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EDITORIAL

M. CHERIF BASSIOUNI

‘Transitional justice’ is a term popularized by South Africa’s experience as it transitioned from the apartheid regime to a democratic system of government in 1994¹. After years of racial repression, truth and justice were indispensable to achieving a peaceful transition from oppressive white minority rule to majority indigenous democratic rule. This transition involved a number of modalities, which have since been followed and expanded in a number of societies transitioning out of conflict. These modalities include criminal accountability for those who have committed the most serious crimes (sometimes only the leaders); the establishment of truth commissions to generate a record of past abuses and develop measures to prevent the recurrence of similar abuses; and various forms of victim redress, including victim compensation².

¹ The research assistance of Daniel Swift, attorney-at-law, is hereby acknowledged.

² M.C. Bassiouni, ed. (2002) *Post-Conflict Justice*, Ardsley, NY: Transnational Publishers; M. C. Bassiouni and D. Rothenberg, eds. (2008) *The Chicago Principles on Post-Conflict Justice*, Chicago: International Human Rights Law Institute.

In 2005, these modalities were included in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law³.

Since World War II, a number of states that underwent conflict or regime change have sought ways to reckon with the past as a way of paving the road to the future – processes described and analyzed in the pages of this journal.

Conflicts are *sui generis*, consequently the choice among post-conflict and transitional justice modalities varies depending on the conflict, the value-oriented goals intended to be achieved by any one or a combination of these modalities, and the manner in which they are implemented. For example, in order to address the conflicts in the former Yugoslavia and Rwanda, the UN Security Council pursued the first international effort at postconflict justice since the end of World War II, establishing the International Criminal Tribunals for the former Yugoslavia (ICTY)⁴ and Rwanda (ICTR).⁵ Prosecution was the chief modality pursued by the UN and domestic actors in these contexts. In contrast, Latin American countries have emphasized establishing the truth and recording history at the domestic level in order to bring closure to the victims of the region's various

³ M. C. Bassiouni (2006) "International Recognition of Victims' Rights", *Human Rights Law Review*, 6, pp. 203–279.

⁴ UN Security Council Resolution 827 (25 May 1993).

⁵ In addition to UN Security Council Resolutions 827 and 935, see, 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935,' UN Doc. S/1994/1405 (9 December 1994).

dictatorships and prevent the recurrence of human rights abuses⁶. In post-Soviet Eastern and Central Europe, meanwhile, the focus has been mainly on vetting and lustration⁷, with the sociopolitical goal of transition to stability and democracy trumping the search for justice.

Starting in 2011, parts of the Arab world experienced internal conflicts and regime change, all of which were euphemistically called the ‘Arab Spring’⁸.

The Arab Spring soon turned into a bitter winter when the conflicts in Yemen and Libya continued and new conflicts erupted in Syria, Iraq and the Gaza Strip. Egypt went through much turmoil and again became, by popular demand, a repressive military regime akin to what it has been since 1952. The only difference so far between the current regime and what came before in Egypt is the lessening of corruption and the high hopes and good will of most of the population. Whether Egypt will move toward democracy is still in question.

Despite this turmoil, several Arab countries have established meaningful postconflict and transitional justice mechanisms. Some countries with lower-intensity internal conflicts did so before the Arab Spring, such as Morocco and Bahrain. In fact, Bahrain is the only

⁶ See P. B. Hayner (2010) *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed., Oxford: Routledge.

⁷ R. Boed (2002) “An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice,” in M. C. Bassiouni (2002) *op. cit.*, supra nt. 2.

⁸ M. C. Bassiouni (2013) “The ‘Arab Revolution’ and Transitions in the Wake of the ‘Arab Spring’”, *UCLA Journal of International Law and Foreign Affairs*, 17, pp. 133–174; E. Al-Amin (2013) *The Arab Awakening Unveiled: Understanding Transformations and Revolutions in the Middle East*, Washington, DC: American Educational Trust.

country in the Arab world to have established a comprehensive commission of inquiry, the Bahrain Independent Commission of Inquiry (BICI). A few mechanisms have also been established since 2011.

The following is a description of the postconflict and transitional justice processes initiated in the Arab world in chronological order, although the overlap in events occurring in the region makes the order somewhat subjective. The mechanisms established in Morocco, Iraq, Sudan (Darfur), Lebanon, Bahrain, Tunisia, Yemen, Libya, Egypt and Gaza have been ad hoc and driven by diverse actors, namely the UN (with referrals to the International Criminal Court (ICC) in Sudan and Libya and the establishment of commissions of inquiry on Sudan, Libya, Syria and Gaza); national bodies (in Morocco, Tunisia, Libya, Egypt and Yemen, where some fact-finding bodies were established, though with few outcomes); hybrid bodies (with the UN and the Lebanese government establishing the Special Tribunal for Lebanon); and nationally established but internationally composed bodies (with the establishment of the BICI in Bahrain). What is obvious in all of these instances is that the mechanisms have had more of a political motivation to their establishment than a pursuit of the higher goals and values of truth, justice and peace.

1. Morocco

In response to domestic and international criticism of Morocco's human rights abuses since independence in 1956, King Has-

san II created the Advisory Council on Human Rights (Conseil Consultatif des Droits de l'Homme, or CCDH) in 1990.

In 1998, the CCDH recommended the creation of the Independent Arbitration Commission to compensate victims of arbitrary detention and forced disappearance.

This Commission was established by King Hassan's successor, King Mohammed VI. As the two bodies were not sufficient to meet growing public demands for justice, King Mohammed in 2004 established the Equity and Reconciliation Commission (Instance Équité et Réconciliation, or IER), with a mandate to establish the truth of past abuses, provide compensation to victims and their families and recommend measures to prevent further abuses. King Mohammed supported the publication of the IER's final report in 2005 and charged the CCDH with carrying out the IER's recommendations⁹. To date, little has been done in this regard.

2. Iraq

After the US invasion in 2003, and days before the capture of Saddam Hussein, the US-appointed Iraqi Governing Council established the Iraqi High Tribunal (IHT) to prosecute Saddam and members of his regime¹⁰. The IHT conducted multiple investiga-

⁹ Equity and Reconciliation Commission, <http://www.ier.ma> (accessed 28 August 2014).

¹⁰ See M. C. Bassiouni and M. W. Hanna (2007) "Ceding the High Ground:

tions and initiated the Dujail trial and the al-Anfal Campaign trial, in which former high-ranking government officials were charged with crimes against humanity against Shi'a and Kurdish communities, respectively. The Dujail trial ended with the conviction of Saddam Hussein and six former government officials of crimes against humanity, war crimes and genocide, as well as the acquittal of one former official given lack of evidence¹¹. The al-Anfal Campaign trial ended with charges being dropped against Saddam (as he was executed after the Dujail trial), convictions of five government officials of crimes against humanity, war crimes and genocide and the acquittal of one former official¹².

Since the 2003 invasion, an estimated 300,000 people have been killed in Iraq as a result of ongoing sectarian conflict, which no accountability mechanism has been established to address.

3. Sudan

The conflict in Darfur has resulted in the deaths of an estimated 300,000 people and created an estimated 2.5 million refugees. An

The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein,” *Case Western Reserve Journal of International Law*, 39, pp. 21–98.

¹¹ Saddam and three other high-ranking central government officials were sentenced to death by hanging, while three regional Ba'ath party officials from the Dujail area were each sentenced to 15 years in prison. See Human Rights Watch (2006) *Judging Dujail: The First Trial before the Iraqi High Tribunal*, New York: Seven Stories Press.

¹² Prosecutor v. al-Majid et al., Case No. 1/C Second/2006.

International Commission of Inquiry on Darfur was established in 2004 and resulted in the UN Security Council's referral of the situation to the ICC in 2005¹³.

The ICC has issued indictments against six individuals, including President Omar al-Bashir, but no trials have occurred to date¹⁴. Al-Bashir continues to travel freely to African Union member states without being surrendered to the ICC, despite the member states being signatories to the Rome Statute. The government of Sudan sought to establish a special chamber in its criminal courts to prosecute persons believed to have committed crimes in Darfur based on the definition of crimes in Articles 6, 7 and 8 of the Rome Statute. This measure was a bid to avoid the ICC, but even that was never put into effect.

4. Lebanon

In contrast to other mechanisms in the region, the Lebanese transitional justice process stems from a single terrorist bombing on 14 February 2005 that caused the deaths of 22 people, including former Lebanese Prime Minister Rafiq Hariri. Based on the

¹³ In addition to UN Security Council Resolution 1593 (31 March 2005), see, 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General' (25 January 2005).

¹⁴ See, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, First Warrant of Arrest (4 March 2009); *Prosecutor v. Ahmad Muhammas Harun*, Case No. ICC-02/05-01/07, First Warrant of Arrest (27 April 2007).

recommendation of a UN fact-finding mission to Lebanon¹⁵, the UN Security Council created the International Independent Investigation Commission (UNIIC) on 7 April 2005¹⁶. Following further bombings, the Lebanese government requested that the UN establish a tribunal with international characteristics to investigate and prosecute individuals involved in political bombings of a similar nature and gravity to the attack on the former prime minister, but which occurred between 1 October 2004 and 12 December 2005.

In response to this request, the Security Council created the Special Tribunal for Lebanon (STL)¹⁷. The Lebanese parliament never ratified the STL, however, as its composition changed after the request was made.

The STL is the first tribunal of its kind to deal with terrorism as a distinct crime.

UN Security Council Resolution 1757 describes terrorism as a ‘threat to international peace and security.’ The STL applies the Lebanese legal definition of terrorism, of which an element is the use of means that are ‘liable to create a public danger,’ such as ex-

¹⁵ Fitzgerald submitted his report to the Security Council, wherein he noted the intense polarization of the Lebanese Government coupled with a strong Syrian influence in Lebanese affairs provided the context for assassination. Specifically, the report noted that Syria clearly exerted influence that went beyond the reasonable exercise of cooperative or neighbourly relations. The Fitzgerald Report moves beyond the accusation of Syrian Government to accuse Lebanon of failing to provide adequate protection for its citizens.’ M. C. Bassiouni, ed. (2008) *International Criminal Law*, Volume 3: *International Enforcement*, 3rd ed., Leiden: Brill, p. 770.

¹⁶ UN Security Council Resolution 1595 (7 April 2005).

¹⁷ UN Security Council Resolution 1757 (30 May 2007).

plosive devices, flammable materials, toxic or corrosive products and infectious or microbial agents¹⁸. Unfortunately, local political actors continue to avoid or delay efforts to deal with this violent period in Lebanon's history. So far, no trials have taken place.

5. Bahrain

The demonstrations that took place in Bahrain in February and March 2011 were distinct from other Arab Spring demonstrations as they were largely precipitated by a growing divide between Shi'a and Sunni communities¹⁹. Demonstrators called for a new constitution, an elected parliament and the establishment of a truth commission to investigate human rights abuses against political prisoners and human rights activists. When government forces violently cracked down on demonstrators, tens of thousands of Bahrainis converged on one of the royal palaces to call for the exit of the ruling al-Khalifa family. In response, King Hamad bin Isa al-Khalifa established the BICI, which was formed under national law in consultation with the UN High Commissioner for Human Rights.

Staffed by a panel of international experts²⁰, the BICI was tasked with investigating and reporting on the events that took

¹⁸ Art. 314 of the Lebanese criminal code.

¹⁹ Bahrain Independent Commission of Inquiry (BICI), Report of the Bahrain Independent Commission of Inquiry (10 December 2011).

²⁰ S. Kerr, "Bahrain King Picks Experts to Probe Unrest," *Financial Times*, 29 June 2011.

place in Bahrain in February 2011 and the consequences of those events. The BICI's final report determined that the Bahraini government committed human rights abuses during the uprising, including the systematic torture and killing of political prisoners, nearly all of them Shi'a²¹. In terms of postconflict justice, this was a remarkable moment in history, as no other Arab ruler had willingly opened his government to such public scrutiny. The Bahraini government has since pledged to adopt the BICI's recommendations and keeps the public informed of its progress via a dedicated website²². The ethno-political confrontation between Shi'a and Sunni remains, however, and reconciliation is a distant prospect.

6. Tunisia

The revolution of 2010–2011 was directed at the government of President Zine El Abidine Ben Ali, in power since 1987, and its repressive security policies, which included large-scale arbitrary detentions and the torture of political prisoners.

Tunisia successfully and transparently elected the National Constituent Assembly (NCA) in October 2011. On 13 December 2013, the NCA enacted the Draft Organic Law on the Organization of Transitional Justice Foundations and Area of Competence,

²¹ BICI, *supra* nt. 20.

²² Implementing the Bahrain Independent Commission of Inquiry, <http://www.govactions.bh> (accessed 28 August 2014).

which established the national Truth and Dignity Commission (TDC). The TDC's mandate is to investigate and document human rights abuses from Tunisia's independence through to the exit of the Ben Ali regime, as well as provide redress for victims and recommendations to the Tunisian government.

The Commission will have to navigate sensitive and complex issues of victims' rights, especially with respect to gender-based violence, as well as respond to urgent civil and human rights cases, while simultaneously developing a meaningful and effective reparations program²³. Despite forward-looking measures such as the TDC, accountability for former regime members guilty of the worst abuses does not seem likely. Ben Ali fled to Saudi Arabia in January 2011, where he was given refuge. He and his wife were tried in absentia by a Tunisian court and sentenced to 35 years in jail for theft and unlawful possession of cash and jewelry.

No one else in his ruling elite has yet been meaningfully punished for any crimes committed during the 23-year regime²⁴. Of all the Arab countries, Tunisia has, so far, made the most meaningful progress toward secular democracy and freedom.

²³International Center for Transitional Justice, 'ICTJ Forum: Launch of Tunisia's Truth and Dignity Commission,' 80 June 2014, <http://ictj.org/multimedia/audio/ictj-forum-launch-tunisias-truthand-dignity-commission> (accessed 28 August 2014).

²⁴Almost all of the approximately 20 senior government officials who were tried and imprisoned by military tribunals in the direct aftermath of the revolution have had their sentences reduced to time served on appeal and are now free. See, C. Gall, "Questions of Justice in Tunisia as Ousted Leaders Are Freed," *New York Times*, 17 July 2014, A4.

Transition toward secular democracy is more important to most people in Tunisia at this point in time than transitional justice. But popular demand for transitional justice does exist, particularly for accountability for those in power in the prior regime.

7. Yemen

This country has been in a state of quasi-civil war between Shi'a and Sunni communities since the unification of North Yemen and South Yemen in 1990, under the dictatorial rule of President Ali Abdullah Saleh. On 23 November 2011, Saleh signed a Gulf Cooperation Council transition agreement that transferred power to his deputy, Vice President Abd Rabbuh Mansur Hadi, and called for reforms, including broad national dialogue, changes to the constitution, a constitutional referendum, political and electoral legal reforms, parliamentary and local council elections and presidential elections²⁵. Government discussions have been ongoing since 2012 to institute various mechanisms of transitional justice, including the Draft Law on Transitional Justice and National Reconciliation.

²⁵Human Rights Council, Representative of the UN High Commissioner for Human Rights, 'Situation of Human Rights in Yemen,' UN Doc. A/HRC/24/34 (25 July 2013); International Center for Transitional Justice (ICTJ), 'Facing a Troubled Past, Yemen Debates Transitional Justice Measures,' 25 June 2012, <http://ictj.org/news/facing-troubled-past-yemen-debates-transitional-justice-measures> (accessed 28 August 2014).