

Competing for Justice: Transitional Justice and Stabilisation in the Middle East/North Africa

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Competing for Justice

Transitional Justice and Stabilisation in the Middle East/North Africa

Executive Summary

- From the beginning of the uprisings in the Middle East and North Africa (MENA), the call for transitional justice was constant. In the aftermath of conflict or radical political change, the question today is almost never *whether* transitional justice should take place but rather *which form* it should take, *when*, and *how*. Layered on top of calls for equality, redistribution and social justice in MENA, the calls for transitional justice echoed global exhortations to fight impunity and ensure accountability. A range of processes have followed: trials, battles over international criminal jurisdiction, truth commissions, reparations and lustration.
- Transitional justice often serves the purpose of consolidating and legitimising a new regime. In countries where the new regime shares much with its rights-violating predecessor, where conflict is incipient or constant, or where political compromise remains fragile, contests over the shape and nature of justice become struggles over the distribution of power, resources, victimhood and memory.
- This paper identifies factors that shape the (de) stabilising potential for transitional justice in the MENA region: (1) the choice and design of mechanisms; (2) the conditions of transition; (3) the inclusion of economic factors; and (4) the role of memory, history, and reconciliation.
- Each of these factors offers a different lesson:
 1. an over-emphasis on criminal prosecution can narrow the parameters and outcomes of justice;
 2. halting, interrupted, incomplete, and ongoing transitions make justice processes sites of explicit political contestation;
 3. the inclusion of socio-economic inequalities and corruption is both inescapably necessary and deeply threatening to entrenched elites; and
 4. the ways in which memory is institutionalised and history is written distributes symbolic and material identity by defining victimhood.
- Together, these lessons suggest the inability to draw a clear line between stabilisation and justice in the abstract. Resistance and revolution unbalance existing distributions of power and resources. As those forces founder, continue, surge, or return, transitional justice provides a new site for contestations over identity and community as well as human and material resources. Depending upon the legitimacy of the processes, the investment of the actors, the shape of popular dissatisfaction, and the distributive impact of justice, that site can offer an alternative to violent conflict or become an arena for further battles.

Introduction

By the time of the uprisings throughout the Middle East and North Africa (MENA) in 2011, transitional justice had already established itself as a necessary instrument during and after conflict, atrocity, and/or regime change. The question today is almost never *whether* transitional justice should take place but rather *which form* it should take, *when*, and *how*. Accountability, justice, truth, and reconciliation are now seen as necessary fellow travellers of peace and political settlement.¹ As a result, when massive protests took hold in Tunisia and Egypt, as conflict broke out in Syria, as long-time leaders were rapidly and unexpectedly toppled, talk quickly turned to the question of transitional justice.

Calls for transitional justice do not, on their face, reveal a specific agenda. They can represent competing objectives, divergent relationships to past and present regimes, and ambivalent associations with revolution. Justice, accountability, truth and reconciliation can be the slogans of the resistance, the government, or the opposition – or of all of them at the same time. They can be part of a project of stabilisation and legitimisation of a new regime (“intended to herald the end of mass mobilisation” and found a new political or economic order²) or a cry of protest. Regardless, transitional justice becomes part of ongoing contests over the distribution of resources and political power in the aftermath of significant political change.

In the MENA context, these endemic tensions built on others: achieving (partial) consensus over ending one regime with little or no agreement over the shape of a new one; trying to define justice against the backdrop of ongoing, sometimes violent, conflict; inviting but distrusting external intervention; embracing revolutionary or reformist political positions; and correcting or reinforcing deep historical imbalances of resource distribution within nations and across the region.

Although transitional justice can flexibly incorporate a number of different practices, there has nonetheless been a widespread embrace of a “toolkit” of prosecutions (national or international), truth commissions, reparations, administrative purges and some forms of local practice. Moreover, early debates over the contradictions between truth and justice or justice and peace appeared to dissolve over time into a consensus that the objectives were mutually reinforcing³. This list of seemingly common approaches and objectives sells short the contradictory reality of transitional and post-conflict (or conflict) states. Justice and politics are intimately intertwined, but that has never guaranteed a happy marriage between their plural objectives.

This paper identifies factors that shape the potential for transitional justice in the MENA region to reinforce stability, foment change, and allocate power. Rather than focusing on a single case study, the chapter references salient characteristics and challenges raised by different national and regional situations. The paper is structured around four categories. Section 2 explores the *choice and design of mechanisms*, particularly the tension between a desire for prosecutions and their endemic limitations. It focuses on events in Libya, where a battle over International Criminal Court jurisdiction served as a proxy for assertions of Libyan sovereignty against a backdrop of national fragmentation. Section 3 outlines the critical role of the *conditions of transition*,

¹ See, e.g., Ruti G. Teitel, *Globalizing Transitional Justice: Contemporary Essays*. New York: Oxford University Press, 2014.

² Corinna Mullin and Ian Patel, “Contesting Transitional Justice as Liberal Governance in Revolutionary Tunisia,” *Conflict and Society* 2(1): 104-24 (2016).

³ Earlier debates between truth and justice are reflected in, for example, the essays collected in Robert I. Rotberg and Dennis Thompson, eds. *Truth v. Justice: The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000). Martha Minow characterised the debate instead as one between “vengeance and forgiveness”. *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*. (Boston: Beacon Press, 1998). Subsequent works explored the ways in which these seemingly innate conflicts among objectives were treated as if they had been resolved. Karen Engle, “Anti-Impunity and the Turn to Criminal Law in Human Rights”. In *Anti-Impunity and the Human Rights Agenda*. Eds. Karen Engle, Dr Zinaida Miller, and Dennis Davis. New York: Cambridge University Press, 2016; Christine Bell, “Interdisciplinarity and the State of the Field” or “Non-Field,” *International Journal of Transitional Justice* 3(1): 5-27 (2009); Bronwyn Leebaw, “The Irreconcilable Goals of Transitional Justice,” *Human Rights Quarterly* 30(1): 95-118 (2008).

particularly in areas where supporters of a past regime retain some power or where a return to violent conflict seems likely. Using the cases of Egypt and Tunisia, it reveals the ways in which contestations over justice both reflect and contribute to struggles over political power. Section 4 analyses attempts to include *economic crimes* and inequality in the practice of transitional justice. It uses Tunisia as a case study for how transitional justice can play a role in uncovering patterns of unjust enrichment and unequal deprivation – and for how new regimes may quash the possibility for economic accountability. Finally, section 5 outlines the roles of *memory, history, and reconciliation* and the ways each may be used or captured in the post-transition struggle over the mantle of victimhood.

The concerns raised in each category overlap and re-appear, since each implicates others. For example, the choice of mechanisms influences which types of violence are addressed: trials, which focus on individual guilt and narrow ambits of crimes, offer anemic sites for assessing socio-economic harms. The conditions of transition may affect the mechanisms chosen, since the degree of stability or consensus during regime change will make certain practices preferable over others. The design of mechanisms both produces and relies upon particular interpretations of past violence and abuse. Thus, while the categories identified here offer a useful heuristic, the separation of these concerns into four discrete areas should not be taken as a practical division among them.⁴

Transitional justice practices assert themselves in moments of instability to ensure that a violent past will not continue to haunt and subsequently obstruct a peaceful future. They seek a series of complementary and conflicting goals: retribution, restoration, reconciliation and reparation. They claim the capacity to call perpetrators to account and to fulfil the needs and desires of victims. They balance between local needs and international demands that sometimes conflict. And, while some claim that law can operate outside politics, transitional justice frequently exposes the inevitable collusion and contradiction between the two. Resistance and revolution unbalance existing distributions of power and resources. As those forces founder, continue, surge, or return, transitional justice provides a new site for contestations over identity and community as well as human and material resources.

1. Mechanisms and Institutions

Never a fully consolidated field but an increasingly mainstreamed one, transitional justice has always included a variety of institutional approaches to the problem of resolving and reconciling past human rights violations after a political transition.⁵ In each country context around the world, the new regime has been faced with the question of how to simultaneously address the violence and violations of the past while avoiding a return to conflict or authoritarianism in the near future. In the MENA region, these questions have been all the more fraught by shifting alliances, ongoing conflicts, and incomplete transitions.

⁴ Inevitably, important forces and issues in the region are left largely unaddressed in this paper. A few examples of work that addresses other significant pieces of the puzzle: Cale Salih et al, *The Limits of Punishment: Transitional Justice and Violent Extremism*, United Nations University Centre for Policy Research, 2018; Line Khatib, "Challenges of Representation and Inclusion: A Case Study of Islamist Groups in Transitional Justice". In *Transitional Justice and the Arab Spring*, Eds. Kirsten Fisher and Robert Stewart. New York: Routledge, 2014; Elham Manea, "Transitional Justice and the Arab Spring from a Gender Perspective". In *Transitional Justice and the Arab Spring*; Andrea Khalil, Gender Paradoxes of the Arab Spring, *The Journal of North African Studies* 19(2): 131-136 (2014).

⁵ Christine Bell, "Interdisciplinarity and the State of the 'Field' or 'Non-Field,'" *International Journal of Transitional Justice* 3(1): 5-27 (2009)

1.1. The View from Transitional Justice

Historically, the field of transitional justice has been embedded in a series of debates over the utility, necessity, and primacy of particular institutions. Although the parameters of the field have shifted over time (sometimes defined as justice after authoritarianism or conflict and sometimes by a particular set of mechanisms), transitional justice has consistently been comprised of efforts like truth commissions or other commissions of inquiry, criminal prosecutions, administrative purges or vetting schemes, reparations and related compensation programmes. Constitutional reforms, transformations of the education system and curricula, and memorialisation projects have also been associated with transitional justice in a variety of sites.⁶

In certain cases, contextually-specific tools have been used in lieu of transnationally familiar mechanisms. For example, the post-genocide government in Rwanda (with significant support from the international community) developed a system of *gacaca* courts based on a set of local practices that were converted and translated into a contemporary justice mechanism to address the mass nature of involvement in the genocide.⁷

Transitional justice is often caught between an impulse to routinise the selection of particular mechanisms and a commitment to local choice and participation.⁸ In both cases, however, the stated emphasis remains on delivering justice to victims, promoting truth about atrocity and violence, sustaining peace, and guaranteeing non-repetition of past violations.⁹ What is less clear is whether these goals are mutually reinforcing or endemically contradictory. Moreover, the practices, institutions and objectives of justice are sometimes mismatched.

Perhaps the most dramatic challenge has been the decision in any given context as to whether and when prosecutions are appropriate or even required. The early years of the field featured a series of ongoing conversations about the trade-offs required between truth and justice, characterised by the competing institutions of truth commissions and trials.¹⁰ Decisions about amnesties, truth, and prosecution often took place in national contexts in which prosecution was unlikely or impossible due to the retention of power by military regimes. In South Africa, the choice to establish a truth commission that would both legitimise the experiences of victims under apartheid while at the same time offering amnesty for violators was seen as a bold and necessary sacrifice in the name of reconciliation; moreover, the Truth and Reconciliation Commission vaunted the centrality of truth over the necessity of (retributive) justice.¹¹ In parallel, however, the creation of the International Criminal Tribunals for the Former Yugoslavia (1993) and Rwanda (1994) ushered in a new era for international criminal law. The establishment of the International Criminal Court in 2002 bolstered the push for prosecutions in the aftermath of violent conflict and contributed to a growing discomfort in international institutions for amnesties or other non-prosecutorial responses to gross human rights violations.¹²

⁶ Report of the Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," S/2004/616 (Aug. 23, 2004); see also International Center of Transitional Justice, "What Is Transitional Justice," available at <https://www.ictj.org/about/transitional-justice>

⁷ Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers*. (New York: Cambridge University Press, 2010)

⁸ See, e.g., Rosalind Shaw, Lars Waldorf, with Pierre Hazan, *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Palo Alto: Stanford University Press, 2010); Alexander Laban Hinton, ed., *Transitional Justice: Global Mechanisms and Local Realities After Genocide and Mass Violence* (New Brunswick: Rutgers University Press, 2010).

⁹ See note 6. See also, Naomi Roht-Arriaza and Javier Marriecurrena, eds., *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (New York: Cambridge University Press, 2006); Ruti Teitel, *Transitional Justice* (New York: Oxford University Press, 2000).

¹⁰ See, e.g., Paige Arthur, "How 'Transitions' Shaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31: 321–367 (2009); Ruti Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16(1): 69 (2003); Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Past Regime," *Yale Law Journal* 100: 2537–2615 (1991).

¹¹ See, e.g., *Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa*, 1996 (4) SA 671 (CC).

¹² Karen Engle discusses critically the increasing use of criminal law and rejection of amnesties in "Anti-Impunity and the Turn to Criminal Law in Human Rights," *Cornell International Law Journal* 100: 1069 (2014); Kathryn Sikkink offers a much more positive take on the same trend in *The Justice Cascade*. New York: W.W. Norton: 2011. See also Diane Orentlicher, "Settling Accounts' Revisited: Reconciling Global Norms with Local Agency," *International Journal of Transitional Justice* 1(1): 10–22 (2007).

Trials play not only a punitive role but a symbolic and performative one, by judicially condemning the abuses of the past. Moreover, the prosecution of a former leader and/or those who surrounded him can present a formidable statement about transition. Ideally, such trials demonstrate deference to a new regime formulated around law.

Yet trials themselves, particularly but not solely international trials, often present significant limitations. Criminal justice is by definition arranged to establish individual guilt and generally addresses a narrow set of crimes rather than a broader panoply of harms.¹³ Prosecutions can be significant and empowering for victims – but they may also be disappointing and traumatic.¹⁴ In the context of atrocity, they tend to be long and drawn-out even while addressing only some of the wide cast of characters involved in perpetrating war crimes or sustaining a brutal regime.¹⁵ Depending on whether prosecutions take place at an international tribunal or in local courts, they may feel overly removed from local context or overly enmeshed in local politics.¹⁶

More broadly, the choice of institution or process can limit *a priori* the types and extent of harms addressed, making it a particularly fraught decision.¹⁷ If transitional justice institutions are viewed as illegitimate, externally imposed, lacking in popular participation, or motivated by self-interest, both the sustainability of the institution and its stabilising effect may be imperiled. Even if the institutions begin with the imprimatur of legitimacy, their privileged status can erode if expectations of swift and substantive justice are not met.¹⁸

1.2. Regional Challenges

Several MENA countries have pursued prosecutions in the aftermath of the uprising and the ICC has been involved to varying degrees in Libya and Syria.¹⁹ Broadly, the question remains as to whether prosecutions are the ideal mechanism for justice or whether other institutions should be considered more seriously in the MENA context. Commissions of inquiry have taken place in Bahrain, Morocco, and Tunisia, but as an edited collection published relatively soon after the uprisings commented, “transitional justice debates have mainly revolved around how best to promote retributive justice” rather than debating the merits of different forms and conceptions of justice.²⁰

¹³ See, e.g., Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change*. New York: Cambridge University Press, 2011; Mark Drumbl, “Restorative Justice and Collective Responsibility: Lessons for and from the Rwandan Genocide,” *Contemporary Justice Review*, 5(1): 5-22 (2002).

¹⁴ Howard Varney, Katarzyna Zduńczyk, Marie Gaudard, *The Role of Victims in Criminal Proceedings*. International Center for Transitional Justice (2017)

¹⁵ See, e.g., Mahmood Mamdani, “Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa.” *Politics and Society* 43(1): 61-88 (2014).

¹⁶ See, e.g., Victor Peskin, “Beyond Victor’s Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda.” *Journal of Human Rights* 4(2): 213-31 (2005). One of the early and trenchant critiques of the ICTR was its distance from survivors of the genocide, not only physically (it was located in Tanzania due to the extremity of physical and human destruction in Rwanda) but also conceptually (due to poor outreach efforts, particularly in the early years). At the same time, it was still subject to the preferences of the post-genocide government. For a discussion of the ICTR’s outreach efforts, see Victor Peskin, “Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme”. *Journal of International Criminal Justice* 3: 950-61 (2005). In the Balkans, trials became part of what Subotic calls “hijacked justice”, deeply intertwined with and exploited by local, regional, and international politics. Jelena Subotic, *Hijacked Justice: Dealing with the Past in the Balkans*. Ithaca: Cornell University Press, 2009.

¹⁷ This has been the case not only for the question of economic deprivation or inequality (addressed in Section 4) but of gendered harms. See, for example, Doris H. Gray and Terry C. Coonan, “Reframing Gender Narratives through Transitional Justice in the Maghreb,” in *Transitional Justice in the Middle East and North Africa* (Chandra Lekha Sriram, ed., 2016)

As discussed in detail throughout this paper, the prosecutions that have been pursued in many MENA contexts have focused on crimes committed during transition rather than past harms, raising questions about the objectives and scope of retributive justice in this context.²¹ In Tunisia, relatively few prosecutions for human rights violations have taken place and almost none for violations committed prior to the uprising.²² Largely de-linked from a coherent transitional justice agenda, prosecutions were largely ineffective at creating a broader sense of accountability.

In Egypt, many protesters focused on calls for punitive justice, viewing it as a necessary antidote to years of authoritarian impunity (See Section 3.2).²³ It was in large part due to mass protests over several months in 2011 that the Supreme Council of Armed Forces (SCAF) finally arrested (deposed President) Mubarak and eventually brought him to trial.²⁴ Yet Egyptian prosecutions were selective in scope and limited in effect. Transitional justice generally and trials in particular became signal flashpoints among the Supreme Council of Armed Forces (SCAF), new political forces, and a broad swath of civil society and popular protesters, each of whom had a competing interest in preventing, slowing, or promoting transitional justice.²⁵ While Mubarak's indictment was unquestionably significant, his trial addressed a relatively minimal number of crimes and represented a halting inquiry into the vast abuses that were alleged to have occurred under his rule.²⁶

From the perspective of stability, the choice among mechanisms can have unpredictable effects. Commissions of inquiry that result in little material change can seem symbolic on their own, leading to frustration and anger. Prosecutions that address only limited individuals or crimes may similarly seem unsatisfactory in a situation of ongoing political change; moreover, if judicial action at the criminal or constitutional level reflects continuity with a past regime rather than a break with past politics, the judiciary can become a flashpoint for popular anger.²⁷ Vetting regimes (in which government and security officials of the prior regime are either completely or partially barred from office), used in Iraq prior to the uprisings and Libya afterwards, appear to offer a clear institutional break with a corrupt past but may all too often be utilised as weapons in an ongoing contestation over power and resources. As Sriram has noted more generally, the causal links between transitional justice and stability are oft-proclaimed but rarely proven. The presumed causal lines among transitional justice, governance and rule of law may not follow the expected trajectory; for example, trials may "affect rule of law and democratic governance by way of demonstration and pedagogic effects, and through the removal of past abusers from political life via imprisonment or shaming." But it may just as easily be true that rule of law reforms facilitate the process of transitional trials.²⁸

¹⁸ The South African TRC remains an exemplar of early consultation, eroding legitimacy, and an embattled legacy. Joanna R. Quinn and Mark Freeman, "Lessons Learned: Practical Lessons Gleaned from Inside the Truth Commissions of Guatemala and South Africa," *Human Rights Quarterly* 25 (2003): 1117-1149. Wilson argues that the TRC was a critical tool for "manufacturing legitimacy" for state institutions in the New South Africa. Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the post-Apartheid State*. Cambridge: Cambridge University Press, 2001, 19. See also Madeleine Fullard, "Dis-placing Race: The South African Truth and Reconciliation Commission and Interpretations of Violence." *Centre for the Studies of Violence and Reconciliation* (2004).

¹⁹ In addition, the Special Tribunal for Lebanon was established in 2009 but will not be addressed here given that it predated the uprisings and was focused specifically on the assassination of Rafik Hariri and 22 others. There were hopes in Lebanon that the STL would contribute to stability and defusing political tensions, but the political obstacles placed in the way of the Tribunal, along with increasing regional violence and the failures of the STL made that unlikely.

²⁰ Kirsten J. Fisher and Robert Stewart, *Transitional Justice and the Arab Spring* (New York: Routledge Press, 2014): 4.

²¹ Noha Aboueldahab, *Transitional Justice and the Prosecution of Political Leaders in the Arab Region* (Oxford: Hart Publishing, 2017), 4.

²² Kora Andrieu, "Confronting the Dictatorial Past in Tunisia: Human Rights and the Politics of Victimhood in Transitional Justice Discourses Since 2011," *Human Rights Quarterly* 38 (2)(2016), 275-77.

²³ Aboueldahab, *Transitional Justice*, 42.

1.3. Snapshot: Libya

The two main transitional justice tools utilised in Libya were retributive justice, in the form of both national and international prosecutions, and a lustration-style law passed in 2013 which may have fomented further conflict.²⁹ The post-2011 disintegration into its current war-torn state has challenged accountability efforts and belied the application of the label of ‘transition’. Yet the continuing involvement of the international community, first through the military intervention authorised by the UN Security Council under UNSCR 1973 and subsequently through the contest over International Criminal Court (ICC) jurisdiction, has ensured an ongoing conversation about transitional justice even in the face of war.

The 2013 Political Isolation Law became a tool for excluding not just those who had wholeheartedly supported the regime of Colonel Qadhafi but those who had led the uprising, due to their prior positions in the regime.³⁰ As a result, individuals who might otherwise have played a role in facilitating Libya’s transition towards political stability, particularly the judiciary, were unable to participate in governance.³¹ The Political Isolation Law also permitted groups within Libya to embrace transitional agendas focused on excluding political enemies rather than (potentially) reconciling with them. As a result, Wierda and Boduszynski suggest that the shape of Libya’s post-transition began to look increasingly like victor’s justice, making greater conflict more likely.³²

Retributive justice played a central role in post-Qadhafi Libya, becoming not only one of the arenas of political battle among local actors but a site of intense negotiation and conflict between the divided Libyan leadership and international institutions. In February 2011, the Security Council passed a resolution referring the situation in Libya to the International Criminal Court, which subsequently issued arrest warrants for Muammar Qadhafi, his son Saif al-Islam Qadhafi, and his director of military intelligence Abdullah El Senussi.³³ The resolution referring the situation to the ICC barely preceded the authorisation for the use of force in Resolution 1973 which permitted NATO troops to intervene militarily, resulting in the overthrow of the Qadhafi regime.³⁴ As a result, international criminal justice and military intervention have been directly interwoven from the beginning of the Libyan transition. While the ICC’s statements with regard to Libya have focused on fighting impunity and pursuing justice, it is difficult to fully disentangle the Court’s actions from the complex politics of multiple international interventions in Libyan politics, law and governance.

The ICC’s role in Libya was further complicated when the Libyan government challenged the case’s admissibility on the grounds of complementarity. The doctrine of complementarity, which reflects a preference for national trials when possible, restricts the ICC from taking cases being pursued at the national level except where national authorities are “unwilling or unable” to pursue justice themselves.³⁵ The Libyan government utilised the doctrine as a signal of sovereignty, arguing for its right to conduct the trials. Complementarity was designed primarily to address two situations: post-conflict states left largely incapacitated as a result of conflict and thus institutionally incapable of conducting high-level trials; or states which would seek to shield their own leaders or citizens from prosecution at the expense of justice.³⁶ The Libyan case, in addition to its relevance to the

²⁴ Email correspondence with Issandr El Amrani, North Africa Project Director, International Crisis Group (Oct. 13, 2018)

²⁵ *Ibid.*

²⁶ He was convicted of embezzlement, an important but also extraordinarily narrow finding given the legacy of abuse under his thirty year reign. “Mubarak Sentenced to Three Years in Jail for Corruption,” *Al Jazeera* (May 9, 2015)

²⁷ Nimer Sultany, *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford: Oxford University Press, 2017)

²⁸ Chandra Lekha Sriram, “Beyond Transitional Justice: Peace, Governance and Rule of Law,” *International Studies Review* 19 (2017), 53–69, 61.

²⁹ International Crisis Group, *Libya: Getting Geneva Right* (Feb 26, 2015)

³⁰ Boduszynski and M. Wierda, “Political Exclusion and Transitional Justice: Study of Libya”. In *Transitional Justice in the Middle East and North Africa*. Ed. Chandra Lekha Sriram. (New York: Oxford University Press, 2016) 142.

³¹ Judges and prosecutors saw the law as an instrument for removing them from office and further destabilising the judicial system. Hanan Salah, “Libya’s Justice Pandemonium,” *Human Rights Watch* (Apr. 14, 2014).

³² M. Boduszynski and M. Wierda, “Political Exclusion and Transitional Justice: Study of Libya”. In *Transitional Justice in the Middle East and North Africa*. Ed. Chandra Lekha Sriram. (New York: Oxford University Press, 2016), 158.

³³ UN Security Council Resolution 1970 (Feb. 26, 2011)

³⁴ UN Security Council Resolution 1973 (Mar. 17, 2011)

³⁵ Rome Statute, Art 17

first situation as a recent post-conflict country with divided and politicised judicial institutions, presented the question of whether admissibility could be affected not by a concern that a defendant would be overly shielded but rather that he would be insufficiently protected.³⁷

The ICC rejected the Libyan government's admissibility challenge to Saif al-Islam Qadhafi's case on grounds that included the central government's lack of physical custody of the defendant (who was being held in Zintan, a town in western Libya under militia control) and was unable to carry out his arrest and prosecution. At a political level, the battle reflected the tension between the government's fervent claim of sovereign rule and its lack of control over its own territory and population. By contrast, the El Senussi admissibility challenge was accepted on the grounds that the same case was proceeding concurrently in Libya and that the authorities were neither unwilling nor unable to carry it out.³⁸ Saif al-Islam Qadhafi was prosecuted in a Tripoli court and sentenced to death in absentia in a trial that Human Rights Watch found to suffer "serious due process violations".³⁹

The deterioration of Libya into a fragmented and violent set of internecine conflicts cannot be attributed to international or transitional justice, although anger over past failures to prosecute contributed to the uprising itself.⁴⁰ The struggle over jurisdiction - The Hague or Tripoli - exposed tensions in the ICC's complementarity doctrine that centered on the claims by a (fragile, fragmented, and deteriorating) post-conflict regime to ownership over their own justice processes. The assertion of international authority involved an argument over the incapacities of national and local actors. It also exposed the dangers of an intermingled international criminal, military, and humanitarian agenda which operated through intergovernmental institutions and was justified in the name of a nascent Responsibility to Protect and the global fight against impunity.

At the same time, the political and military fragmentation in Libya has undermined for the moment any hopes of genuine justice for violence perpetrated either during or before the uprising and transition. Trials that are held by the national judiciary routinely reflect lack of basic protections for suspects, including the use of violent means to elicit confessions. In August 2018, the conviction of 99 defendants in a single mass trial for the deaths of anti-Qadhafi protesters in 2011 reflected a judiciary "in shambles," according to Human Rights Watch.⁴¹ Already in 2013, the International Crisis Group documented the "pervasive insecurity" Libya faced, in no small part due to its weakened judicial system. An ongoing cycle of grievance, distrust, and violence - bred by the failures of the courts - increased instability and fostered violence.⁴² In other words, while transitional justice per se could not be cited as the sole or primary cause of violence and escalation in Libya, the lack of confidence in legal institutions or their ability to pursue human rights violators remain a significant consideration - one that transitional justice cannot solve but without a solution for which it cannot operate.

³⁶ Frédéric Mégret and Marika Giles Samson, "Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials," *Journal of International Criminal Justice* 11: 571-598 (2013).

³⁷ Ibid.

³⁸ ICC Pre-Trial Chamber I, Decision on the Admissibility of the Case Against Abdullah Al-Senussi, ICC-01/11-01/11

³⁹ Human Rights Watch, "Libya: Flawed Trial of Gaddafi Officials" (July 28, 2015). He was reportedly released subsequently from prison by the leadership in Zintan.

⁴⁰ Aboueldahab suggests that the massacre of 1200 prisoners at the Abu Salim prison in 1996 "became a powerful symbol of the Gaddafi regime's repressive practices. It also contributed to the momentum that led to the popular revolt to topple Muammar Gaddafi in February 2011." Thus, slogans of "fighting impunity" have particular resonance in a situation of weak judicial institutions, a long history of unpunished violence, and deep anger over the failures to hold anyone accountable. Aboueldahab, *Transitional Justice*, 86.

⁴¹ Human Rights Watch, *Libya: 45 Sentenced to Death for 2011 Killings* (Aug. 22, 2018)

⁴² International Crisis Group, *Trial by Error: Justice in Post-Qadhafi Libya* (Apr. 17, 2013)

2. Conditions of Transition

As regimes became embattled during the Arab uprisings, some believed that the MENA region's transitions would most closely resemble the Latin American post-authoritarian transitional paradigm.⁴³ However, regional dynamics and ongoing conflicts raise questions about doing justice after, or even during, active conflict. The conditions of a transition inevitably influence the outcomes of justice processes and the sustainability of peace.

2.1. The View from Transitional Justice

At its inception, transitional justice mechanisms were established in countries that were presumed to be in transition from authoritarian rule to democracy. Growing out of theories about democratisation that were widely accepted in U.S. political science scholarship at the time, transitional justice was viewed as a bridge between a human rights-abusing past and a rule of law-respecting future.⁴⁴ As a result, the "transition" aspect of transitional justice took center-stage in the early years of its practice.⁴⁵ Although some argued as the years went on that transitional justice was in fact simply "ordinary justice" reconfigured for extreme circumstances⁴⁶, most suggested that the very nature of transition demanded a special type of justice. In a broad sense, transitional justice was seen as a particular form of justice linked to political transformation.⁴⁷

As the Cold War came to a close, more and more violent civil wars prompted a shift in focus to a larger post-conflict agenda for assisting states and societies in recovering from variety of abuses and atrocities. Transitional justice increasingly became linked to peace-building along with, or sometimes instead of, democracy promotion.⁴⁸ Although hardly viewed as conflict resolution mechanisms themselves, transitional justice mechanisms were intended to contribute to the stability and consolidation of peaceful governance, through their role in preventing repetition of harms as well as in coordination with disarmament and other initiatives.⁴⁹

Over time, institutions associated with the objectives and operation of transitional justice have been established in two situations that challenge the nexus with transition in its initial form: contexts in which liberal democracy (and sometimes sustainable peace) remain unreachable or undesired⁵⁰, and contexts in which liberal democracy has been long-established but the legacy of violence remains potent. For example, the Canadian Truth and Reconciliation Commission (2008–2015) exposed the brutality of the residential school system which subjected thousands of First Nations children to abuse and violation.⁵¹ Broadly viewed as a rupture between past and future, transition was initially understood to describe a specific process of political change. Today, the rupture no longer seems clear, raising questions about the exceptional or teleological nature of this form of justice.

⁴³ See, e.g., Larry Diamond, "A Fourth Wave or a False Start? Democracy After the Arab Spring," *Foreign Affairs* (May 22, 2011). For a discussion of this question, see "After the Arab Spring: A New Wave of Transitional Justice?," *Transitional Justice and the Arab Spring*. Eds. Kirsten J. Stewart and Robert Fisher. New York: Routledge, 2014.

⁴⁴ Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31 (2009): 321–367

⁴⁵ Neil J. Kritz, ed, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, (Washington, DC: US Institute of Peace, 1995)

⁴⁶ Eric Posner and Adrian Vermeule, "Transitional Justice as Ordinary Justice," *Harvard Law Review* 117 (2003): 762–825

⁴⁷ Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000).

⁴⁸ Chandra Lekha Sriram, "Justice as Peace Liberal Peacebuilding and Strategies of Transitional Justice," *Global Society* 21(4): 579–91 (2007)

⁴⁹ *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (2010)

⁵⁰ Rwanda is an apt example of a robust transitional justice process in the context of a non-democratising regime. On human rights violations, particularly with regard to democratic processes in post-genocide Rwanda, see Amnesty International, *Setting the Scene for Elections: Two Decades of Silencing Dissent in Rwanda* (2017); Frontline Rwanda, *Disappearances, Arrests, Threats, Intimidation and Co-Option of Human Rights Defenders 2001–2004* (2005). See also, Lars Waldorf and Scott Straus, eds. *Remaking Rwanda: Statebuilding and Human Rights After Mass Violence*. Madison: University of Wisconsin Press, 2011. See also, Human Rights Watch, *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts* (May 31, 2011).

⁵¹ *Honouring the Truth, Reconciling for the Future: Final Report of the Canadian Truth and Reconciliation Commission* (2015)

Finally, transition presents not only a definitional puzzle but a temporal one. Accountability may not be immediate; in some contexts, it may be necessary to lay the groundwork for accountability measures for the future rather than pursue them in the present. In Argentina, trials of individuals involved in the “dirty war” have recently re-opened, demonstrating the possibility for increased accountability even decades after the events took at issue took place.⁵² From this perspective, the creation of an archive is critical. Documentation for the purposes of trial may differ from human rights fact-finding or from statement-gathering for a truth commission, making the challenge of gathering information during conflict all the more vital.

2.2. Regional Challenges

In the MENA region, political change has meant everything from competitive elections to open warfare. When conflict and instability threaten in one state, fears about parallel collapses elsewhere abound, aided and abetted by wider global trends that prioritise security and counter-terrorism over rights and privacy.⁵³ In many countries, elements of old regimes have retained power or re-emerged over time, leading to questions about not just the functioning but the instrumentalisation of transitional justice by various, often opposing, parties. Libya demonstrated the ways in which administrative purges and illegitimate justice processes intersect with violent destabilisation. In other countries, calls for justice have come from protesters seeking to question governments that even after transition have failed to recognise past abuses or current violations.

The Egyptian case exemplifies a number of the challenges posted in MENA for transitional justice, in particular the shifting nature of the transition (as political power has morphed from Mubarak to the SCAF to the Muslim Brotherhood, and back again), the character of prosecutions as both partial and political, and the commission of violations by a broad swath of ruling actors. Efforts to pursue accountability have been both significant and significantly limited, leading to an impoverished approach to transitional justice in a situation in which observers hoped it would play an important role in stabilising political change and opening up a long-closed government.⁵⁴

The call for revolution in Egypt, as in Tunisia, was a significant aspect of the protests; changing the government was articulated not as a question of elite pacts but of popular overthrow.⁵⁵ Yet the Egyptian transition, while significant, did not shake the foundations of military control and the “deep state”. The country morphed (or reverted) relatively quickly into a military state after the overthrow of President Mohamed Morsi in 2013 (dubbed appropriately the “second transition” by the International Crisis Group⁵⁶). Morsi, a member of the Muslim Brotherhood, was elected in post-uprising elections in June 2012 and ousted by the military a year later. Prosecutions took place throughout these government changes but did little to suggest a new era of radical accountability. After several waves of protest, President Mubarak, his two sons, and other former government officials were charged with corruption and human rights violations.⁵⁷ Mubarak was found innocent in 2017 of killing protestors during the uprising; he and his sons were found guilty of embezzlement but released upon appeal.⁵⁸

⁵² Daniel Politi and Ernesto Londoño, “29 Argentines Sentenced to Life in Prison in ‘Death Flights’ Trial,” *The New York Times* (Nov. 29, 2017).

⁵³ International Crisis Group, *Tunisia: Transitional Justice and the Fight Against Corruption* 13.

⁵⁴ Rowida Omar, “The Delay of Transitional Justice in Egypt,” Middle East Institute (Feb. 12, 2014) available at <http://www.mei.edu/content/delay-transitional-justice-egypt>.

⁵⁵ As Abou-El-Fadl points out, the slogan in Egypt, as in Tunisia, was “The People Want the Fall of the Regime,” where the Arabic word for ‘regime,’ al-nizam, also connotes ‘order’ or ‘system.’ Reem Abou-El-Fadl, “Beyond Conventional Transitional Justice: Egypt’s 2011 Revolution and the Absence of Political Will,” *International Journal of Transitional Justice*, (6) 2: 318–330 (2012), at 320.

⁵⁶ International Crisis Group, *Marching in Circles: Egypt’s Dangerous Second Transition* (Aug 7, 2013).

⁵⁷ Ann M. Lesch, “Troubled Political Transitions: Tunisia, Egypt, and Libya,” *Middle East Policy* 21(1): 62–74 (2014).

⁵⁸ Mahmoud Mourad and Haitham Ahmed, “In final ruling, Egypt court finds Mubarak innocent in killing of protestors,” Reuters (Mar. 2, 2017). In September 2018, Gamal and Alaa Mubarak were re-arrested on charges of illegal stock market transactions. Reuters, “Egyptian Court Orders Arrest of Mubarak’s Sons Over Stock Market Manipulation” (Sept. 15, 2018).

By limiting prosecutions to a narrow set of individuals and a restricted temporal scope (essentially the transition itself), the link between transitional prosecutions and the transformative potential of justice is largely dissolved. Prosecutions that did take up more longstanding crimes such as corruption seemed aimed at limiting human rights prosecutions and focusing on particular high-level cases rather than a systemic history of human rights violations. After Morsi was ousted in 2013, a Ministry of Transitional Justice was established, but even its own minister was quoted saying that the time was not yet ripe for transitional justice in Egypt.⁵⁹ Divisions among opposition groups made it difficult to unify around a particular vision of justice.⁶⁰

A contested transition may then be further limited or obstructed by an entrenched judiciary comprised of those who served the prior regime.⁶¹ Judges find themselves balancing the demands of past and future, sometimes interpreted as a competition between stability and political-legal innovation. In a context like Egypt – where the country was already riven by opposing revolutionary claims and suspicion between Muslim Brotherhood supporters and other opposition groups – justice processes may become less engine of change than a brake on transformation.⁶²

Nonetheless, transitional justice efforts can potentially play a role in foregrounding popular grievances and giving voice to any independent voices of the judiciary and resurgent civil society.⁶³ In circumstance of ongoing military control, calls for transitional justice can reflect popular resistance. In this context, Aboueldahab argues, transitional justice should be understood as a “process, as opposed to a definitive outcome”.⁶⁴

2.3 Snapshot: Tunisia

Although in some ways Tunisia represents the most traditional “transition” in the region, eventually involving a full transfer of power and competitive elections, it was also significant in its revolutionary (rather than negotiated) nature.⁶⁵ Through multiple waves of transitional justice, Tunisia has offered a case study in the deployment of transitional justice for the consolidation of power and the distribution of political resources.⁶⁶

Immediately after Tunisian President Ben Ali’s ouster, the provisional government established limited commissions (based partly on suggestions made by Ben Ali himself the night before his ouster) to investigate state abuses under the regime and violence during the uprising. An Amnesty Law was passed releasing political prisoners arrested under the Ben Ali regime and establishing a reparations programme aimed at financial compensation and the public reintegration of political prisoners. At the same time, hundreds of corruption-related lawsuits were filed against a number of individuals, including Ben Ali and his family.⁶⁷ The International Crisis Group found in interviews with civil society activists that these initial efforts related to justice were largely opaque to the public, “chaotic” in nature, and ill-equipped for managing larger objectives of truth-seeking or reconciliation.⁶⁸ They were “characterized by narrow responses adopting a restricted temporal and material scope” that looked only at offenses during and directly following the revolution.⁶⁹ Although many, including

⁵⁹ Amr Shalakany, “The Day the Graffiti Died,” *London Review of International Law* 2(2): 357-78 (2014), 373.

⁶⁰ Aziz argues that revolutionary groups wanted to substantively transform the legal system while liberal opposition groups wanted merely procedural protections. Sahar Aziz, “Theater or Transitional Justice: Reforming the Judiciary in Egypt,” in *Transitional Justice in the Middle East and North Africa*, at 211.

⁶¹ For an elaboration on this idea, see Sahar Aziz, “Independence without Accountability: The Judicial Paradox of Egypt’s Failed Transition to Democracy,” *Penn State Law Review* 120(3)(2016).

⁶² Sultany, *Law and Revolution*, at 160.

⁶³ Noha Aboueldahab, “Transitional Justice Policy in Authoritarian Contexts: The Case of Egypt,” *Brookings Doha Center Publications* (October 19, 2017).

⁶⁴ *Ibid.*

⁶⁵ Andrieu, “Confronting the Dictatorial Past”, 273

⁶⁶ Neither Tunisia nor the MENA region more generally represents a unique politicisation of transitional justice. In Rwanda, transitional justice—and “anti-impunity” discourses in particular—played a key role in the consolidation and legitimisation of the post-genocide RPF-led governments. See Dr Zinaida Miller, “Anti-Impunity Politics in Post-Genocide Rwanda.” In *Anti-Impunity and the Human Rights Agenda*. Eds. Karen Engle, Dr Zinaida Miller, & Dennis Davis. New York: Cambridge University Press, 2016.

⁶⁷ Corinna Mullin and Brahim Rouabah, “Requiem for Tunisia’s Transition?” *Jadaliyya* (Dec. 22, 2014), available at <http://www.jadaliyya.com/Details/31596/Requiem-for-Tunisia%E2%80%99s-Revolution>; International Crisis Group, *Tunisia: Transitional Justice and the Fight Against Corruption* (May 3, 2016): 4

Ben Ali, were charged and sentenced in absentia, others were acquitted, resulting in anger among victims, who sought to overturn the decisions.⁷⁰ These early efforts lasted less than a year and were subsequently replaced with a more internationally cognisable process begun after the October 2011 election for a new constituent assembly that put the Islamist party An-Nahda in power in a Troika with the center/center-left, secular parties Congress for the Republic and Ettakatol.⁷¹

The Troika government created a Ministry for Human Rights and Transitional Justice, which occupied itself at the outset primarily with implementing the Amnesty Law passed earlier in 2011 and its promise of (unspecified) reparations. Some Tunisians suggested that the governing coalition was using the amnesty law to distribute unequal and politicised reparations payments de-linked from a full truth-seeking mechanism rather than genuinely working to help victims.⁷²

At the same time and with significant international consultation and assistance, the Ministry launched a national dialogue on the possibilities for transitional justice.⁷³ When the Transitional Justice Law was passed in 2013, there were hopes among many that it would provide a more viable and sustainable form of justice. The law covered truth, accountability, reparations, collective memory, and non-recurrence. It called for the creation of “specialized judicial chambers” to prosecute gross violations of human rights and for the establishment of a Truth and Dignity Commission. The latter, known as the L’Instance Vérité et Dignité, or IVD, was created in 2014 with a mandate to address violations committed between 1955 and 2013.⁷⁴ The law’s passage also reflected An-Nahda’s fears of an imminent shift in political power that would affect the possibilities for justice.⁷⁵

After the 2014 election of President Béji Caïd Essebsi and the creation of a new government in early 2015 led by Nida Tounes (comprised of figures from both the Bourguiba and Ben Ali regimes) and An-Nahda, transitional justice - particularly the IVD - became both instrument and symbol of political division. While An-Nahda supporters remained involved with the IVD (albeit ambivalently), Nida Tounes members criticised it heavily. Human rights organisations also documented arbitrary arrests and excessive force used by security forces against suspects, further eroding any legitimacy of transitional justice instruments.⁷⁶

Moreover, a fundamental rift opened between those who believe a preoccupation with the past will inherently destabilise and those who view the IVD and associated measures as the only path towards sustainable peace and democratic rule.⁷⁷ There has been some level of nostalgia expressed in certain quarters about past authoritarian regimes and questions raised about the revolutionary aspects of 2010–2011. The IVD and other transitional justice activities must be understood and assessed in the context of a political landscape in which transition may be considered ongoing by some and finished by others. The association of the IVD with an earlier era of post-Ben Ali governance reflects the difficulty of adapting an ongoing justice process to a political climate subject to rapid shifts in alliances and power.

⁶⁸ International Crisis Group, *Tunisia: Transitional Justice and the Fight Against Corruption* (May 3, 2016): 4

⁶⁹ Christopher K. Lamont, “The Scope and Boundaries of Transitional Justice in the Arab Spring,” in *Transitional Justice in the Middle East and North Africa*, at 91

⁷⁰ Nimer Sultany, *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (Oxford: Oxford University Press, 2017), 179.

⁷¹ Issandr El Amrani and Ursula Lindsey, “Tunisia Moves to the Next State,” *Middle East Research and Information Report* (Nov. 8, 2011).

⁷² Andrieu, “Confronting the Dictatorial Past,” 281; International Crisis Group, *Tunisia: Transitional Justice and the Fight Against Corruption* (May 3, 2016); Andrieu, “Confronting the Dictatorial Past,” 271–2.

⁷³ *Ibid.*, 5–6

⁷⁴ Organic Law on Establishing and Organizing Transitional Justice (unofficial translation by ICTJ). The IVD referred its first four cases of gross human rights violations to the Specialised Criminal Chambers in 2018, and 30 more were anticipated before the closure of the IVD. However, as the ICTJ noted, this is a small percentage of the more than 60,000 complaints received by the IVD. ICTJ, “Conference Explores Uncertain Path Forward for Tunisia’s Specialized Criminal Chambers,” (May 10, 2018) available at <https://www.ictj.org/news/conference-explores-uncertain-path-forward-tunisia%E2%80%99s-specialized-criminal-chambers>

⁷⁵ Email correspondence with Issandr El Amrani (Oct 13, 2018)

⁷⁶ Amnesty International, *‘We Want an End to the Fear’: Abuses Under Tunisia’s State of Emergency* (Feb. 13, 2017)

⁷⁷ This paragraph is drawn primarily from International Crisis Group, *Tunisia: Transitional Justice and the Fight Against Corruption*, 13–17.

Tunisia thus represents a significant example of the sometime-recursive nature of transitional justice: not only do transitional states engage in battles over the legitimacy of justice, but justice itself can become a primary “site of contestation for post-revolutionary legitimacy”⁷⁸. In a context of multiple, ongoing, or unfinished transitions and of contestation among groups with divergent visions of justice, transitional justice becomes a lens “through which different visions of Tunisia’s past and potential future are debated”.⁷⁹

3. Economics of Transitional Justice

For the past decade, transitional justice activists and advocates have struggled with the question of how much and how fully the institutions could attend to the legacies of unequal economic distribution, corruption, and land dispossession. In the MENA region, these questions are particularly acute, since many of the 2011 uprisings were sparked directly and explicitly by anger over poverty, maldistribution, corruption.

3.1. The View from Transitional Justice

Early truth commissions and prosecutions focused almost exclusively on civil and political rights violations such as torture, disappearances and murder; social and economic rights violations played little or no role. Although the South African TRC included hearings on the complicity of businesses in Apartheid and made mention of the large-scale displacements which were a signal part of the Apartheid regime, the Commission focused almost entirely on gross human rights violations involving physical integrity harms rather than economic and land dispossession or inequality.⁸⁰ Elsewhere, social and economic rights and corruption were considered the purview of other actors; they were sometimes integrated into a new constitution or left to the consideration of development practitioners but were largely absent from the justice arena.

As it became increasingly clear that inequality and deprivation played a significant role in conflict and social dissension, however, transitional justice practitioners and scholars began to consider the possibilities for including economic harms stretching from rights violations to structural violence to corruption.⁸¹ If transitional justice institutions are to act as a bridge from past harm to future peace or from prior instability to future stabilisation, they must grapple with the issues that motivate citizens to anger, resistance and potentially violence. Moreover, some argue, transitional justice may not only omit important considerations but may actually perpetuate economic inequality by contributing to a liberalising project that contributes to (re) structuring the political economy of societies around the world.⁸² Others have countered that including issues more traditionally addressed by development, humanitarian aid and economists would stretch the field of justice to the point of irrelevance or incapacity.⁸³ Overall, however, it has become more difficult to dismiss the relevance of social and economic rights violations, unjust enrichment by elites and economic inequality to transition and conflict.

⁷⁸ Christopher K. Lamont, “The Scope and Boundaries of Transitional Justice in the Arab Spring,” in *Transitional Justice in the Middle East and North Africa*. Ed. C.L. Chandra Lekha Sriram, Oxford University Press, 2016, 100

⁷⁹ C. Mullin and B. Rouabah, “Requiem for Tunisia’s Transition?” *Jadaliyya* (22 Dec. 2014).

⁸⁰ Wilson, *The Politics of Truth and Reconciliation in South Africa*, at 35-6. Mahmood Mamdani, *The Truth According to the TRC*. In *The Politics of Memory: Truth, Healing and Social Justice*. Eds. Ifi Amadiume & Abdullahi An-Na’im. London: Zed Books, 2000

⁸¹ See, e.g., Dustin Sharp, ed., *Justice and Economic Violence in Transition* (2014); Dr Zinaida Miller, “Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice,” *International Journal of Transitional Justice* 2(3): 266-291 (2008); Louise Arbour, “Economic and Social Justice for Societies in Transition,” *New York University Journal of International Law & Politics*, 40 NYU J. INT’L L & POL. 40: 1 (2007).

⁸² For example, see Hannah Franzki and Maria Carolina Olarte, “Understanding the Political Economy of Transitional Justice: A Critical Theory Perspective,” in *TRANSITIONAL JUSTICE THEORIES* (Susanne Buckley Zistel et al., eds.) (New York: Routledge, 2013).

⁸³ Lars Waldorf, *Anticipating the Past: Transitional Justice and Socio-Economic Wrongs*, 21 SOC. & LEG. STUD. 171 (2012); Padraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Northampton: Edward Elgar Publishing Limited, 2017)

Some institutions have made efforts to include the legacies of prior economic exploitation and the effects of dispossession and displacement, or to pursue litigation in relation to corruption. One of the more successful cases of anti-corruption work occurred in the Philippines where an exhaustive process to investigate the Marcos regime involved not only lawyers but forensic accountants and other experts, resulting in the recovery of approximately US\$680m in assets and the creation of a fund for victims based on the funds recovered through litigation.⁸⁴ The Kenya Truth, Justice and Reconciliation Commission's mandate included not only economic rights but economic crimes, expropriation of property, resource exploitation and corruption.⁸⁵ Sierra Leone's Truth Commission investigated colonial legacies and endemic postcolonial corruption.⁸⁶ In Liberia, the Truth and Reconciliation Commission focused on economic crimes as a core part of its final report.⁸⁷

3.2 Regional Considerations

From the beginning of the uprisings, economic rights, corruption, poverty, unemployment and inequality have been central not only to the protests but to the discussions over transitional justice - largely because the centrality of these concerns to the protests made clear the need to integrate economic considerations into any institutions meant to account for the past or sustain peace in the future. Political dissatisfaction with repressive leadership played an important, provocative role in the uprisings, but anger over radical inequality and deprivation were at least as and possibly more important. Moreover, the close relationship between political rulers and economic enrichment makes it difficult to disentangle the two.⁸⁸

Moreover, the conditions of transition inevitably affect the parameters of transitional justice. The retention of power by military actors can ensure a combination of amnesties and truth commissions. In South Africa, the negotiated transition necessitated both the creation of a commission to recognise and authorise the voices of those who were silenced under apartheid and the entrenchment of a right to private property that ensured continuities of unequal land and resource ownership.⁸⁹ Arguably, the latter only postponed later rage over inequity and the reopening of discussions over economic and racial distribution. In the MENA context, the uprisings themselves suggested revolutionary change and the overthrow of dictatorships by popular action, but the aftermath of the uprisings - even in places where leaders were indeed overthrown - has in many places been less than revolutionary in nature.

Egypt's experience with corruption trials raised parallel questions about the ability of transitional justice to contend not only with specific charges of illicit activity but broader patterns of socio-economic deprivation. The Egyptian uprising, as in Tunisia, was sparked and driven by anger over - among other things - economic deprivation and inequality. Corruption trials did take place, but they were limited in both targets and crimes. Rather than creating a commission or orchestrating a prosecutorial strategy that might probe the long history of external involvement in Egyptian politics, official corruption and radical inequality, the transitional justice efforts in Egypt proceeded to avoid any possibility of systematic inquiry. Somewhat ironically, the focus on

⁸⁴ Ruben Carranza, "Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes," *International Journal of Transitional Justice*, 2 (2008): 310-330, at 324.

⁸⁵ Ronald C. Slye, *Putting the J into TRC: Kenya's Truth Commission, in Twenty Years On: Other Ways of Being and the South African Truth and Reconciliation Commission*, edited by Mia Swart and Karin van Marie (forthcoming).

⁸⁶ *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Vol. III, Ch. 1, para. 143-9 (2004).

⁸⁷ Liberian Truth and Reconciliation Commission, *Consolidated Final Report*, 9.9.1

⁸⁸ Melani Cammett and Ishac Diwan, *The Political Economy of the Arab Uprisings* (Routledge 2014), 2.

⁸⁹ Mahmood Mamdani, "Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa," in *Anti-Impunity and the Human Rights Agenda*. Eds. Karen Engle, Dr Zinaida Miller, D.M. Davis. New York: Cambridge University Press, 2016, 339-40.

economic harms - so often neglected in transitional justice for being linked too closely to structural considerations - created a "means to shroud the neglected of accountability for widespread torture, killings, and other civil and political rights abuses committed for decades."⁹⁰

3.3 Snapshot: Tunisia

The Tunisian transitional justice process paid unusually close attention to economic harms such as unjust enrichment, corruption, and deprivation. Rather than a later addition or a marginalised part of a background story, economic issues were central to discussions of justice from the beginning of the post-Ben Ali period in Tunisia. As a result, some civil society activists arguably associated transitional justice more closely with a justice that could more fundamentally alter economic relations and regional inequities rather than focusing solely on the truth-telling and retributive objectives of many transitional justice processes.⁹¹

Ben Ali's regime in Tunisia was characterised not only by violations such as arbitrary arrest and imprisonment, torture, and repression of political dissent, but by socio-economic rights violations, corruption, unfair extraction practices and a differentiated regional economy.⁹² Combined with growing unemployment and economic crisis, anger over deprivation, inequality, and poverty helped spark the 2011 revolution. One of the three commissions created directly after the revolution was devoted specifically to investigating corruption and embezzlement. Like a truth commission, it heard testimony and took complaints from victims; unlike any other truth commission, however, it was devoted solely to economic crimes.⁹³

The 2013 Transitional Justice Law included in the Commission's purview investigation of the misuse of public funds as well as recommendations for economic reform (among others). It called on the Commission to propose suggestions for the reform of institutions that participated in corruption⁹⁴ and granted to the Commission a number of quasi-prosecutorial powers, such as the ability to utilise both regular and specially-constituted courts to investigate a variety of rights violations, including economic rights, the capacity to summon witnesses and protect them, and to order forensic work. The "inclusion of economic crimes and corruption in the TDC's mandate, considered on a par with other gross human rights" is largely unprecedented.⁹⁵

The IVD includes a financial arbitration process, which has thus far successfully overseen an agreement by former President Ben Ali's son-in-law to return looted assets along with cases involving other of Ben Ali's family members⁹⁶; thousands of claims have been filed, mainly regarding financial crimes.⁹⁷

⁹⁰ Aboueldahab, *Transitional Justice*, at 43

⁹¹ International Crisis Group, *Tunisia: Transitional Justice and the Fight Against Corruption* (May 3, 2016), at 8

⁹² Andrieu, "Confronting the Dictatorial Past," 268.

⁹³ Andrieu, "Confronting the Dictatorial Past," 270.

⁹⁴ Organic Law, Art. 43

⁹⁵ Andrieu, "Confronting the Dictatorial Past," 283.

⁹⁶ Fatim-Zohra El Malki, *Tunisia's Partisan Path to Transitional Justice* (Carnegie Endowment for International Peace, Mar. 7, 2017)

⁹⁷ International Crisis Group, *Tunisia: Transitional Justice and the Fight Against Corruption* (May 3, 2016); Fatim-Zohra El Malki, *Tunisia's Partisan Path to Transitional Justice* (Carnegie Endowment for International Peace, Mar. 7, 2017).

However, The Tunisian parliament crippled the IVD's work in September 2017, when they passed the Administrative Reconciliation Law, which effectively ended ongoing or future prosecutions of civil servants involved in corruption and embezzlement who did not personally benefit from their corrupt acts. Although the law technically distinguishes between personal enrichment and corrupt acts committed essentially under orders (and thus without personal benefit), there was little or no way to distinguish between the two.⁹⁸ As a result, the effort to investigate economic crimes and understand the wider corruption of the Ben Ali regime has been compromised.⁹⁹ Originally introduced by President Essebsi, different versions of the bill were put forward by Nida Tounes and only minimally challenged by An-Nahda. While Essebsi and his supporters argued that the bill was intended to support economic development by minimising instability, critics suggested that it served primarily to insulate former members of the Ben Ali regime who are well-represented in Nida Tounes. Moreover, the refusal by the parliament to allow an extension of the IVD's mandate set it on the road to closure prior to addressing many of the cases brought to its attention.¹⁰⁰ At the same time, dissatisfaction among Tunisians about the rate and scale of economic change prompted new protests against the regime in January 2018, suggesting that any hopes that the IVD could affect resentment based on economic deprivation and rights violations have been outweighed by immediate concerns about the state of the national economy, ongoing corruption, and unemployment.¹⁰¹

4. History, Memorialisation, Reconciliation

Tropes of “never again” abound in transitional justice. The truth commission form relies in many ways on the necessity of both memory and history: greater knowledge (of repression, of torture, of the brutality of a regime that made people silently disappear) would ensure that the abuses would not be repeated. Both truth commissions and criminal trials often find themselves freighted with the responsibility of re-telling the history of a particular conflict, creating space for survivors to testify and remember harms done to them, and making possible broad-scale social reconciliation. The outcomes of these efforts, however, have been conflicted at best.

4.1 The View from Transitional Justice

History, memory, and reconciliation are simultaneously inseparable and fundamentally separate aspects of transitional justice. The influence of the South African Truth and Reconciliation Commission (TRC) cannot be under-estimated in these areas: by linking truth to reconciliation, emphasising the cathartic importance of victim testimony, and authorising a particular history of Apartheid, the TRC established a new model for transitional justice which was rapidly exported throughout the world.¹⁰²

⁹⁸ Amna Guellali, “New Reconciliation Law Threatens Tunisia’s Democracy,” *World Policy Blog* (October 2, 2017).

⁹⁹ Human Rights Watch, Tunisia: *Parliament Shouldn’t Undercut Transitional Justice* (March 23, 2018)

¹⁰⁰ Olfa Ayed, “Prolongation de l’IVD en Tunisie : ‘Un geste d’apaisement du gouvernement.’” *France 24* (May 29, 2018)

¹⁰¹ Abdullah Aydogan and A.Kadir Yildirim, *The Economic and Political Dissatisfaction Behind Tunisia’s Protests* (Carnegie Endowment for International Peace, Jan 23, 2018)

¹⁰² Jamie Rowen, *Searching for Truth in the Transitional Justice Movement* (New York: Cambridge University Press, 2017)

The writing of history and the establishment of collective memory can play highly divisive or irreplaceably reconciliatory roles. Most of all, these are long-term objectives in a short-term game: focusing on history and memory necessitates ongoing technical support for preserving archives and engaging survivors. Transitional justice institutions throughout the world have suggested that efforts should also be made to preserve the histories of different conflicts and regimes, to create a record of human rights violations and officially recognise collective memories of violence, and to attempt at least minimal reconciliation. Yet each of these areas raises a series of questions.

First, many early institutions of transitional justice were premised on the need to learn and expose previously hidden information. In reaction to military regimes that quite literally “disappeared” people for their actual or suspected dissident activities or beliefs, commissions in Argentina and Chile were intended to bring to light information about murdered loved ones. The South African TRC also lauded the status of “truth” and knowledge won at the high price of amnesties for perpetrators of horrific abuses under Apartheid.¹⁰³ (Mozambique and Spain are often used as (positive or negative) foils for this historic turn, held out as representatives of an “amnesiac” impulse premised on forgetfulness rather than memory.¹⁰⁴)

Transitional justice efforts were thus often premised on the capacity of knowledge to combat past abuse and prevent its repetition. Developments in the field have challenged these baseline assumptions: the truths gained in South Africa were shaped by the parameters of the Commission’s mandate (amnesties were granted only for acts committed with a “political objective”; only gross violations of human rights were discussed); knowledge in post-conflict contexts did not always appear to be sufficient to create social transformation; and in many contexts, survivors were less interested in memory than in retribution or reparation.

Second, both trials and truth commissions have come under fire for their historical narratives. Truth commissions, which often claim some version of history-telling, have been subject to criticism for the narrow focus of a supposedly public history. The intermingling of professional historical norms with a push for victim testimony can create irreconcilable conflicts. These tensions may be even more trenchant in international criminal law, where one of the major, and longstanding, challenges has come from those who suggest that trials, particularly for atrocity crimes, are inappropriate but also inevitable places to consider history. The role of history in transitional justice remains contested, leaving open questions about the potential biases of institutional or state history, the beneficial or negative effects on victims of testifying publicly, and the role of state acknowledgement in supporting reconciliation and promoting stability.

Third, to remember is also to classify. Just as the determination of reparations identifies only some individuals or groups as recipients of material or symbolic assistance, the structure of mechanisms based on seeking truth or preserving memory can create a hierarchy of victimhood that reflects or exacerbates potent societal divisions.¹⁰⁵

¹⁰³ The amnesty process was also a key to the achievement of another objective, namely eliciting as much truth as possible about past atrocities... For many victims, the granting of amnesty was a high price to pay for the public exposure of perpetrators... In helping reveal details of gross human rights violations and the systems, motives and perspectives that made such violations possible, the amnesty process assisted the Commission in compiling as “complete a picture as possible of the nature, causes and extent” of past gross violations of human rights.” *South African Truth and Reconciliation Commission Final Report* (1998), p121

¹⁰⁴ See, for example, Victor Igreja, “Memories as Weapons: The Politics of Peace and Silence in Post-Civil War Mozambique,” *Journal of Southern African Studies* 34(2): 539-556 (2008); Paloma Aguilar, *Memory and Amnesia: The Role of the Spanish Civil War in the Transition to Democracy* (trans. Mark Oakley) (2002).

¹⁰⁵ On the relationship between reparations and victimhood, see Dr Zinaida Miller, “Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice,” *The International Journal of Transitional Justice* 2(2): 266-291 (2008), 284-287. On the construction, politics, and effects of victimhood in transitional justice, see Harvey M. Weinstein, “Victims, Transitional Justice, and Social Reconstruction: Who is Setting the Agenda?” in *Justice for Victims: Perspectives on Rights, Transition, and Reconciliation*. Eds. Inge Vanfraechem et al (New York: Routledge Press, 2014).

Finally, reconciliation too is fraught with challenges. Although referenced frequently, the definition, objectives, and assessment of reconciliation remain stubbornly opaque.¹⁰⁶ For example, a “thinner” version of reconciliation looks primarily to political compromise and respect, suggesting that the goal of such processes is largely to redirect violent conflict or repression through trusted political institutions. A “thicker” version might instead develop mechanisms to promote interpersonal healing, forgiveness, redemption and restoration.¹⁰⁷ The latter may offer the possibility for more sustainable peace but in the context of open wounds and recent agreements, it is largely unachievable. It remains empirically unclear which processes and practices of transitional justice might contribute to either a thinner version of coexistence or a thicker version of social forgiveness. Equally, some versions of transitional justice might undermine rather than promote reconciliation.

4.2 Regional Challenges

Most of the regimes subject to protest and overthrow in the MENA region were run by longstanding leaders who had instituted strong central authority. Systematic discrimination against minority groups was rampant, as was unjust enrichment of elites and regional favoritism.¹⁰⁸ As a result, examining, accounting for, and interrogating earlier periods raises questions not just about recent memory and history but much longer timescales of abuse, division and exploitation.

The choice of mechanism and of mandate or indictable crimes inevitably influences the narratives established about past human rights abuses. As noted above, many of the trials that have taken place in the MENA region have focused on a narrow timeframe, trying crimes only related to a particular uprising rather than extending the timeline back to include the abuses of the prior regime. As a result, the processes may highlight change while showing fealty to some continuity. For example, the choice in Egypt to focus prosecutions on abuses during the uprising while at the same time prosecuting corruption from years before, created a particular narrative about the “exceptional” nature of human rights abuses rather than “the culmination of decades of human rights violations leading up to it”.¹⁰⁹

Earlier abuses and the memory of them still wend their way into transitional processes –sometimes directly and sometimes implicitly – but the narrowed timeframe of justice short-circuits attempts at establishing history or preserving memories. Rather than an evaluation of the legacy of long-term harms perpetrated by brutal regimes, justice is reframed as a narrow technical tool to address immediate violence. As a result, it serves leaders who seek to legitimise themselves by calling for an accounting of recent action while eliding their own connections to earlier abuses.¹¹⁰ Recent memory too can become polarised and reshaped in the process, as has happened in Egypt where widely divergent narratives of events since the 2011 protests have emerged.¹¹¹

¹⁰⁶ Chandra Lekha Sriram, “Transitional Justice in Comparative Perspective: Lessons for the Middle East,” in *Transitional Justice in Middle East and North Africa: 27*

¹⁰⁷ Tristan Anne Borer, “Reconciling South Africa or South Africans? Cautionary Notes from the TRC” *African Studies Quarterly* 8(1)(2004), 25-6. See also

Adam Hanieh, *Lineages of Revolt: Issues of Contemporary Capitalism in the Middle East*. Chicago: Haymarket Books, 2013.

¹⁰⁹ Aboueldahab, *Transitional Justice*, at 24. Memorialisation does not, of course, happen only or even primarily through trials or even through official activities. As Barsalou notes, “Egypt is in the midst of a transition whose outcomes remain unclear. The running contest over place names, graffiti and memorials is one way that its protagonists proclaim their positions and keep score.” Judy Barsalou, Post-Mubarak Egypt: History, Collective Memory, and Memorialization,” *Middle East Policy* 19(2)(2012), at 145.

¹¹⁰ Catherine Turner, Transitional Justice in Egypt: A Challenge and Opportunity. *The Tahrir Institute for Middle East Policy* (May 14, 2016).

¹¹¹ Email correspondence with Issandr El Amrani (Oct. 14, 2018)

The Tunisian truth commission was granted a longer temporal mandate, permitting a deeper inquiry into past abuse. In 2016, the ICG found continuing loyalty to the possibilities of the IVD among civil society activists who saw it as the “last remaining institutional mechanism that can arouse hope and compete with the ‘anti-establishment’ nature of Salafi jihadism.”¹¹² Official institutional recognition of previously silenced harms and of the individuals who suffered them has always been a major component of transitional justice in general and truth commissions in particular. The IVD has the capacity to embody that aspect by recognising those who suffered under the prior regime and rewriting Tunisian history, in addition to potentially preventing future violence “driven by the deepening economic, social and identity divides between the country’s north and south”.¹¹³ Yet Tunisia’s memory politics are also intertwined with competitions over victimhood, violation and recognition. Abuses took place over decades and under both the Bourguiba and Ben Ali regimes; to ‘remember’ them is also to identify particular groups (such as leftists or An-Nahda members) as victims – and, conceivably, as perpetrators or bystanders of abuses against others. Tunisia notwithstanding, the attempts thus far to hold individuals accountable in MENA countries has been strikingly time-delimited. These limitations reflect the centrality of time to transitional justice: when institutions exist only to address the most immediately proximate harms, they cannot provide a more fundamental accounting that might lay the ground for a sustainably peaceful future.

The preservation of the past becomes all the more fraught when the present is dominated by conflict rather than transition. Yet just as the conditions of transition shape plausible versions of justice, so too does a long-term continued conflict raise questions about the documentation of ongoing violations. Trapped in one of the more entrenched and bloody conflicts in the region, Syria has become a focal point of discussions about the possible contributions of transitional justice to peace. Aboueldahab argues that the ongoing nature of the conflict along with the efforts by local actors to create archives and documentation of current abuses suggests that “the documentation of violence should be considered as both a stand-alone mechanism of transitional justice and as a means to lay the foundation for a variety of future post-conflict justice goals.”¹¹⁴

In other words, documentation may itself constitute transitional justice, in addition to facilitating the establishment of other institutions and mechanisms in the future. Moreover, activists are documenting not just physical integrity abuses such as torture and killing but large-scale displacement and land seizures in order to facilitate both accountability and also return.¹¹⁵ This suggests a fruitful intersection with other considerations: it is not only about the creation of an archive that can create a basis for future justice processes but the parameters of that archive that will shape what sort of justice is done.

¹¹² International Crisis Group, *Tunisia: Transitional Justice and the Fight Against Corruption* (May 3, 2016), at 8

¹¹³ *Ibid.*, at 17

¹¹⁴ Noha Aboueldahab, *Writing Atrocities: Syrian Civil Society and Transitional Justice*, Brookings Doha Center Publication (May 7, 2018), at 4

¹¹⁵ *Ibid.*, at 13

5. Conclusion

The uprisings in the MENA region were premised in large part on anger over socioeconomic deprivation and the lack of accountability by leaders. Whether leaders were deposed, replaced, or forced to reform, transitional justice seemed an almost inevitable next step. International actors, protesters, government officials, opposition parties, have all at different points and in different places called for justice. The commonality of the call suggests a united front. Yet in each country, struggles over the form of that justice become part of the transition itself – not least because transitional justice can serve as a rallying cry for protest or as a form of government legitimation. As a result, no linear relationship exists between stabilisation – which suggests a preference for consolidated governmental control – and justice, which could conceivably either support or disrupt that power. At the most granular level, these struggles should be understood as fragments of, rather than separate from, contestations over power, resources, and violence.

The MENA context is hardly anomalous in its imbrication of law and politics, but it does provide an important set of examples for how justice processes, particularly in moments of radical change or possibility, are inextricably linked with specific local and regional dynamics. Such links can potentially strengthen justice practices by imbuing them with legitimacy, strengthening their relevance for local claims, and establishing a foundation for political upheaval. Where regressive forces maintain strong claims to power, however, including when the judiciary remains at least partially tied to the past regime, and where insecurity remains prevalent, justice and accountability measures have less capacity to strengthen redistributive programmes or establish meaningful reparation to victims of past harm. As institutions that bear responsibility for holding individuals and regimes to account for past violence, trials and commissions often raise expectations that cannot be fulfilled within the existing political climate. The disappointment of those expectations can fuel further frustration and eventual unrest. Moreover, delimiting the temporal scope of investigation, inquiry, or prosecution, immediately narrows the horizon of justice. The result may be to re-ignite recent anger in the face of continuities in repression or deprivation, to establish a new stability premised on a return to military rule, or, most dramatically, to devolve into armed conflict.

Justice processes struggle to mediate among opposing parties while seeking to present justice as residing outside political conflict. Given the impossibility of separating law or justice from politics, we should focus instead on pragmatically and contextually understanding the costs and benefits of particular processes and practices. Moreover, victims, survivors, beneficiaries and perpetrators should all be considered as agents in their full capacity. In its highest order, transitional justice could offer not a short-term fix to long-term social problems but an ongoing confrontation with the past and reinvention of the present.

Perhaps the most important lesson for stability is to understand justice as a distributional process, one which contributes to the allocation of power, legitimacy and resources to any number of groups and as a result remains inevitably interwoven with the continual formation and reformulation of state and society.

Bibliography

- Aboueldahab, N. "Transitional Justice Policy in Authoritarian Contexts: The Case of Egypt." *Brookings Doha Center Publications*, Oct. 19, 2017.
- Writing Atrocities: Syrian Civil Society and Transitional Justice*, Brookings Doha Center Publication, May 7, 2018.
- Transitional Justice and the Prosecution of Political Leaders in the Arab Region*, Oxford: Hart Publishing, 2017.
- Abou-El-Fadl, R. "Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will," *International Journal of Transitional Justice*, (6)2 (2012).
- Amnesty International. *'We Want an End to the Fear': Abuses Under Tunisia's State of Emergency* (2017).
Setting the Scene for Elections: Two Decades of Silencing Dissent in Rwanda (2017)
- Arendt, H. *Eichmann in Jerusalem: A Report on the Banality of Evil*. New York: The Viking Press (1963).
- Ayed, O. "Prolongation de l'IVD en Tunisie : 'Un geste d'apaisement du gouvernement'." *France 24*, 29 May 2018.
- Barsalou, J., "Post-Mubarak Egypt: History, Collective Memory, and Memorialization," *Middle East Policy* 19(2) (2012)
- Aguilar, P. *Memory and Amnesia: The Role of the Spanish Civil War in the Transition to Democracy* (trans. Mark Oakley) (New York: Berghahn Books, 2002).
- Andrieu, K. "Confronting the Dictatorial Past in Tunisia: Human Rights and the Politics of Victimhood in Transitional Justice Discourses Since 2011," *Human Rights Quarterly* 38 (2)(2016).
- Arbour, L. "Economic and Social Justice for Societies in Transition," *New York University Journal of International Law & Politics*, 40 *NYU Journal International Law & Policy* 40(1) (2007).
- Arthur, P. "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31 (2009).
- Aydogan, A. and Yildirim, A.K., *The Economic and Political Dissatisfaction Behind Tunisia's Protests*. Carnegie Endowment for International Peace, Jan. 23, 2018.
- Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa, 1996 (4) SA 671 (CC).
- Aziz, S. "Theater or Transitional Justice: Reforming the Judiciary in Egypt," *Transitional Justice in the Middle East and North Africa*. Ed. C.L. Sriram, New York: Oxford University Press, 2016.
- "Independence without Accountability: The Judicial Paradox of Egypt's Failed Transition to Democracy," *Penn State Law Review* 120(3)(2016).
- Bell, C. "Interdisciplinarity and the State of the 'Field' or 'Non-Field'," *International Journal of Transitional Justice* 3(1)(2009).
- Boduszyński M. and Wierda, M., "Political Exclusion and Transitional Justice: Study of Libya". In *Transitional Justice in the Middle East and North Africa*. Ed. C.L. Sriram, New York: Oxford University Press, 2016.
- Borer, T.A. "Reconciling South Africa or South Africans? Cautionary Notes from the TRC" *African Studies Quarterly* 8(1)(2004).

- Cammett, M. and Diwan, I. *The Political Economy of the Arab Uprisings*, New York: Routledge, 2014.
- Carranza, R., "Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes," *International Journal of Transitional Justice* (2008).
- Clark, P. *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers*, New York: Cambridge University Press, 2010.
- Commission on Human Rights, *Promotion and Protection of Human Rights: Study on the Right to the Truth*, E/CN.4/2006/91 (Feb. 8, 2006)
- Diamond, L. "A Fourth Wave or a False Start? Democracy After the Arab Spring." *Foreign Affairs* (May 22, 2011).
- El Amrani, I. and Lindsey, U., "Tunisia Moves to the Next State," *Middle East Research and Information Report*, (Nov. 8, 2011).
- El Malki, F., *Tunisia's Partisan Path to Transitional Justice* (Carnegie Endowment for International Peace, (Mar. 7, 2017).
- Engle, K., Miller, Z., and Davis, D.M., *Anti-Impunity and the Human Rights Agenda*, New York: Cambridge University Press, 2016.
- Fisher, K.J. and Stewart, R., *Transitional Justice and the Arab Spring*, New York: Routledge Press, 2014.
- Franzki, H. and Olarte, M.C., "Understanding the Political Economy of Transitional Justice: A Critical Theory Perspective," in *Transitional Justice Theories* Ed. Susanne Buckley Zistel et al., New York: Routledge, 2013.
- Frontline Rwanda, *Disappearances, Arrests, Threats, Intimidation and Co-Option of Human Rights Defenders 2001– 2004* (2005)
- Gray, D.H. and Coonan, T.C., "Reframing Gender Narratives through Transitional Justice in the Maghreb," in *Transitional Justice in the Middle East and North Africa*. Ed. C.L. Chandra Lekha Sriram, Oxford University Press, 2016.
- Guellali, A. "New Reconciliation Law Threatens Tunisia's Democracy." *World Policy Blog*, Oct. 2, 2017.
- Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (2010).
- Hanieh, A. *Lineages of Revolt: Issues of Contemporary Capitalism in the Middle East*. Chicago: Haymarket Books, 2013.
- Hinton, A.L., ed. *Transitional Justice: Global Mechanisms and Local Realities After Genocide and Mass Violence*. New Brunswick: Rutgers University Press, 2010.
- Honouring the Truth, Reconciling for the Future: Final Report of the Canadian Truth and Reconciliation Commission*, 2015.
- Human Rights Watch. *Tunisia: Parliament Shouldn't Undercut Transitional Justice*, March 23, 2018.
- Libya: 45 Sentenced to Death for 2011 Killing*, Aug. 22, 2018
- Libya: Flawed Trial of Gaddafi Officials*, July 28, 2015.

- Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts*, May 31, 2011.
- ICC Pre-Trial Chamber I, Decision on the Admissibility of the Case Against Abdullah Al-Senussi, ICC-01/11-01/11
- Igreja, V. "Memories as Weapons: The Politics of Peace and Silence in Post-Civil War Mozambique," *Journal of Southern African Studies* 34(2): 539-556 (2008).
- International Center of Transitional Justice, "What Is Transitional Justice," available at <https://www.ictj.org/about/transitional-justice>
- International Crisis Group, *Trial by Error: Justice in Post-Qadhafi Libya*, Apr. 17, 2013.
- International Crisis Group, *Marching in Circles: Egypt's Dangerous Second Transition*, 7 Aug 2013.
- International Crisis Group, *Libya: Getting Geneva Right*, 26 February 2015.
- International Crisis Group, *Tunisia: Transitional Justice and the Fight Against Corruption*, 3 May 2016.
- Khalil, A. Gender Paradoxes of the Arab Spring, *The Journal of North African Studies* 19(2): 131-136 (2014).
- Khatib, L. "Challenges of Representation and Inclusion: A Case Study of Islamist Groups in Transitional Justice". In *Transitional Justice and the Arab Spring*. Eds. Kirsten Fisher and Robert Stewart. New York: Routledge, 2014
- Kritz, N.J., ed. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Washington, DC: US Institute of Peace, 1995.
- Lamont, C.K. "The Scope and Boundaries of Transitional Justice in the Arab Spring," in *Transitional Justice in the Middle East and North Africa*. Ed. C.L. Chandra Lekha Sriram, New York: Oxford University Press, 2016.
- Lesch, A.M. "Troubled Political Transitions: Tunisia, Egypt, and Libya," *Middle East Policy* 21(1): 62-74 (2014).
- Mamdani, M. "Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa." In *Anti-Impunity and the Human Rights Agenda*, 2016.
- "Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa." *Politics and Society* 43(1): 61-88 (2014).
- "The Truth According to the TRC." In *The Politics of Memory: Truth, Healing and Social Justice*. Eds. Ifi Amadiume & Abdullahi An-Na'im. London: Zed Books, 2000.
- Manea, E. "Transitional Justice and the Arab Spring from a Gender Perspective". In *Transitional Justice and the Arab Spring*. Ed. C.L. Chandra Lekha Sriram, New York: Oxford University Press, 2016.
- McAuliffe, P., *Transformative Transitional Justice and the Malleability of Post-Conflict States*, Northampton: Edward Elgar Publishing Limited, 2017.
- McEvoy, K. "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 34 (2007)
- Mégret, F. and Samson, M.G., "Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials," *Journal of International Criminal Justice* 11: 571- 598 (2013).

- Miller, Z., "Anti-Impunity Politics in Post-Genocide Rwanda." In *Anti-Impunity and the Human Rights Agenda*. Eds. Karen Engle, Dr Zinaida Miller, & Dennis Davis. New York: Cambridge University Press, 2016.
- "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice." *The International Journal of Transitional Justice* 2(2): 266-21 (2008).
- Mourad, M. and Ahmed, H., "In final ruling, Egypt court finds Mubarak innocent in killing of protestors," Reuters, 2 Mar. 2017.
- Mullin, C. and Rouabah, B. "Requiem for Tunisia's Transition?" *Jadaliyya* (22 Dec. 2014)
- and Patel, I. "Contesting Transitional Justice as Liberal Governance in Revolutionary Tunisia", *Conflict and Society* 2(1): 104-24 (2016).
- Omar, R. "The Delay of Transitional Justice in Egypt". *Middle East Institute* (Feb. 12, 2014)
- Organic Law on Establishing and Organizing Transitional Justice (unofficial translation by ICTJ).
- Peskin, V. "Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda." *Journal of Human Rights* 4(2): 213-31 (2005).
- "Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme". *Journal of International Criminal Justice* 3: 950-61 (2005).
- Politi, D. and Londoño, E., "29 Argentines Sentenced to Life in Prison in 'Death Flights' Trial," *The New York Times*, Nov. 29, 2017.
- Posner, E. and Vermeule, A., "Transitional Justice as Ordinary Justice," *Harvard Law Review* 117 (2003).
- Quinn, J.R. and Freeman, M., "Lessons Learned: Practical Lessons Gleaned from Inside the Truth Commissions of Guatemala and South Africa," *Human Rights Quarterly* 25 (2003).
- Report of the Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post- Conflict Societies," S/2004/616 (Aug. 23, 2004).
- Republic of Liberia Truth and Reconciliation Commission Final Report (2009)
- Roht-Arriaza, N. and Marriezcurrena, J., eds. *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*. New York: Cambridge University Press, 2006.
- Rome Statute of the International Criminal Court. (2002)
- Rowen, J., *Searching for Truth in the Transitional Justice Movement*, New York: Cambridge University Press, 2017.
- Salah, H., "Libya's Justice Pandemonium," *Human Rights Watch*, 14 April 2014.
- Salih C. et. al., *The Limits of Punishment: Transitional Justice and Violent Extremism*. United Nations University Centre for Policy Research, 2018.
- Shalakany, A. "The Day the Graffiti Died," *London Review of International Law* 2(2): 357-78 (2014).
- Sharp, D. ed., *Justice and Economic Violence in Transition* (2014).

Shaw, R., Waldorf, L. with Hazan, P. *Localizing Transitional Justice: Interventions and Priorities After Mass Violence*, Palo Alto: Stanford University Press, 2010.

South Africa Truth and Reconciliation Commission (1998).

Sriram, C.L., "Beyond Transitional Justice: Peace, Governance and Rule of Law, *International Studies Review* 19 (2017).

"Transitional Justice in Comparative Perspective: Lessons for the Middle East," in *Transitional Justice in the Middle East and North Africa*. Ed. C.L. Chandra Lekha Sriram, Oxford University Press, 2016.

"Justice as Peace Liberal Peacebuilding and Strategies of Transitional Justice," *Global Society* 21(4): 579-91 (2007)

Subotic, J. *Hijacked Justice: Dealing with the Past in the Balkans*. Ithaca: Cornell University Press, 2009.

Sultany, N., *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring*, Oxford: Oxford University Press, 2017.

Teitel, R. *Transitional Justice*, New York: Oxford University Press, 2000.

Globalizing Transitional Justice: Contemporary Essays. New York: Oxford University Press, 2014.

Turner, C. *Transitional Justice in Egypt: A Challenge and Opportunity*. The Tahrir Institute for Middle East Policy (May 14, 2016).

United Nations Security Council Resolution 190, 26 Feb. 2011.

United Nations Security Council Resolution 1973, 17 Mar. 2011.

Varney, H., Zduńczyk, K., Gaudard, M. *The Role of Victims in Criminal Proceedings*. New York: International Center for Transitional Justice, 2017.

Waldorf, L., "Anticipating the Past: Transitional Justice and Socio-Economic Wrongs", *Social and Legal Studies* 21 (2012).

and Scott Straus, eds. *Remaking Rwanda: Statebuilding and Human Rights After Mass Violence*. Madison: University of Wisconsin Press, 2011.

Weinstein, H.M., "Victims, Transitional Justice and Social Reconstruction: Who is Setting the Agenda?" In *Justice for Victims: Perspectives on Rights, Transition and Reconciliation*, Ed. Inge Vanfraechem et al, Routledge, 2016.

Wilson, R. *Writing History in International Criminal Trials*. New York: Cambridge University Press, 2011.

Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission, 2004.