's development. When it comes to corruption, El Yessa explained, "everyone is a victim."[327] Amor Boubakri, a Tunisian academic, lawyer and United Nations consultant, echoed this explanation: "People want to hold [political leaders] accountable for poverty and widespread socio-economic malaise. To prosecute them would help resolve economic problems."[328] Anis Morai, a Tunisian legal and political expert, suggested that the scale of corruption and poverty meant that other rights were not a priority for the average Tunisian: "Tunisians do not dwell on freedom of thought, on the freedom to form an association. And I can understand that, because it is *they* who are hungry."[329]

Much like the "young" and "leftist"[330] protesters had specific demands regarding what should be prosecuted, the Islamists and Youssefists also voiced specific demands for accountability. Habib Bourguiba was Tunisia's first president from 1957 to 1987. Salah Ben Youssef was a nationalist who led an opposition that was against the diplomatic solution Bourguiba pursued to end the French occupation of Tunisia. Ben Youssef thus became Bourguiba's arch-enemy and his supporters, the Youssefists, were regularly detained, beaten and tortured in Bourguiba's prisons. The Islamists, on the other hand, were Ben Ali's largest opposition and they also suffered repression including torture under his rule. As a result, the Youssefists and

[327] Interview with Abderrahman El Yessa, Democratic Governance Advisor, UNDP, Tunisia (Tunis, Tunisia, 26 April 2012). The original quote was in French: "tout le monde est victime."
[328] Interview with Amor Boubakri, Lawyer and Professor, University of Sousse; UNDP Consultant (Tunis, Tunisia, 26 April 2012).
[329] Interview with Anis Morai, Lawyer, Professor, Columnist and Host of 'Dans le Vif du Sujet' (Telephone interview, 2 May 2013). The original quote was in French: "Les tunisiens ne réfléchissent pas à la liberté de pensée, à la liberté de faire une association. Et je peux le comprendre, parce que c'est eux qui ont faim au ventre."
[330] As described by Abderrahman El Yessa. Interview with Abderrahman El Yessa, Democratic Governance Advisor, UNDP, Tunisia (Tunis, Tunisia, 26 April 2012).

the Islamists emerged as the most vocal actors with demands for the prosecution of leaders who oversaw widespread torture since Tunisia's independence.[331]

Legal Challenges, the Transitional Justice Law and Lack of Political Will

The absence of certain critical reforms to Tunisia's criminal code severely limited prosecutions in two ways. First, all trials have taken place in military courts because they involve actions by military personnel. Human Rights Watch explains the problem of military jurisdiction in Tunisia:

> [T]he Tunisian president appoints civilian judges to serve in military courts by decree, pursuant to the recommendation of the ministers of justice and defense. The general military prosecutor is appointed by the minister of defense and works under his supervision. All prosecutors and investigative judges who serve in the military courts are members of the military. Thus, military courts cannot be considered as structurally independent from the executive branch. This lack of independence of military courts understandably heightened suspicions among victims and their families that the courts remained susceptible to political pressure, leading to lenient sentences for those convicted in relation to the uprising killings and the acquittal of other accused.[332]

Second, the lack of the principle of command responsibility in Tunisia's penal code significantly weakened the extent of the prosecutions and resulted in many acquittals. While Ben Ali was found guilty of failing to stop the killings of protesters in his capacity as commander of security forces, the military courts did not use the same legal reasoning in the trials of the former minister of interior and other high-level officials. In its 2015 report on accountability in Tunisia, Human Rights Watch observed:

> The military appeals court sentenced former president Ben Ali to life in prison when delivering its April 12, 2014 verdict. It found that as head of state he commanded the security forces, in accordance with article 2 of law

[331] Interview with Amor Boubakri, Lawyer and Professor, University of Sousse; UNDP Consultant (Tunis, Tunisia, 26 April 2012); Interview with Abderrahman El Yessa, Democratic Governance Advisor, UNDP, Tunisia (Tunis, Tunisia, 26 April 2012).

[332] Human Rights Watch, 'Flawed Accountability: Shortcomings of Tunisia's Trials for Killings during the Uprising' (January 2015) 21-22 <www.hrw.org/report/2015/01/12/flawed-accountability/shortcomings-tunisias-trials-killings-during-uprising> accessed 26 July 2015.

> 70 of 1982 specifying that the president has direct or indirect supervision of all of Tunisia's security forces…The court did not follow this same reasoning with regard to the former minister of interior and the former directors general of the security forces. The court sentenced these defendants to three years in prison for "dereliction of duty" or "failure to act." This discrepancy between the severity of the sentence imposed on Ben Ali and the leniency of the sentences imposed on other former senior officials underscores the court's failure to analyze the command and control structures of the Ministry of Interior in depth, in order to determine the responsibility of each defendant.[333]

The report also notes that the military appeals court did not take into account elements that it had itself listed as evidence for the trials of other senior officials. It adds that: "Article 32 of Tunisia's penal code encompasses the notion of aiding and abetting, stating that an accomplice is someone who assisted the offender in the commission of a crime."[334]

Finally, a lack of political will together with a weak judiciary and a weak legal framework contributed to the limited scope of the content and extent of prosecutions in Tunisia. The majority of the complaints filed against former leaders were instigated by individual plaintiffs and by a group of lawyers called the Groupe de 25. The Groupe de 25 was formed on the 14 January 2011 – the day that Ben Ali was ousted from power. Amor Safraoui, the head of the Groupe de 25, explained initial efforts aimed at prosecution:

> Between the 14 January 2011 and the 8 February 2011, we were waiting for the Public Prosecutor to begin the process of prosecution. We were also waiting for the Minister of Justice to take action. As a group of concerned lawyers and citizens, we met often during this time period. We realised that there was no political will to prosecute, and so we decided to act on the 8 February 2011. Although [this was not our role as lawyers], we…decided to take the place of what should have been the Public Prosecutor and we went ahead and filed a complaint against two former ministers of interior and the former president for corruption crimes and human rights violations committed during the uprising.[335]

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[333] ibid.
[334] ibid.
[335] Interview with Amor Safraoui, Coordinator, National Coalition for Transitional Justice and Head, Groupe de 25 (Tunis, Tunisia, 25 April 2012).

A lack of action on the part of the public prosecutor thus led the Groupe de 25 to initiate prosecutions. When I asked the Groupe de 25 why they were more active in filing for corruption rather than human rights crimes, Charfeddine Kallel, a human rights lawyer for several victims of the uprising and prominent member of the Groupe de 25, cited capacity and expertise challenges:

> We, the Groupe de 25, have limited capacity. We are unable to pursue human rights violations on the same scale as financial corruption cases because first of all, we do not have the resources and second, we need the training on how to prosecute crimes such as torture.[336]

Furthermore, while Tunisia's transition was not as tightly controlled as in Egypt, many figures from the Ben Ali era – the "anciens nouveaux"[337] – retain power. Beji Caïd Essebsi, for instance, held senior government positions in both Bourguiba and Ben Ali's governments and is now Tunisia's President.[338] Since winning the presidency in December 2014, Essebsi nominated three Ben Ali regime officials to senior political positions, including Habib Essid as Prime Minister.[339] Concerned about the consequences of opening up "too many" human rights cases implicating senior figures from a deeply entrenched and repressive regime meant that these incoming elites, many of whom have ties to the former Ben Ali regime, "might not be spared" from prosecution.[340] A public prosecution allied with the ruling political party has thus meant that many human rights cases continue to be blocked.[341]

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[336] Interview with Charfeddine Kallel, Lawyer and Member, Groupe de 25 (Tunis, Tunisia, 25 April 2012).

[337] Héla Yousfi, Wejdane Majeri, Choukri Hmed, Sonia Djelidi, Shiran Ben Abderrazak, 'En Tunisie, le retour de l'ancien regime n'est pas une rumeur" (Liberation 21 November 2014) <www.liberation.fr/debats/2014/11/21/en-tunisie-le-retour-de-l-ancien-regime-n-est-pas-une-rumeur_1147107> accessed 28 July 2015.

[338] Habib Bourguiba was Tunisia's first post-independence president from 1957-1987.

[339] Christine Petre, 'Tunisia, Let's not Forget about Revolution Already" (Middle East Monitor 13 January 2015) <www.middleeastmonitor.com/articles/africa/16310-tunisia-lets-not-forget-about-the-revolution-already> accessed 28 July 2015. See also Yousfi, Majeri, Hmed, Djelidi and Abderrazak (n 327).

[340] Interview with anonymous senior employee of the Tunisian Ministry of Foreign Affairs (2012).

[341] Interview with Messaoud Rhomdani, Vice President, Ligue Tunisienne des Droits de l'Homme (Tunis, Tunisia, 25 April 2012); Interview with Amor Safraoui, Coordinator, National Coalition for Transitional Justice and Head, Groupe de 25 (Tunis, Tunisia, 25 April 2012).

While the lack of an enabling legal framework to prosecute for serious human rights crimes was a major challenge that limited the content of prosecutions, the transitional justice law adopted in December 2013 aims to redress this. It has also tamed demands to prosecute decades of torture crimes. This is because specialised chambers will be established to try serious crimes between July 1955 and December 2013.[342] The law also set up a Truth and Dignity Commission that will cover crimes committed during the same time period. Amna Guellali observed that: "in the beginning, popular demand for prosecutions was focused on social justice, but then it also encompassed demands for justice for human rights abuses. The reason for this limited content is that everyone is waiting for the Truth and Dignity Commission."[343] Boubakri and El Yessa made similar arguments, stating that the Islamists and the Youssefists took the lead in pressuring the interim governments to expand the scope of the Truth and Dignity Commission to ensure that it addresses the crimes committed against them between the 1950s and the 1990s.[344]

Role of International Actors

The role of international actors in steering Tunisia's decisions regarding prosecution was, as in Egypt, minimal. Several lawyers and civil society activists noted that prosecutions of political leaders were domestically driven, with little involvement from external actors. Messaoud was emphatic in his response to the question of international actors' involvement: "The decision to prosecute was directly in response to the demands of civil society and the protesters. It was entirely

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[342] Human Rights Watch, 'Tunisia: Hope for Justice on Past Abuses: Specialized Chambers Should be Independent, Fair' (22 May 2014) <www.hrw.org/news/2014/05/22/tunisia-hope-justice-past-abuses> accessed 28 July 2015.
[343] Interview with Amna Guellali, Tunisia and Algeria Researcher, Human Rights Watch (Telephone interview, 23 April 2012).
[344] Interview with Amor Boubakri, Lawyer and Professor, University of Sousse; UNDP Consultant (Tunis, Tunisia, 26 April 2012); Interview with Abderrahman El Yessa, Democratic Governance Advisor, UNDP, Tunisia (Tunis, Tunisia, 26 April 2012).

domestically driven – there has been no role played by the international human rights movement in the decision to prosecute."[345] Despite this, Messaoud continued to argue for the importance of working with international actors to advance transitional justice in Tunisia, as well as reforming the judiciary:

> Tunisians do want transitional justice for torture and corruption crimes, but they don't quite understand how important it is to do it right. Transitional justice is not necessarily understood well – some consider it 'turning the page' and not dealing with the crimes of the past. We must learn from the experiences of Latin America, South Africa, Portugal and Spain. Morocco's experience with its truth and reconciliation commission has not been thorough. We need to work both internationally and nationally. But justice has been slow. The snipers, for instance, have not been held to account. We have a very corrupt judicial system. The Groupe de 25 has done a good job of fighting this, but a lot still needs to be done.[346]

While the role of international actors was minimal in the immediate aftermath of Ben Ali's ouster in January 2011, however, it was much more prominent in the decade leading up to the uprising. Prior to the uprising, international NGOs such as Human Rights Watch, FIDH and Amnesty International were influential in raising awareness about human rights violations in Tunisia and in documenting abuses. As head of the Groupe de 25 Safraoui explained: "We reached out to the international community in the past: FIDH, the Paris Bar, etc., in an effort to put pressure on the European Community to put pressure on the Ben Ali government to respect human rights."[347] Moreover, the use of universal jurisdiction laws in Switzerland and France were critical in triggering prosecutions pre-uprising and also in raising awareness among Tunisians regarding criminal accountability for

[345] Interview with Messaoud Rhomdani, Vice President, Ligue Tunisienne des Droits de l'Homme (Tunis, Tunisia, 25 April 2012).
[346] ibid.
[347] Interview with Amor Safraoui, Coordinator, National Coalition for Transitional Justice and Head, Groupe de 25 (Tunis, Tunisia, 25 April 2012).

its leaders.[348] Post-uprising, international actors have largely taken on a training role, rather than one that triggers or drives decisions to prosecute.[349]

The systematic documentation and monitoring of human rights abuses, particularly with the help of international actors has, however, had a significant impact in the post-uprising transition period. For instance, Amnesty International worked relentlessly with the United Nations Committee Against Torture, Tunisian victims and civil society organisations on a gruelling twenty-two year-long campaign to establish the truth and ensure justice for the torture case of Faysal Baraket.[350] The exhumation of Baraket's body took place in March 2013, twenty-two years after his death from torture by police officers. While at the time of writing nobody has been prosecuted, the collaboration between international actors and Tunisian actors has been critical in moving Faysal's case forward.[351] Still, the pervasive repression throughout Ben Ali's police state in Tunisia meant that international and domestic civil society actors faced massive challenges in ultimately ensuring prosecutions, particularly of high-level officials.

Strikingly, none of the interviewees mentioned any role or impact of Tunisia's accession to the Rome Statute on 24 June 2011. A senior employee at the Middle East and North Africa section of OHCHR stated that his office banked on the transition period immediately following Ben Ali's ouster and, together with

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[348] See "The Prosecution of Political Leaders in Pre-Transition Tunisia" section in this chapter.
[349] Interview with Amna Guellali, Tunisia and Algeria Researcher, Human Rights Watch (Telephone interview, 23 April 2012); Interview with Solène Rougeaux, Director, Avocats Sans Frontières, Tunis Office (Tunis, Tunisia, 25 April 2012); Interview with Amor Safraoui, Coordinator, National Coalition for Transitional Justice and Head, Groupe de 25 (Tunis, Tunisia, 25 April 2012); Interview with Amor Boubakri, Lawyer and Professor, University of Sousse; UNDP Consultant (Tunis, Tunisia, 26 April 2012); Interview with Abderrahman El Yessa, Democratic Governance Advisor, UNDP, Tunisia (Tunis, Tunisia, 26 April 2012).
[350] Amnesty International, 'Tunisia: When Bones Speak: The Struggle to Bring Faysal Baraket's Torturers to Justice' (October 2013) <www.amnesty.org/en/library/asset/MDE30/016/2013/en/cf6715f8-e1a7-426b-9635-8dd5289bc1e0/mde300162013en.html> accessed 28 July 2015.
[351] ibid.

international human rights groups, launched a campaign calling on the interim authorities to join the ICC.[352] He added that the timing of the campaign – when government policies were in flux – was key to its success. When I specifically asked whether Tunisia's accession to the Rome Statute has had any impact on domestic decisions to prosecute, Safraoui, on the other hand, replied:

> People are not so much interested in the goings-on of the international criminal justice movement, even after Tunisia ratified the Rome Statute. At the moment, Tunisians are caught up with internal politics – particularly the Islamists vs. the secularists discourse that has become so dominant now.[353]

Safraoui's observation, however, came just over one year after the ouster of Ben Ali and a few months short of Tunisia's one-year anniversary of its accession to the Rome Statute.

Role of Domestic Civil Society

The preservation of historical memory and the documentation of human rights abuses guided the work of Tunisia's civil society in the decades before the uprising. Working within a repressive environment, civil society organisations such as LTDH began to document and disseminate information, particularly following a 1978 general strike by labour unions.[354] As a result of this strike, labour union members were tortured and faced other repressive measures. This, Rhomdani argued, is what motivated the LTDH to make it its goal to document and disseminate information on human rights violations. It also marked the start of a Tunisian civil society that was predominantly made up of labour union activists. Rhomdani explained:

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[352] Interview with anonymous senior employee, Office of the High Commissioner for Human Rights (24 April 2012).
[353] Interview with Amor Safraoui, Coordinator, National Coalition for Transitional Justice and Head, Groupe de 25 (Tunis, Tunisia, 25 April 2012).
[354] Interview with Messaoud Rhomdani, Vice President, Ligue Tunisienne des Droits de l'Homme (Tunis, Tunisia, 25 April 2012).

> Trade and labour unions in Tunisia have historically played an important role in politics. Because of the severe repression practiced by the RCD [Rassemblement Constitutionnelle Démocratique], Tunisia's ruling political party, it was extremely difficult to form political parties. Political dissidents thus either joined the LTDH or the trade unions. A number of 'governmental NGOs' were formed, but they were just that – GONGO's.[355]

While there were very few explicit attempts by civil society to trigger prosecutions of political leaders before the 2010-2011 uprising,[356] documentation of abuses signified anticipation of a time when prosecutions would be possible. As an anonymous Tunisian interviewee explained:

> [Civil society documented abuses] because they knew one day that the dictatorship would fall. Also, they did it for the sake of historical memory. The CNLT developed a list of who they thought was responsible for abuses from the 1990s. OCTT has also documented testimonies. We all knew one day that the regime would disappear. That is why documentation took place.[357]

Conclusion

Triggers

At least three events in Tunisia's recent past served as turning points in the momentum behind decisions to prosecute the country's leaders. The 1978 general strike, the Baraket Essahel torture practices in 1991 and the Gafsa revolt of 2008 each fuelled resistance to repression and civil society advocacy for accountability for human rights violations. The Baraket Essahel case specifically led to the initiation of a case against former Minister of Interior Abdallah Qallel in Switzerland in 2001, and was reignited domestically in Tunisia in 2011. As Rhomdani argued, the general strike in Tunisia in 1978 was critical in that the torture that took place at the time

[355] Referring to the term "governmental NGOs." ibid.

[356] See Baraket Essahel case, General Habib Ammar case and Khaled Ben Said case in "Efforts to Prosecute before 2010-2011 Uprising" section. These three cases, however, were initiated by individual plaintiffs and some were later taken up by international lawyers and NGOs, such as the Organisation Mondiale Contre la Torture (OMCT) in Switzerland.

[357] Interview with anonymous senior employee of the Tunisian Ministry of Foreign Affairs (2012). CNLT is the Conseil National pour la Liberté des Tunisiens. OCTT is the Organisation Contre la Torture Tunisienne.

triggered a civil society movement for accountability.[358] The six-month revolt in Gafsa, violently repressed by state security forces in 2008, had a similar if not even more significant impact on later decisions to prosecute leaders. While there may not have been calls aimed specifically at the prosecution of leaders for the repression that marked both the general strike and Gafsa, they were still cited regularly as early turning points that triggered a movement that ultimately turned into a call for criminal accountability.[359] Speaking about Gafsa, an anonymous interviewee stated, "It was the spark."[360]

Immediately following the ouster of Ben Ali in January 2011, individual plaintiffs and groups of lawyers such as the Groupe de 25 filed complaints on behalf of victims and against former leaders for both human rights violations and corruption. These actors were key in initiating the process of prosecution. However, pressure from 'the street' during the uprising and also immediately following Ben Ali's ouster was, as several interviewees noted, the strongest trigger that led to decisions to prosecute.[361] This demonstrates the significant role of mass mobilisation and repeated calls by civil society for accountability, particularly following a long period of repression. As Nassar declared, "Impunity is one reason the uprisings

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[358] Interview with Messaoud Rhomdani, Vice President, Ligue Tunisienne des Droits de l'Homme (Tunis, Tunisia, 25 April 2012).

[359] Interview with anonymous senior employee of the Tunisian Ministry of Foreign Affairs (2012); Interview with Messaoud Rhomdani, Vice President, Ligue Tunisienne des Droits de l'Homme (Tunis, Tunisia, 25 April 2012); Interview with Amor Boubakri, Lawyer and Professor, University of Sousse; UNDP Consultant (Tunis, Tunisia, 26 April 2012).

[360] Interview with anonymous senior employee of the Tunisian Ministry of Foreign Affairs (2012).

[361] Interview with Anis Mahfoudh, Human Rights Officer, OHCHR, Tunisia (Tunis, Tunisia, 27 April 2012); Interview with Amna Guellali, Tunisia and Algeria Researcher, Human Rights Watch (Telephone interview, 23 April 2012); Interview with Abderrahman El Yessa, Democratic Governance Advisor, UNDP, Tunisia (Tunis, Tunisia, 26 April 2012); Interview with Habib Nassar, Former Middle East and North Africa Director, International Center for Transitional Justice (New York City, New York, 18 May 2012); Interview with anonymous senior employee of the Tunisian Ministry of Foreign Affairs (2012); Interview with Solène Rougeaux, Director, Avocats Sans Frontières, Tunis Office (Tunis, Tunisia, 25 April 2012).

started."[362] He added that the timing of popular calls for prosecution was key, despite the fact that they were not organised and without a clear prosecutorial strategy.[363] The Groupe de 25 echoed this observation.

Drivers

Some of the trigger factors described above also served as drivers of decisions regarding prosecution. In particular, the Groupe de 25's early efforts, immediately following Ben Ali's ouster, were successful in pushing for prosecutions. Continued protests and pressure from victims' families made it difficult for interim authorities to ignore the question of prosecutions for former leaders. The appeasement of public anger was therefore a key driver of decisions regarding prosecution.[364]

Shapers

The demands for human rights prosecutions were largely focused on the killings of protesters during the uprising, whereas demands for socio-economic justice spanned the twenty-three years of Ben Ali's rule. Moreover, most of the twenty senior officials from Ben Ali's regime who were prosecuted have been set free. Several factors shaped this limited content and extent of the prosecutions. Poverty, inequality and widespread corruption contributed to the emphasis on accountability for socio-economic crimes in the mass protests of 2010-2011. The highly symbolic tragedy of Mohamed Bouazizi's self-immolation, the spark of the Tunisian uprising, illustrates this state of affairs well. The government's plans to establish a Truth and Dignity Commission that will cover crimes committed since

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[362] Interview with Habib Nassar, Former Middle East and North Africa Director, International Center for Transitional Justice (New York City, New York, 18 May 2012).
[363] ibid.
[364] ibid.

Tunisia's independence in 1955 further contributed to the very limited scope of the human rights charges in the prosecutions. Moreover, a corrupt judiciary and a politicised public prosecutor, along with the use of military jurisdiction to try former leaders put into question the legitimacy of the legal steps taken to ensure criminal accountability. A lack of command responsibility provisions led to many acquittals and light sentences. Finally, a transition that increasingly saw the return of the *anciens nouveaux* meant that human rights prosecutions in particular, but also corruption prosecutions, would be limited to protect those with former regime ties. In much the same way that prosecutions were used to sacrifice a part of the regime to save the regime in Egypt, former Minister of Interior Abdallah Qallel prosecuted for the Baraket Essahel case was, as his daughter proclaimed, "designated as a scapegoat for torture" while other former ministers were exempted from prosecution.[365]

LIBYA

The Prosecution of Political Leaders in Pre-Transition Libya

The Gaddafi regime had a tight grip on all state institutions and prevented political opposition by adopting Law No. 71 in 1972, which banned political parties. Such dictatorial laws and severe repression and intimidation of critics of the Gaddafi regime meant that there were no significant efforts to prosecute political leaders in Libya before the uprising and civil war broke out in 2011.[366] However, as veteran human rights lawyer Azza Maghur explained, there were politicised and unsystematic steps taken by Muammar Gaddafi to allow prosecutions and to establish mechanisms

[365] The National, 'Tunisian Ex-Minister Fights Torture Verdict: What did he know, when did he know it?'(29 Februrary 2012) <www.thenational.ae/news/world/middle-east/tunisian-ex-minister-fights-torture-verdict-what-did-he-know-when-did-he-know-it#full> accessed 28 July 2015.

[366] Interview with Amel Jerary, Director of Communications, Prime Minister's Office (for former Libyan Prime Minister Aly Zeidan) (Doha, Qatar, 8 November 2012); Interview with Lydia Vicente, Executive Director, Rights International Spain (Telephone interview, 16 April 2012).

through which victims could file human rights complaints. These efforts seriously lacked legitimacy and ultimately served as political tools to restrict opposition. For example, Muammar Gaddafi tried to bring cases against other government officials who were no longer under his control. In 2003, the Gaddafi International Charity and Development Foundation (GICDF)[367] filed charges against the minister of interior for human rights violations.[368] In 2004, the Ministry of Justice assigned a body to receive complaints against the Ministry. These efforts were, as Maghur explained, nothing more than overtly political maneuvers by the Gaddafi regime to clamp down on opposition and critics of the regime.[369] Maghur also mentioned the efforts of human rights lawyer Salwa Bugaighis, who filed several "political cases against the state during Gaddafi," particularly requesting compensation for the detained.[370]

The Search for Accountability for the 1996 Abu Salim Prison Massacre

Following the massacre of approximately 1,200 prisoners at the Abu Salim prison in 1996, the Gaddafi regime took some superficial steps to improve its international image and to show that there were efforts to hold the perpetrators accountable. This massacre, widely documented by the media and international human rights organisations, became a powerful symbol of the Gaddafi regime's repression. It also contributed to the momentum that led to the popular revolt to

[367] The following description is from the GICDF's website: "[GICDF] is an international non-governmental organization, carries out developmental and humanitarian activities in the social, economic, cultural and human rights fields. GICDF was established in 2003 through the signing of its article of association in Geneva, Switzerland. Its chairman is Saif Al Islam Al Gaddafi… The Foundation adopts principles that define and guide its functions such as maintaining and protecting human rights, and fundamental liberties, developing civil society and its organizations, promoting charitable voluntary work, establishing cooperation relations among societies to consolidate the team work supporting the oppressed, the downtrodden, and the vulnerable segments in the community, such as the poor, the needy, orphans, and the handicapped. It also provides humanitarian aid for war and disaster victims wherever they are." Gaddafi International Charity and Development Foundation, <www.gicdf.org> accessed 30 July 2015.
[368] Newspaper article source for this is on file with Azza Maghur. Interview with Azza Maghur, Veteran Lawyer and Human Rights Activist (Tripoli, Libya, 17 September 2013).
[369] ibid.
[370] ibid. Salwa Bugaighis was killed in her home in 2013.

topple Muammar Gaddafi in February 2011. As a result, pre-2011 efforts to hold to account the perpetrators of the Abu Salim massacre have trickled into post-2011 efforts to prosecute, much like the Baraket Essahel and Khaled Said cases did in Tunisia and Egypt, respectively.

Ali al Kermi was a political prisoner for thirty years, most of them spent at Abu Salim. He successfully sought financial compensation from the courts following his release in 2002. He had filed a claim in 2005 against the state for the torture and beatings he suffered in detention. Following the success of his claim, he became president of the Libyan Association for Prisoners of Conscience, where he advocated for reparations. As Amnesty International reported, "In 2012, a law providing for financial compensation to political prisoners detained between September 1969 and February 2011 was finally adopted."[371] No individual political leaders were charged following al Kermi's complaint. According to an Amnesty International report, financial compensation was offered to the victims of Abu Salim on the condition that they would abandon their pursuit of judicial redress.[372] "No member of the [Internal Security Agency]," the report continues, "is known to have ever been charged or tried for committing human rights violations, including torture."[373]

As a result, public pressure had been mounting for years to obtain the truth about the Abu Salim massacre. Protests took place every Saturday for four years. In response, Muammar Gaddafi appointed an investigative judge, Mohamed Bashir Al Khaddar, in 2008.[374] Nothing came of this judge's work. Maghur described him as

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[371] Amnesty International, 'Rising from the Shadows of Abu Salim Prison' (26 June 2014) <www.amnesty.org/en/latest/news/2014/06/rising-shadows-abu-salim-prison/> accessed 31 July 2015.

[372] Amnesty International, 'Libya of Tomorrow: What Hope for Human Rights' (June 2010) 11-12.

[373] ibid 31.

[374] Interview with Azza Maghur, Veteran Lawyer and Human Rights Activist (Tripoli, Libya, 17 September 2013); Interview with Dao Al Mansouri, Veteran lawyer and human rights activist (Tripoli, Libya, 18 September 2013).

"a disaster."[375] However, human rights lawyers and activists continued to push for accountability for Abu Salim. Fathi Terbil was among the most prominent lawyers who represented the families of the Abu Salim victims. His arrest on the 15 February 2011 sparked protests in Libya's eastern town of Benghazi, which then grew into a massive uprising on the 17 February 2011. Terbil's arrest and the protests that ensued signify that the Libyan uprising was triggered by both the government's aggressive campaign against criminal accountability and by the victims' families' desire to bring the Abu Salim perpetrators to justice. As Amel Jerary noted, "The aim of the revolution was to establish a state of law and to achieve justice for the Abu Salim victims."[376]

On the subject of the establishment of mechanisms through which victims could file human rights complaints, Maghur referred to *qanun mahkamit el sha'ab,* or the establishment of the People's Court in 1971. Maghur explained:

> Gaddafi initiated this court because he proclaimed he wanted to stop human rights violations. Then he started to amend the law [that established the Court] until it itself became a human rights violation. Still, many people brought forth cases to this court for the disappeared, tortured, and killed.[377]

The People's Court was set up to try members of the former royal family, which Muammar Gaddafi overthrew in a coup in 1969. This Court tried prime ministers and other – over two hundred – officials from the deposed monarchy, including former King Idris, who received a death sentence in absentia.[378] Law 5 of 1988 institutionalised the Court, making it even more politicised. Human Rights Watch explained the problem with the People's Court:

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[375] Interview with Azza Maghur, Veteran Lawyer and Human Rights Activist (Tripoli, Libya, 17 September 2013).
[376] Interview with Amel Jerary, Director of Communications, Prime Minister's Office (for former Libyan Prime Minister Aly Zeidan) (Doha, Qatar, 8 November 2012).
[377] Interview with Azza Maghur, Veteran Lawyer and Human Rights Activist (Tripoli, Libya, 17 September 2013).
[378] International Crisis Group, 'Trial By Error: Justice in Post-Qadhafi Libya' (April 2013) 12.

> Many cases involved charges of illegal political activities that should have been protected under the rights to free association or speech, in particular, alleged violations of Law 71, which bans any group activity based on a political ideology opposed to the principles of the 1969 revolution that brought al-Qadhafi to power. Some cases also were against state employees accused of graft.[379]

The People's Court was finally abolished in 2005, following pressure from Libyan lawyers who refused to take part in its arbitrary and politicised procedures. The People's Court, then, served as a prosecution tool for the Gaddafi regime, rather than as a mechanism through which victims of the Gaddafi regime could attain justice.

Content and Extent of Prosecutions

The very few prosecutions that took place in Libya since Muammar Gaddafi's ouster primarily focus on crimes committed during the 2011 conflict. This is with the exception of the Abu Salim charges faced by El Senussi and others. Some former regime officials also faced corruption charges. Given the difficulty of access to the trials, the list of charges remains ambiguous.[380] However, known charges include the embezzlement of public funds, amounting to USD2.5 billion by former Foreign Minister Al Obaidi and former head of the General People's Conference Mohamed El Zway. These were the first verdicts issued against high-level officials since Muammar Gaddafi's ouster.[381] These funds were used to compensate families of those killed in the 1988 Lockerbie plane bombing, as a way to get them to drop legal claims against Libya.[382] However, this corruption charge, which notably dates to a

[379] Human Rights Watch, 'Libya: Words to Deeds: The Urgent Need for Human Rights Reform' (Vol. 18 (1E) January 2006) <http://www.hrw.org/reports/2006/libya0106/5.htm> accessed 31 July 2015.
[380] Elham Saudi, for example, explained that her organisation, Lawyers for Justice in Libya, faced difficulty in obtaining information on the charges. Elham Saudi in Noha Aboueldahab, 'Rapporteur's Report: Prosecutions, Politics and Transitions: How criminal justice in the Arab Spring is shaping transitional justice' (Panel discussion, Durham Law School Durham 6 May 2014).
[381] BBC News, 'Lockerbie Compensation: Libyan Officials Acquitted' (17 June 2013) <www.bbc.com/news/world-africa-22936678> accessed 31 July 2015.
[382] Ghaith Shennib, 'Gaddafi Officials Acquitted but Stay Behind Bars' (Reuters, 17 June 2013) <www.reuters.com/article/2013/06/17/us-libya-trial-idUSBRE95G0S120130617> accessed 31 July 2015.

period from before the 2011 uprising, was dropped and Al Obaidi and El Zway were acquitted in June 2013. No explanation was given by the judge for their acquittal.[383]

Al Mahmoudi, who was Libyan Prime Minister from 2006-2011, was charged with funneling USD25 million of public money to Tunisia to help Gaddafi forces fighting in the 2011 conflict. Saif al Islam Gaddafi and his brother Saadi Gaddafi were also accused of "plundering state coffers to fund extravagant playboy lifestyles abroad."[384] The number of corruption charges, however, does not match those of the prosecutions in Egypt and Tunisia. The charges are, however, overwhelmingly focused on crimes of the transition, particularly the killing of protesters and mass rape.

While some former high-profile regime officials were extradited to Libya to face trial, some escaped prosecution, thereby limiting the extent of the trials. Of note is Moussa Koussa, Libya's notorious head of intelligence from 1994 to 2009 and former Foreign Minister from 2009-2011. Koussa fled to London soon after the uprising erupted, after which he spent some time in Qatar. Media reports from October 2013 indicate that he was then recruited by the Saudi intelligence agency as an advisor.[385] This is despite Mustafa Gheriani's call in March 2011 for Koussa's extradition to Libya from London to face trial. Gheriani was the rebel leader at the time and stated that Koussa should face trial for murder and crimes against

[383] El Obaidi and El Zway remained in detention, however, for other human rights charges.
[384] Chris Stephen 'Gaddafi Sons War Crimes Trial Begins in Libya Amid Security Fears' (The Guardian,13 April 2014) < http://www.theguardian.com/world/2014/apr/13/gaddafi-sons-war-crimes-trial-libya> accessed 31 July 2015.
[385] Nasser Charara, 'Saudi Restores Libyan Spy Chief Moussa Koussa's Role as Global Shadow Broker' (Global Research, 28 October 2013) <www.globalresearch.ca/saudi-restores-libyan-spy-chief-moussa-koussas-role-as-global-shadow-broker/5355884> accessed 31 July 2015.

humanity.[386] This call was made six months before the capture and killing of Muammar Gaddafi in October 2011.

Three main factors help explain the limited content and extent of the prosecutions. First, an enabling legal framework that is equipped to prosecute serious crimes such as war crimes and crimes against humanity is absent. Second, victims and their families do not trust the judiciary to independently carry out investigations and trials, which has limited the number of legal complaints filed. There is also a serious lack of awareness and understanding among victims, lawyers, judges and the elite regarding the "concept of justice" as enshrined in international treaties.[387] Third, a dangerous security situation means that many judges and lawyers fear for their lives when asked to represent Gaddafi regime officials and loyalists.

The history of efforts to achieve justice for the Abu Salim massacre and its significant symbolic value in triggering the Libyan uprising ensured that the Abu Salim charges would emerge in the post-2011 prosecutions. El Senussi was charged for his involvement in the Abu Salim massacre as well as in crimes committed during the 2011 conflict. In fact, the pool of individuals implicated in the Abu Salim massacre significantly expanded since 2011. Amnesty International estimates that approximately 170 guards and officials suspected of involvement in the Abu Salim killings were detained since 2011.[388]

However, apart from the Abu Salim charges faced by El Senussi, no pre-transition human rights violations have figured into the post-2011 trials. Similar to

[386] Chris McGreal, 'Libya Foreign Minister Moussa Koussa Must Face Atrocities Trial, Rebels Declare' (The Guardian, 31 March 2011) <www.theguardian.com/world/2011/mar/31/moussa-koussa-foreign-minister-trial> accessed 31 July 2015.

[387] Interview with Lydia Vicente, Executive Director, Rights International Spain (Telephone interview, 16 April 2012).

[388] Amnesty International, 'Libya: End Long Wait for Justice for Victims of Abu Salim Prison Killings' (Public Statement, 27 June 2014) 3.

Egypt and Tunisia, the human rights trials are limited to crimes committed during the uprising because, as journalist Rana Jawad argued:

> [T]hey're easier to prove. A lot of archive material was lost during the war. The memory was so fresh and alive post-war, that they're looking to address those issues first. The only old issue that we see resurfacing is Abu Salim because it was one massive thing that happened […] but the other crimes, such as systematic torture and so on – they're very hard to pursue unless they track down the people who were directly involved.[389]

Maghur was emphatic about the need for appropriate legal mechanisms to prosecute human rights violations in which the state is implicated. She underlined the need for either a change in Libya's current penal code, or the establishment of a transitional justice mechanism to address crimes of a massive scale:

> It is very difficult to prove human rights violations. First, it is a problem of a lack of professionalism. Second, you are prosecuting according to old laws – the old penal code. You cannot prosecute political leaders for human rights violations under the current laws. You have to really have a specialised team to work on that. We do not have this. We are using the same prosecutors who were also responsible for human rights violations. The same prosecutors who jailed people contrary to human rights standards. These special crimes are addressed as normal crimes – not as human rights violations in which the state took part. How will we establish responsibility of the state? It is very stupid of them to prosecute these people under normal laws.[390]

No Peace Without Justice (NPWJ)'s Libya Program Coordinator Stefano Moschini, however, noted that Libya decided not to establish a special court or mechanism to try former regime members. Instead, the normal courts are handling these cases and organisations such as NPWJ were helping the judiciary with how to prosecute war crimes and crimes against humanity.[391]

Also, given the long history of Libya's politicised public prosecution, victims and their families continue to refrain from filing human rights complaints for lack of trust in the judiciary. As Moschini explained:

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[389] Interview with Rana Jawad, BBC Journalist based in Tripoli (Tripoli, Libya, 18 September 2013).
[390] Interview with Azza Maghur, Veteran Lawyer and Human Rights Activist (Tripoli, Libya, 17 September 2013).
[391] Interview with Stefano Moschini, Libya Programme Coordinator, No Peace Without Justice (Tripoli, Libya, 18 September 2013).

> Victims' demands for justice are quite limited because they still do not trust the institutions and the judiciary. There is no access to the trials. There was instead massive popular pressure for the political isolation law[392], but not the same pressure for prosecutions. Also, Libyans are more focused on compensation and the return of their properties. Finally, there is a lack of awareness regarding their rights. Somebody might not even recognise torture as such.[393]

Lydia Vicente echoed this observation when she noted: "The concept of justice in Libya is missing. They don't even know what a crime against humanity is."[394] The lack of awareness and understanding among ordinary Libyans, lawyers, judges and the elite regarding the 'global concept of justice' is what prompted NPWJ and other international NGOs to implement training programmes in Libya.[395] The International Crisis Group (ICG) makes an important observation regarding the type of justice that is expected by Libyan victims and their families and the consequent distrust of the judiciary:

> The main problem emerging from these prosecutions is that they are too few and – from the perspective of many armed group members – too slow. These complaints feed into the already widespread feeling that the state is unable to carry out justice. That these delays and referrals might be a healthy sign of commitment to due process often is ignored. Similarly, rather than being praised as a positive development ensuring respect for civil liberties, the December 2012 Supreme Court order that criminal courts follow proper

[392] Political Isolation Law (the Isolation Law). On 5 May 2013 the General National Congress (GNC) passed the Isolation Law. The law disqualifies individuals who are deemed to have been previously associated with the Gaddafi regime from holding political or public office or posts in government. Lawyers for Justice in Libya (LFJL) expressed its concern that the exclusion of those from holding office should not be based on the mere fact that they are associated with the previous regime, but on the basis of criminal acts proven in a court of law. LFJL warns of the arbitrary application of the law, where its vague language and its exemption from judicial review, LFJL stresses the need for the state to apply restraint and transparency in the application of the Isolation Law and reminds the state that it must only apply it to the extent consistent with its international human rights obligations. If this is not the case, this might undercut government legitimacy, undermine the rule of law and weaken efforts for national reconciliation. Lawyers for Justice in Libya, 'An Eye on Human Rights in Libya' (Report, December 2013).

[393] Interview with Stefano Moschini, Libya Programme Coordinator, No Peace Without Justice (Tripoli, Libya, 18 September 2013). Justice Minister Salah Al Marghani, who is a veteran human rights activist, expressed similar views: "[T]here is little trust towards the judges who are still considered to be Qadhafi's judges." Quoted in International Crisis Group, 'Trial By Error: Justice in Post-Qadhafi Libya' (April 2013) 18.

[394] Interview with Lydia Vicente, Executive Director, Rights International Spain (Telephone interview, 16 April 2012).

[395] Interview with Lydia Vicente, Executive Director, Rights International Spain (Telephone interview, 16 April 2012); Interview with Amna Guellali, Tunisia and Algeria Researcher, Human Rights Watch (Telephone interview, 23 April 2012); Interview with Stefano Moschini, Libya Programme Coordinator, No Peace Without Justice (Tripoli, Libya, 18 September 2013).

> procedures often is viewed as evidence of the judiciary's ongoing collusion in defence of Qadhafi-era officials. Many fighters as well as ordinary citizens insist on quick retribution against these officials, even if they were not directly implicated in repressing the uprising, viewing them as guilty for standing by Qadhafi. For others, swift justice for political opponents is simply the only type of justice they know.[396]

This kind of fast, retributive justice is a key characteristic of the way in which transitional justice has been pursued not just in Libya, but in other Arab Spring countries as well.[397]

The dire security situation in Libya has significantly affected decisions regarding the prosecution of political leaders. There has been a string of targeted assassinations of judges and prosecutors in Libya, including the former General Prosecutor in February 2014.[398] Almost all interviewees referred to the fact that judges and lawyers who accepted to be involved in or to defend Gaddafi regime officials have received death threats. So much so, that when asked specifically about the trial of Saif Al Islam Gaddafi and El Senussi, some lawyers quietly responded that they prefer not to speak about those cases for security reasons. They added that they were approached to become involved in those cases, but that they refused out of fear for their safety. Dao Al Mansouri, a prominent human rights lawyer who served as Dorda's defense lawyer, recalled:

> When the Dorda trial started, there were lots of threats against those involved in the case. Many of the accused were unable to find lawyers to represent them because of the security situation. The judiciary in Libya is not politicised. The judge cannot, however, work properly while the gun is aimed at his head. There are major threats from the government against the judiciary.[399]

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[396] International Crisis Group, 'Trial By Error' (n 368) 34-35.
[397] Reflections on justice expectations are discussed in Chapter 4.
[398] Elham Saudi in Noha Aboueldahab, 'Rapporteur's Report: Prosecutions, Politics and Transitions: How criminal justice in the Arab Spring is shaping transitional justice' (Panel discussion, Durham Law School Durham 6 May 2014).
[399] Interview with Dao Al Mansouri, Veteran lawyer and human rights activist (Tripoli, Libya, 18 September 2013). Al Mansouri did note, however, that there are some problems with the independence of the judiciary. The Public Prosecutor, for example, was appointed by the General National Congress, rather than by the Supreme Judicial Council.

Similarly, prosecutors are afraid to indict rebel leaders, who issued a controversial amnesty law in May 2012 to protect themselves from prosecution:

> Law 38 of 2012 on certain matters relating to transitional justice includes a complete amnesty for any "acts made necessary by the 17 February revolution" for its "success or protection", whether such acts are of a military, security or civil nature… this law has terrifyingly familiar echoes of the Gaddafi era…Impunity for violations of human rights and war crimes resulting from a sense of revolutionary legitimacy is dangerous and perpetuates the culture that existed under the Gaddafi regime, where all was justified in the name of the 1969 Revolution.[400]

The relatively small population of Libya – approximately six million – also means that many policemen are ex-fighters from the conflict. Consequently, accountability becomes even more difficult when perpetrators join the police force as law enforcers. Elham Saudi, Director of Lawyers for Justice in Libya, noted, "When a person claims they were tortured by a member of a militia, they go to the police and they find that their torturer is there, working as a policeman. It significantly reduces the possibilities for accountability."[401]

Role of International Actors and Domestic Civil Society

While the role of international actors in Libya was minimal prior to the 2011 revolt against Muammar Gaddafi, the conflict that ensued quickly became an international one with the military intervention of NATO and other foreign governments. Moreover, the ICC's arrest warrants for Muammar Gaddafi, Saif-al-Islam Gaddafi, and El Senussi in 2011 marked a crucial turning point in decisions regarding prosecution of political leaders in Libya. The interviewees differed in their opinion on whether or not the domestic prosecution of the thirty-seven former regime members would have taken place had the ICC arrest warrants not been

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[400] Lawyers for Justice in Libya, 'LFJL Strongly Condemns New Laws Breaching Human Rights and Undermining the Rule of Law' (7 May 2012) <www.libyanjustice.org/news/news/post/23-lfjl-strongly-condemns-new-laws-breaching-human-rights-and-undermining-the-rule-of-law/> accessed 31 July 2015.
[401] Saudi (n 388).

issued. Jerary, former Director of Communications for former Libyan President Aly Zeidan, argued that some Libyans were relieved that Muammar Gaddafi was killed because they did not want a chaotic and sham trial "such as the Mubarak trial in Egypt." However, Jerary continued, Muammar Gaddafi, Saif al-Islam Gaddafi along with other former regime officials would have been prosecuted regardless of the ICC.[402] Moschini echoed this view of the minimal impact of the ICC on domestic prosecutions in Libya:

> I don't think the ICC has had a positive or negative impact on the speed of prosecutions in Libya. The Saif-al-Islam case would have taken place without the ICC, but perhaps not Senussi. There has otherwise been no real impact by international actors. Collaboration between local and international NGOs is quite sensitive. There is a fear of foreign intervention.[403]

Jawad made a similar observation regarding the non-impact of international actors:

> Whether the ICC was involved or not, former regime members would have still been arrested in Libya. People need closure and accountability, regardless of the intervention of the ICC and international NGOs.[404]

Still, others, such as Al Mansouri, argued that the ICC triggered domestic decisions to prosecute political leaders in Libya. He described the domestic prosecutions as a reaction to the 'foreign' ICC and the international community: "They want the world to see they can do it."[405] Similarly, Vicente stated, "There is a sense of 'we want to do things our way' in Libya, with limited help from abroad."[406]

Saudi discussed the importance of Libyan fears of the 'foreign intervention' that Moschini and others alluded to. While there are international actors with big

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[402] Interview with Amel Jerary, Director of Communications, Prime Minister's Office (for former Libyan Prime Minister Aly Zeidan) (Doha, Qatar, 8 November 2012).
[403] Interview with Stefano Moschini, Libya Programme Coordinator, No Peace Without Justice (Tripoli, Libya, 18 September 2013).
[404] Interview with Rana Jawad, BBC Journalist based in Tripoli (Tripoli, Libya, 18 September 2013).
[405] Interview with Dao Al Mansouri, Veteran lawyer and human rights activist (Tripoli, Libya, 18 September 2013).
[406] Interview with Lydia Vicente, Executive Director, Rights International Spain (Telephone interview, 16 April 2012).

budgets to spend on developing Libyan civil society, holding events, and so on, the same international actors tread carefully in Libya because, unlike in Tunisia and Egypt, it is still unclear who the powerful domestic actors are. It is not yet clear which militias will be the new political parties. Saudi said, "Although [Libya] is fragile and open to international influence, Libyans have lived in paranoia for more than forty-two years and sixty-seven per cent of us were born under Gaddafi, so we know nothing other than paranoia. So there is this mechanism where on the one hand we welcome international intervention, but we are always suspecting its motives at the same time."[407]

Advocacy networks linking Libyan and international civil society organisations during Muammar Gaddafi's rule between 1969 and 2011 were extremely weak. Human Rights Watch and Amnesty International were – and continue to be - active in documenting human rights violations in Libya and in raising public awareness to put pressure on the Libyan government to address these violations. The highly authoritarian and repressive policies of the Gaddafi regime, however, made it extremely difficult for such international NGOs to have any real impact on criminal accountability for high-level government officials.

With the fall of the Gaddafi regime and in the aftermath of the 2011 uprising, this has started to change – international NGOs such as NPWJ have been actively working to train Libyan legal professionals and the judiciary to improve accountability for human rights violations in Libya. The United Nations Support Mission in Libya (UNSMIL) has also been training and encouraging the Libyan government to devise a prosecutorial strategy.[408] Lawyers for Justice in Libya, a

[407] Saudi (n 388).
[408] United Nations Support Mission in Libya, 'Transitional Justice – Foundation for a New Libya,' (Report, 17 September 2012) < http://unsmil.unmissions.org/Default.aspx?tabid=5292&language=en-US> accessed 31 July 2015. See also No Peace Without Justice, 'Libya: NPWJ Fosters

group that was formed by Libyan lawyers in the diaspora and which now includes a network of lawyers in Libya, has also been actively monitoring legal developments and making recommendations to the Libyan government. Civil society organizations within Libya have been growing, but the level of engagement with international actors has remained low.[409] Given the legal and security challenges to the prosecution of political leaders mentioned above, most civil society organisations called for reconciliation as opposed to prosecutions.[410] Moschini noted the initial growth of civil society soon after the ouster of Muammar Gaddafi, which was quickly followed by their decline because of restrictions imposed by the government: “[Civil society] started off as 20,000 and now only twenty-five per cent of them operate.”[411]

Conclusion

Triggers

> *“Had credible prosecutions been successfully carried out, the revolution would never have happened.”*[412]

Maghur’s statement refers to the significant role that impunity for perpetual human rights violations had in triggering the mass revolt against Muammar Gaddafi’s forty-two year-old regime. She echoed former Prime Minister Abdurrahim al-Keeb, who declared, “proper justice is one of the reasons why this revolution started and one of

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Establishment of Libyan Trial Monitoring Network’ (15 June 2013) <www.npwj.org/ICC/Libya-NPWJ-fosters-establishment-Libyan-Trial-Monitoring-Network.html?utm_source=CICC+Newsletters&utm_campaign=b42a1e6c0b-August_2013_Libya_Digest_EN&utm_medium=email&utm_term=0_68df9c5182-b42a1e6c0b-356533713> accessed 31 July 2015.

[409] Lawyers for Justice in Libya, Transitional Justice Programme, <www.libyanjustice.org> accessed 28 July 2015.

[410] Interview with Stefano Moschini, Libya Programme Coordinator, No Peace Without Justice (Tripoli, Libya, 18 September 2013).

[411] ibid.

[412] Interview with Azza Maghur, Veteran Lawyer and Human Rights Activist (Tripoli, Libya, 17 September 2013).

the reasons why we ended where we are."[413] At the centre of popular frustration was the shocking Abu Salim prison massacre in 1996, which resulted in a series of efforts by victims and lawyers to hold the perpetrators to account. It also resulted in the acquisition of financial compensation for some victims, which was, in the face of major legal and political obstacles, considered a successful attempt at ensuring some form of justice.[414] Despite the politicised nature of the move, Muammar Gaddafi's appointment of a *juge d'instruction* for Abu Salim was nevertheless in response to popular demands for justice.[415] Abu Salim was thus a highly influential trigger that led to decisions regarding prosecution, particularly for former head of intelligence El Senussi. At the time of this writing, it along with Al Obaidi and El Zway's corruption trial are the only pre-transition crimes that have figured into the post-transition prosecutions.

The efforts of individual lawyers such as Salwa Bugaighis, Dao Al Mansouri, and Fathi Terbil in pursuing accountability for human rights, particularly in the last decade of Muammar Gaddafi's rule, were crucial. The highly symbolic arrest of Fathi Terbil on the 15 February 2011, widely regarded as the spark of the Libyan uprising, attests to this critical role of individual lawyers in triggering decisions regarding prosecution. Moreover, despite differences of opinion on the impact of the ICC's indictments against Saif al Islam Gaddafi and El Senussi, the tug of war between Libya and the ICC and references to Libya's eagerness to show that it can conduct the trials domestically cannot be dismissed as irrelevant factors. Libya's successful appeal regarding the admissibility of the Senussi case at the ICC, which resulted in the Court's approval that the Senussi trial be held in Libya, is a strong

[413] Quoted in International Crisis Group, 'Trial By Error' (n 368) 12.
[414] See Amnesty International, 'Rising from the Shadows of Abu Salim Prison' (n 361).
[415] Interview with Azza Maghur, Veteran Lawyer and Human Rights Activist (Tripoli, Libya, 17 September 2013).

indication of how domestic decisions regarding prosecution were heavily impacted by the intervention of the ICC.[416]

Drivers

These individual lawyers also served as key drivers of decisions regarding prosecution. In addition, despite the difficult and opaque conditions within which both international and local NGOs worked pre-transition, the advocacy efforts of organisations such as Amnesty International were vital to pressuring the government to respond. The case of Ali al Kermi is an example of this.[417] Moreover, persistent public pressure – mostly by families of the victims of Abu Salim and of other torture crimes in Libya – proved crucial to keeping the issue of impunity for human rights on the radar of both ordinary Libyans and the government. The tug of war for jurisdiction between Libya and the ICC is an additional factor that has had a driving role. The shadow of the ICC[418] intensified certain Libyan authorities' defiant stance on holding domestic prosecutions rather than sending former regime officials to The Hague.

Shapers

Legal challenges, a precarious security situation, and a deep mistrust of the judiciary's ability to operate independently and effectively have contributed to the limited charges in the prosecutions. Moreover, a pre-occupation with the crimes committed during the 2011 conflict, coupled with the adoption of a transitional justice law in December 2013, further limited the charges. Although none of the

[416] See International Criminal Court, 'Al Senussi case: Appeals Chamber case is inadmissible before ICC' (Press Release, 24 July 2014) <www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1034.aspx> accessed 28 July 2015.
[417] See Amnesty International, 'Rising from the Shadows of Abu Salim Prison' (n 361).
[418] Chandra Sriram and Stephen Brown, 'Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact' (2012) 12 International Criminal Law Review 219.

interviewees mentioned the role of the transitional justice law, its adoption has expanded the time period of the crimes addressed. It led to the cancellation of the statute of limitations for crimes committed before 1997 for political and security reasons and allows for the investigation into the Abu Salim prison massacre, which took place in 1996.[419] Finally, the continued violence that has gripped Libya since 2011 and chaotic militia politics have formed a transition whose direction is uncertain. Significant questions of political stability plague the country, which have effectively stalled decisions regarding the prosecution of political leaders.

However, Minister of Justice Salah Marghani reached out to the ICC in July 2014, asking it to investigate crimes committed by Zintani and Misrati militias.[420] While at the time of writing, there have been no major developments following this request other than the verdicts that were issued in July 2015, it is indicative of two things. First, despite strong resistance to the involvement of the ICC for the case of Saif al-Islam Gaddafi and El Senussi, domestic political developments such as the deterioration of the security situation and an almost collapse of the state partially reversed this resistance, at least at a certain level of the political leadership. While Marghani did not raise the issue of Saif al-Islam Gaddafi's arrest warrant, the fact that the ICC has been called upon by the Minister of Justice to intervene means that decisions regarding prosecution are still on the political agenda. The shape of domestic prosecutions in Libya is therefore still in flux and the ICC is not completely out of the picture.

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[419] Amnesty International, 'Libya: End Long Wait for Justice' (n 378). The transitional justice law had not yet been adopted when the interviews were conducted in Libya in September 2013.

[420] Libya Herald, 'Libya Looks to International Criminal Court to Prosecute Militias' (19 July 2014) <www.libyaherald.com/2014/07/19/libya-looks-to-international-criminal-court-to-prosecute-militias/#axzz381ZlRrGa> accessed 28 July 2015.

YEMEN

The Prosecution of Political Leaders in Pre-Transition Yemen

Despite a provision in Yemen's constitution that allows for the prosecution of political leaders, no such prosecutions took place before the uprising that ousted President Saleh from power in 2011.[421] Article 111 of Yemen's 1991 constitution allows for the prosecution of the Prime Minister, his deputies and ministers following a vote of support by two-thirds of the House of Representatives.[422] In subsequent amendments to the constitution, the President was added to the list of government officials who could face prosecution. However, as all the interviewees stated, no high-level government official was prosecuted in Yemen for either corruption or human rights crimes. This was because, as activist Manal Al Qudsi and human rights lawyer Ahmed Barman put it, "no one would dare."[423] Political commentator Tamer Shamsan added, "Here in Yemen, if we try to hold someone accountable, we risk our lives."[424]

However, human rights lawyers pointed out that since 2005 there have been increasing efforts to prosecute senior officials in the security agencies and in the police. An example is the 2006 case of Anisa Al-Shuaibi, who was accused of murdering her ex-husband and was taken into police custody where she was repeatedly raped and beaten. Rizq Al-Jawfi, head of the Criminal Investigation Unit was interrogated for his role in Al-Shuabi's illegal detention and abuse while in

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[421] Ali Abdallah Saleh did not formally step down until February 2012, following months of negotiations with the Gulf Cooperation Council (GCC) and other actors.

[422] Article 111, Constitution of the Republic of Yemen, 1991. See 'Yemen – Constitution' <www.servat.unibe.ch/icl/ym00000_.html> accessed 31 July 2015.

[423] Interview with Manal Al Qudsi, Programme Officer, Yemen Center for Transitional Justice (Telephone interview, 21 November 2013); Interview with Abdelrahman Barman, Human Rights Lawyer, National Organisation for Defending Rights and Freedoms (Sanaa, Yemen, 22 January 2014).

[424] Interview with Tamer Shamsan, Political Activist; Columnist (Sanaa, Yemen, 22 January 2014).

prison. Barman described Al-Shuaibi's relentless efforts to hold a police chief to account in a court of law as a "key case" that raised a lot of awareness in Yemen.[425] This is despite the verdict that was issued for Al-Shuaibi: she was found innocent, but was ordered to pay one million Yemeni riyals in compensation. Ahmed Arman described this verdict as "strange, but still regarded as a success."[426] That the Al-Shuaibi case was considered a positive step towards criminal accountability for one senior police official points to the difficult environment that made even the initiation of a prosecution targeting a minister or head of state unthinkable. As with Mubarak, Ben Ali and Muammar Gaddafi, Saleh's authoritarian regime of thirty-three years did not tolerate opposition. The repressive consequences for those who did criticise the regime meant that there were no efforts to prosecute political leaders in pre-transition Yemen.

Factors Shaping the Decision not to Prosecute in Yemen

Unlike Egypt, Tunisia and Libya, however, Yemen passed an immunity law to protect former President Saleh and his aides from prosecution.[427] This meant that, with the exception of some preliminary hearings for the 18 March 2011 killings, there were no prosecutions of former political leaders in Yemen after Saleh's ouster. The 18 March killings are known as the "Friday of Dignity" killings, during which Yemeni security forces allegedly killed over forty-five peaceful protesters and

[425] Interview with Abdelrahman Barman, Human Rights Lawyer, National Organisation for Defending Rights and Freedoms (Sanaa, Yemen, 22 January 2014).
[426] Interview with Ahmed Arman, Lawyer and Executive Secretary, National Organisation for Defending Rights and Freedoms (Sanaa, Yemen, 22 January 2014).
[427] Law No. 1 of 2012 Concerning the Granting of Immunity from Legal and Judicial Prosecution, translated from Arabic to English by Amnesty International in *Yemen's Immunity Law – Breach of International Obligations,* (March 2012) <www.amnesty.ca/sites/default/files/2012-03-30mde310072012enyemenimmunitylaw.pdf> accessed 10 July 2015.

wounded over 200 people.[428] There were attempts by lawyers to seek the indictment of Saleh and several of his aides for the Friday of Dignity killings case, but the presiding judge responded that he could not proceed because of the immunity law and the case was subsequently closed.[429] This section, then, will discuss the various factors that shaped the decision *not* to prosecute former leaders in Yemen.

International actors, geo-politics, legal challenges and a fairly ambiguous transition all contributed to the decision not to prosecute. The Yemeni parliament passed Law No.1 in January 2012, institutionalising immunity for the former president and his aides.[430] This immunity law was the product of negotiations that GCC led together with the United States, the European Union, the Russian Federation, and the United Nations Special Adviser to the Secretary General, Jamal Benomar (hereinafter the 'GCC initiative').[431] After several months of mass protests calling for the ouster of former President Saleh in 2011, he agreed to the terms and conditions set forth in the GCC initiative, which entered into force in November 2011. Key to this initiative was the guarantee of immunity from prosecution for Saleh and his aides, provided that they cease their involvement in Yemeni politics:

> On the 29th day after the Agreement enters into force, Parliament, including the opposition, shall adopt laws granting immunity from legal and judicial prosecution to the President and those who worked with him during his time in office.[432]

The subsequent passing of the immunity law includes the following articles:

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[428] Human Rights Watch, 'Unpunished Massacre: Yemen's failed response to the "Friday of Dignity" killings' (Report, 2013) <www.hrw.org/report/2013/02/12/unpunished-massacre/yemens-failed-response-friday-dignity-killings> accessed 31 July 2015.

[429] Interview with Letta Tayler, Senior Researcher, Human Rights Watch (Telephone interview, 21 November 2013).

[430] Law No. 1 of 2012 Concerning the Granting of Immunity (n 416).

[431] International Crisis Group, 'Yemen: Enduring Conflict, Threatened Transition' (3 July 2012) <www.crisisgroup.org/en/regions/middle-east-north-africa/iraq-iran-gulf/yemen/125-yemen-enduring-conflicts-threatened-transition.aspx> accessed 31 July 2015.

[432] The Gulf Cooperation Council Initiative, translated by the United Nations in International Crisis Group, 'Yemen: Enduring Conflict, Threatened Transition' (3 July 2012) <www.crisisgroup.org/en/regions/middle-east-north-africa/iraq-iran-gulf/yemen/125-yemen-enduring-conflicts-threatened-transition.aspx> accessed 31 July 2015.

> Article (1): Brother Ali Abdullah Saleh, President of the Republic, shall hereby be granted complete immunity from legal and judicial prosecution.
>
> Article (2): Immunity from criminal prosecution shall apply to the officials who have worked under the President – in state civil, military and security agencies – in connection with politically motivated acts carried out during the course of their official duties; immunity shall not apply to acts of terrorism.[433]

While the passing of this law had the full support of the international powers that negotiated the GCC initiative, it generated deep disappointment among domestic and international human rights NGOs, such as the Yemeni Center for Transitional Justice (YCTJ), Amnesty International, Human Rights Watch, and the Coalition for the International Criminal Court (CICC).[434] It also angered the victims of the Friday of Dignity killings.

Despite the immunity law, the Friday of Dignity victims continued to file legal complaints with the public prosecutor in an attempt to hold those who ordered and carried out the killings accountable. The case was originally opened in 2011 and when it became clear that the attorney general at the time, Abdullah al-Olfy, was taking the independence of the investigation seriously, he was sacked by Saleh. The court proceedings since then were conducted in a haphazard manner and marred with hasty acquittals and with a questionable selection of 'suspects' that did not include any high-ranking security or government officials.[435]

Navigating the GCC Initiative

[433] Law No. 1 of 2012 Concerning the Granting of Immunity (n 416).
[434] In addition, while the UN Special Adviser Jamal Benomar helped facilitate the GCC initiative, some controversy surrounded the UN's support for the immunity part of the deal. Abu Al Zulof, however, stressed the following: "Regarding accountability, our office was very clear when this impunity law was passed - that we are against this as an office. We consider that we will not be able to turn a new page in Yemen without closing the previous period properly. Those who committed grave human rights violations should be held accountable." Interview with George Abu Al Zulof, Country Representative, OHCHR Yemen (Sanaa, Yemen, 23 January 2014).
[435] Human Rights Watch, 'Unpunished Massacre' (n 417); Interview with Belkis Wille, Yemen and Kuwait Researcher, Human Rights Watch (Sanaa, Yemen, 22 January 2014); Interview with Letta Tayler, Senior Researcher, Human Rights Watch (Telephone interview, 21 November 2013).

Curiously, the United Nations consistently called for the implementation of the GCC initiative in Yemen (which specifically grants immunity from prosecution for Saleh and his aides), all while also calling on Yemen to pursue transitional justice measures that include criminal accountability for human rights violations.[436] A string of United Nations documents immediately preceding and following the signing of the GCC initiative reflect this bizarre contradiction, which warrants a close look at the following excerpts:

> 77. Launch transparent and independent investigations, in line with relevant international standards, into credible allegations of serious human rights violations committed by the Government security forces, including, but not limited to, the killing of civilians, excessive use of force against civilians, arbitrary detention, and torture and ill treatment; ensure that perpetrators are held accountable…
>
> 95. Recognizing that in the present climate of violence and counter violence, much-needed investigations, particularly into excesses or abuses by the military, the security services or their affiliates will not be seen as credible or impartial, ensure that international independent and impartial investigations are conducted into incidents which resulted in heavy loss of life and injuries;[437]

These calls for accountability are reiterated in the Human Rights Council resolution of 14 October 2011, which notes Yemen's commitment to launch independent investigations into human rights violations that adhere to international standards. However, the same resolution makes the following statement:

> 7. Calls upon all parties to move forward with negotiations on an inclusive, orderly and Yemeni-led process of political transition on the basis of the initiative of the Gulf Cooperation Council;[438]

The resolution therefore calls on Yemen to pursue two conflicting goals: the fulfillment of its international human rights obligations on the one hand, and the

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[436] See Security Council Resolution 2014 (2011); Security Council Resolution 2051 (2012); the UN Implementing Mechanism (2011); the Human Rights Council Resolution A/HRC/18/19 (2011); the UN Security Council Presidential Statement of 29 March 2012.

[437] Human Rights Council, 'Report of the High Commissioner on OHCHR's Visit to Yemen' A/HRC/18/21 (13 September 2011) <www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-21.pdf> accessed 31 July 2015.

[438] Human Rights Council, 'Resolution Adopted by the Human Rights Council' A/HRC/RES/18/19 (14 October 2011).

conditions set forth in the GCC initiative on the other, which prevent the prosecution of the former president and his aides. This contradictory call reappears in subsequent United Nations documents:

> *Taking note* of the Human Rights Council resolution on Yemen (A/HRC/RES/18/19), and underlining the need for a comprehensive, independent and impartial investigation consistent with international standards into alleged human rights abuses and violations, with a view to avoiding impunity and ensuring full accountability, and noting in this regard the concerns expressed by the United Nations High Commissioner for Human Rights,
>
> *Welcoming* the statement by the Ministerial Council of the Gulf Cooperation Council on 23 September 2011 which called for the immediate signing by President Saleh and implementation of the Gulf Cooperation Council initiative, condemned the use of force against unarmed demonstrators, and called for restraint, a commitment to a full and immediate ceasefire and the formation of a commission to investigate the events that led to the killing of innocent Yemeni people…
>
> 4. *Reaffirms* its view that the signature and implementation as soon as possible of a settlement agreement on the basis of the Gulf Cooperation Council initiative is essential for an inclusive, orderly, and Yemeni-led process of political transition…[439]

United Nations Security Council Resolution 2051 (2012) repeats conflicting demands for accountability and for compliance with the GCC initiative that calls for immunity:

> 1. *Reaffirms* the need for the full and timely implementation of the GCC Initiative and Implementation Mechanism in accordance with resolution 2014 (2011);
>
> 7. *Stresses* that all those responsible for human rights violations and abuses must be held accountable, and underlining the need for a comprehensive, independent and impartial investigation consistent with international standards into alleged human rights abuses and violations, to prevent impunity and ensure full accountability;[440]

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[439] Security Council Resolution 2014 (2011). Similar contradictory calls regarding accountability and Yemen's international human rights obligations continued to emerge in subsequent UN documents, such as the Agreement on the Implementation Mechanism for the Transition Process in Yemen in Accordance with the Initiative of the GCC, the UN Security Council Presidential Statement of 29 March 2012, and Security Council Resolution 2051 (2012).

[440] Security Council Resolution 2051 (2012).

Despite these clauses in the United Nations documents that call for conflicting paths to individual criminal accountability in Yemen, the Transitional Justice Working Group at the National Dialogue Conference made use of these documents to advocate for criminal accountability. The Working Group essentially referred to the clauses that call on Yemen to fulfill its international legal obligations by ensuring those responsible for human rights violations are held accountable. This strategy, according to Hamza Al Kamali, a prominent member of the Transitional Justice Working Group, is a means to circumvent the immunity law by citing these clauses in the Working Group's recommendations to the National Dialogue Conference. Al Kamali explained, "The UN is a tool for us – the youth and civil society – an important tool to put pressure on the president to set up an investigative commission and to ensure accountability."[441] Such attempts to circumvent the immunity law in Yemen are akin to the circumvention strategies pursued in Chile, Argentina and Uruguay to overcome those countries' amnesty provisions. As Engstrom and Pereira observe, "[I]n many countries, amnesty provisions are circumvented rather than overturned."[442]

Moreover, the immunity law in Yemen is, according to some interpretations, not as all encompassing as it might initially appear. George Abu Al Zulof, for instance, explained that the transitional justice working group's recommendations aimed to link the immunity law with political activity by ensuring that politically active individuals would be stripped of their immunity. Here, 'politically active' means "to take high positions in the government, or *manasib 'olyah*."[443] In other

[441] Interview with Hamza Al Kamali, Member of the Transitional Justice Working Group, National Dialogue Conference (Sanaa, Yemen, 22 January 2014).
[442] Lessa and Payne (n 274) 122.
[443] Interview with George Abu Al Zulof, Country Representative, OHCHR Yemen (Sanaa, Yemen, 23 January 2014). '*Manasib 'olyah'* is the Arabic term for 'high-level positions.'

words, the immunity law currently in place only pertains to high-level government officials:

> This means that we can – despite the immunity law – address human rights violations committed by other personnel from the previous regime, such as the security forces. There are other political groups, such as Islah, that were part of the 1994 civil war and they worked with the previous regime and they committed violations as well. So this means that if there are investigations conducted, their leaders, or those who were involved and decided to continue to be involved in the political scene in the country could be held accountable and prosecuted. Or, from the very beginning, they could choose either to step down from political life or face prosecution.[444]

Whether such other mid to low ranking officers will be prosecuted in Yemen remains an open question, particularly given the fragile security situation and the judiciary's weak and politicised disposition. Moreover, it leaves unresolved the question of lack of accountability for high-level officials at both the domestic and international level.

Role of International Actors and Geo-Politics

Human rights lawyers argue that the political interests of certain international and regional actors directly led to immunity for high-level government officials in Yemen. Arman, for instance, stated: "The immunity law is a product of politics at the international level."[445] Belkis Wille of Human Rights Watch agreed: "The reason that the immunity law exists is because of international actors."[446] Abu Al Zulof provided three explanations regarding the question of the role of international and geo-political actors in Yemen in severely limiting the prospects for prosecuting former leaders:

> First, Yemen's location in the Arabian Peninsula – being close to the Gulf States and Saudi Arabia – means that any instability in Yemen will affect the neighbouring countries. So I think the GCC countries are very much

[444] ibid.
[445] Interview with Ahmed Arman, Lawyer and Executive Secretary, National Organisation for Defending Rights and Freedoms (Sanaa, Yemen, 22 January 2014).
[446] Interview with Belkis Wille, Yemen and Kuwait Researcher, Human Rights Watch (Sanaa, Yemen, 22 January 2014).

> concerned that what will happen in Yemen will negatively affect them. They are doing their utmost to reach an agreement peacefully. They are against the prosecutions because they were allies with the previous regime.
>
> Secondly, the GCC countries didn't pay a lot of attention to the complete dismantlement of the previous regime because the previous regime shares half of the authority over the country. The reason is that the alternative was not acceptable to the GCC countries. The alternative was the key opposition group – al-Islah, which is the Yemeni branch of the Muslim Brotherhood. From a political point of view, they were not so much motivated to have a regime that is Muslim Brotherhood. There is the right wing of al-Islah, such as the Zindani. Their ideology is very much in line with Al Qaeda. So there is an extremist wing in al-Islah so they were concerned that this would have bad consequences for instability in Yemen.
>
> The third reason is related to the international community. For Europe, the EU, and the United States the key concern was Al Qaeda in the Arabian Peninsula's (AQAP) unification with the Saudi branch and their ability to build their own bases. For the Western countries, any instability in Yemen is an opportunity for AQAP to expand and control more areas. So the political agenda supersedes the human rights agenda for these powers.
>
> The impunity law was the price to be paid for stability in Yemen. This is what makes Yemen different from other countries. In Libya, NATO intervened. This wasn't possible in Yemen. In Yemen you have weak government and institutions, more than 50 million pieces of small arms in Yemen. On top of that you have Al Qaeda and the tribal powers. All these elements pushed towards a scenario not to have the international community come and end the conflict. It's a different kind of international intervention.[447]

Others commented on the role of specific actors, such as Saudi Arabia, in directing a substantial part of domestic politics in Yemen to suit their interests. For example, Shamsan criticised several international actors for contributing to the decades-long political chaos in Yemen:

> Saudi Arabia doesn't want to see a stable and successful state in Yemen because they don't want the Saudi people to see a successful, democratic model elsewhere…The UN is controlled by big powers which are run by institutions, not individuals. They build their decisions based on studies. Europe views us – the Third World – as barbaric, reactionary. They're fine with an almost collapsed state – it's in their interests. So long as it is 'stable' enough not to cause too many problems for them.[448]

Omar Own lamented this state of affairs by referring to the weakness of Yemeni President Hadi: "Ten states control Yemen. Our president merely acts as the

[447] Interview with George Abu Al Zulof, Country Representative, OHCHR Yemen (Sanaa, Yemen, 23 January 2014).
[448] Interview with Tamer Shamsan, Political Activist; Columnist (Sanaa, Yemen, 22 January 2014).

coordinator."[449] Shamsan also charged Yemenis – and Arabs in general – with failing to build a democratic state that could hold its leaders accountable. "We in the Arab world," Shamsan observed, "make a dictator out of a democratic leader. And that is because we don't have democratic institutions to ensure a leader remains democratic."[450] In sum, Yemen's grappling with internal tribal politics[451] while also fielding external power wrangling meant, "the impunity law was the price to be paid for stability in Yemen."[452]

Legal Challenges and a Weak Tribal Justice System

Weak institutions are a significant factor that shaped decisions not to prosecute in Yemen. Lawyers and activists explained that while the Public Prosecutor at the time of the uprising tried to ensure independent investigations, particularly for the Friday of Dignity killings case, the government responded by removing him from his post.[453] Split along tribal and factional lines, the judiciary rarely takes action with regards to controversial cases that implicate high-level officials. Barman noted, "The judiciary in Yemen has many challenges. You will find a good judge, but he's also corrupt. You will find a good judge, but he is not powerful. You will find a powerful judge, but he is not knowledgeable."[454] This politicisation of the judiciary, coupled with corruption and nepotism, left Yemenis

[449] Interview with Omar Own, Consultant, UNDP Yemen; NGO Expert (Sanaa, Yemen, 22 January 2014).
[450] Interview with Tamer Shamsan, Political Activist; Columnist (Sanaa, Yemen, 22 January 2014).
[451] For example, tensions between the Houthis, Islah, the military, and Al Qaeda in the Arabian Peninusla.
[452] Interview with George Abu Al Zulof, Country Representative, OHCHR Yemen (Sanaa, Yemen, 23 January 2014).
[453] Interview with Belkis Wille, Yemen and Kuwait Researcher, Human Rights Watch (Sanaa, Yemen, 22 January 2014); Interview with Ahmed Arman, Lawyer and Executive Secretary, National Organisation for Defending Rights and Freedoms (Sanaa, Yemen, 22 January 2014); See also Human Rights Watch, 'Unpunished Massacre: Yemen's failed response to the "Friday of Dignity" killings' (Report, 2013) <www.hrw.org/report/2013/02/12/unpunished-massacre/yemens-failed-response-friday-dignity-killings> accessed 31 July 2015.
[454] Interview with Abdelrahman Barman, Human Rights Lawyer, National Organisation for Defending Rights and Freedoms (Sanaa, Yemen, 22 January 2014).

with a weak judicial institution to which very few turned in their quest for justice. The aborted Friday of Dignity killings case is a tragic illustration of this. Barman also noted that many of his organisation's archives were destroyed by security forces during the revolution, making it particularly difficult to provide the evidence required to prosecute.[455]

Moreover, problems of security in Yemen have also infiltrated the judiciary. Judges and prosecutors have been – and continue to be – assassinated.[456] The strong involvement of the military in politics is yet another factor that has severely restricted progress towards prosecutions. As a result, even in cases where officials who hold high-level governmental positions are supportive of the push for criminal accountability of political leaders, their goals are quashed by other more powerful actors. Wille explained that the Ministry of Legal Affairs and Ministry of Human Rights are strongly against the immunity law and support a comprehensive transitional justice law and the ratification of the Rome Statute. However, they are the two weakest ministries in terms of power, and thus have had little, if any, influence on decisions regarding prosecution.[457] A high-level government position does not equal a position of power.

Finally, there is a serious problem of capacity in the judiciary. Apart from the absence of war crimes, crimes against humanity and genocide in the criminal code, the prosecution of ordinary crimes is highly unlikely. As Arman explained, there are only 700 judges in Yemen and 2,700 members of the judiciary who take a four-month annual leave. He added, "This is a very, very low number of judges for a population of twenty-two million. One judge has 200 or more cases per month.

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[455] ibid.
[456] Interview with George Abu Al Zulof, Country Representative, OHCHR Yemen (Sanaa, Yemen, 23 January 2014).
[457] Interview with Belkis Wille, Yemen and Kuwait Researcher, Human Rights Watch (Sanaa, Yemen, 22 January 2014).

There is no time to deal with all these cases. There is also a problem of law enforcement – the police do not enforce judicial decisions. Judges are powerless."[458] As a result, many cases have lingered with the judiciary for twenty or more years.[459] While the Supreme Judicial Council in Yemen has control over the judicial budget – something which other countries in the region continue to struggle for – its weak capacity overshadows its ability to perform its functions effectively. As Hesham Nasr, Jill Crystal and Nathan J. Brown note:

> There are 223 offices with human working power of 800 prosecutors. In this regard, Yemen has particular need of infrastructural development…In Yemen, there is particular need for work related to buildings, equipment and human resources (administrative and judicial) in order to provide for the basic needs of effective public prosecution function.[460]

It is not surprising, then, that even lower profile prosecutions in Yemen since the 2011 uprising have not progressed, given the judiciary's weak capacity and the complex tribal loyalties within the justice system.

Content and Extent of Decisions Regarding Prosecution

Despite the immunity law and the challenges discussed above, there are efforts in Yemen to seek accountability for political leaders – whether in the form of prosecutions, truth commissions, or through other transitional justice mechanisms. Al Kamali's explanation of the Transitional Justice Working Group's efforts, described above, is one example of this. However, when asked about the time period of the crimes to be covered within a transitional justice framework, the picture begins to look similar to that of Egypt, Tunisia and Libya. A focus on crimes *of* the transition, namely, the killing of peaceful protesters in 2011 has left the subject of

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[458] Interview with Ahmed Arman, Lawyer and Executive Secretary, National Organisation for Defending Rights and Freedoms (Sanaa, Yemen, 22 January 2014).
[459] Interview with Tamer Shamsan, Political Activist; Columnist (Sanaa, Yemen, 22 January 2014).
[460] Hesham Nasr, Jill Crystal and Nathan J. Brown, 'Criminal Justice and Prosecution in the Arab World' (Programme on Governance in the Arab Region, UNDP October 2004) 8 <ftp://pogar.org/LocalUser/pogarp/judiciary/criminaljustice-brown-e.pdf> accessed 28 July 2015.

pre-transition crimes to be dealt with by the non-existent transitional justice law. A number of explanations for this limited scope of crimes emerged.

First, prosecuting crimes committed during the 2011 uprising is, as Al Kamali explained, easier and more practical. It is easier because "all the various political factions who continue to wield power in Yemen were involved in pre-2011 crimes. 2011 crimes are more straightforward – the killing of protesters, full stop."[461] Letta Tayler observed that the question of how far back the transitional justice law should go was a "key sticking point" for the same reasons that Al Kamali identified. Consequently, Tayler explained, "Our position is…ideally start with the most recent violations because they are fresh and easiest to prosecute…We'd rather see that than no [transitional justice] law at all."[462] Efforts have emerged, however, to include as many of the pre-2011 crimes as possible. Abu Al Zulof explained some of the maneuvers taken to try and ensure a more inclusive set of crimes are addressed by the transitional justice law that was under negotiation in 2013 and 2014. He described these efforts by referring to the example of enforced disappearances and land confiscations, of which there are many in Yemen. He stated that:

> As an office, we are supporting expansion of the [transitional justice law's] mandate to include crimes committed before 2011. But there are so many limitations, including the text of the GCC agreement. We are trying to overcome these limitations through the national dialogue. The decision they reached now is that the grievances of the past – their impact is still ongoing today and will be addressed in the new draft of the transitional justice law. For example, for cases of enforced disappearances, the families are still suffering from this ongoing crime. The president will consider the national dialogue recommendations and those who were affected will at least be compensated.

Abu Al Zulof emphasised that enforced disappearances and land confiscations are both 'ongoing' crimes and that "families are still suffering as a result of these crimes,

[461] Interview with Hamza Al Kamali, Member of the Transitional Justice Working Group, National Dialogue Conference (Sanaa, Yemen, 22 January 2014).
[462] Interview with Letta Tayler, Senior Researcher, Human Rights Watch (Telephone interview, 21 November 2013).

so there is a need [for the transitional justice law] to address these grievances, which have been around since 1994 and not 2011."[463] Barman also discussed the inclusion of 'ongoing' crimes: "The transitional justice working group will go back to previous years but only for 'ongoing crimes' – land confiscation, enforced disappearances, and so on. Not torture and extra judicial killings. This is because the current political forces in Yemen are implicated in these crimes."[464]

Secondly, a lack of direct evidence linking Saleh and other high-level government officials to crimes such as the Friday of Dignity killings significantly weakened prospects for prosecution. The destruction of evidence that Barman mentioned is also a contributing factor.[465] Third, and perhaps most importantly, is that the chaotic and ambiguous nature of Yemen's transition has significantly impacted decisions regarding prosecution. This factor warrants further elaboration.

The overtly negotiated transition in Yemen and the country's long history of tribal politics resulted in a number of major obstacles to both the inclusion of pre-2011 crimes and the prosecution of political leaders in general. The most obvious is the immunity law. However, despite the fact that the immunity law was negotiated as a compromise that would see Saleh's removal from power – and from politics altogether – a different transition unfolded in Yemen. As Tayler explained: "This deal may have avoided bloodshed in the immediate term, but it certainly did not remove Saleh and his allies from power in the dramatic way that I think many who backed this immunity deal had hoped."[466] Saleh continued to head the GPC, his political party, and made sporadic political appearances, giving many reason to

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[463] Interview with George Abu Al Zulof, Country Representative, OHCHR Yemen (Sanaa, Yemen, 23 January 2014).
[464] Interview with Abdelrahman Barman, Human Rights Lawyer, National Organisation for Defending Rights and Freedoms (Sanaa, Yemen, 22 January 2014).
[465] ibid.
[466] Interview with Letta Tayler, Senior Researcher, Human Rights Watch (Telephone interview, 21 November 2013).

believe that he still wields power in Yemen. Al Qudsi made a similar observation: "The problem is that our current government is a partner of the former regime – they are avoiding accountability for prior human rights abuses."[467] Barman summarised the Yemeni transition as follows:

> [T]here was a political agreement between the old regime and the revolutionary parties. The old regime is still very present in today's state security. We've removed the heads and the families of the old regime, but its supporters are still there and they are influential…In Yemen, the faces of the regime changed, but the mentality of the old regime persists…We don't actually have a new regime in Yemen – it's the same people. If you want to create a change and open a new page, you should do it with new agents of change. Not with the same agents of the past. With them, you cannot close the past properly.[468]

Conclusion

Triggers

It is clear that external actors' preoccupation with the preservation of political stability in Yemen, considered necessary to ensure regional and international stability, triggered the decision not to prosecute political leaders in Yemen. It produced an immunity law that contradicted the provisions of the Yemeni constitution and went against the wishes of victims and their families.[469] Unlike Egypt, Libya and Tunisia, popular demands to hold Saleh accountable for crimes committed before and during the uprising rang hollow. These demands, however, could also be regarded as triggers that prompted regional and domestic politicians to issue the immunity law so as to lay the question of prosecuting Saleh to rest.

Drivers

A corrupt judiciary, a weak and tribal justice system, internal and external

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[467] Interview with Manal Al Qudsi, Programme Officer, Yemen Center for Transitional Justice (Telephone interview, 21 November 2013).
[468] Interview with Abdelrahman Barman, Human Rights Lawyer, National Organisation for Defending Rights and Freedoms (Sanaa, Yemen, 22 January 2014).
[469] See Al Jazeera, 'Yemenis Protest Against Immunity for Saleh' (22 January 2012) <www.aljazeera.com/news/middleeast/2012/01/201212210178891840.html> accessed 31 July 2015.

politics are some of the principal drivers behind decisions not to prosecute. Wille mentioned that international actors in support of the immunity law would not fund local organisations that seek criminal accountability.[470] There are, then, active efforts to steer away from decisions to prosecute political leaders in Yemen. However, civil society and human rights activists, particularly those who participated in the Transitional Justice Working Group of the National Dialogue Conference, worked hard to find ways around the immunity law and to ensure some form of accountability – even if this meant through the use of a transitional justice mechanism other than prosecutions. Al Kamali's account of these efforts regarding the navigation of the GCC initiative and the various United Nations mechanisms attests to this.[471]

Shapers

The shaping factors that impacted the decision not to prosecute in Yemen, including the limited scope of crimes addressed in the negotiations are similar to the factors that triggered and drove the decisions. As human rights lawyers explained, senior security and police officials are essentially the only individuals who could be held accountable for crimes. International actors and internal politics played a major role in limiting the content as well as the extent of potential prosecutions in this way. They helped ensure that high-level government officials, particularly Saleh and his regime, would not be tried. But the ambiguous nature of the transition itself significantly shaped decisions regarding prosecution in Yemen. From the removal of the Public Prosecutor presiding over the Friday of Dignity killings case, to the negotiators of the immunity law, to the continued assassination of judges and

[470] Interview with Belkis Wille, Yemen and Kuwait Researcher, Human Rights Watch (Sanaa, Yemen, 22 January 2014).
[471] Interview with Hamza Al Kamali, Member of the Transitional Justice Working Group, National Dialogue Conference (Sanaa, Yemen, 22 January 2014).

prosecutors, it is clear that while Saleh was removed from his position as head of state, he and individuals loyal to him continued to exert influence on the transition itself. As a result, they also influenced the direction of decisions regarding prosecution. Moreover, the precarious security situation in Yemen, often described as being on the brink of another civil war, further compounded efforts to ensure that the immunity law remains in place.

CHAPTER 4 | RE-THINKING TRANSITIONAL JUSTICE: Implications of findings from Egypt, Libya, Tunisia and Yemen for transitional justice theory and practice

Introduction

This chapter provides a critique of mainstream transitional justice theory with a focus on prosecutions. Using scholarly literature and the findings generated from interviews in each of the four case studies as presented in Chapter 3, this chapter challenges the predominant understanding that transitional justice uniformly occurs in liberalising contexts. The findings of this research therefore build on the growing literature that claims that transitional justice is an under-theorised field and needs to be developed to take into account non-liberal and complex transitions.[472]

I make four principal arguments. First, the complex nature of the transitions that took place in the Arab region warrants a re-thinking of transitional justice and its pursuit in various contexts. Transitions that are at once ruptured as well as negotiated, where the heads of state were ousted but politically controversial state institutions remained intact, produced a complex set of decisions regarding the prosecution of political leaders. Moreover, the shift to a renewed form of repressive, non-liberal rule in several Arab region transitions undermines mainstream transitional justice theory's presumption of a "return to a liberal state."[473]

Second, the Arab region cases demonstrate that both domestic and international actors pursue competing accountability agendas, thereby weakening global accountability norm claims. Domestic and international wrangling over if, when and how to pursue prosecutions points to the diverse goals of transitional

[472] Thomas Obel Hansen, 'Transitional Justice: Toward a Differentiated Theory' (2011) 13 Oregon Review of International Law 1; Nicola Palmer, Phil Clark and Danielle Grenville (eds), *Critical Perspectives in Transitional Justice* (Intersentia 2012). See also Laurel E. Fletcher and Harvey M. Weinstein, 'Writing Transitional Justice: An Empirical Evaluation of Transitional Justice Scholarship in Academic Journals' [2015] Journal of Human Rights Practice <http://jhrp.oxfordjournals.org/content/early/2015/05/17/jhuman.huv006.abstract> accessed 15 July 2015, in which they suggest that transitional justice is under-theorised.
[473] Ruti G. Teitel, *Globalizing Transitional Justice: Essays for the New Millennium* (OUP 2014).

justice actors. The contradictory role of international actors in Libya and Yemen – pushing for criminal accountability in the former and immunity in the latter – exemplifies the need to deconstruct the varied objectives of transitional justice actors. Some actors pursue prosecutions within a transitional justice framework that is advocated by international human rights organisations. Many other actors, however, use transitional justice as either a façade to appease public anger without achieving meaningful accountability or as a weapon to silence political dissent post-transition. Both scenarios are a product of transitions that, unlike their Latin American counterparts, are marked by a return to – or a renewed form of - repressive rule and continued human rights violations.[474]

Third, the limited content and extent of the investigations and prosecutions that have taken place in all four case studies further underline the need to develop transitional justice theory. The emphasis on accountability for corruption and socio-economic crimes and a much more limited form of accountability for civil and political crimes in Egypt and Tunisia, for instance, points to a practice of scapegoating certain crimes in order to avoid the prosecution of a more comprehensive set of crimes. This practice of scapegoating is used by political leaderships with the aim of producing an authoritative image of a break with the former regime. In reality, however, the influence of the *feloul* in Egypt, the *anciens nouveaux* in Tunisia and former President Saleh's political maneuverings in Yemen

[474] Tunisia is often cited as the exception to this. Nevertheless, the flawed prosecutions, continued politicisation of the judiciary and the re-emergence of ancien regime officials in Tunisia's leadership warrant a cautious assessment of the Tunisian transition. See, for example, Human Rights Watch, 'Flawed Accountability: Shortcomings of Tunisia's Trials for Killings during the Uprising' (January 2015) 1 <www.hrw.org/report/2015/01/12/flawed-accountability/shortcomings-tunisias-trials-killings-during-uprising> accessed 26 July 2015. More optimistic accounts of the Tunisian transition as a role model for other Arab Spring countries include Boston Globe, 'Tunisia Becomes a Beacon of Hope' (Editorial, 17 February 2015) <www.bostonglobe.com/opinion/editorials/2015/02/16/tunisia-becomes-beacon-hope/q4ZJ0VuX6LljqmYXjcj4pK/story.html> accessed 31 July 2015; Middle East Eye, 'Tunisia Polls Offer Arab Spring Ray of Hope' (28 October 2014) <www.middleeasteye.net/news/tunisia-polls-offer-arab-spring-ray-hope-1988403914> accessed 31 July 2015.

reveal otherwise. The very limited human rights prosecutions that have taken place thus point to the controlled nature of the transitions. Moreover, the focus on crimes *of* the transition in the investigations and trials that have taken place leaves decades of human rights violations unaccounted for.[475] This contributes to the propagation of conflicting narratives regarding legacies of past injustices, furthering the use of transitional justice to entrench authoritarian rule.

Fourth, the Arab region cases demonstrate the perils of pursuing prosecutions during highly contentious transitions. Weak and politicised judiciaries crippled by executive power meddling and inadequate legal frameworks are a principal challenge to the pursuit of fair prosecutions. I therefore argue that a re-thinking of transitional justice needs to take into account the absence of pre-existing democratic structures and what this means for criminal accountability prospects in such transitional contexts.

In Chapter 3, I identified the key factors that triggered, drove and shaped decisions regarding the prosecution of political leaders in Egypt, Libya, Tunisia and Yemen. As explained in the Methodology section in Chapter 2, the trigger-driver-shaper mechanism is used as a general prism through which I make sense of the research collected and by which I develop an explanation of how decisions regarding the prosecution of political leaders emerged and developed before, during and after

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[475] These human rights violations have been documented by many Egyptian civil society organisations, including the Egyptian Organization for Human Rights (www.eohr.org); the Cairo Institute for Human Rights Studies (www.cihrs.org); the Egyptian Initiative for Personal Rights (www.eipr.org); the Arabic Network for Human Rights Information (http://anhri.net); The Nadim Center for the Treatment and Rehabilitation of Victims of Violence (http://alnadeem.org). They have also been documented extensively by Amnesty International and Human Rights Watch. For an account of systematic torture in Egypt, see, for example, Human Rights Watch, 'Behind Closed Doors: Torture and Detention in Egypt' (Report, July 1991) <www.hrw.org/sites/default/files/reports/Egypt927.pdf> accessed 29 July 2015; Human Rights Watch, 'Work on Him Until he Confesses: Impunity for Torture in Egypt' (Report, 30 January 2011) <www.hrw.org/report/2011/01/30/work-him-until-he-confesses/impunity-torture-egypt> accessed 29 July 2015.

the highly contentious period of transition.[476] First, it is worth briefly reiterating the triggers, drivers and shapers identified in each case study. An analysis of the implications of the case study findings for transitional justice will follow.

Egypt

The cases of Emad El Kebir and Khaled Said were triggers that opened up the possibility of holding the police, a much-feared arm of the Ministry of Interior, criminally accountable. In addition, the Kifaya movement in 2005 and the 6 April movement in 2008 served as triggers in the form of social movements that grew over time and were marked by periodic protests, or 'mini-uprisings'.[477] Emad El Kebir, Khaled Said, the Kifaya and the 6 April movements thus served as some of the most influential trigger factors that led to the 2011 uprising and stronger demands for criminal accountability.

Public pressure during and immediately after the 2011 uprising and individual plaintiffs, particularly those working in established NGOs, were the major drivers of decisions regarding prosecution in Egypt. Given that public pressure and individual lawyers played a significant role in initiating prosecutions, they also served as triggers. Together, these triggers and drivers pushed the judiciary and interim military authorities to respond by allowing certain prosecutions of high-level government officials.

A number of shapers impacted the content and extent of decisions regarding prosecution in Egypt. Explicit demands for socio-economic accountability by the protesters, a politicised judiciary and public prosecutor, a weak legal framework, and

[476] See Methodology section in Chapter 2.
[477] The Mahalla strike and protests in 2008 is often described as an uprising or revolt. See Osman El Sharnoubi, 'Revolutionary History Relived: The Mahalla Strike of 6 April 2008' Ahram Online (6 April 2013).

a military-controlled transition all shaped the limited content and extent of prosecutions in Egypt.

Tunisia

At least three events in Tunisia's past triggered the momentum behind decisions to prosecute the country's leaders. The 1978 general strike, the Baraket Essahel torture practices in 1991, and the Gafsa revolt of 2008 each fuelled resistance to repression and civil society advocacy for accountability for human rights violations. Moreover, public pressure during the uprising and also immediately following Ben Ali's ouster was, as several interviewees noted, the strongest trigger that led to decisions to prosecute.[478]

The Groupe de 25's early efforts, immediately following Ben Ali's ouster, were successful in driving decisions regarding prosecution. Continued protests and pressure from victims' families made it difficult for interim authorities to ignore the question of prosecutions for former leaders. The appeasement of public anger was therefore also a key driver of decisions regarding prosecution.[479]

The shapers in Tunisia included the dire socio-economic situation, which led to an emphasis on corruption and economic crimes in the charges, and the prospect of a Truth and Dignity Commission, which many relied on as the mechanism that would cover the human rights violations that the prosecutions thus far failed to address. Much like Egypt, a politicised judiciary and public prosecutor also limited

[478] Interview with Amna Guellali, Tunisia and Algeria Researcher, Human Rights Watch (Telephone interview, 23 April 2012); Interview with Solène Rougeaux, Director, Avocats Sans Frontières, Tunis Office (Tunis, Tunisia, 25 April 2012); Interview with Abderrahman El Yessa, Democratic Governance Advisor, UNDP, Tunisia (Tunis, Tunisia, 26 April 2012); Interview with Anis Mahfoudh, Human Rights Officer, OHCHR, Tunisia (Tunis, Tunisia, 27 April 2012); Interview with Habib Nassar, Former Middle East and North Africa Director, International Center for Transitional Justice (New York City, New York, 18 May 2012); Interview with anonymous senior employee of the Tunisian Ministry of Foreign Affairs (2012).
[479] Interview with Habib Nassar, Former Middle East and North Africa Director, International Center for Transitional Justice (New York City, New York, 18 May 2012).

the content and extent of prosecutions. Furthermore, a lack of command responsibility provisions led to many acquittals and light sentences. Finally, a transition that increasingly saw the return of the *anciens nouveaux* – ex-Ben Ali regime officials – meant that human rights prosecutions in particular, but also corruption prosecutions, would be limited to protect those with former regime ties.

Libya

The 1996 Abu Salim prison massacre and the impunity its perpetrators enjoyed for years served as a powerful trigger for subsequent decisions regarding prosecution. Moreover, the highly symbolic arrest of Fathi Terbil on the 15 February 2011, widely regarded as the spark of the Libyan uprising, attests to the critical role of individual lawyers in triggering decisions regarding prosecution. The ICC's arrest warrants for three Libyan high-level officials also triggered domestic decisions to prosecute.

Individual lawyers similarly served as key drivers of decisions regarding prosecution. In addition, the advocacy efforts of organisations such as Amnesty International were vital to pressuring the government to respond. Persistent public pressure – mostly by families of the victims of Abu Salim and of other torture crimes in Libya – were also influential in driving decisions to prosecute.

Legal challenges, a precarious security situation, and a deep mistrust of the judiciary's ability to operate independently and effectively all contributed to the limited charges in the prosecutions. The continued violence that has gripped Libya since 2011 and chaotic militia politics have formed a transition whose direction is uncertain and in which decisions regarding prosecution are in flux.

Yemen

International actors, preoccupied with the preservation of political stability in Yemen and the region, triggered the decision not to prosecute political leaders in the form of an immunity law.[480] Unlike Egypt, Libya and Tunisia, popular demands to hold Saleh accountable for crimes committed before and during the uprising rang hollow. These demands, however, could also be regarded as triggers that prompted regional and domestic politicians to issue the immunity law so as to lay the question of prosecuting Saleh to rest. A corrupt judiciary, a weak and tribal justice system, internal and external politics are some of the principal drivers behind decisions not to prosecute. International actors and internal politics played a major role in limiting both the content and the extent of potential prosecutions. They helped ensure that high-level government officials, particularly Saleh and his regime, would not be tried. But the ambiguous nature of the transition itself significantly shaped decisions regarding prosecution in Yemen. From the removal of the Public Prosecutor presiding over the Friday of Dignity killings case, to the negotiators of the immunity law, to the continued assassination of judges and prosecutors, it is clear that while Saleh was removed from his position as head of state, he and individuals loyal to him continued to exert influence on the transition itself.[481] As a result, they also influenced the direction of decisions regarding prosecution. Moreover, the precarious

[480] Law No. 1 of 2012 Concerning the Granting of Immunity from Legal and Judicial Prosecution, translated from Arabic to English by Amnesty International in *Yemen's Immunity Law – Breach of International Obligations,* (March 2012) <www.amnesty.ca/sites/default/files/2012-03-30mde310072012enyemenimmunitylaw.pdf> accessed 10 July 2015.

[481] PRI The World, for example, reports: "Saleh, a strongman who ran Yemen for 33 years, stepped down in 2011 after a wave of popular protests. But if demonstrations drove him from office, they failed to drive him from power. Thanks to the flawed immunity deal he signed in exchange for resigning, Saleh still lives in Yemen, heads its biggest political party and retains a network of well-placed friends, family and cronies." PRI The World, 'The Man Accused of Stealing $60 Billion from Yemen is Still There and Wielding Power' (2 April 2015) <www.pri.org/stories/2015-04-02/man-accused-stealing-60-billion-yemen-still-there-and-wielding-power> accessed 31 July 2015.

security situation in Yemen, often teetering on the brink of another civil war, further compounded efforts to ensure that the immunity law remains in place.

The factors identified in each case study above reveal that while the triggers and drivers – particularly in Egypt, Libya and Tunisia – are marked by the traditional motives for a more just, liberal democratic order, the shapers paint a more complex picture that presents a significant challenge to mainstream transitional justice theory. The various shaping factors that pushed and pulled decisions regarding the prosecution of political leaders in different, and even opposing, directions are a strong indication that different actors have been fiercely battling each other for competing visions of transitional justice – and of criminal justice in particular.

Notably, rather than serving as a 'liberalising ritual', transitional justice can be – and indeed has been – employed by both pre and post-transition leadership figures as a political tool to consolidate or renew repressive rule.[482] On the other hand, actors such as domestic human rights organisations and individual lawyers push for prosecutions within a transitional justice framework that they regard as an opportunity for genuine accountability for past atrocities. For the leadership figures exerting control over the transition so as to preserve the status quo or to consolidate their power, the absence of independent judicial institutions to carry out investigations and trials is an essential factor that aided their cause. For human rights actors vying for individual criminal accountability for former leaders and other high-level government, police, and military officials, weak and politicised judiciaries have obviously posed a major obstacle to their cause.

[482] Thomas Obel Hansen, 'Transitional Justice: Toward a Differentiated Theory,' (2011) 13 Oregon Review of International Law 1.

Non-Paradigmatic Transitions

The complex nature of the transitions that took place in the Arab region warrants a re-thinking of transitional justice and of its pursuit in various contexts. The Arab transitions do not fall within the paradigmatic framework for transitions that is marked by a shift from authoritarian to liberal democratic rule. Ahmed Nader Nadery warns that, "we must take care to distinguish the nature of each transition, lest we mistakenly import the lessons of one context into another."[483] Transitions that are at once ruptured as well as negotiated, where the heads of state were ousted but politically controversial state institutions remained intact, produced a complex set of decisions regarding the prosecution of political leaders. They are, as Nassar and others have described them, "ambiguous transitions."[484] The ambiguity in Libya and Yemen primarily lies in the uncertain direction of the politics of the transitions, the ongoing violent conflicts there, and the actors that hold sway in decisions regarding prosecution. In Egypt and Tunisia, the continued presence of certain influential political actors and institutions, despite dramatic changes at the head-of-state level, has shaped decisions regarding prosecution. The police, military, state security agencies and the judiciary are among such institutions that escaped reform and have morphed into renewed versions of authoritarianism.[485]

The shaping role of these contextual factors significantly undermine the predominant theory and practice of transitional justice and of prosecutions in

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[483] Ahmad Nader Nadery, 'Editorial Note: In the Aftermath of International Intervention: A New Era for International Justice?' (2011) 5 IJTJ 171.

[484] Habib Nassar, 'Transitional Justice in the Wake of the Arab Uprisings: Between Complexity and Standardisation' in Kirsten J. Fisher and Robert Stewart (eds), *Transitional Justice and the Arab Spring* (Routledge 2014).

[485] There have been constitutional amendments that, to some degree, strengthen the independence of the judiciary. Despite these amendments, however, political alliances and the absence of the separation of powers remain. See, for instance, International Bar Association Human Rights Institute, 'Separating Law and Politics: Challenges to the Independence of Judges and Prosecutors in Egypt' (Report, February 2014); International Commission of Jurists, 'The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future' (Report, May 2014).

particular.[486] It points to the diverging objectives of various transitional justice actors, which puts into question the merits of the transitional justice industry's advocacy for accountability mechanisms rooted in liberal values. Lingering, or remnant political actors include, but are not limited to, the judiciary, military and Mubarak loyalists in Egypt; the judiciary and the *anciens nouveaux* politicians in Tunisia; and Saleh and his political and tribal loyalists in Yemen. Cherif Bassiouni usefully summarises the ambiguity of the Arab Spring transitions:

> The difficulty in the Arab world is that there have not been fundamental changes in the different countries' political systems because previous regimes, whenever removed, have either simply survived, morphed into the new regimes or continued to hold influence over what appear to be new regimes. Consequently, there is a vested interest in both the old and new regimes to avoid publicizing past misdeeds and to cover up human rights violations and, for that matter, crimes under national and international law…the interests of actors in prior regimes remain powerful in those Arab states where change has occurred. [487]

It is important to note here that the ambiguity of the Arab Spring transitions is not new. The initial tendency of transitional justice scholars to explain the likelihood of prosecutions based on whether or not the country in question experienced a ruptured or a negotiated transition has rapidly started to wane. As scholars took a closer look at what happened in the Latin American transitions, it became clearer that even in the orthodox ruptured case of Argentina, where an explicit military defeat took place, the transition was both ruptured and pacted. The Argentinian military and the post-transition governments negotiated decisions regarding prosecution, resulting in the initial wave of amnesties which were then followed by many prosecutions – some of which are still taking place at the time of this writing. Skaar's account of the role of judicial reform over time is an important contribution to this area of research, as it highlights the relationship between the ebbs and flows of prosecutions in

[486] Libya is an exception to this ambiguity due to the definitive break with the Gaddafi regime and its loyalists.
[487] M. Cherif Bassiouni, 'Editorial' (2014) 8 IJTJ 325, 335-336.

Argentina and developments in the establishment of the independence of the judiciary over time.[488] The "paradigmatic transition" from "violent conflict to peace and democracy," then, is no longer an adequate framework for the analysis of varied transitions and their transitional justice decisions.[489]

Many of the challenges to the prosecution of political leaders in pre-transition Egypt, Libya, Tunisia and Yemen are, with a few important exceptions, similar to the post-transition challenges to prosecution. These challenges include lack of judicial independence, crimes that continue to be orchestrated and/or perpetrated by the regime, victims' fear of the repercussions for filing complaints against high-level government officials, and legal obstacles such as lack of access to direct evidence and the absence of command responsibility provisions. The continued existence of these challenges is indicative of the ambiguous nature of the transitions and the role this plays in shaping decisions regarding prosecutions and making them more limited. In other words, without a definitive resolution of these challenges, the so-called transition offers no real change in its institutions and human rights practices. Consequently, decisions regarding prosecution remain severely limited and politicised.

Despite these challenges, however, pre-transition efforts to hold perpetrators to account have, with the exception of Yemen, trickled into post-2011 efforts to prosecute. Egypt's Khaled Said case, Tunisia's Baraket Essahel case, and Libya's Abu Salim prison massacre case are all examples of prosecutions targeting mid to high-level government and police officials that, despite an exceedingly difficult and repressive environment for civil society to work within, were revived post-

[488] Elin Skaar, *Judicial Independence and Human Rights in Latin America* (Palgrave MacMillan 2011).
[489] Christine Bell, Colm Campbell and Fionnuala Ni Aolain, 'Justice Discourses in Transition' (2004) 13 (3) Social and Legal Studies 305, 310.

transition.[490] Of note here is that the incidents that led to these iconic cases were also cited as major triggers that eventually led to decisions to prosecute high-level officials in Egypt, Libya and Tunisia. These triggers, which were marked by the public outrage they created and the tireless efforts of civil society and individual lawyers to ensure accountability for them, were milestones in the long and difficult road to accountability for political leaders in these countries. This is why it is crucial to identify pre-transition triggers and to analyse their impact, if any, in subsequent decisions to prosecute former political leaders. They point to the significant role that public pressure and civil society efforts play in sustaining the momentum behind certain iconic cases, which also in one way or another served as triggers of post-transition decisions to prosecute political leaders.

Nassar points to an important difference between the Arab Spring transitions and others that preceded them: the Arab region is dealing with the legacy of atrocities committed under multiple regimes, whereas most transitions in the rest of the world have dealt with the legacy of a single regime or conflict.[491] Nassar's observation is important as it indicates the impossibility of a "return to a liberal state"[492] because in all four case studies there was no liberal state to begin with. The decades of atrocities committed under multiple regimes, as Nassar argues, will require creativity that today's transitional justice models do not offer.[493] This is another attribute of the Arab region transitions that contributes to their complexity, as transitional and post-transitional political actors are often implicated in the multiple legacies of atrocities, making accountability measures that much more difficult to pursue.

[490] See Chapter 3 for details on each of these cases.
[491] Nassar, 'Transitional Justice in the Wake of the Arab Uprisings' (n 472) 59.
[492] Ruti G. Teitel, *Transitional Justice* (OUP 2000) 67.
[493] Nassar, 'Transitional Justice in the Wake of the Arab Uprisings (n 472) 59.

This question of transitioning *from what* and transitioning *to what* has been briefly examined by scholars and is worth visiting here.[494] Catherine Turner, for instance, draws attention to what she calls the temporality of transitional justice in the critical scholarship. She refers to "the extent to which we can ever speak of a before and after of transition, and the ways in which past, present and future intersect in the transitional context."[495] Rosemary Nagy's account of the South African Truth and Reconciliation Commission and of the Saddam Hussein trial in Iraq is also insightful in that she points out the selective focus on crimes committed within a certain period as well as the problem of continued political violence, human rights violations, and socio-economic inequalities. Nagy explains:

> Transitional justice…implies a fixed interregnum period with a distinct end; it bridges a violent or repressive past and a peaceful, democratic future. Notions of 'breaking with the past' and 'never again', which align with the dominant transitional mechanisms, mould a definitive sense of 'now' and 'then'. This can problematically obscure continuities of violence and exclusion. … In Iraq and Afghanistan the transition is constructed as being 'from' a repressive police state under Saddam Hussein or 'from' cycles of war and repression culminating in the Taliban regime. This neatly avoids the current matter of foreign military intervention and implies that the transitional problem has to do with 'then' and not the 'now' of occupation, insurgency, and the war on terror…Although prosecution, vetting, reparation and truth-telling are taking or will take place in the midst of violence and insecurity, the concern of these transitional mechanisms is the history before 2001 in Afghanistan and before 2003 in Iraq. The 'to' of transitional justice is thus insulated from the current reasons for instability.[496]

The question of time, then, emerges as a contentious feature of transitional justice decisions, which, as Nagy illustrates above, already has a history of limiting decisions regarding prosecution. The patchy extent of the prosecutions in Egypt and Tunisia demonstrate that decisions regarding prosecution have for the most part been

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[494] See Rosemary Nagy, 'Transitional Justice as Global Project: critical reflections' (2008) 29 (2) Third World Quarterly 275; Catherine Turner, 'Transitional Justice and Critique' in D Jacobs (ed), *Research Handbook on Transitional Justice* (Edward Elgar, forthcoming).

[495] Catherine Turner, 'Transitional Justice and Critique' in D Jacobs (ed), *Research Handbook on Transitional Justice* (Edward Elgar, forthcoming).

[496] Rosemary Nagy, 'Transitional Justice as Global Project: critical reflections' (2008) 29 (2) Third World Quarterly 275, 280.

guided by a reckoning with the transition itself, rather than with what brought about the transition to begin with.

Despite these challenges, decisions to prosecute former leaders have been taken in three of the four case studies. If transitional justice were only pursued in a liberalising direction, what explains the opaque and politicised prosecutions of Mubarak, Ben Ali, Saif al-Islam Gaddafi and their aides? While there is no single answer to this question, Obel Hansen's call for greater attention to the various claims of transitional justice is important for a better understanding of the motives behind prosecution decisions in the Arab region:

> [M]ost observers think of transitional justice as something that is inherently "good," at least to the extent it preserves the rights of victims and perpetrators…there is a need for more rigorous scrutiny of the intentions behind establishing transitional justice mechanisms and, in particular, at the level of the general scholarship, a need for adjusting the perception that transitional justice generally aims at, and achieves, liberalization and democratization.[497]

Rather than serve as a mechanism to help transitional societies overcome past atrocities, decisions regarding the prosecution of political leaders in the Arab region exhibit a divergence in objectives from the classical cases of Latin America and elsewhere. They largely represent transitions to non-liberal and repressive rule, contrary to the liberalising ritual of transitional states elsewhere.[498]

In the case of Egypt, for instance, transitional justice has been used to entrench repressive rule and to propagate conflicting historical narratives regarding legacies of injustice. Since the toppling of former President Mubarak in 2011, both military-backed transitional governments (2011-2012 and again in 2013-2014) and the one-year rule of President Morsi (2012-2013) oversaw widespread human rights abuses. In November 2012, Morsi issued a highly controversial presidential decree

[497] Obel Hansen, 'Transitional Justice: Toward a Differentiated Theory' (n 470) 18.
[498] Again, perhaps, with the exception of Tunisia.

that effectively removed the separation of powers.[499] A repressive protest law, which grants security forces sweeping powers to ban protests through the use of lethal force, effectively putting an end to any kind of dissent and freedom of assembly, was issued in 2013 under the then interim President Adly Mansour.[500] Moreover, the biggest mass killing in Egyptian modern history, the Raba'a massacre of August 2013 where over 800 Muslim Brotherhood supporters were allegedly killed by security forces, continues to be marked by impunity.[501] Since the ouster of President Morsi by the military in July 2013, thousands of people have been arrested and detained without trial, while crackdowns on student protesters, journalists and the media, and NGOs are endemic and have become institutionalised.[502] At a mass trial in April 2014, the judge sentenced 683 alleged Muslim Brotherhood supporters to death – the largest mass death sentencing of its kind in recent times.[503] The trial was a mockery of justice: it lasted eight minutes, the majority of defendants were absent, the judge did not review evidence, and defense lawyers were not allowed to cross-

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[499] For an English translation of the constitutional declaration, see Ahram Online, 'English text of Morsi's Constitutional Declaration (22 November 2012) <http://english.ahram.org.eg/NewsContent/1/64/58947/Egypt/Politics-/English-text-of-Morsis-Constitutional-Declaration-.aspx> accessed 29 July 2015. After intense protests, this decree was annulled in December 2012.

[500] Law 107 (2013). For more on the human rights implications of this law, see Amnesty International, 'Egypt: New Protest law gives security forces free rein' (25 November 2013) <www.amnesty.org/en/news/egypt-new-protest-law-gives-security-forces-free-rein-2013-11-25> accessed 29 July 2015.

[501] For a detailed report on this massacre, see Human Rights Watch, 'All According to Plan: The Rab'a Massacre and Mass Killings in Egypt' (12 August 2014) <www.hrw.org/node/127942> accessed 29 July 2015.

[502] Sharif Abdel Kouddous, 'Egypt's 1984' (Sada, Carnegie Endowment for International Peace, 28 October 2014) <http://carnegieendowment.org/sada/index.cfm?fa=show&article=57051&solr_hilite=> accessed 29 July 2015.

[503] Al Jazeera, 'Egyptians Reel from Mass Death Sentence' (29 April 2014) <www.aljazeera.com/news/middleeast/2014/04/egyptians-react-mass-death-sentence-201442951751626248.html> accessed 30 July 2015.

examine witnesses.[504] The trial was presided over by Judge Saeed Yousef, fittingly also known as *al gazzar,* or ‘the butcher.’

In Tunisia, most of the twenty senior government officials who faced prosecution have been set free.[505] Ousted Tunisian President Ben Ali continues to live in Saudi Arabia, which has ignored extradition requests from Tunisia. In Libya, thirty-seven former regime officials, including Saif al-Islam Gaddafi and El Senussi, continue to be held in detention with the first verdicts having been issued only in July 2015. In Yemen, repeated calls for Saleh to be put on trial have been ignored. Saleh’s continuous violation of the terms of the immunity agreement – namely, that he disengage from practicing politics – has been met with silence.

It is clear, then, that the Arab region transitions do not constitute a return to a liberal state, nor do they constitute a transition in a new liberalising direction. Instead, they are marked by regimes that have “survived, morphed into the new regimes or continued to hold influence over what appear to be new regimes.”[506] Despite this ambiguous state of affairs, a definitive break with the past has taken place in each case study and formal decisions to prosecute and not to prosecute political leaders have been taken. The toppling of leaders as a result of a massive uprising and the subsequent initiation of a political transition constitute this definitive break. They are also significant attributes shared among these complex transitions, which warrant further comparative research on their impact on

[504] Maggie Michael and Mamdouh Thabet, ‘Egypt Mass Trial: Judge Sentences 683 to Death in Single Mass Trial’ (Huffington Post, 28 April 2014) <www.huffingtonpost.com/2014/04/28/egypt-mass-trial_n_5224509.html> accessed 29 July 2015.
[505] Carlotta Gall, ‘Questions of Justice in Tunisia as Ousted Leaders are Freed’ New York Times (16 July 2014) <www.nytimes.com/2014/07/17/world/africa/questions-of-justice-in-tunisia-as-ousted-leaders-are-freed.html> accessed 30 July 2015.
[506] Bassiouni, ‘Editorial’ (n 475) 325. To be sure, prosecutions are not the single defining factor of whether or not a transition is moving in a liberalising direction. However, it has served as a strong indicator reflecting the largely non-liberal, ambiguous transitions that have taken place.

transitional justice theory more broadly.[507]

Whose Transitional Justice?

Globally, the number of prosecutions of political leaders has increased significantly in the last two decades.[508] Between 1990 and 2008, sixty-seven heads of state have been prosecuted.[509] This phenomenon has been described as a "justice cascade" that originated in Latin America and reverberated worldwide, leading to an increase in universal jurisdiction laws.[510] Indeed, the prosecution of Mubarak and Ben Ali contribute to these numbers. But the statistic on its own overlooks the complex motives behind such trials and, perhaps more importantly, it overlooks how and why various actors struggle for competing visions of transitional justice. Teitel argues that due to its globalised nature, transitional justice is increasingly disassociated from politics.[511] The politically charged unfolding of transitional justice in the Arab region, particularly decisions regarding prosecution, challenge this observation. Martti Koskenniemi's rejection of the "neutrality" of law is relevant here, as he argues: "It is impossible to make substantive decisions within the law which would imply no political choice."[512] This is particularly true in transitional situations, which are highly contentious and political.

As the case studies demonstrate, various factors pushed and pulled decisions regarding the prosecution of political leaders in different and even opposing directions. These drivers and shapers are thus a strong representation of the different

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[507] See Methodology section in Chapter 2 for a detailed explanation of the merits of this comparative research.
[508] Ellen L. Lutz and Caitlin Reiger (eds), *Prosecuting Heads of State* (CUP 2009).
[509] ibid 2.
[510] Ellen L. Lutz and Kathryn Sikkink, 'Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America' (2001) 2 Chicago Journal of International Law 1, 5.
[511] Teitel, *Globalizing Transitional Justice* (n 473).
[512] Martti Koskenniemi, *The Politics of International Law* (Bloombsury Publishing 2011) 61.

actors that fiercely battled each other for competing visions of transitional justice – and of criminal justice in particular. Obel Hansen rightly urges a closer examination of the "horizontal expansion" or "proliferation" of transitional justice actors to better understand these competing transitional justice discourses and practices.[513] The Arab region cases present an important contribution to this particular scholarly discussion. The key domestic actors involved in decisions regarding prosecution were individual lawyers, civil society organisations and victims on the one hand, and the judiciary, transitional and post-transitional leadership officials on the other.[514] The former group of actors tends to share the similar motive of criminal accountability for former leaders. The latter group of actors has largely played a role in blocking prosecutions or at least severely limiting their content and extent. As a result, a highly contentious process of prosecution took shape in the Arab region cases, with these two groups of actors often clashing with each other. Subotic identifies three domestic groups of actors in the overall process of decisions regarding prosecution, which are also useful in describing the competing domestic actors in the Arab region:

> [H]ow elites go about engaging in transitional justice is the result of specific domestic power structures and coalitions. The contested process of transitional justice adoption defines domestic elites along three major groups: justice resisters, justice instrumentalists and true believers. Which domestic group comes out on top in the domestic political battle will determine what approach to transitional justice elites undertake and to what policy effect.[515]

The various civil society actors, lawyers, interim elites, military actors, and judges largely fall within the three categories outlined by Subotic above. The unfolding of

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[513] Thomas Obel Hansen, 'The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field' in Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth (eds), *Transitional Justice Theories* (Routledge 2014) 108.

[514] The military is a crucial additional factor in the case of Egypt.

[515] Jelena Subotic, 'Bargaining Justice: A Theory of Transitional Justice Compliance,' in Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth (eds), *Transitional Justice Theories* (Routledge 2014) 128.

decisions regarding prosecution before, during and immediately after the Arab Spring uprisings is thus marked by such tensions between what Subotic describes as justice resisters, instrumentalists, and true believers.

The interview responses across the four case studies indicate that civil society actors advocated for fair and effective prosecutions of former leaders. Given the repressive environment within which civil society actors had to work, however, their primary role particularly in the pre-transition period was to document human rights violations by the regime and its associated state agencies. The objective was to raise awareness and put pressure on governments to change their human rights practices. Eid and El Shewy explained that despite working with a politicised judiciary, the aim of civil society documentation was to have enough evidence so that "one day," when an independent judiciary is in place, "we will be able to prosecute."[516] As a result, documentation was the "most powerful tool" for a civil society struggling with authoritarian rule.[517] As we have seen in the literature review, scholars differ on the extent to which civil society actors impact decisions regarding prosecution. The findings from the Arab region cases largely confirm Pion-Berlin's and others' contention that political leadership preferences trump those of "interest groups," or civil society and other domestic actors.[518]

As mentioned in Chapter 2, access to prosecutors for interviews proved extremely difficult mainly because they and other members of the judiciary in all four case studies faced security threats. A review of government and ministry

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[516] Interview with Gamal Eid, Human Rights Lawyer, Activist and Director of the Arabic Network for Human Rights Information (Cairo, Egypt, 8 December 2013); Interview with Mohamed El Shewy, Transitional Justice Programme Officer, Egyptian Initiative for Personal Rights (Telephone interview, 24 November 2013).

[517] Interview with Mohamed El Shewy, Transitional Justice Programme Officer, Egyptian Initiative for Personal Rights (Telephone interview, 24 November 2013); See Chapter 3 for a more detailed discussion of the responses regarding the role of civil society and documentation.

[518] David Pion-Berlin, 'To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone' in Neil J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Vol. 1 USIP 1995) 83-84.

websites in Egypt, Libya, Tunisia and Yemen reveals little more than general descriptions of the function of public prosecutors in the four case studies. At the time of writing, it was difficult to find official statements issued by the public prosecution concerning transitional justice and the prosecution of political leaders in particular. This is perhaps not surprising, given the ongoing nature of the prosecutions as well as the assassinations of former Libyan prosecutor general Abdelaziz al-Hasadi in February 2014 and of former Egyptian prosecutor general Hesham Barakat in June 2015, both signifying the highly controversial nature of their mandate and of the prosecutions in general.

The title of Egypt's Ministry of Transitional Justice changed four times since its establishment in 2011.[519] The swearing in of a new cabinet in September 2015 resulted in the abolishment of this ministry altogether. Commentators have gone so far as to describe this move as a sign that "the country's transitional justice process is over."[520] In Tunisia, the Ministry for Human Rights and Transitional Justice was created in January 2012 and one of its principal tasks was to oversee the drafting of Tunisia's transitional justice law, which was subsequently passed in December 2013. No such ministry was established in Libya or Yemen, although the ministries of

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[519] Mada Masr reports: "The Ministry of Transitional Justice was changed back to the Ministry of Legal and Parliamentary Affairs after being the subject of much controversy. In the past, it was led by prominent Mubarak-era figures, including Kamal al-Shazly and Mofeed Shehab. After the 2011 revolution, it was named the Ministry of Democratic Transformation and Social Development, and was headed by Yehia al-Gamal and Ali al-Selmy. It was re-established with its original title, the Ministry of Parliamentary and Shura Council Affairs, during the administration of former President Mohamed Morsi, as part of Qandil's Cabinet. In 2013, Judge Hatem Bagato was appointed as minister, followed by Judge Amin al-Mahdy during Hazem al-Beblawi's Cabinet, when it was renamed the Ministry of Transitional Justice and National Reconciliation. It was renamed as the Legal and Parliamentary Affairs Ministry in this latest reshuffle. The new minister, Judge Magdy al-Agaty, previously served as the vice president of the State Council, approving many of the laws that have been passed in the absence of a parliament, including the controversial Protest Law." Mada Masr, 'Egypt's New Cabinet: What changed and what didn't?' (19 September 2015) <www.madamasr.com/news/%E2%80%8Begypts-new-cabinet-what-changed-and-what-didn't> accessed 8 December 2015.

[520] Elisa Miller, 'A Close Look at the Changes to Egypt's Ministries,' Atlantic Council (1 October 2015) <www.atlanticcouncil.org/blogs/egyptsource/a-close-look-at-the-changes-to-egypt-s-ministries> accessed 8 December 2015.

human rights and legal affairs in Yemen have called for transitional justice and criminal accountability in the past.[521] In April 2013, Yemen's General Prosecutor Ali Al-Awash ordered an investigation into alleged acts of terrorism committed by former President Saleh, his son Ahmed Ali Abdullah Saleh, his brother Ali Saleh Al-Ahmar and their aides.[522] At the time of writing, no major developments emerged following this prosecutorial order.

However, discussions in the emerging scholarship on transitional justice decisions in the Arab region largely overlook the proliferation of actors that drive and shape transitional justice decisions. One example is Khatib's critique of the rise of political Islamists in the Arab Spring countries and the allegedly harmful challenge they pose to the transitional justice process.[523] The deconstruction of the various domestic actors involved in decisions regarding prosecution is thus vital to understanding that the origins of competing agendas of transitional justice are much more complex.

Domestic and International Actors: Advocates of competing visions of transitional justice

The pursuit of individual criminal accountability for past atrocities in transitional justice contexts often draws the involvement of international actors. Much has been discussed about the role of international NGOs such as Amnesty International and Human Rights Watch, regional bodies such as the IACtHR, international tribunals such as the ICC and intergovernmental bodies such as the United Nations and its various agencies as some of the key international actors that

[521] See n 214 and 457.

[522] Rammah Al Jubari, 'Court in Sana'a and General Attorney Order Investigations of Former President Saleh and Company,' Yemen Times (29 April 2013) <www.yementimes.com/en/1672/news/2284/Court-in-Sana'a-and-general-attorney-order-investigations-of-former-President-Saleh-and-company.htm> accessed 8 December 2015. The immunity law in Yemen precludes immunity from acts of terrorism.

[523] See a critique of Line Khatib's chapter in the Literature Review section in Chapter 1.

work to promote accountability for past human rights violations. This promotion is often conducted through transnational networks made up of these actors and that work to ensure accountability at the domestic level where possible, or at the international level where necessary. The prevailing assumption is that international – or 'transnational' – actors actively seek the fulfillment of a well-established and shared norm – that of individual criminal accountability, or the global accountability norm.[524]

While domestic elites use transitional justice to score political points as Subotic observes, international actors also pursue conflicting justice agendas.[525] One of the key factors responsible for the existence of the immunity law in Yemen but not in the other Arab Spring countries, for instance, is the particular role of geopolitics in the Yemeni transition. Arman's statement was clear: "The immunity law is a product of politics at the international level."[526] Wille of Human Rights Watch agreed: "The reason that the immunity law exists is because of international actors."[527] Subotic discusses instances where both international pressure for transitional justice and domestic opposition to transitional justice are strong and therefore clash. Yemen, however demonstrates the opposite case: domestic support for justice – particularly in the form of prosecutions - is strong, but international

[524] See Cath Collins, 'Grounding Global Justice: International Networks and Domestic Human Rights Accountability in Chile and El Salvador' (2006) 38 Journal of Latin American Studies 711; Margaret E. Keck and Kathryn Sikkink, 'Transnational Advocacy Networks in International and Regional Politics' (1999) 51 (159) International Social Science Journal 89; Paige Arthur, 'How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 Hum. Rts. Q. 321, 359; Kathryn Sikkink, 'Patterns of Dynamic Multilevel Governance and the Insider-Outsider Coalition' in Donatella Della Porta and Sidney Tarrow (eds), *Transnational Protest and Global Activism: People, Passions and Power* (Rowman & Littlefield 2005); Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change,' (1998) 42 (4) International Organization 887; Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012).

[525] Subotic (n 515) 134-135.

[526] Interview with Ahmed Arman, Lawyer and Executive Secretary, National Organisation for Defending Rights and Freedoms (Sanaa, Yemen, 22 January 2014).

[527] Interview with Belkis Wille, Yemen and Kuwait Researcher, Human Rights Watch (Sanaa, Yemen, 22 January 2014).

pressure is not.[528] The long-standing peace versus justice debate in transitional justice and international criminal law scholarship may explain the decision not to prosecute in Yemen.[529]

Sharp usefully explains how the "transitional justice as peacebuilding" narrative only works where the concepts of justice and peace are synonymous with a liberal justice and a liberal peace. He argues:

> [I]nsofar as the goals of liberal international peacebuilding and the historical goals of transitional justice are essentially one and the same, transitional justice as peacebuilding may be little more than a dressed up tautology. More darkly, an amorphous 'transitional justice as peacebuilding' narrative may prove useful to autocratic regimes that would seek to use the tools and rhetoric of transitional justice to consolidate abusive regimes in the name of peace, just as victors have often done in the name of justice.[530]

Nevertheless, further research is needed on how the conflicting justice agendas between domestic and international actors affect transitional justice theory, which rests on the global accountability norm that many scholars claim is gaining ground.

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[528] This, of course, refers to international pressure at the international relations level. International human rights organisations, such as Amnesty International and Human Rights Watch, have consistently called for prosecutions.

[529] For more on the peace versus justice debate, see for example, Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-first Century: Beyond Truth versus Justice* (CUP 2006); Chandra Lekha Sriram, *Confronting Past Human Rights Violations: Justice versus Peace in Times of Transition* (Routledge 2004); Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012). See also David Pion-Berlin, 'To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone' in Neil J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Vol. 1 USIP 1995); Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals.* (Princeton University Press 2000); Human Rights Watch, 'Uganda: No Amnesty for Atrocities. Turning a Blind Eye to Justice Undermines Durable Peace.' (27 July 2006) <www.hrw.org/news/2006/07/27/uganda-no-amnesty-atrocities> accessed 17 August 2015; Diane F. Orentlicher, 'That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia,' Open Society Justice Initiative, International Center for Transitional Justice (July 2010); Leslie Vinjamuri, 'Justice, Peace and Deterrence in the Former Yugoslavia' (European Council on Foreign Relations, Background Paper, November 2013) <www.ecfr.eu/page/-/IJP_BosniaHerzegovina.pdf> accessed 17 August 2015. On why there have been few prosecutions for human rights violations, Cherif Bassiouni, writing in 2002, notes: "The answer is that justice is all too frequently bartered away for political settlements…the practice of impunity has become the political price paid to secure an end to the ongoing violence and repression. In these bartered settlements, accountability to the victims and the world community becomes the object of political trade-offs, and justice itself becomes the victim of realpolitik." Cherif Bassiouni (ed), *Post-Conflict Justice* (Transnational Publishers 2002) 7-8.

[530] Dustin N. Sharp, 'Emancipating Transitional Justice from the Paradigmatic Transition' 2014 IJTJ 1, 2.

International actors, particularly in the case of Libya and Yemen, thus constitute another set of influential actors that drove and shaped decisions regarding prosecution. Their objectives, however, were not monolithic as the supporters of the so-called global accountability norm would contend. Libya and Yemen demonstrate that the influence of international actors on domestic decisions regarding prosecution can – and indeed has – had very different outcomes. The involvement of the ICC in Libya, although fiercely resisted by certain domestic actors, drove domestic decisions to prosecute tens of members of the former Gaddafi regime.[531] The GCC, the United States, the European Union, and the United Nations had the opposite effect in Yemen: the negotiation of a deal granting immunity for the former president and his aides. Thanks to this immunity law that was passed in Yemen, domestic efforts to launch prosecutions of former political leaders for human rights violations committed before and during the 2011 uprising have been continuously blocked.[532] Just as there are competing objectives regarding criminal justice among domestic actors, so there are competing accountability preferences among international actors. The starkly opposing justice strategies in Libya and Yemen, then, weaken the international community's claim to a global accountability norm.

Why did some of the same international actors who advocated for criminal accountability in Libya almost simultaneously back an immunity deal in Yemen? An analysis of this difference in the preferences of international actors with regards to the pursuit of prosecutions in these two countries is crucial to understanding how such actors can have a significant and divergent impact on the shape of transitional

[531] Of those domestic actors, the Zintani militias, who continue to hold Saif al-Islam Gaddafi in custody, have been the most strongly opposed to ICC intervention.
[532] Law No. 1 of 2012 Concerning the Granting of Immunity from Legal and Judicial Prosecution, translated from Arabic to English by Amnesty International in *Yemen's Immunity Law – Breach of International Obligations* (March 2012) < www.amnesty.ca/sites/default/files/2012-03-30mde310072012enyemenimmunitylaw.pdf> accessed 10 July 2015.

justice in different countries. The United Nations Security Council requested the ICC to investigate crimes committed in Libya while stopping short of such a request with regards to Yemen. While the Security Council was swift in its issuance of resolution 1970 (2011) which referred the situation in Libya to the ICC, no such action was taken with regards to Yemen, despite the commission of grave crimes.[533] Eager to prevent instability and violence in Yemen that could threaten the stability of its neighbouring countries, particularly with the active presence of Al Qaeda in the Arabian Peninsula (AQAP) in Yemen, the GCC countries along with the United States and the European Union had decided that "the impunity law was the price to be paid for stability in Yemen."[534] The geopolitics of Libya, on the other hand, are such that the international community's endorsement of the ICC's involvement and of domestic efforts to prosecute were deemed less risky to the stability of Libya and the region.[535]

The Libyan and Yemeni cases reveal that, even in circumstances of severe domestic repression and limited interaction between domestic and international civil society, international actors can still significantly influence accountability decisions at the domestic level. At the same time, those same international actors exercise

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[533] This is particularly true for the 'Friday of Dignity' attack that took place in Yemen on 18 March 2011. See Human Rights Watch, 'Unpunished Massacre: Yemen's Failed Response to the "Friday of Dignity" Killings' (February 2013) < https://www.hrw.org/report/2013/02/12/unpunished-massacre/yemens-failed-response-friday-dignity-killings> accessed 26 July 2015.

[534] Interview with George Abu Al Zulof, Country Representative, OHCHR Yemen (Sanaa, Yemen, 23 January 2014).

[535] Ironically, the Security Council has not moved to pressure Libya to cooperate with the ICC, despite requests from the Court's Chief Prosecutor, Fatou Bensouda. Violent conflict has since gripped the country. Similar Security Council inaction in Sudan prompted the Chief Prosecutor to formally put the case on hold: "Given this Council's lack of foresight on what should happen in Darfur, I am left with no choice but to hibernate investigative activities in Darfur as I shift resources to other urgent cases, especially those in which trial is approaching. It should thus be clear to this Council that unless there is a change of attitude and approach to Darfur in the near future, there shall continue to be little or nothing to report to you for the foreseeable future." Fatou Bensouda on the situation in Darfur in her statement to the Security Council in December 2014. UN News Centre, 'Security Council Inaction on Darfur "can only embolden perpetrators" – ICC prosecutor' (12 December 2014) <http://www.un.org/apps/news/story.asp?NewsID=49591#.VbwfYyTaH7U> accessed 31 July 2015.

varying degrees of power that yield different outcomes related to prosecutorial decision-making. In the case of Yemen, for instance, the GCC was an external actor whose accountability preference (immunity for Saleh and his aides) overwrote domestic civil society's accountability preference (prosecution of Saleh and his aides). In the Libyan case, the 'shadow of the ICC,' or the threat of the ICC's involvement stirred some domestic judicial activity, albeit within a complicated political and security environment.[536]

It is worthwhile to revisit Koskenniemi's analysis of the politics of international law and the consequent selectivity of international actors. For instance, he refers to the Security Council's "notorious selectiveness"[537] when pushing for collective security actions in certain countries and not in others. "Selectivity," he argues, "is unavoidable."[538] While Koskenniemi makes this statement in the context of his discussion on collective security, it is applicable to international criminal law as well. It points to his overarching argument that law is a product of politics:

> It is an uninteresting truism that delegations couch decisions in legal garb to make them look respectable. That is the point of law…The question is never about security versus something else, but about "whose security" and "at what cost?"[539]

It is crucial, then, to examine the divergent objectives of not only transitional justice actors, but especially of transitional justice actors in varying transitional contexts. The stark contrast between the accountability preferences of the so-called international community in Libya and Yemen is an example of competing accountability agendas. The international community's divergent goals regarding Libya and Yemen may, perhaps, seem less contradictory when cast in the light of the

[536] Interview with Azza Maghur, Veteran Lawyer and Human Rights Activist (Tripoli, Libya, 17 September 2013); Interview with Dao Al Mansouri, Veteran lawyer and human rights activist (Tripoli, Libya, 18 September 2013).
[537] Koskenniemi, *The Politics of International Law* (n 512) 84.
[538] ibid 88.
[539] ibid 100, 111.

peace versus justice debate.[540] The immunity deal in Yemen was inspired by a strong desire on the part of the GCC to ensure a relatively peaceful transition on the basis that Saleh would remove himself from politics. On the other hand, the Security Council referred the Libyan situation to the ICC, signifying a clear preference for criminal accountability, even whilst the conflict was raging.[541]

Different *types* of international actors have different accountability agendas. Many prominent international human rights NGOs, such as Amnesty International, continue to advocate for prosecutions whether in Libya, Yemen, or elsewhere. The role of transnational advocacy networks as described by Keck and Sikkink, then, needs to be reviewed by taking into account the competing agendas of international actors with political interests at stake. The hierarchy between governmental and non-governmental actors at the international and domestic levels, for instance, must be taken into account when assessing the likelihood of success of transnational advocacy networks. Keck and Sikkink rightfully acknowledge the divergent goals of different transnational actors:

> [D]ifferent transnational actors have profoundly divergent purposes and goals. To understand how change occurs in the world polity we have to unpack the different categories of transnational actors, and understand the quite different logic and process in these different categories. The logic of transnational advocacy networks, which are often in conflict with states over basic principles, is quite different from the logic of other transnational actors who provide symbols or services or models for states.[542]

Subotic, on the other hand, points to a shortcoming of Keck and Sikkink's transnational advocacy network model. She argues that, "it underestimated the strength of domestic elite resistance to international norms and overestimated the

[540] See n 529.
[541] The ICC arrest warrants for Muammar Gaddafi, Saif-al-Islam Gaddafi and Abdullah El Senussi were issued in June 2011. At the time, the conflict was still ongoing and neither Gaddafi nor any of the other senior Gaddafi regime members had been captured.
[542] Margaret E. Keck and Kathryn Sikkink, 'Transnational Advocacy Networks in International and Regional Politics' (1999) 51 (159) International Social Science Journal 99.

power of norm supporters – domestic allies of transnational groups, such as NGOs and civil society."[543] Of the four case studies, Libya perhaps most strongly exemplifies Subotic's observation of the strength of domestic resistance to so-called international norms regarding accountability. Also, despite repeated calls by both domestic and international human rights organisations such as Amnesty International and Human Rights Watch on Egypt and Tunisia to pursue more comprehensive and fairer prosecutions of former leaders, domestic elite preferences – or the justice instrumentalists – prevailed.

The literature on the growing interdisciplinary relationship between international law and international relations provides a broader angle from which the Libyan and Yemeni cases can be considered. Power relations and the question of fixed versus changing state interests provide a possible explanation for the divergence of decisions regarding prosecution in Libya and Yemen. Put simply, it could be argued that Libya is an example of the use of international law to advance a particular course of international politics – the definitive rejection of the Gaddafi regime – while Yemen is an example of the rejection of international law, or of the 'culture of accountability' to protect certain political interests, power relations, and geopolitical stability. Anne-Marie Slaughter, Andrew Tulumello and Stepan Wood argue for a collaborative research agenda between international relations and international law scholars and provide examples of such collaboration between domestic and international courts:

> [B]oth national and international courts are attracting increased attention in terms of their actual or potential relationship with one another, either as partners in enforcing international rules or as participants in a larger dynamic process of socialization in the service of compliance.[544]

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[543] Subotic (n 515) 134.
[544] Anne-Marie Slaughter, Andrew Tulumello and Stepan Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92 (3) AJIL 367, 392.

However, this collaboration is not the case when viewed through the Libyan and Yemeni cases where domestic and international demands regarding prosecution have clashed. The fundamental tension between international relations and international law, as it has unfolded in these two cases, thus requires further examination. As the authors suggest, "what counts as a theory or explanation of action may be extremely context dependent, raising the question of whether the goal of research can be to develop a single theory of action."[545] International law in the form of the ICC served political interests in the context of Libya, resulting in the Security Council's referral of the situation to the ICC. In the case of Yemen, international law in the form of accountability norms did not serve political interests and instead resulted in the issuance of the immunity law.

Libya and Yemen: A TWAIL Perspective

From yet another broader perspective, the difficulty of a universally applicable theory of transitional justice becomes even more prominent when viewed through the body of critical legal scholarship known as Third World Approaches to International Law (TWAIL). While TWAIL does not and indeed cannot fully explain why accountability in the form of prosecutions is sometimes pursued and sometimes not, it nevertheless provides a useful critical framework through which the divergent strategies of international actors in Libya and Yemen can be understood. I will first outline the main tenets of TWAIL followed by a brief analysis of how it applies to the Libyan and Yemeni case studies.

The most recurrent Third World protest to the practices of the dominant international human rights system is the inconsistency between legal text and legal

[545] ibid 388.

practice. The importance of TWAIL lies in its ability to reveal that the practices of international institutions with regards to Third World issues are inconsistent with the international community's ode to equality as enshrined, for example, in the Preamble of the Charter of the United Nations.[546] TWAIL seeks an explanation for the continued Third World resistance to established international human rights norms deemed universally applicable by what appears to be a relatively small but powerful section of the international community, the hegemonic 'West.'

Caution, of course, must be taken against the overly simplified use of the Third World versus West distinction. Resistance to international human rights norms is not exclusive to the Third World, but can also be found in the West, although the resistance in both cases is waged from within different contexts. The Third World context of resistance is linked to the region's shared anti-colonial history and its post-colonial present.[547] Western resistance to international human rights norms emerges both from its fear of being held accountable by an international human rights system largely of its own making and from its refusal to risk the fulfillment of its political and economic interests for the grander sake of protecting human rights. It must also be mentioned that far from homogenous in cultural and political ideals, Third World states are similarly culpable of exploiting the international human rights system in ways that further their own national goals,

[546] "We the peoples of the United Nations determined, to save succeeding generations from the scourge of war…and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." Preamble, *Charter of the United Nations* (1945). This heroic role to 'save' people from war along with the promise of equal treatment to 'nations large and small' has been met with skepticism by most TWAILers and other critics, owing to the actions of the international community in certain key situations, such as NATO's military campaign against Yugoslavia, the war against Iraq, and the broader, elusive 'war against terror,' just to name a few. Differential treatment is practiced in these cases because actors such as NATO are not held accountable for their own atrocities while the opposite is true for the other parties to the conflict. See Michael Mandel, 'Illegal Wars and International Criminal Law' in Antony Anghie, Bhupinder Chimni, Obiora Okafor and Karen Mickelson (eds), *The Third World and International Order: Law, Politics and Globalization* (Brill Academic Publishers 2003) 131.

[547] Obiora Chinedu Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective' (2005) 43 Osgoode Hall Law Journal 171, 174, 178.

especially those of national elites, at the expense of the protection of the larger majority's human rights. An example of this instrumental use of human rights that has been cited throughout this thesis is the scapegoating of certain former political leaders in court in order to avoid more comprehensive prosecutions for a more comprehensive set of crimes.

By virtue of its purpose to ensure criminal accountability and to counter impunity, the ICC's mandate falls nicely within the liberal transitional justice paradigm. However, these liberal values were deemed harmful by the regional and international actors negotiating the transition in Yemen. Aside from the fact that the possibility of prosecutions was effectively eliminated through the immunity law, no notable efforts were made by international actors for alternative forms of justice in Yemen. No truth commissions and other reconciliation methods were pursued or materialised. The precarious security situation has also, of course, prevented progress in this regard, but challenges such as lack of security and ongoing conflict did not preclude prosecutions and other transitional justice mechanisms from taking place in other parts of the world, including in the former Yugoslavia and indeed in Libya.

This again brings to the fore the question of whether the global accountability norm is as strong as its proponents contend. As Gerry Simpson argues, "“The fear […] is that the ICC may become another particularistic institution and part of the deepening constitutionalism of the liberal project; aspiring to universality but remaining relevant only to the good citizens of the international order."[548] Shamsan's views on the role of international – read Western – actors in Yemen and in the Arab region in general are worth repeating here:

[548] Gerry Simpson, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order.* (CUP 2004) 8.

> The UN is controlled by big powers which are run by institutions, not individuals. They build their decisions based on studies. Europe views us – the Third World – as barbaric, reactionary. They're fine with an almost collapsed state – it's in their interests. So long as it is 'stable' enough not to cause too many problems for them.[549]

Shamsan's comments reflect the clash of international law and international relations described earlier. The rejection of international law in Yemen to protect the power relations and geopolitical interests of a select few, namely the GCC and in particular Saudi Arabia, meant that the realpolitik of international relations had different plans for Yemen than it did in Libya. It is, therefore, difficult to claim that a global accountability norm is gaining strength without accounting for what continues to be a very important component of international criminal law debates and practices: amnesty laws.[550]

Content and Extent of Decisions Regarding Prosecution

The limited content and extent of the investigations and prosecutions that took place in all four case studies further underline the need to develop transitional justice theory. The emphasis on accountability for corruption and socio-economic crimes and a much more limited form of accountability for civil and political crimes in Egypt and Tunisia, for instance, points to a practice of scapegoating certain crimes in order to avoid the prosecution of a more comprehensive set of crimes. Moreover, certain highly symbolic individuals, such as Mubarak and Ben Ali, were prosecuted while several others were not. This practice of scapegoating is used by political leaderships with the aim of producing an authoritative image of a break with the former regime. In reality, however, the influence of the *feloul* in Egypt, the *anciens*

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[549] Interview with Tamer Shamsan, Political Activist; Columnist (Sanaa, Yemen, 22 January 2014).

[550] See, for example, Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (CUP 2012). See also discussion on amnesties and prosecutions in the literature review in Chapter 1.

nouveaux in Tunisia and former President Saleh's political maneuverings in Yemen reveal otherwise. The very limited human rights prosecutions that have taken place thus point to the controlled nature of the transitions.

Nagy offers an important reminder that transitional justice is, by its nature, a selective process due to resource, time and political constraints.[551] While these constraints are pertinent to the Arab region case studies and have been discussed in Chapter 3 as shaping factors, the political constraints of the Arab region prosecutions require a close examination because of their significant role in limiting the extent of the investigations and trials. By prosecuting only a handful of individuals for a significantly limited set of crimes, those actors shaping the prosecutions aim to create the impression of a symbolic break with the former regime in order to appease an outraged public that demanded the prosecutions in the first place. Moreover, the limited selection of individuals that faced investigation and prosecution points to a prosecutorial strategy that is motivated by elite preferences and leadership interests rather than by the merits of the so-called global accountability norm. Finally, the focus on crimes *of* the transition in the investigations and trials that have taken places leaves decades of human rights violations unaccounted for.[552]

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[551] Nagy, 'Transitional Justice as Global Project' (n 494) 276.

[552] Tunisia's Truth and Dignity Commission (TDC) may become an exception to this. Isabel Robinson explains the importance of 'quasi-judicial' powers of the TDC and the expanded scope of the crimes to be covered: "Created in December 2013, the TDC was launched in June 2014 and will run for four years, with the possibility of a one-year extension…The law aims to address past human rights violations committed by previous regimes, in particular the regime of former President Zine al-Abidine Ben Ali, who ruled from 1987 until the revolution in January 2011. During this time, Ben Ali's extended family reportedly embezzled millions and, by 2010, controlled approximately 20 per cent of private sector profits in Tunisia. In addressing corruption, the TDC will combine investigation, arbitration and reform functions. The Commission is mandated to investigate violations committed by the state and organized groups from July 1955 to December 2013… The significant powers of the TDC regarding arbitration and vetting effectively mean that the TDC's work vis-a-vis corruption is characterized by a quasi-judicial nature. This is not necessarily a new phenomenon; indeed, there have been truth commissions that have had subpoena powers (including for individuals or documents and other objects) and search and seizure powers. However, it is certainly the first time that a truth commission has been given such far-reaching powers vis-a-vis corruption." Isabel Robinson, 'Truth Commissions and Anti-Corruption: Towards a Complementary Framework?' 2014 IJTJ 2, 13, 16.

Before discussing the implications of the emphasis on corruption and socio-economic crimes in the Arab region prosecutions, it is worth clarifying what is meant by 'corruption.' Isabel Robinson usefully sums up the difference between grand and low-level corruption:

> [C]orruption can…be understood as a systematic and structurally entrenched phenomenon that affects all social interactions. In this regard, it is important to distinguish between high-level or 'grand' corruption, involving appropriation of large sums of money by heads of state and senior officials, and low-level corruption – also referred to as 'administrative' or 'petty' corruption – which takes place 'at the implication end of politics, where citizens meet public officials.'[553]

In the Arab region case studies, both grand and low-level types of corruption took place and contributed to the 'visibility' that several interviewees referred to when explaining the impetus behind demands for accountability.[554] The investigations and prosecution charges, however, pertain to the type of grand corruption that Robinson mentions.

The content and extent of decisions regarding the prosecution of political leaders demonstrate that the Arab region is beyond recent debates calling for the merging of the two sets of rights in transitional justice mechanisms. Vasuki Nesiah laments the absence of sufficient consideration of Pinochet's harmful macroeconomic policies in his trial. She argues that the Chilean and South African cases show that transitional justice often backgrounds systemic factors such as economic and racial structures, "rather than shining a light on them as enabling conditions of human rights abuse…[they] deter and distract from structural violence."[555] Sharp argues that economic violence has been the "blind spot of

[553] Isabel Robinson, 'Truth Commissions and Anti-Corruption: Towards a Complementary Framework?' [2014] IJTJ 2.
[554] See Chapter 3.
[555] Vasuki Nesiah, 'The Trials of History: Losing Justice in the Monstrous and the Banal' in Ruth Buchanan and Peer Zumbansen (eds), *Law in Transition: Human Rights, Development and Transitional Justice* (Hart 2014) 305. Nesiah notes that despite a sharp rise in poverty under

transitional justice" as it is rarely scrutinised as much as human rights violations.[556] Abou-El-Fadl draws attention to Egypt as an example of how conventional transitional justice falls short of addressing the former regime's violation of social and economic rights.[557] The "invisibility" of the economic dimension of transitional justice is further highlighted by Miller, who argues that its inclusion would help ensure a more comprehensive accountability that would prevent renewed violence and inequality.[558]

Various scholars have proposed several explanations for why socio-economic rights have not been included in most transitional justice processes in other parts of the world. For example, transitional justice is largely based on traditional international human rights law, which has long viewed economic and social rights as "entitlements" rather than "rights."[559] Other explanations include the difficulty to ascribe responsibility to individuals for socio-economic crimes and that social justice is a longer-term political process that short-term transitional justice mechanisms cannot fully take into account.[560] Moreover, scholarly discussions on the inclusion of economic and social rights in transitional justice mechanisms focus on their place in truth commissions and reconciliation deals, with limited discussion on their place in criminal prosecutions. As Makau Mutua notes, despite significant efforts to incorporate socio-economic justice into transitional justice mechanisms, "the human

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Pinochet's rule, "it is striking that the impact of Pinochet's macroeconomic policies is not part of Chile's transitional justice story." Nesiah (2014) 295-296.

[556] Dustin N. Sharp, 'Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice' (2012) 35 Fordham International Law Journal 780, 782.

[557] Reem Abou-El-Fadl, 'Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will' (2012) 6 (2) IJTJ 318.

[558] For a more detailed discussion of the call for the inclusion of socio-economic accountability in transitional justice mechanisms, see Literature Review in Chapter 1.

[559] Louise Arbour, 'Economic and Social Justice for Societies in Transition' (Second Annual Transitional Justice Lecture hosted by the Center for Human Rights and Global Justice at New York University School of Law and by the International Center for Transitional Justice, New York University School of Law, 25 October 2006).

[560] Lars Waldorf, 'Anticipating the Past? Transitional Justice and Socio-Economic Wrongs' (2012) 21 (2) Social and Legal Studies 171.

rights idiom speaks largely in the language of the entitlements that are germane to a liberal, market democracy. It focuses on the so-called core rights that are essential to securing the people against political tyranny, but does little to ward off the privations that come from economic despotism."[561]

The Arab region prosecutions, on the other hand, show that contrary to most transitional justice experiences in other parts of the world,[562] corruption and socio-economic crimes figured quite heavily in the charges. Moreover, despite strong demands for accountability for civil and political rights, they have taken a much more limited form, largely focusing on crimes *of* the transition (as in Egypt, Libya and Tunisia), or they have been dismissed almost entirely (as in the case of Yemen). The reasons for this particular content and extent – or shape – of decisions regarding prosecutions are complex, as presented by the findings in Chapter 3. A number of conclusions can be drawn from them. However, a brief review of the explanations for the content and extent of the prosecutions is worthwhile here, followed by a discussion of their important implications for transitional justice research and practice.

Factors Shaping the Content and Extent of Decisions Regarding Prosecution in Egypt, Libya, Tunisia and Yemen: A re-cap

Egypt experienced a controlled transition, whereby the military and other state agencies worked to ensure that investigations and trials did not extend 'too far' so as not to harm their political interests and subject themselves to prosecution. Linked to this explanation is the role of a politicised judiciary in blocking certain controversial cases. A third factor is the victims, activists and lawyers who were active in pursuing prosecutions were preoccupied with the more recent crimes of

[561] Makau Mutua, 'What is the Future of Transitional Justice' (2015) 9 (2) IJTJ 4.
[562] A few exceptions here include the trial of General Augusto Pinochet (Chile), Alberto Fujimori (Peru), Suharto (Indonesia) and Joseph Estrada (Philippines).

2011 because they are 'fresher' and therefore easier to prosecute.[563] Fourth, the absence of an enabling legal framework and other legal challenges such as the requirement of direct evidence have made human rights prosecutions particularly difficult, thereby limiting the extent of individuals on trial. Fifth, the emphasis on corruption and economic crimes was used as a means to scapegoat certain high-level individuals to deflect attention from the lack of accountability for a more comprehensive set of human rights violations and their perpetrators.

In Tunisia, a number of explanations for the content and extent of prosecutions emerge. These include: a.) a combination of the relative success of workers' movements; b.) a history of a very visible and rampant corruption; c.) specific public demands for prosecution; d.) a weak judiciary and legal framework, and e.) the anticipation of a truth and reconciliation commission that would address a more comprehensive set of crimes.[564] A pre-occupation with political stability immediately following the uprising also stalled decisions regarding the prosecution of political leaders for human rights violations.

The very few prosecutions that took place in Libya since Muammar Gaddafi's ouster primarily focus on crimes committed during the 2011 conflict. Given the difficulty of access to the trials, the list of charges remains ambiguous.[565] While the number of corruption charges does not match those of the prosecutions in Egypt and Tunisia, they are overwhelmingly focused on crimes of the transition, particularly the killing of protesters and mass rape. Three main factors help explain the limited

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[563] Interview with Gamal Eid, Human Rights Lawyer, Activist and Director of the Arabic Network for Human Rights Information (Cairo, Egypt, 8 December 2013).

[564] This has been named the "Truth and Dignity Commission," or TDC. See n 552.

[565] Elham Saudi, for example, explained that her organisation, Lawyers for Justice in Libya, faced difficulty in obtaining information on the charges. Elham Saudi in Noha Aboueldahab, 'Rapporteur's Report: Prosecutions, Politics and Transitions: How criminal justice in the Arab Spring is shaping transitional justice' (Panel discussion, Durham Law School Durham 6 May 2014) <www.academia.edu/8738334/Rapporteurs_Report_Prosecutions_Politics_and_Transitions_-_How_criminal_justice_in_the_Arab_Spring_is_shaping_transitional_justice> accessed 26 July 2015. Details of some of the charges are explained in Chapter 2.

content and extent of the prosecutions. First, an enabling legal framework that is equipped to prosecute serious crimes such as war crimes and crimes against humanity is absent. Second, victims and their families do not trust the judiciary to independently carry out investigations and trials, which has limited the number of legal complaints filed. There is also a serious lack of awareness and understanding among victims, lawyers, judges and the elite regarding the "concept of justice" as enshrined in international treaties.[566] Third, a dangerous security situation means that many judges and lawyers fear for their lives when asked to represent Gaddafi regime officials and loyalists.

International actors, geo-politics, legal challenges and a fairly ambiguous transition all contributed to the decision not to prosecute in Yemen. Weak judicial institutions are a significant factor that shaped decisions not to prosecute. Moreover, problems of security in Yemen have also infiltrated the judiciary. Judges and prosecutors have been – and continue to be – assassinated.[567] The strong involvement of the military in politics is yet another factor that has severely restricted progress towards prosecutions. As a result, even in cases where officials who hold high-level governmental positions are supportive of the push for criminal accountability of political leaders, their goals are quashed by other more powerful actors. Despite the immunity law and the challenges discussed above, there are efforts in Yemen to seek accountability for political leaders – whether in the form of prosecutions, truth commissions, or through other transitional justice mechanisms. A focus on crimes *of* the transition, namely, the killing of peaceful protesters in 2011 has left the subject of pre-transition crimes to be dealt with by the non-existent

[566] Interview with Lydia Vicente, Executive Director, Rights International Spain (Telephone interview, 16 April 2012).
[567] Interview with George Abu Al Zulof, Country Representative, OHCHR Yemen (Sanaa, Yemen, 23 January 2014).

transitional justice law. A number of explanations for this limited scope of crimes emerged.

First, prosecuting crimes committed during the 2011 uprising is, as Al Kamali explained, easier and more practical. It is easier because "all the various political factions who continue to wield power in Yemen were involved in pre-2011 crimes. 2011 crimes are more straightforward – the killing of protesters, full stop."[568] Tayler observed that the question of how far back the transitional justice law should go was a "key sticking point" for the same reasons that Al Kamali identified.[569] Secondly, a lack of direct evidence linking Saleh and other high-level government officials to crimes such as the Friday of Dignity killings case significantly weakened prospects for prosecution. The destruction of evidence that Barman mentioned is also a contributing factor.[570] Third, and perhaps most importantly, is that the complex and uncertain nature of Yemen's transition has significantly impacted decisions regarding prosecution, effectively resulting in the immunity law.

Implications for Transitional Justice Theory and Practice

Despite the fact that the trials and overall transitional justice process in the Arab region have been heavily politicised and face many challenges, they present an opportunity to develop transitional justice theory and practice. First, the Arab region cases demonstrate that addressing socio-economic crimes is a possibility, even within a difficult and opaque judicial and authoritarian environment.[571] While

[568] Interview with Hamza Al Kamali, Member of the Transitional Justice Working Group, National Dialogue Conference (Sanaa, Yemen, 22 January 2014).
[569] Interview with Letta Tayler, Senior Researcher, Human Rights Watch (Telephone interview, 21 November 2013).
[570] ibid.
[571] Simon Robins, 'Mapping a Future for Transitional Justice by Learning from its Past' 2015 IJTJ 1. "While the politics that accompany transitional justice deny the social and the economic as justice issues, the Arab Spring has confronted the discourse with transitions driven by slogans such as 'bread, freedom and dignity.' The revolutions in Egypt and Tunisia were catalysed by graduate

scholars and practitioners have been consumed with cautioning transitional countries against neglecting the incorporation of socio-economic rights crimes in their transitional justice mechanisms, the case studies in this thesis demonstrate that corruption and economic crimes have taken centre stage in many of the investigations and trials.[572] Robins makes a similar observation:

> While the politics that accompany transitional justice deny the social and the economic as justice issues, the Arab Spring has confronted the discourse with transitions driven by slogans such as 'bread, freedom and dignity.' The revolutions in Egypt and Tunisia were catalysed by graduate unemployment and rapid rises in the prices of basic foods. This presents both a challenge and an opportunity for approaches to justice in transition, in terms of looking beyond electoral democracy and civil and political rights.[573]

Given the vast extent of corruption, which involved the embezzlement of tens of millions of dollars in Egypt, Libya, Tunisia and Yemen, some interim authorities decided to settle for reconciliation deals, as in Egypt and Tunisia.

Through such deals, business tycoons such as Hussein Salem and former presidents such as Mubarak would pay the state the money they gained illicitly and this money would be used to help re-build Egypt's battered economy. Legal steps were taken to facilitate these reconciliation deals, particularly the SCAF Decree No. 4 of 2012, which "gives immunity from criminal prosecution to businessmen accused of corruption under Mubarak and offers them the chance to settle their cases with government commissions."[574] Wageeh explained that the military justified these reconciliation deals as a means to protect capitalism and restore economic security.

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unemployment and rapid rises in the prices of basic foods. This presents both a challenge and an opportunity for approaches to justice in transition, in terms of looking beyond electoral democracy and civil and political rights. In Tunisia, for example, the Organic Law on Transitional Justice has created a novel class of transitional justice actor by defining groups of individuals who have been socially marginalized or excluded as 'collective victims.' Robins (2015) 6.

[572] See Literature Review in Chapter 1. See also Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 IJTJ 339. They argue, however, that socio-economic crimes are best addressed through reparations, which can offer both "corrective and distributive justice." Gready and Robins (2014) 347, 356.

[573] Robins, 'Mapping a Future for Transitional Justice' (n 571) 6.

[574] Maha Abdelrahman, *Egypt's Long Revolution: Protest Movements and Uprisings* (Routledge 2014) 130.

Rather than imprison individuals for such grand corruption and economic crimes, the reconciliation deals proved somewhat popular among a public eager to improve an economy "in tatters."[575] Tunisia took similar steps toward reconciliation deals with corrupt business tycoons and former Ben Ali regime officials in order to revive its economy. Its proposed Reconciliation Bill effectively offers immunity from prosecution in exchange for a portion of illicit gains to be returned to the state. David Tolbert, the president of the ICTJ, heavily criticised the proposed bill and emphasised the mutually reinforcing nature of socio-economic and political crimes:

> Massive corruption and violent human rights violations are mutually reinforcing, and unless this linkage is exposed and broken, it can lead to mutually reinforcing impunity. This is the lesson Tunisia must learn from the legacy of the brutal and corrupt Marcos dictatorship in the Philippines, which killed, tortured and forcibly disappeared approximately 10,000 victims, and from the Duvaliers in Haiti, and the Fujimoris in Peru. All were responsible for massive human rights violations. All of them committed large-scale corruption.[576]

A stronger account for the few yet significant cases in which corruption and socio-economic crimes *were* the focus of prosecutions, as in the Asian examples cited by Lutz and Reiger and now in the Arab region as well, is therefore needed.[577]

Second, the inclusion of socio-economic accountability does not, of course, necessarily imply a more comprehensive transitional justice process is in place. The Arab region cases, specifically Egypt and Tunisia where the trials are at their most advanced stage in comparison to Libya and Yemen, demonstrate that the inclusion of socio-economic crimes is, on its own, insufficient in ensuring a more comprehensive accountability mechanism. On the contrary, due to scapegoating strategies to appease public anger and to foment a symbolic "break" with the past, the focus on

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[575] Interview with Tamer Wageeh, Director, Economic and Social Justice Unit, Egyptian Initiative for Personal Rights (Cairo, Egypt, 8 December 2013).

[576] David Tolbert, 'Tunisia's Reconciliation Bill Threatens Gains of the Revolution' (Huffington Post, 17 August 2015) <www.huffingtonpost.com/david-tolbert/tunisias-reconciliation-b_b_7906230.html> accessed 18 August 2015.

[577] Lutz and Reiger (n 508) 280-282.

corruption and socio-economic crimes has served as a means to protect interim and post-transitional authorities from prosecution for human rights crimes. Speaking about Egypt, Ziad Abdel Tawab notes:

> None of the violations of the past, including forced disappearances, constitutional and human rights violations have been prosecuted, except for some cases of corruption. This is an attempt by the military to show that the revolution was only about the corruption.[578]

In this sense, the prosecution of political leaders for corruption crimes reflects the use of transitional justice for strategic purposes. As Thomas Risse, Stephen C. Ropp and Sikkink observe, "Repressive governments often adapt to normative pressures for purely instrumental reasons" – those reasons being appeasement of public anger and a disingenuous attempt to show a definitive break with the former regime.[579]

Third, the focus on crimes *of* the transition, particularly in Egypt and Yemen, presents a very real risk of the propagation of conflicting narratives regarding legacies of past injustices. This limited content of the trials furthers the use of transitional justice to entrench authoritarian rule. Michael Wahid Hanna warns against the detrimental consequences of the fabrication of historical narratives in Egypt. There, conflicting narratives on past atrocities have already had negative consequences and have derailed the transitional justice process.[580] It will be a long while before Tunisia's Truth and Dignity Commission yields results, including trials, as it was only established in June 2014. It may, however, become an example of how to expand the content and scope of the crimes through a specialised mechanism that is separate from the ordinary courts where the trials have thus far been conducted.[581]

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[578] Ziad Abdel Tawab, Deputy Director of the Cairo Institute for Human Rights Studies, quoted in Abou-El-Fadl (n 541) 327.

[579] Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds), *The Power of Human Rights. International Norms and Domestic Change.* (CUP 2007) 15.

[580] Michael Wahid Hanna, 'Egypt and the struggle for accountability and justice' in Kirsten J. Fisher and Robert Stewart (eds), *Transitional Justice and the Arab Spring* (Routledge 2014).

[581] See n 552. It should be noted here that in Tunisia, most trials of former political leaders were conducted in military courts. See Human Rights Watch, 'Flawed Accountability: Shortcomings of

Fourth, the uses of the limited criminal sanction, as proposed by Teitel and Orentlicher, fall short of explaining the limited extent of the investigations and trials in the Arab region case studies. The strategic limitation of prosecutions for the sake of preserving the "return to a liberal state"[582] and the broader stability of the transition itself offer only a partial explanation for the decisions regarding the extent of individuals who faced investigation and prosecution. Orentlicher warns against the cynical use of prosecutions as a scapegoating practice. "This might happen," she explains, "if prosecutions were directed against only low-level participants in a system of past atrocities or if patently political considerations infected the determination of defendants."[583] Teitel defines the limited criminal sanction as a practice of criminal investigations and prosecutions followed by little or no penalty. She identifies this practice as a partial process "that distinguishes criminal justice in transition," because it does not result in full punishment.[584] The merits of the limited criminal sanction, Teitel continues, is that it offers a "pragmatic resolution of the core dilemma of transitions; namely, that of attributing individual responsibility for systemic wrongs perpetrated under repressive rule."[585]

The problem with this argument is that it does not take into account complex transitions that do not constitute a shift to liberal rule. As an anonymous interviewee explained, the practice of selective prosecutions Egypt and Tunisia was a strategy aimed to "sacrifice a part of the regime to save the regime."[586] The starkly opposing

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Tunisia's Trials for Killings during the Uprising' (January 2015) <www.hrw.org/report/2015/01/12/flawed-accountability/shortcomings-tunisias-trials-killings-during-uprising> accessed 26 July 2015.

[582] Teitel, *Transitional Justice* (n 492) 67.

[583] Diane Orentlicher 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' in Neil J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Vol. 1 USIP 1995) 410.

[584] Teitel, *Transitional Justice* (n 492) 99.

[585] ibid 100.

[586] Interview with anonymous senior expert on transitional justice in Egypt, International Center for Transitional Justice (14 June 2013).

motivations behind Teitel's description of the limited criminal sanction and the ways in which it has unfolded in the Arab region suggest the need for a serious reconsideration of the various and competing claims of transitional justice agents. Teitel further suggests that where prosecutions fail to provide full accountability, other mechanisms that recognise and condemn past atrocities can have transformative impact, "the public establishment of which liberates the collective."[587] But where there is a strong and very public demand for a retributive justice in the courts, the "mere exposure of wrongs"[588] would fall far short of meeting victims' expectations and desires. Moataz El Fegeiry and others have noted that for the Arab Spring protesters, justice means retribution, while reparations and truth commissions do not hold any significance. People are not so much concerned with the justice process itself; they instead want to see the outcome, such as imprisonment.[589]

On the other hand, Koskenniemi suggests that selective trials that are also show trials – in the sense that they do not establish a full picture of the truth about past atrocities – are sufficient for the mere recognition that suffering was inflicted

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[587] Teitel, *Transitional Justice* (n 492) 101.
[588] ibid.
[589] Noha Aboueldahab, 'Rapporteur's Report: Prosecutions, Politics and Transitions: How criminal justice in the Arab Spring is shaping transitional justice' (Panel discussion, Durham Law School Durham 6 May 2014). Even in Libya, where the progress of prosecutions has been much slower than in Egypt and Tunisia, the selective extent of criminal accountability was institutionalised early on. The International Crisis Group's report on Libya explains: "Overshadowing the security situation has been the lack of accountability for crimes committed by rebel fighters during and after the 2011 conflict. Rather than being investigated, those suspected of such acts often are hailed as national heroes. The state's unwillingness or inability to look into the unlawful killing of prisoners of war throughout 2012 has contributed to the fighters' feeling of operating above the law. Although this might be a prudent course of action to avoid an open confrontation between government forces and independent armed groups, it inevitably carries the risks of entrenching lawlessness and becoming a trigger of violence. The [National Transitional Council] in effect gave legal sanction to impunity in May 2012 when it amnestied those who had committed crimes – including murder and forced displacement – during the uprising." Law 38/2012 on 'Special Procedures during the Transitional Period' grants immunity from prosecution to 'revolutionaries' for 'military, security and civilian acts required by the 17 February Revolution' committed with the 'purpose of leading the revolution to victory.' International Crisis Group, 'Trial by Error: Justice in Post Qadhafi Libya,' (April 2013) 28.

and wrong.[590] Koskenniemi outlines the limits of criminality, especially as an inevitable focus on individual leaders may "serve as an alibi for the population at large to relieve itself from responsibility."[591] Instead, or as a complement to criminal trials, he argues that truth commissions are able to address context in a way that criminality, especially in the form of prosecutions, cannot.[592] It is too early to assess whether transitional justice mechanisms other than prosecutions will become acceptable for victims in the Arab region case studies. The merits of the limited criminal sanction, however, need to be re-examined when selective trials – both in content and extent – instead have a negative impact on the course of transitions and the stability of the state. The polarisation of Egyptian society, for example, is in many ways tied to those with loyalties to the Mubarak regime and those who have a strong desire to see more radical change and a clearer break with the authoritarian past. The result is a highly contentious justice process that has largely contributed to the suffering, rather than the healing, of victims and their families.

Crippled Judiciaries, Crippled Prosecutions: Transitional justice in non-liberal transitions

The Arab region cases demonstrate that a re-thinking of transitional justice needs to take into account the absence of pre-existing democratic structures and what this means for criminal accountability prospects in such transitional contexts. The challenges of pursuing prosecutions during highly contentious transitions where weak and politicised judiciaries are crippled by executive power meddling and by an inadequate legal framework need closer examination. The case studies show that prosecutions of political leaders in times of transition provide a major opportunity

[590] Koskenniemi, *The Politics of International Law* (n 512) 178.
[591] ibid 181.
[592] ibid 179.

for the use and abuse of transitional justice for political ends. These ends are intimately tied to the nature of the transition, which as explained previously, does not fall neatly within the paradigmatic shift from authoritarian to liberal, democratic rule. The Arab region cases therefore present transitional justice – and criminal prosecutions in particular – as a process that prioritises politics over accountability, strengthens repression, and buttresses the overall disregard for the rule of law and for establishing the truth about past atrocities. This process has seen the use of military trials in Egypt to silence opposition, arbitrary and non-transparent judicial decisions in Libya, questionable acquittals in Tunisia, and an immunity law against the will of many Yemenis with detrimental political and security consequences. The lack of adequate legal frameworks has led to questionable acquittals, stagnant trials and the absence of trials in several cases. The abuse of transitional justice – currently and largely understood as a liberalising process – has instead strengthened repressive rule post-transition, effectively turning transitional justice and its prosecution mechanism on its head. As Nesiah aptly describes the motivations behind transitional justice decisions: "…transitional justice initiatives anchor a political horizon that bends towards historical closure and away from historical accountability."[593]

The argument that previously existing democratic institutions, particularly functioning judiciaries, are necessary in order for adequate trials to take place post-transition falls significantly short of explaining the course of transitional events in the Arab region. Teitel warns against political justice and unfair trials and calls attention to the necessity of democratically functioning institutions in order to avoid such a scenario. Similarly, Lutz and Reiger argue that "accountability, by itself is neither sufficient nor possible absent other functioning democratic institutions,

[593] Nesiah (n 555) 293.

including an independent judiciary…"[594] It is useful to recount Huyse's assessment of the Belgian, Dutch and French experiences in addressing their past atrocities following World War II. Huyse argues that the democratic institutions and structures that existed prior to the four years of repressive rule in those countries were able to survive and were not completely eliminated: "…four years of occupation and collaboration were insufficient time for the authoritarian regime's legal culture and codes to take root."[595] This may explain the speed with which prosecutions were initiated.[596] On the other hand, Huyse points to Central and Eastern Europe – particularly Czechoslovakia, Poland and Hungary – where communist regimes lasted for forty years. This meant that decision making on crime and punishment was much slower and "[t]he legal culture created by communism was firmly established and [proved] hard to eradicate."[597]

The United Nations' solution to the lack of democratically functioning institutions needed to carry out fair prosecutions is to involve international and hybrid tribunals. It proposes the following in its guidance note on transitional justice:

> States emerging from years of conflict or repressive rule may be unable or unwilling to conduct effective investigations and prosecutions. In such situations, international and hybrid criminal tribunals may exercise concurrent jurisdiction… The ICC operates on the basis of the principle of complementarity articulated in article 17 of the Rome Statute. As such, it should also contribute to the development of national capacities to bring alleged perpetrators of international crimes to justice.[598]

The killing of protesters during the Arab Spring uprisings would not reach the gravity threshold required to qualify as an international crime that the ICC, for

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[594] Lutz and Reiger (n 508) 4.
[595] Luc Huyse, 'Justice After Transitions: On the Choices Successor Elites Make in Dealing with the Past' in Neil J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Vol. 1 USIP 1995) 111.
[596] ibid.
[597] ibid.
[598] Guidance Note of the Secretary General, 'United Nations Approach to Transitional Justice' (March 2010) <www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf> accessed 28 July 2015.

instance, could address. On the other hand, a special tribunal or hybrid tribunal could, as the United Nations suggests, overcome the problem of a state's inability to carry out prosecutions due to a legacy of weak and corrupt institutions. Such a tribunal would not work, however, if the concerned state were unwilling to carry out prosecutions or to provide the evidence required to conduct prosecutions internationally. This leaves the question of the inexistence of democratically functioning institutions and a state's consequent inability to carry out fair prosecutions unresolved. Indeed, it is a very real issue in Egypt, Libya, Tunisia and Yemen, as the intelligence agencies, the police and other security agencies have either refused to submit or destroyed evidence requested by the courts to carry out prosecutions of former leaders. The problem, then, is not just weak and corrupt judiciaries. Where judiciaries are functioning, a non-cooperative police or intelligence force could seriously hamper the proceedings of a trial.

Sharp argues that scholarly deliberations on the shortcomings of mainstream transitional justice's assumptions "go to the heart of the field's potential to serve as an instrument for the consolidation of more democratic societies grounded in positive peace."[599] But in Egypt, Tunisia, Libya and Yemen, it was the very lack of democratically functioning institutions – and in particular the judiciary – that in large part led to the uprisings and prevented fair prosecutions from taking place. It is unclear, then, how Teitel and others, including those from the critical literature such as Sharp and Obel Hansen, would explain the possibility of having democratically functioning institutions in place during a phase of the "fledgling liberal state,"[600] particularly when the lack of such institutions was the reason the transitions occurred in the first place. Skaar's nuanced account of the developments within the

[599] Dustin N. Sharp, 'Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice' (2013) 26 Harvard Human Rights Journal 178.
[600] Teitel, *Transitional Justice* (n 492).

Argentinian judiciary and their relation to the variations in trials over time is helpful here in understanding the role of institutional reform in facilitating fair criminal prosecutions. She attributes the initial absence of trials in post-transition Argentina to, among other factors, the politically biased courts. It took decades for judicial reform to materialise, which in turn opened up prosecutions after the initial lull.[601]

The socio-economic wellbeing of a country also adversely impacts the ability of judiciaries and other institutions to carry out a transitional justice process that is acceptable to victims. The prospects for redress for human rights violations are grimmer, scholars suggest, when pursued in poor countries with a lack of adequate access to justice. The poorer the country, the lower the chances that transitional justice and in particular costly prosecutions will be pursued.[602] In such cases and especially where judiciaries are weak and corrupt, international law should, as Nagy argues, play a role in ensuring some form of accountability.[603] However, the implementation of such transitional justice "blueprints" by international actors is, as Mutua argues, "a paternalistic and imperialistic approach that should be rejected out of hand."[604] Instead, Mutua continues, societies should distance themselves from a desire for revenge against the perpetrator and instead seek ways to address "the injured soul of the victim, and the corruption of the nation's moral fiber."[605]

Still others, such as Chandra Sriram, point to the merits of institutional reform before the implementation of transitional justice processes. Citing the example of Chile, she argues: "the introduction of judicial reforms such as changes

[601] Skaar (n 488) 11.
[602] See Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy' (2010) 32 (4) Hum. Rts. Q. 980 and Geoff Dancy and Eric Wiebelhaus-Brahm, 'Bridge to Human Development or Vehicle of Inequality? Transitional Justice and Economic Structures' 2014 IJTJ 1.
[603] Nagy, 'Transitional Justice as Global Project' (n 494) 226.
[604] Mutua, 'What is the Future of Transitional Justice?' (n 561) 5.
[605] ibid.

relating to judicial appointments, the size and composition of the Supreme Court, and the power of military courts played an important role in stimulating increased activism by domestic courts to try Pinochet era-crimes."[606] Sriram further argues that transitional justice is more likely to be successful in promoting a "normative environment conducive to democratic institution-building," rather than promoting deep structural changes.[607] Similar to Obel Hansen and other critiques of the impact of transitional justice as per its mainstream proponents, Sriram concludes that given the negative impact of transitional justice on democratic institution building in certain contexts, transitional justice may not be "the most appropriate instrument in all transition contexts."[608]

These are serious points to ponder for Egypt, Libya, Tunisia and Yemen. As Abu Al Zulof noted when speaking about Yemen, many judges and prosecutors belong to the previous regime, making any prosecution attempts almost impossible without the necessary changes in the judiciary. These changes include reform, full independence, and capacity building for judges on human rights standards.[609] Aziz describes the Egyptian judiciary as "politically vulnerable" and "facially independent," used and abused by a savvy military to create a false appearance of transition.[610] The result, Aziz observes, is "a nation firmly in the grasp, both politically and legally, of its military – with the judiciary's blessing."[611]

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[606] Valerie Arnould and Chandra Sriram, 'Pathways of Impact: How Transitional Justice Affects Democratic Institution-Building' Project on the Impact of Transitional Justice on Democratic Institution-building (Policy Paper October 2014) <www.tjdi.org> accessed 31 July 2015.
[607] ibid.
[608] ibid.
[609] Interview with George Abu Al Zulof, Country Representative, OHCHR Yemen (Sanaa, Yemen, 23 January 2014).
[610] Sahar Aziz, 'Theater or Transitional Justice: Reforming the Judiciary in Egypt' in Chandra Sriram (ed), *Transitional Justice in the Middle East* (Forthcoming 2015) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2543313> accessed 27 July 2015 2.
[611] ibid 3.

Consequently, Aziz argues, there was no political transition in Egypt and therefore one cannot speak of a transitional justice process.[612]

Aziz's contention presupposes that a certain type of transition must take place in order for transitional justice to flourish. However, the case study findings reveal that a transitional justice process *does* take place in ambiguous political transitions. The fact that decisions regarding prosecution were taken – even in the case of Yemen where an immunity law was passed – provides ample material that challenges the predominant understanding of transitional justice as a liberalising process. The absence of pre-existing democratic structures, particularly a functioning and independent judiciary, is perhaps the most significant factor that distinguishes the Arab region transitional justice processes from transitions elsewhere and particularly in Latin America. That said, the evolution of the Argentinian judiciary over time is an example of how, even in a radically different political transition such as that of Argentina, judicial reform had a significant impact on decisions regarding prosecution. In sum, to speak of the total absence of a transition in the Arab region case studies is to miss a crucial point: the use of transitional justice processes and of prosecutions in particular to consolidate authoritarian, non-liberal rule and to emphasise one historical narrative on past atrocities over the other. The absence of pre-existing democratic structures has contributed to this state of affairs in the Arab region, but it has not single-handedly shaped decisions regarding prosecution, as this thesis has thus far demonstrated.

Conclusion

This chapter has contributed to the proliferation of transitional justice discourses concerning complex and non-liberal transitions.[613] I have argued that the

[612] ibid.

shift to a renewed form of repressive, authoritarian rule in several Arab region transitions undermines mainstream transitional justice theory's presumption of a "return to a liberal state."[614] The complex nature of the Arab region transitions warrants a re-thinking of transitional justice and its pursuit in various contexts. Second, the pursuit of competing accountability agendas by both domestic and international actors weakens global accountability norm claims. The number of prosecutions of former political leaders may be increasing, but this does not take into account whether other senior level officials who oversaw massive human rights violations have also been prosecuted. It also does not take into account the motives behind the trials and their content and extent. Third, the emphasis on corruption and socio-economic crimes and the very limited focus on civil and political rights crimes are driven by the controlled nature of the transitions and point to a practice of scapegoating certain high-level officials and a certain set of crimes to show that there has been a break with the former regime. This, in effect, reinforces the use of transitional justice as a tool of entrenching authoritarian rule rather than as a mechanism to attain accountability or to establish the truth and acknowledge the suffering of victims. Finally, I have argued that a re-thinking of transitional justice needs to take into account the absence of pre-existing democratic structures.

The similarity of the challenges to prosecution in pre-transition Egypt, Libya, Tunisia and Yemen to those in the post-transition period is indicative of the ambiguous nature of the transitions. Without a definitive resolution of these challenges, the so-called transition offers no real change in its institutions and human rights practices. As a result, decisions regarding prosecution remain severely limited

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[613] Thomas Obel Hansen, 'The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field' in Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth (eds), *Transitional Justice Theories* (Routledge 2014) 108.

[614] Teitel, *Globalizing Transitional Justice* (n 473).

and politicised. However, certain iconic human rights cases in pre-transition Egypt, Libya, and Tunisia served as major triggers, or turning points, that led to decisions to prosecute high-level officials in those three countries. These cases targeting pre-transition high-level officials have, with the exception of Yemen, trickled into post-2011 efforts to prosecute. Marked by the public outrage in response to the original crimes and the persistent efforts of civil society and individual lawyers to see the cases through, these triggers were milestones in the long and difficult road to accountability for political leaders in these countries. This is why it is crucial to identify pre-transition triggers and to analyse their impact, if any, in subsequent decisions to prosecute former political leaders.

The various factors that pushed and pulled decisions regarding the prosecution of political leaders in different directions strongly represent the battle for competing visions of transitional justice and criminal justice in particular. Discussions in the emerging scholarship on transitional justice decisions in the Arab region largely overlook the proliferation of actors that drive and shape transitional justice decisions. Instead, many of them attribute competing accountability agendas to differences between the Islamists and the secularists. The deconstruction of the various domestic actors involved in decisions regarding prosecution, however, has demonstrated that the origins of competing accountability agendas are more complex. Subotic's argument that domestic elites, for example, use transitional justice to score political points is therefore important. Various actors, including but not limited to the Islamists, fall within the categories of justice resisters, instrumentalists and true believers that Subotic usefully identifies. Moreover, I have demonstrated that the starkly opposing justice strategies in Libya and Yemen weaken the international community's claim to a global accountability norm. The

international community's divergent goals, however, may appear less contradictory when explained within the peace versus justice debate. The outcome thus far, however, has seen anything but peace in both Libya and Yemen.

The content and extent of decisions regarding the prosecution of political leaders demonstrate that the Arab region is beyond recent debates calling for the merging of the two sets of rights in transitional justice mechanisms. The case studies, then, demonstrate that addressing socio-economic crimes is a possibility even within a difficult and opaque judicial and authoritarian environment. At the same time, the focus on corruption and socio-economic crimes has served as a means to protect interim and post-transitional authorities from prosecution for human rights crimes. This goes back to the argument that ambiguous transitions that lack a definitive break with the past manifest themselves in prosecutions, as remnants of the former regime attempt to shield themselves from the courts for their responsibility in past atrocities. The merits of the limited criminal sanction, then, need to be re-examined when selective trials (both in content and extent) instead have a negative impact on the course of transitions and on the stability of the state.

Scholars of both the mainstream and critical transitional justice strands argue that some degree of democratically functioning institutions, particularly the judiciary, is necessary in order for fair trials to take place. However, when the lack of such institutions was a major reason the transitions occurred in the first place, this argument falls short of explaining the course of transitional events in the Arab region. The absence of pre-existing democratic structures, particularly a functioning and independent judiciary, is perhaps the most significant factor that distinguishes the Arab region transitional justice processes from transitions elsewhere and particularly in Latin America. The ambiguity of the transitions has led some to

conclude that transitions simply did not take place in the Arab region.[615] However, to speak of the total absence of a transition in the Arab region case studies is to miss a crucial point: the use of transitional justice processes and of prosecutions in particular to consolidate authoritarian, non-liberal rule and to emphasise one historical narrative on past atrocities over the other. Transitional justice processes *do* take place in ambiguous political transitions. The fact that decisions regarding prosecution were taken – even in the case of Yemen where an immunity law was passed – provides ample material that challenges the predominant understanding of transitional justice as a liberalising process.

These arguments have profound implications for the study of transitional justice because they weaken long-standing scholarly assumptions of the liberalising directions of transitions and of transitional justice. From the outset, it is clear that the Arab Spring transitions – many of which are still ongoing – already point to the shortcomings of the prevailing assumptions of the liberal roots of transitional justice. Indeed, there is a fundamental tension between the liberal roots of transitional justice and the illiberal leanings of key socio-political actors.[616] In recent scholarship, these illiberal socio-political actors who pose a challenge to the practice of liberal transitional justice are overwhelmingly identified as the Islamists.[617] Scholars on transitional justice in the Arab region have largely stopped short of adequately discussing the use and abuse of transitional justice by other, secular political actors, most notably the military. The binary analyses that have emerged, pitting the

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[615] Ruti G. Teitel, 'Transitional Justice and the Power of Persuasion: Philosophical, Historical and Political Perspectives' (Panel, American Political Science Association annual conference, Chicago, September 2013).
[616] This tension is referred to by several authors in Kirsten J. Fisher and Robert Stewart (eds), *Transitional Justice and the Arab Spring* (Routledge 2014). See Literature Review section in Chapter 1.
[617] See Line Khatib and Elham Manea in Kirsten J. Fisher and Robert Stewart (eds), *Transitional Justice and the Arab Spring* (Routledge 2014). See Literature Review section in Chapter 1.

secularists against the Islamists, are therefore unhelpful in taking stock of how the Arab Spring is shaping transitional justice more broadly. As Mutua argues, "Dogmatic universality is a drawback to an imaginative understanding of transitional justice."[618]

This thesis therefore builds on the critical body of transitional justice literature. The mixture of non-liberal and ambiguous transitions, the multiple legacies of human rights violations and the particular content and extent of decisions regarding prosecution underline the need to re-examine transitional justice and to develop its theory and practice. The conflicting roles of regional and international actors, particularly in the case of Libya and Yemen, also reveal that transitional justice itself is not a consistently applied phenomenon that is rooted in so-called universal, liberal values. The case studies illustrate clearly that transitional justice is indeed a political project and cannot be described nor understood to be post-political.[619]

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[618] Mutua, 'What is the Future of Transitional Justice?' (n 561) 5.

[619] Hannah Franzki and Maria Carolina Olarte, 'The political economy of transitional justice. A critical theory perspective' in Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth (eds), *Transitional Justice Theories* (Routledge 2014) 202.

CHAPTER 5 | CONCLUSION

The objective of this thesis was not to make an argument for whether prosecutions should or should not be pursued within a transitional justice framework in the Arab region. Nor was its aim to provide a history of transitional justice as it has been pursued in other parts of the world. There is an abundance of literature on the history of transitional justice and the use of its various mechanisms, including prosecutions.[620] The emergence of the prosecution of political leaders in the Arab region, however, remains a largely unexplored area of this rising trend of individual criminal accountability for political leaders. Rather than contribute to the many accounts of countries that have undergone transitional justice, this thesis has critiqued the theoretical underpinnings of mainstream transitional justice theory. The critique is based on the findings generated from Egypt, Libya, Tunisia and Yemen and through a detailed inquiry of what factors and actors triggered, drove and shaped decisions regarding the prosecution of political leaders in these four case studies. This thesis has, therefore, aimed to explain the formative stages of these decisions, the factors that pushed and pulled the decisions in different directions, and the factors that shaped the limited content and extent of decisions regarding prosecution. It has also served as a critical inquiry of transitional justice scholarship, which is increasingly described as under-theorised.

Transitional justice in the Arab region presents the strongest challenge yet to the transitional justice paradigm, which presumes a shift from violent, non-liberal rule to peaceful, liberal-democratic rule. I have made this argument in four parts that examine the nature of the Arab region transitions, the role of international and

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[620] One of the earlier accounts is in Neil J. Kritz's three volumes on transitional justice cases from around the world: Neil J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Vols. 1-3 USIP 1995). See Literature Review section in Chapter 1. See also Andrew G. Reiter's compilation of scholarly writings on transitional justice in Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, 'Transitional Justice Data Base Project' (Web Portal) <https://sites.google.com/site/transitionaljusticedatabase/> accessed 30 July 2015.

domestic actors, the content and the extent of prosecutions, and the absence of pre-existing democratic structures needed to pursue effective transitional justice strategies. First, the non-paradigmatic nature of the Arab region transitions, whereby a renewed form of repressive, non-liberal rule has largely taken shape, warrants a re-thinking of transitional justice and its pursuit in various contexts. Second, the Arab region cases demonstrate that both domestic and international actors pursue competing accountability agendas, thereby weakening claims of a global accountability norm. Third, the emphasis on accountability for corruption and socio-economic crimes as opposed to civil and political rights violations underline the need to develop transitional justice theory. The limited content and extent of the investigations and prosecutions in the four case studies point to a practice of scapegoating certain high-level officials to avoid the prosecution of others and to show that there has been a break with the former regime. This practice, I have argued, is linked to the controlled nature of the transitions. Finally, a re-thinking of transitional justice needs to take into account the absence of pre-existing democratic structures and what this means for criminal accountability prospects in non-paradigmatic transitional contexts.

Pre-transition efforts to prosecute political leaders including former ministers were few and largely unsuccessful. This was for a number of reasons, including: lack of political will, particularly as it was often the regime that was orchestrating crimes such as torture; lack of judicial independence; fear of the negative consequences for victims who were bold enough to file complaints against high-level officials; and lack of concrete evidence to build strong cases along with other legal challenges, such as lack of command responsibility provisions, preventing the successful prosecution of political leaders. The limited content and extent of prosecutions,

particularly in Egypt and Tunisia where the trials have advanced the most in comparison with Libya and Yemen, have also been impacted by a number of factors.

The controlled nature of the transitions and the lingering influence of the *feloul* in Egypt, the emergence of the *anciens nouveaux* in Tunisia, and the political maneuverings of former President Saleh in Yemen meant that politicised judiciaries continued to block many cases, shielding former regimes from criminal accountability. However, other significant factors also shaped the content and the extent of prosecutions. Many interviewees cited the tendency of lawyers to focus on crimes committed during the uprisings instead of the decades of human rights violations that preceded them because those crimes were the most recent and therefore easier to prosecute. Moreover, the absence of enabling legal frameworks, such as the lack of command responsibility provisions and the stringent requirement of direct evidence significantly weakened the prospects of successful prosecution.

The practice of scapegoating by interim and post-transitional leaderships led to the prosecution of certain high-level individuals – many of whom were eventually released – to deflect attention from the lack of accountability for a more comprehensive set of human rights violations and their perpetrators. The strength of workers' movements in Egypt and Tunisia, coupled with the rampant and very visible corruption thrown in the face of the public for decades, contributed to the emphasis on corruption and socio-economic crimes in the trials. It is thus no surprise that the public demands for prosecution were heavily focused on corruption and socio-economic rights, hence the chanting of slogans such as *'aish, hurreya, 'adalah igtima'iya* and *pain, eau, Ben Ali non!*[621]

[621] Translates to 'bread, freedom, social justice,' which was one of the prominent slogans of the Egyptian uprising and 'bread, water, Ben Ali no!' in Tunisia.

Still, those few pre-transition prosecution attempts were bold in the sense that they targeted high-level officials in an extremely repressive and opaque judicial and political environment. Moreover, with the exception of Yemen, every case study demonstrates that certain pre-transition cases, although initially unsuccessful, re-emerged in post-transition efforts to prosecute. This is true for the Khaled Said case in Egypt, the Abdallah Qallel case in Tunisia, and the Abu Salim prison massacre case in Libya. For example, of the three pre-transition cases targeting high-level officials in Tunisia, the Baraket Essahel case implicating Abdallah Qallel has had a significant impact on the pursuit of high-level government officials in Tunisia following the 2010 uprising. The initiation of the case in Switzerland in 2001 followed by its revival ten years later in Tunisia is a strong indication of the case's importance for the victims and its symbolic value for many Tunisians, particularly during and shortly after the transition. The same can be said for the Khaled Said case in Egypt and the Abu Salim case in Libya.

I have explained that the role of international actors in driving decisions to prosecute in post-transition Egypt and Tunisia was negligible. I have also argued that international actors were more influential in pre-transition Egypt and Tunisia as they helped document human rights violations, raise awareness, and pressure governments to improve their human rights practices. The Tunisian case in particular benefited from the role of international actors given that universal jurisdiction laws in Switzerland and France were used to pursue the prosecution of high-level officials such as Abdallah Qallel, General Habib Ammar and Khaled Ben Said. On the other hand, international actors such as the United Nations Security Council, the ICC, and the GCC played a significant role in driving prosecutions in Libya and in establishing the immunity law in Yemen. The Arab region cases, then, demonstrate

that both domestic and international actors pursue competing accountability agendas, thereby weakening claims of a global accountability norm. Just as there are competing objectives regarding criminal justice among domestic actors, so there are competing accountability preferences among international actors.

While not comprehensive, each case study revealed that while the triggers and drivers are marked by the traditional motives for a more just, liberal democratic order, the shapers paint a more complex picture that presents a significant challenge to mainstream transitional justice theory. The various shaping factors that pushed and pulled decisions regarding the prosecution of political leaders in different and even opposing directions are a strong indication that different actors have been fiercely battling each other for competing visions of transitional justice – and of criminal justice in particular. A re-thinking of transitional justice therefore needs to take into account how non-liberal, or non-paradigmatic, transitions undermine mainstream transitional justice theory's presumption of a "return to a liberal state."[622]

Egypt, Libya, Tunisia and Yemen all demonstrate that the predominant understanding of transitional justice as post-political and as a phenomenon that exudes the universality of international human rights norms falls short of explaining their decisions regarding prosecution. Instead, the use and abuse of transitional justice and of prosecutions in particular have served to strengthen a transition to renewed forms of authoritarianism. The Arab transitions do not fall within the paradigmatic framework for transitions that is marked by a shift from authoritarian to liberal democratic rule. Nor do, as scholars are increasingly observing, other transitions that have informed transitional justice theory. The "paradigmatic

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[622] Ruti G. Teitel *Globalizing Transitional Justice: Essays for the New Millennium* (OUP 2014) 102.

transition" from "violent conflict to peace and democracy," then, is no longer an adequate framework for the analysis of varied transitions and their transitional justice decisions.[623]

Moreover, the absence of pre-existing democratic structures, such as effective judiciaries and a separation of powers, reinforces the argument that the liberalising ritual of transitional justice is a far cry from the reality of the Arab region transitions. Sriram's discussion on the merits of institutional reform before the implementation of transitional justice processes is relevant here. Sriram argues that given the negative impact of transitional justice on democratic institution building in certain contexts, transitional justice may not be "the most appropriate instrument in all transition contexts."[624] This, however, is a discussion beyond the scope of this thesis, but that is nevertheless crucial for the future development of transitional justice scholarship in the Arab region.

A rapidly burgeoning field, transitional justice is broad, inter-disciplinary and evolving in radical ways. Transitional justice and its various mechanisms, including truth commissions, reparations, vetting, and prosecutions, are spread widely and draw scholarly attention from lawyers, political scientists, anthropologists, sociologists and historians. Prosecutions, however, are the most pursued mechanism of transitional justice, and the Arab region is not an exception to this trend.[625] It is, then, a field that possesses highly political attributes, but is heavily legalistic in its application. Sharp critiques the tendency of actors to pursue a top-down approach to transitional justice that is focused on "technocratic legalism" that wrongly overlooks

[623] Christine Bell, Colm Campbell and Fionnuala Ni Aolain, 'Justice Discourses in Transition' (2004) 13 (3) Social and Legal Studies 305, 310.
[624] Valerie Arnould and Chandra Sriram, 'Pathways of Impact: How Transitional Justice Affects Democratic Institution-Building' Project on the Impact of Transitional Justice on Democratic Institution-building (Policy Paper October 2014) <www.tjdi.org> accessed 31 July 2015.
[625] Truth commissions have also increasingly become a popular mechanism of transitional justice.

the "underlying politics of transitional justice interventions."[626] Nagy similarly critiques the heavy influence of the "international legalist paradigm" and notes, "The problem is not with law and human rights *per se* but with the depoliticised way in which 'justice' can operate."[627] Such calls to take the political and the contextual into account are certainly crucial to understand both how transitional justice operates in various contexts and to understand the limitations of the transitional justice paradigm as it currently stands. But politics is what has driven transitional justice decisions in the four case studies and indeed in many other transitional countries.

An argument might be made, then, for a more legalistic rather than a less legalistic approach, if effective prosecutions are the end goal of a particular transitional justice strategy. The privileging of law, of course, does not mean that political factors will cease to shape transitional justice, including prosecution-related decisions. Teitel's assertion that transitional justice in its globalised form is increasingly disassociated from politics thus comes into question.[628] Koskenniemi's description of the centrality of politics to law better describes the unfolding of decisions regarding prosecution in the Arab region during a highly contentious and political transitional period. Perhaps ironically, Teitel's description of the role of law in times of transition is useful here:

> To the extent that transitions imply paradigm shifts in the normative conception of justice, the role of law at these moments appears deeply paradoxical. In ordinary times, law provides order and stability, but in extraordinary periods of political upheaval, law is called upon to maintain order, even as it enables transformation. Accordingly the ordinary intuitions and predicates about law simply do not apply in transitional situations. These dynamic periods of political flux generate a sui generis paradigm of transformative law.[629]

[626] Dustin N. Sharp, 'Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice' (2013) 26 Harvard Human Rights Journal 149, 150.
[627] Rosemary Nagy, 'Transitional Justice as Global Project: critical reflections' (2008) 29 (2) Third World Quarterly 275, 278, 279.
[628] Teitel, *Globalizing Transitional Justice* (n 622).
[629] ibid 96.

However, the "normative conception of justice" Teitel refers to above is itself contested and far from monolithic when examined within the context of the Arab region cases, and indeed in other parts of the world.[630] To the extent that law enables transformation, as Teitel notes, the type of transformation it enables is diverse, as the case studies demonstrate. Moreover, independent judiciaries are necessary to implement law equally and effectively. The absence of independent judiciaries, then, makes the legal application of decisions during highly contentious transitions inevitably, if not more, politicised.

Areas for further research into the implications of decisions regarding prosecution in non-paradigmatic transitions are numerous. Here, I identify a few key areas of research that could further develop the rich yet under-theorised field of transitional justice, particularly within the context of prosecutions. First, victims and non-victims' perception of justice is a topic that warrants examination, particularly in the Arab region where retributive justice tends to take precedence over restorative justice, reconciliation and other justice methods. Judy Barsalou's work on Egypt has addressed this question of perception and serves as a useful reference for further studies.[631]

Second, I have generally described the role of the judiciary in shaping decisions regarding prosecution in the four case studies as one that has been politicised and crippled by weak legal frameworks and a lack of separation of powers. However, judiciaries are much more complex than this. For example, the judiciary in Egypt has traditionally been split along loyalties to various political forces. The same can be said for Yemen, where tribal loyalties have often caused

[630] ibid.
[631] Judy Barsalou, 'What do Egyptians expect from justice?' (Egypt Independent, 6 June 2012) <www.egyptindependent.com/opinion/what-do-egyptians-expect-justice-please-copyedit-and-publish-asap> accessed 31 July 2015.

clashes within the judiciary. Judicial politics, then, is a crucial area of research, particularly in the four case studies where judiciaries have and continue to play a significant role in shaping the pursuit of transitional justice. Moreover, the absence of fully independent and effective judiciaries pre-transition presents the Arab region as a significant case for comparison in the transitional justice literature, which has thus far been dominated by the experiences of states where the history and status of the judiciary is quite different. I refer here again to the importance of Skaar's work on the role of judiciaries in transitional justice over time.[632] Skaar notes, "Politics can change overnight, whereas judicial culture and legal precedents may take years – even generations – to shift."[633]

Third and related to this question of functioning judiciaries and transitional justice is the question: do prosecutions strengthen or weaken transitions to democracy? This is not a new area of research; it has already been a subject of much scholarly debate.[634] In her discussion of Poland, Agata Fijalkowski argues that "prosecutions do not form part of the state's process of transitioning towards democracy, and could, in fact, occur years later, such as in various Central and Eastern European states."[635] Jack Snyder, Leslie Vinjamuri, Jack Goldsmith and Stephen D. Krasner argue against the prosecution of leaders because they believe it harms democracy building by making authoritarian leaders tighten their grip on power.[636] Snyder and Vinjamuri further claim that human rights trials can increase

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[632] Elin Skaar, *Judicial Independence and Human Rights in Latin America* (Palgrave MacMillan 2011).
[633] ibid 93.
[634] See Literature Review section in Chapter 1.
[635] Agata Fijalkowski, 'Transitional Criminal Justice: The Polish Way' in Agata Fijalkowski and Raluca Grosescu (eds), *Transitional Criminal Justice in Post-Dictatorial and Post-Conflict Societies* (Intersentia 2015) 102.
[636] Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice.' (2003/04) 28 (3) International Security 5; Jack Goldsmith and Stephen D. Krasner, 'The Limits of Idealism.' (2003) 132 (1) International Justice 47. Both cited in Kathryn

the likelihood of future atrocities rather than serve as a deterrent.[637] Olsen, Payne and Reiter also caution against the use of trials in fragile transitional contexts and point instead to the importance of striking a "justice balance."[638] Since the authors' transitional justice database covers a period that ends in 2007, their findings understandably do not include the developments from the Arab region.[639]

But decisions regarding prosecution in the Arab region case studies now provide a wealth of material to re-visit this question of trials and democracy building, particularly because of the complex nature of the transitions. On the other hand, the question of whether or not transitional justice and prosecutions in particular strengthen democracy may not provide the best analytical angle from which to assess the impact of the Arab region transitions on transitional justice. This is because of the non-traditional, non-paradigmatic nature of the transitions and of the divergent goals of transitional justice actors in the Arab region. The assumption that a liberal democracy is the end-goal therefore may not provide a suitable starting point for any analysis of transitional justice in the Arab region. Finally, the contentious immunity law in Yemen presents a classic case study within the framework of the peace versus justice debate that has featured prominently in the transitional justice literature. A re-visiting of the peace versus justice debate in the context of Yemen would therefore provide a fresh contribution to this often cyclic discussion.

Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World* Politics (WW Norton 2011).

[637] Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice.' (2003/04) 28 (3) International Security 5.

[638] See discussion in Literature Review in Chapter 1. Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy.' (2010) 32 (2) Hum. Rts. Q. 980.

[639] Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, 'Transitional Justice Data Base Project' (Web Portal) <https://sites.google.com/site/transitionaljusticedatabase/> accessed 30 July 2015.

The arguments presented in this thesis have profound implications for the study of transitional justice because they weaken long-standing scholarly assumptions of the liberalising directions of transitions and of transitional justice. From the outset, it is clear that the Arab Spring transitions – many of which are still ongoing – already point to the shortcomings of the prevailing assumptions of the liberal roots of transitional justice. The emerging scholarship on transitional justice decisions in the Arab region, however, largely overlooks the proliferation of actors that drive and shape transitional justice decisions. Instead, it often reduces competing accountability agendas to differences between actors such as Islamists and secularists. The deconstruction of the various domestic actors involved in decisions regarding prosecution, however, has demonstrated that the origins of competing accountability agendas are more complex. Such binary analyses are therefore unhelpful in taking stock of how the Arab Spring is shaping transitional justice more broadly. This thesis has questioned the foundational assumptions of transitional justice through an inquiry of decisions regarding the prosecution of political leaders in the Arab region. It ultimately calls for a revision and a rethinking of our current understanding and application of transitional justice.

Appendix I | Sample List of Interview Questions

The following is a list of sample interview questions that were asked during interviews in Egypt, Libya, Tunisia and Yemen between 2012 and 2014. This is not a comprehensive list of questions, as the interviews were semi-structured to ensure a focused comparison of data across the cases. This was done through the use of a set of questions asked of each individual, followed by additional questions generated by the responses received and by the particular context of the case study.

1. What is the current status of prosecutions in X country?
2. Who took the decisions to prosecute/not to prosecute? Was there any contestation of these decisions? By whom and what was the content of these contestations?
3. Were there efforts to prosecute former leaders, military officers, police officers, and other high-ranking government officials in X country before the 2010/2011 uprising? If so, by whom, when, against whom, how and what was the outcome?
4. What factors, if any, triggered decisions regarding the prosecution of political leaders in X country? Were there key turning points in the past that helped pave the way toward these prosecutions/amnesties? Which ones and how?
5. What or who were the key drivers of decisions regarding prosecution?
6. Did civil society influence leadership preferences and vice versa? How?
7. What was the content of popular demands for the prosecution of political leaders?
8. Who was involved in X country's immunity law? How did it come about? How has it impacted decisions regarding prosecution in X country?
9. Are there accusations of corruption and financial crimes? Why is there an emphasis on these crimes, more so than on human rights crimes?
10. What, if any, has been the role of external actors in the decisions to prosecute/not to prosecute in X country?
11. What factors ultimately led to the decision to prosecute (or not to prosecute)? Who were the main actors involved? Any further contacts I should get in touch with?

Appendix II | List of Interviewees[640]

EGYPT

1. Ahmed Abdallah – Human Rights Officer and Lawyer, 6 April Movement.
2. Anonymous senior expert on transitional justice in Egypt, International Center for Transitional Justice.
3. Mohamed Al Ansary – Lawyer and Legal Researcher, Cairo Institute for Human Rights Studies.
4. Khaled Ali – Executive Director, Hisham Mubarak Law Center; former presidential candidate (2012); Co-Founder of the Bread and Freedom Party; lawyer and activist.
5. Gamal Eid - Lawyer and Executive Director, Arabic Network for Human Rights Information (ANHRI).
6. Mohamed El Shewy – Transitional Justice Programme Officer, Egyptian Initiative for Personal Rights.
7. Wael Eskandar – prominent blogger, independent journalist and media commentator; member of Kaziboon campaign, which called for accountability for crimes committed by the Egyptian military.
8. Judge Adel Maged – Vice President, Court of Cassation.
9. Nadeem Mansour – Director, Egyptian Center for Economic and Social Rights (ECESR).
10. Habib Nassar - Former Middle East and North Africa Director, International Center for Transitional Justice.
11. Amal Sharaf – Co-founder and Foreign Media Spokesperson, 6 April Movement.
12. Tamer Wageeh – Director, Economic and Social Justice Unit, Egyptian Initiative for Personal Rights (EIPR).

LIBYA

1. Dao Al Mansouri – Veteran lawyer and human rights activist.
2. Rana Jawad – BBC journalist.

[640] Some interviewees were interviewed more than once.

3. Amal Jerary – Director of Communications, Prime Minister's Office (for former Libyan Prime Minister Aly Zeidan).
4. Azza Maghur – Veteran lawyer and human rights activist.
5. Stefano Moschini – Libya Programme Coordinator, No Peace Without Justice.
6. Habib Nassar - Former Middle East and North Africa Director, International Center for Transitional Justice.
7. Lydia Vicente – Executive Director, Rights International Spain (Vicente did some transitional justice work in Libya and provided useful contacts).

TUNISIA

1. Anonymous – Senior Employee, Office of the High Commissioner for Human Rights.
2. Anonymous – Senior Employee, Tunisian Ministry of Foreign Affairs.
3. Anissa Ben Hassine – Researcher and Professor, l'Ecole Supérieure des Sciences Economiques et Commerciales de Tunis (ESSEC).
4. Amor Boubakri – Lawyer and Professor, University of Sousse; UNDP Consultant.
5. Ruben Carranza – Director, Reparative Justice Programme, International Center for Transitional Justice.
6. Abderrahman El Yessa – Democratic Governance Advisor, UNDP, Tunisia.
7. Amna Guellali – Tunisia and Algeria Researcher, Human Rights Watch.
8. Charfeddine Kallel – Lawyer and Member, Groupe de 25.
9. Akram Khalifa – Human Rights Officer, OHCHR, Tunisia.
10. Anis Mahfoudh – Human Rights Officer, OHCHR, Tunisia.
11. Anis Morai - Lawyer, Professor, Columnist and Host of 'Dans le Vif du Sujet', a radio talk show in Tunisia that tackles the socio-political and legal issues facing the country.
12. Habib Nassar - Former Middle East and North Africa Director, International Center for Transitional Justice.
13. Messaoud Rhomdani – Vice President, Ligue Tunisienne de Droits de l'Homme (LTDH).
14. Solène Rougeaux – Director, Avocats Sans Frontières, Tunis Office.

15. Amor Safraoui – Coordinator, National Coalition for Transitional Justice; Head, Groupe de 25.

YEMEN

1. George Abu Al Zulof – Country Representative, OHCHR Yemen.
2. Hamza Al Kamali – Member, Transitional Justice Working Group, National Dialogue Conference.
3. Manal Al Qudsi – Programme Officer, Yemen Center for Transitional Justice.
4. Ahmed Arman – Lawyer and Executive Secretary, National Organisation for Defending Rights and Freedoms (HOOD).
5. Abdulrahman Barman – Human Rights Lawyer, National Organisation for Defending Rights and Freedoms (HOOD).
6. Omar Own – Consultant, UNDP Yemen; NGO Expert.
7. Tamer Shamsan – Political Activist; Columnist.
8. Letta Tayler – Senior Researcher, Human Rights Watch.
9. Belkis Wille – Yemen and Kuwait Researcher, Human Rights Watch.

Appendix III | Procedural laws concerning the process of prosecution

Egypt

Public Prosecution Office: Overview of Egypt's Prosecutor General and Public Prosecution Office[641]

"The role of the public prosecutor is to conduct a neutral, unbiased investigation into the truth. Criminal investigations are generally initiated based on complaints filed by citizens or government officials, but may also be initiated by the Public Prosecution Office itself based on information such as news reports.

In conducting investigations, public prosecutors acting in their capacity as judicial officers receive the sworn testimony of witnesses, which is reduced to a written statement and signed by both the witness and the prosecutor, much like a deposition or affidavit. Such a sworn statement constitutes substantive evidence without the need to call the witness to testify at trial.

If the public prosecution finds that the evidence justifies a trial, charges are filed with the trial court in the form of a referral, which consists of a statement of the charges and a summary of the evidence supporting each charge as to each defendant. The referral and public prosecution file constitute substantive trial evidence without the need to call live witnesses."

The Course of a Criminal Case at the Public Prosecution[642]

"After the prosecution receives a report or notification of an incident, or a report on the evidence gathered and the investigation that was done in matters that warrant investigation, an action is initiated if the evidence to indict is sufficient to increase the likelihood of getting a conviction. But if the case papers are devoid of indicting evidence, or if the evidence is not likely get a conviction, the case is dismissed or a decision is made thereon indicating lack of grounds to initiate action as the case may be.

In Matters of Misdemeanors and Violations

The action is initiated by summoning the defendant to appear in the summary court. However, if the crime was a misdemeanor that was committed by way of the press or other means of publication, excluding misdemeanors that are injurious to persons, the action is initiated before the criminal court by referral from the solicitor general.

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[641] Excerpts from 'Public Prosecution Office: Overview of Egypt's Prosecutor General and Public Prosecution Office,' <http://egyptjustice.com/public-prosecution-office/> accessed 2 December 2015.
[642] Excerpts from 'Structure of the Public Prosecution Office in Egypt,' Programme on Governance in the Arab Region (POGAR), United Nations Development Programme. <ftp://pogar.org/LocalUser/pogarp/judiciary/prosecution/structure-egypt.pdf> accessed 2 December 2015.

-- For actions brought before misdemeanors and violations courts, the summons to appear that is served upon the defendant may be disregarded. Such is the case if he were present at the hearing and was officially charged by the prosecution prior to trial.

-- A criminal action is not considered initiated simply because the prosecution officially endorsed its submission to the court. The reason for this is that such endorsement is nothing more than an administrative order sent to the prosecution's clerk's office to prepare the summons to appear. Even if such summons were prepared and served in accordance with the law, it would have various legal implications.

-- A case does not leave the hands of the prosecution, until a summons is given to the defendant to appear in court. If the prosecution orders the transfer of the case to the court without serving a summons to appear, it has the right to refrain from transferring the case to the court and return to the investigation and disposal of the case papers in light of any new facts, and to issue an order of lack of grounds to initiate the criminal action.

-- The consequence of initiating a criminal action by way of a summons to appear before the court is connecting the sentencing authority with the case, and the lapse of the prosecution's right to conduct the initial investigation with respect to the defendant who is to be tried for the incident itself. Whatever the prosecution does after that is considered non- probative with regard to said incident.

This does not preclude the prosecution, as an evidence-gathering authority, from doing whatever it deems necessary, whether by itself or through the commissioner of the judicial police. It submits the evidence report to the court.

-- The dates for hearings in cases brought before the misdemeanors and violations court are set by members of the prosecution themselves. This is not left to the clerks.

Consideration should be given to setting proximate hearing dates for cases that require expediency, such as cases that involve incarcerated defendants or cases related to crimes that are detrimental to the public welfare, and in compliance with the provisions of Article 276 repeated of the Criminal Procedure Code, which requires the review of cases concerning those crimes set forth in the Article, in a hearing that takes place within two weeks of the date it was referred to the competent court.

In Criminal Matters

-- If the prosecution member sees fit to initiate a criminal action in criminal court, he must then send the case to the solicitor general accompanied by a list containing the purport of witnesses' statements and prosecuting evidence, signed by him, in addition to an indictment for the solicitor general to sign.

-- The indictment must show the name of the defendant, his place of residence, a description of the crime with which he is charged, the date of commission of said crime, and the applicable articles of law.

-- The solicitor general himself studies important criminal cases; and as necessary has the right to assign the heads of prosecution offices to study it and submit it to him. In addition, he has the right to distribute among them, and among the rest of the general jurisdiction prosecution, all other cases for study and submission to him to take action on them.

Moreover, he must complete whatever deficiencies may exist in these cases from the aspects of investigation, and to correct whatever errors and inaccuracies may exist in the registration and description thereof.

-- The initiation of a criminal action in criminal matters, by its referral from the solicitor general or whomever is acting on his behalf, to the criminal court, is done by an indictment showing the crime with which the defendant is charged of committing and the elements of that crime, all the aggravating or mitigating circumstances that are to be considered during the penalty phase, and the applicable articles of law. The indictment is to be accompanied with a list containing the purport of witnesses' statements and prosecution evidence.

The solicitor general automatically appoints an attorney for every defendant in a felony case who has been ordered transferred to the criminal court, in the event such defendant had not retained an attorney to defend him.

The prosecution informs the litigants of the order issued by the solicitor general to transfer the case to the criminal court or the supreme state security court within ten days of the issuance thereof.

-- Immediately upon the solicitor general's issuance of the order to transfer the case to the criminal court, the case file is sent to the court of appeals to set a date for it to be reviewed before the competent court. If the defense requests a time to read the case file, the prosecution sets a time for it not to exceed ten days during which the case file remains at the clerk's office until such time when it is possible for the defense to read it but not remove anything from it.

Initiation of an Action Through Direct Prosecution

-- A criminal action may be initiated through direct prosecution in misdemeanors and violations, even if such misdemeanors were defined by law as being exceptional cases that fall within the jurisdiction of the criminal court. These are misdemeanors committed by way of the press or other means of publication excluding misdemeanors that are harmful to persons. Excluded from that are the following:

1. Crimes that are committed outside the Republic, whereby the right to move such criminal cases is restricted to the prosecution alone.

2. Cases brought against an employee, public servant or any police officer, for a crime committed by them during the performance of their duties or as a result thereof, except those crimes provided for in Article 123 of the Penal Code, e.g. when a public employee uses the authority of his position to suspend the execution of orders issued by the court, or the provisions of the laws and regulations, or delay the collection of assets and fees, or suspend the execution of a judgment or order issued by the court or by any competent entity, and such public employee deliberately

refrains from executing any of the aforesaid judgments or orders upon the lapse of eight days of his admonition by a process server, provided that the execution of such judgment or order falls within the responsibilities of such employee.

3. Orders issued by the investigating judge or the prosecution that there would be no grounds to initiate an action if the prosecutor for civil rights has not appealed such order within the prescribed time or has appealed it and it was upheld by the appellant misdemeanor court while in session in the deliberating chamber.

-- The direct case is initiated through a summons to appear served by the prosecutor for civil rights. If this summons is not served, the case does not come into the jurisdiction of the court. The summons to appear must include the civil rights claim and it must be done in accordance with the prescribed rules for service to the litigants as set forth in Article 123 et seq. of the Criminal Procedure Code.

-- When a criminal case proceeds, it becomes the undertaking of the prosecution alone as a matter of right, and not the prosecutor of civil rights. This is with respect to all who have moved it before them, and not the court's carrying out of the civil rights prosecutor's motions with regard to the criminal case under review.

-- Criminal cases may not be initiated through direct prosecution before juvenile courts, military courts and state security courts, as the law did not grant these courts the jurisdiction to decide civil cases adjoined with criminal cases. It did not allow originally for these courts to accept civil cases.

The Investigation by the Public Prosecution

-- The prosecution member commences the investigation after receiving information or notification, or receipt of the evidence gathering report, and reading such report and transferring the contents thereof to an investigation report. The investigation of the defendant commences by questioning him verbally about the charge attributed to him after advising him of such charge and the punishment therefor, and that the public prosecution is the agency that is conducting the investigation. If the defendant confesses to the charge, the prosecution member begins interrogating him in more detail while bearing in mind to highlight whatever points would reinforce the confession. If the defendant denies the charge, the prosecution member would ask him whether he had something to present in his defense, and if he had witnesses for his defense that he would like call upon. This defense and the names of the witnesses are recorded in the report.

Thereafter the prosecution member asks the defendant whether he wants to call upon other witnesses. If he decides that he does not have other witnesses, that is recorded in the report as well. Then the prosecution member orders that all the witnesses called by the defendant are summoned immediately, and they are asked to wait in a secluded place until their turn comes to be questioned. The investigation is completed by questioning the witnesses for the prosecution in the order of their importance. The prosecution member talks with them to elicit their statements and determine to what extent they are truthful. He confronts them with whatever statements they made in the evidence gathering report that are inconsistent with what they testified to before him. He discusses the matter with them. He has the right not to re-open the questioning of those persons who were questioned previously as

witnesses in the evidence gathering report, if such witnesses had not testified to anything material, thus making it useless to re-question them.

Whenever there is mention of a name of a person who may possibly have information about the incident, he is summoned immediately and questioned about his information. Then he interrogates the defendant – this is in the event he had not initiated his interrogation after questioning him verbally about the charge attributed to him and getting his [the defendant's] confession -- by confronting him with the evidence established against him. He asks him if he has anything to refute it, then he records in the report the defendant's defense, if such defense exists. The prosecution member must begin by hearing the witnesses for the defense immediately after concluding the interrogation of the defendant to avert any subornation of the witnesses in such a way so as to conform with the defendant's statements. There should not be any delay in hearing their testimonies based on the fact that the defendant is incarcerated, as it would not be difficult, neither upon him nor his family, to contact these witnesses. It is also to be taken into consideration to confront defendants with witnesses with respect to inconsistencies in their statements.

Thereafter, the investigation is completed by making use of experts, or conducting surveillance and inspection if necessary.

Upon the conclusion of the investigation, the necessary action is taken on it in misdemeanors, violations and felonies, as the case may be."

Tunisia

Functions of the Office of the Public Prosecutor[643]

"Pursuant to article 22, the Prosecutor-General is placed at the head of the prosecution service but specifically 'under the authority of the Minister of Justice.' Article 23 provides that the Minister of Justice may "report to the Prosecutor-General the violations of criminal law within his knowledge, may require him to initiate, or ask someone to initiate, the prosecution or to seize the competent jurisdiction with the written submissions considered desirable.' In addition, by virtue of article 21 of the Code of Criminal Procedure, all public prosecutors are 'required to comply with written submissions in accordance with instructions given to him under the conditions set out in article 23.' The Minister of Justice may also order the Prosecutor-General to the Court of Cassation to lodge an appeal against a ruling to the Court of Cassation.[644]

[…]

Under article 30 of the Code of Criminal Procedure, the public prosecutor has discretion over whether to dismiss a complaint or denunciation received by or transmitted to him or her. No reason is required for the dismissal and there is no power to request judicial review of a prosecutor's decision not to prosecute. Where

[643] International Commission of Jurists, 'The Independence and Accountability of the Tunisian Judicial System: Learning from the Past to Build a Better Future' (Report, May 2014) 66-68.
[644] Code of Criminal Procedure, article 258(6).

the victim of a crime wishes to ensure criminal proceedings are started, he or she must become a civil party and request the opening of an inquiry or commence direct proceedings against the accused.[645]

[…]

The prosecutor has discretion to assign cases to the investigating judge of his choice within the jurisdiction. Article 28 of the Code of Criminal Procedure stipulates that when a crime is committed, the public prosecutor should inform the Prosecutor-General of the Republic and the relevant Attorney-General, and order an investigating judge within his jurisdiction to conduct an inquiry. Article 49 provides that where there are several investigating judges in one jurisdiction, the prosecutor decides who will be in charge of the investigation. Investigating judges are themselves assigned to their functions by the Minister of Justice.[646] Furthermore, the Minister of Justice can order a judge to assume the role of investigating judge for a specific case.[647]

According to testimony heard during ICJ missions to Tunisia, prosecutors designate investigating judges based on the nature of the case. 'Sensitive' cases, including cases of corruption or cases involving high officials of the former regime, are reportedly assigned to 'specialized' investigating judges known for their loyalty to the authorities or their superiors.

[…]

The Military Justice System in Tunisia[648]

Tunisia's military justice system derives from the code of military justice, promulgated on January 10, 1957.[649] The military justice system is composed of three permanent military first instance tribunals and a military appeals court;[650] a Military Chamber of Indictment (*Chambre militaire de mise en accusation*) before the Permanent Military Tribunals; the Military Court of Cassation, which is a section of the ordinary Court of Cassation, in which sits a high military officer appointed by the Ministry of Defense; military investigative judges and the military public prosecutor.[651]

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[645] ibid, article 36.
[646] ibid, article 48.
[647] ibid.
[648] Human Rights Watch, 'Flawed Accountability: Shortcomings of Tunisia's Trials for Killings during the Uprising' (January 2015) 1 <www.hrw.org/report/2015/01/12/flawed-accountability/shortcomings-tunisias-trials-killings-during-uprising> accessed 26 July 2015.
[649] Decree n° 57-9 (10 January 1957) www.legislation-securite.tn/fr/node/27829 accessed 4 December 2015.
[650] The permanent military Tribunal of Tunis (covering the governorates of Tunis-Ariana-Manouba-Ben Arous-Bizerte -Nabeul- Zaghouan-Sousse-Monastir); the permanent military tribunal of Le Kef (covers the governorates of Kef- Jendouba- Beja- Siliana-Kasserine- Kairouan) and the permanent military tribunal of Sfax (covers the governorates of Sfax- Mehdia- Sidi Bouzid-Gabes- Médenine-Tataouine-Tozeur- Gafsa- Kebili).
[651] Code of Military Justice (10 January 1957), article 1.

The military courts have jurisdiction over military offenses, offenses committed against the army, and offenses against the ordinary law when they are committed by military personnel against other military personnel either in-service or when off-duty.[652] The jurisdiction *ratione personae* of the military courts covers officers of the army and several other classes of military personnel, as well as civilians alleged to have committed or participated in offenses in military barracks, or to have committed defamation against the army.[653] According to this classification, the competence *ratione personae* of the military courts includes members of the internal security forces that constitute 'a civil armed force' under the control of the Ministry of the Interior, including the agents of the National Security organization and of the National Police.[654] Under article 22 of Law 70 of August 1982 regulating the Basic Status of Internal Security Forces 'cases involving agents of the internal security forces for their conduct during the exercise of their duty and linked to internal or external state security, or to the protection of public order [...] during public meetings, processions, marches, demonstrations, and gatherings, must be transferred to the competent military courts.'

[…]

In July 2011, six months after the ouster of Ben Ali, the interim government issued two decree laws, number 69 of July 29, 2011, amending the military justice code, and number 70 of July 29, 2011, on the organization of military justice and the statute of military judges.

These reforms had four main objectives, according to the military prosecutor:[655]

1. To reinforce the independence of military justice from the executive. The previous law gave the ministry of defense wide powers in procedural matters. The commencement of criminal proceedings in the military courts required the approval of the minister of defense.[656] The minister also had authority to order the suspension of the execution of any sentence imposed by a military tribunal.[657] The new decree laws abolished both these powers.

2. To increase the presence of civil judges in military courts. Decree law number 69 requires the president of the tribunal and the presidents of sections to be judges from the civilian courts.[658]

3. To establish a double degree of jurisdiction through the creation of a military

[652] ibid, article 5.
[653] ibid, article 8. Article 91 of the Code of Military Justice stipulates that it "is punishable with three months to three years imprisonment anyone, military or civilian who commits in public and by words, gestures, writings, drawings, photography or films, outrages against the flag or the army, offenses against the dignity, the reputation or the moral of the army, or acts undermining military discipline, obedience and due respect to superiors or criticizes the action of military hierarchy or the military officers which offends their dignity."
[654] The statute of Interior Security Forces (6 August 1982) Law no. 82-70, arts. 22, 4.
[655] Human Rights Watch interview with Colonel Marouane Bouguerra, General military prosecutor, October 2011.
[656] Code of Military Justice (10 January 1957) arts. 15,21.
[657] ibid, article 44.
[658] Modifying and completing the military justice code (29 July 2011), article 10.

appeals court; and to lengthen the time limit for appealing a decision to the cassation court, harmonizing it with the 10 day deadline for filing that applies to decisions rendered by the civilian judiciary.

4. To ensure access of victims to military justice. The original Code of Military Justice did not allow parties to join a case before military courts as *parties civiles*.[659] Decree law 69 changed this. Its article 7 provides the 'constitution of civil parties and the rules and procedures set up in the criminal procedure code.' The code of criminal procedure allows launching of civil actions are allowed before military justice in conformity with the procedure allows 'all those who have personally suffered a harm as a direct result of the offense' to bring an action. In addition, victims now have the right to make claims for reparation under the criminal procedure code."

Libya

Libya's Prosecutor General initiates investigations and enforces arrests. However, "the emergence of a parallel judicial system in which independent armed groups [assume] state functions, arresting, detaining and kidnapping individuals without judicial oversight or accountability," has complicated the process of prosecution.[660] The excerpts below from a report by the International Crisis Group help explain the current situation with regards to the process of prosecution in Libya.

"The first trials against Qadhafi-era officials occurred in mid-2012, in either ordinary criminal courts or their military counterparts […] the state referred non-military former regime officials in its custody to the ordinary criminal justice system."[661]

"Libya has a four-tier judicial system. At the bottom are district courts (*mahakim juziya*), with a single judge and jurisdiction over commercial and civil cases valued less than 1,000 Libyan dinars ($750), as well as over certain family law cases; above these, are courts of first instance (*mahakim ibtidaiya*) that function both as an appellate court for the district tribunals and as the initial court for all other civil, commercial and family cases; further up the chain are appeals courts (*mahakim al-istinaf*) that also function as the initial tribunal for criminal and administrative cases. The Supreme Court (*al-mahkama al-ulya*) serves as a constitutional court and a court of cassation, deciding appeals of civil, commercial, criminal, administrative and family cases."[662]

"[R]evolutionary brigades – and, at times, criminal gangs posing as such – have been operating above the law, hindering the work of investigators and judges. They all at once assume the roles of police, prosecutors, judges and jailers. Armed brigades create investigation and arrest units; draft lists of wanted individuals; set up checkpoints or force their way into people's homes to capture pre- sumed outlaws or people suspected of aiding the former regime; and, in some cases, run their own detention facilities in their own headquarters, isolated farms or commandeered

[659] Code of Military Justice (10 January 1957), article 7.
[660] International Crisis Group, 'Trial By Error: Justice in Post-Qadhafi Libya' (April 2013) 18.
[661] ibid, 34.
[662] ibid, 16.

former state buildings."[663]

"Hundreds of armed groups that emerged victorious and refused to lay down their arms after the regime's fall still function as parallel police forces, at times working against state interests. Although some armed groups nominally fall under the authority of a civilian or military prosecutor's office – depending on whether they have been recognised by the interior or defence ministry – they tend to act both independently and arbitrarily. Such bodies for the most part also lack investigative capacity, and their members have never undergone formal police or legal training. Having compiled lists of 'wanted' individuals – without reference to any judicial procedure – they have carried out arbitrary arrests, kidnappings and killings of alleged 'anti-revolutionary' figures well after the end of hostilities. Indeed, more than 7,000 people captured by so-called revolutionary brigades during and after the 2011 conflict remain in arbitrary detention, for the most part in makeshift prisons."[664]

Yemen

The following excerpts from Yemen's Code of Criminal Procedures outline the process of prosecution in Yemen as well as the role of the General Prosecution:[665]

Article 21: The General Prosecution has the jurisdiction over the initiation, presentation and implementation in the Court. Such indictment may not be filed by any others except in the cases stipulated in the Law.

Article 22: The General Prosecution is not permitted to suspend a criminal indictment, or to abandon it, or to interfere in its proceedings, or to rescind it or the ruling issued regarding it, or the suspension of its execution or implementation except in the cases stipulated by the Law.

Article 23: The General Prosecutor himself or through any members of the General Prosecutor shall proceed with carrying out charges in accordance with the provisions of the Law.

Article 24: The victim, the claimant of a personal entitlement or a right, the claimant for a civil right is an associate joint litigant with the prosecution in the criminal lawsuit and a litigant in the civil indictment associated with it, if he has any claims thereto. The person liable for the civil rights or entitlements shall be considered as a joint litigant of the accused in the criminal lawsuit and the civil indictment associated with it, if he is entered into or he interfered in it, even though no claims are presented to him accordingly.

Article 26: Criminal lawsuit may not be filed against a Judicial Enforcement Officer or a Public Employee for a crime any of them committed while carrying out his job or due to the latter, except with the permission of the General Prosecutor, or anyone delegated for this among the Public Attorneys, or the Heads of the Prosecution. The

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[663] ibid, 1.
[664] ibid, 4.
[665] 'Republican Decree – By Law No. [13] For 1994 Concerning the Criminal Procedures,' <www.refworld.org/pdfid/3fc4bc374.pdf> accessed 6 December 2015.

permission must be issued in the cases involving blood retribution or organic retribution or financial compensation, or in the cases involving libel if the victim presented a complaint and persisted on it.

Article 27: The General Prosecution may not file charges before the Court except when it is based on complaint filed by the victim or anyone acting legally on his behalf in the following situations:

1. In libel, insults and disclosure of personal secrets, or in the case of insults, threats, in words and in deed, or cause of simple bodily harm, unless the crime occurred to one entrusted with a public servant, during the execution of his duties accordingly or due to such execution.
2. In those crimes occurring on properties between the direct line relatives, the branches thereof, the spouses or the sisters and brothers.
3. Crimes involving checks.
4. In the crimes involving destruction, distortion, damage of private property, or the killing of animals without justification, or unintentional fires, or the violation of the sanctity of the property of others, as well as the situations specified by Law.

Article 28: If the victims of a particular crime are multiple, it is sufficient to have a complaint presented by one of them; if the accused are multiple member; the complaint is filed against only one of them, it shall be considered as being presented against all of them in legitimizing the investigation of the Prosecution with them.

Article 29: The right to complain terminates in accordance with the provisions of Article 27 after the passage of four months from the date of the victim becoming aware of the crime, or of it being committed, or the removal of the compulsory excuse which prevented the presentation of a complaint; the right to complain collapses with the death of the victim of the crime.

Article 30: In all cases, the Law requires that a criminal indictment be filed based on the presentation of a complaint, no investigation may take place in such a case until the complaint has been presented.

Article 31: Whoever has the right to present a complaint in the cases indicated in Article 27 may withdraw it at any time.

Article 32: If the Elementary Court sees in the charges presented to it that there are suspects other than those on whom the charges are being filed against, or that there are other events or facts that are not implicated on them, or that there is a crime that is linked to the accusation presented before the Court, then the Court may refer the case to the Prosecution for investigation and to deal with it in accordance with Part Three of Volume TWO of this Law.

If a decision is issued to refer charges to another court, the Court may refer it to another Court; if the Court does not act decisively in dealing with the original indictment; it is linked with the new indictment, in a manner that makes their separation unacceptable, the whole case may be then referred to another court.

Article 33: The Appeals Court, when reviewing an appeal, has the same authority stipulated in the previous article; the referral, in this case may be to the another Primary Court other than the Court which issued the ruling being appealed. In all cases such transfer shall take place through a decision of the Chairman of the Court in accordance with the Law.

Article 34: The concerned bench which is reviewing a case based on an appeal for the second time in the Supreme Court has the same authorities as outlined in the previous two articles.

Article 35: The Court has the right, while reviewing a case, if any acts occur which violate its orders, or the respect which it shall be accorded; there is attempt to influence in its judicial decisions, or the witnesses before it with respect to charges under its review to file a criminal lawsuit against the accused in accordance with Articles 32 and 33; to issue its verdict thereof.

Article 84: The Judicial Enforcement Officers are considered, in the areas of their jurisdiction, to be the following officials:

First: The members of the General Prosecution;
Second: The Governors [of the Governorates];
Third: The General Security Managers;

Fourth: The District Administrators

Fifth: The Police and Security Officers;

Sixth: The Guards Supervisors, the Police Precinct Supervisors, the Police Checkpoint Supervisors, and otherwise whoever is delegated to take on the role of Judicial Enforcement Officers;
Seventh: The Village "Elders";

Eighth: The Air and Sea Craft Captains;

Ninth: All [Government] employees who are delegated as Judicial Enforcement Officers in accordance with this Law;

Tenth: Any other entity assigned to take on the role of Judicial Enforcement in accordance with the Law.

Article 85: The Judicial Enforcement Officers shall report to the General Prosecutor and subject to his supervision within the jurisdictions for Judicial Enforcement. The General Prosecutor may request the concerned relevant entity to look into anyone for whom there could be a violation or deficiency in carrying out of his duties; he may file disciplinary lawsuit, all of this shall not prevent filing criminal charges.

Article 86: If the General Prosecutor felt that a Judicial Enforcement Officer committed a severe error, or that the penalty ruled to him is insufficient, and also if

the concerned entity did not respond to the request for looking into Judicial Enforcement Officers, the case maybe taken up to the Appeals Court to consider removing the Judicial Enforcement status from the relevant official; all of this does not prevent the filing of criminal lawsuit. This Court may also take on a case at its own discretion or based on the request of the Chairman whether a case that is presented to it is appropriate, and shall look into the case of removing the Judicial Enforcement status in the situations cited in the previous article.

Article 91: The Judicial Enforcement Officers are assigned to investigate crimes and to chase after those who commit them; to examine all reports and complaints and the gathering of evidence and information relevant to them and to record them in the Minutes [Report] which shall be sent to the General Prosecution.

Article 92: If the Judicial Enforcement Officer is notified or becomes aware of a crime occurrence of a severe nature, or is of those so specifically designated by the General Prosecutor by a decree from him, he must inform the General Prosecution and immediately move to the crime scene to safeguard it and to arrest all that is relevant to the crime and to carry out all the necessary examinations; in general, he shall take all the necessary measures to safeguard the evidence of the crime and whatever will facilitate the investigation thereof, listen to all the statements from anyone having any information on any crimes that occur and to interrogate the suspects about them.

He must also record all this in the Minutes [Report] of Investigations and Collection of Evidence, which he shall sign along with the witnesses he listened to and the experts whose help he sought. He shall have no right to put the witnesses and experts under oath, unless he is concerned that it will be impossible to get the testimony under oath after this testimony. All these report shall be submitted to the members of the General Prosecution upon his presence. In the other crimes the Minutes [Report] of investigation and collection of evidence which are carried out by the Judicial Enforcement Officers in accordance with what is stated above, shall be duly sent by them to the General Prosecution to take the appropriate measures.

Article 93: The member of the General Prosecution, upon receipt of the Minutes [Report] of Investigation and Collection of Evidence or upon the presentation of the Minutes [Report] for his review must ensure the fulfillment of these report to the requirements thereof prior to any further action being taken; he shall return it to its source of origin for completion, or designate someone to complete or completing them or he shall complete them by himself.

Article 94: Anyone who is aware of the occurrence of a crime which fall under those crimes which the General Prosecution may file charges for, without having to wait for a complaint or permission, shall inform the General Prosecution immediately or the nearest Judicial Enforcement Officers.

Article 95: Any general public employee, or those appointed for public service, who comes to learn, while performing their duties, or as a result thereof of the occurrence of a crime, which fall under those crimes which the General Prosecution may file charges for, without having to wait for a complaint or permission, shall inform the General Prosecution immediately or the nearest Judicial Enforcement Officers.

Article 96: If a member of the General Prosecution and a Judicial Enforcement Officer meets at the scene of a crime, the member of the General Prosecution shall carry on the tasks of the Judicial Enforcement Officer; if any of the Judicial Enforcement Officers has already commenced work, the member of the General Prosecution may investigate by himself or to order the completion thereof directly.

Article 109: The General Prosecution is the sole authority that handles charges based on the Minutes [Report] For the Collection of Evidence in accordance with the following provisions:

Article 110: f the General Prosecution felt that the Minutes [Report] For the Collection of Evidence involves a serious crime, then the criminal lawsuits shall not be filed until it has investigated it.

Article 111: If the General Prosecution felt that the case is ready for presentation based on the Minutes [Report] For the Collection of Evidence, which entails the occurrence of a non-serious crime, then the suspect is ordered to attend directly to the Court of appropriate jurisdiction.

Article 112: If the General Prosecution feels that there is no scope for bringing charges to a case, it shall issue an order with cause, to file the papers temporarily with the continuation of the careful checking if the perpetrator is unknown or that the evidence against him is inadequate, or to order the final filing of the papers, if the incident did not constitute a crime, or is insignificant. The decision for filing due to non- significance shall only be issued by the General Prosecutor or anyone designated by him to this end.

Article 113: If the General Prosecution issued an order to file a case, it shall notify this to the victim of the crime claiming civil rights. If any of them dies, the notice shall be given to his heirs, in total, at his place of residence. Each of those mentioned has the right to appeal a decision to file a case in the court of appropriate jurisdiction within 5 days of the date of the notification thereof.

Article 114: The General Prosecution may cancel its decision to file a case if the period set for not hearing a criminal indictment cited in Article 38 of this Law has not expired.

Article 115: The jurisdiction of the General Prosecution is limited to the investigation of crimes occurring within the jurisdictions of the Court under which it carries out its work.

Article 116: The General Prosecution has the authority to investigate and prosecute and all the authorities and responsibilities set by the Law; he may directly exercise the authority to investigate himself or through any member of the General Prosecution or who ever is assigned for this by the Judiciary or through the Judicial Enforcement Officers.

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5. Interview with Abdelrahman Barman, Human Rights Lawyer, National Organisation for Defending Rights and Freedoms (Sanaa, Yemen, 22 January 2014)
6. Interview with Omar Own, Consultant, UNDP Yemen; NGO Expert (Sanaa, Yemen, 22 January 2014)
7. Interview with Tamer Shamsan, Political Activist; Columnist (Sanaa, Yemen, 22 January 2014)
8. Interview with Letta Tayler, Senior Researcher, Human Rights Watch (Telephone interview, 21 November 2013)
9. Interview with Belkis Wille, Yemen and Kuwait Researcher, Human Rights Watch (Sanaa, Yemen, 22 January 2014)