

Transitional justice interrupted:

Tunisia, Libya, and lessons still to be learned



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Just days after massive nationwide protests that began in the impoverished interior towns of Tunisia forced its dictator Ben Ali into exile, massive protests broke out in Egypt, leading to the fall of Hosni Mubarak.

Ten months later, Libya's leader of 42 years and the one who had ruled the longest among the authoritarian leaders that fell in that period, was ignominiously killed. The term 'Arab Spring' signifies a season of growth and renewal. Instead, the season began with anti-dictatorship revolutions that promised political change and social transformation. But ended, with one exception, in renewed repression or a descent into armed conflict. There are several important factors and differences in context that can explain why transitional justice (TJ, for brevity) processes advanced in Tunisia but stalled elsewhere in the region including in Libya. This discussion is limited and will focus only on some of the overlaps and differences in the two processes, including what drove them forward and what might interrupt them.

Driven by grievances over unemployment, marginalization, corruption and political repression, the overthrow of dictatorships in Tunisia, Egypt, Yemen, and Libya created expectations that those long-standing grievances would finally be addressed, if not resolved, by post-authoritarian governments.



This did not happen, With the exception of Tunisia, the countries that emerged from Arab Spring revolutions, even those in which long-entrenched authoritarian rulers were ousted, instead descended into violent, deadly and continuing repression in the case of Egypt and still ongoing war in the cases of Yemen, Syria, and Libya. Moreover, the resulting instability, continuing conflict, the spread of military weaponry and lack of credible governance in Libya has led to instability beyond the country and affected neighboring countries in the region, including Mali and Niger. One point that has been made about transitional justice that bears borrowing is this:

“Transitional justice policies in the Arab world, in both their definitions and their forms, are likely to take a trajectory distinct from their predecessors in Latin America, Eastern Europe, and Africa. Every context is unique and thus requires a distinct set of mechanisms to address existing needs (and) while most traditional transitional justice literature conceives of a context in which transitional justice is thought of as a remedy for the period after repression and conflict...the time to discuss, consider, and conceive of transitional justice can occur even during ongoing repression and conflict.”¹

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War and humanitarian needs before the pursuit of transitional justice

One consequence for countries like Syria and Yemen in which war has replaced protest is that conflict-related crime being committed in these wars to have overshadowed demands for

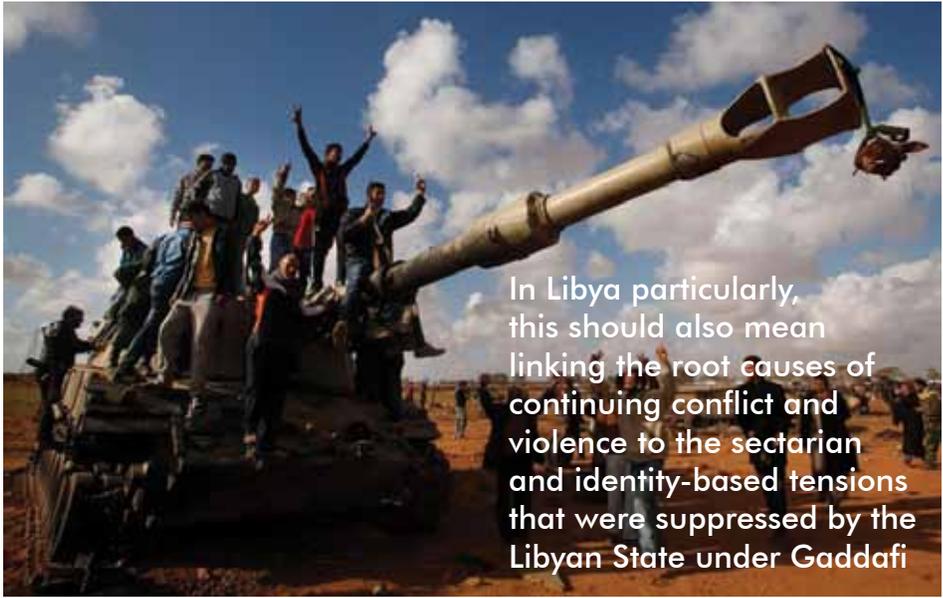
1- <https://timep.org/wp-content/uploads/2018/10/TIMEP-TJP-Intro-MethodUPDATED.pdf>

accountability involving earlier human rights violations as well as large-scale corruption and marginalization from the pre-war dictatorship period. In Syria, for example, this has meant a focus on documenting conflict-related crimes and violations of human rights involving the Assad government, regional States, non-State armed groups, and powerful non-regional States such as Russia, Turkey, and even the United States. This has correspondingly meant little to no documentation or effort to find the truth around human rights abuses under Assad's father or prior to the war – grievances that drove the revolution that should not be forgotten whatever might be the outcome of the ongoing conflict.

A second consequence for transitional justice as a result of revolutions turning into prolonged conflict is the need to prioritize responses to humanitarian needs, given their scale and the vulnerability of many victims, such as children and refugees. The situation in Yemen is an obvious example, where Saudi Arabian missile strikes using US and UK-supplied weapons have killed tens of thousands of civilians and denied millions of Yemenis access to food and health care. Setting the stage for investigating and prosecuting these war crimes and crimes against humanity is important, but this should not be done at the expense of ignoring the expectations of victims and citizens who have the right to truth and to reparation for the violence and denial of basic economic and social rights they are now suffering. In ICTJ's experience elsewhere, documenting the wartime conduct of armed groups and their criminal responsibility will not be what victims and citizens consider of utmost importance; rather, they might prioritize truth and reparations.² When those rights begin to be fulfilled, they will seek justice for the harms and losses they suffered.

A third implication is that justice and accountability initiatives for victims of individual human rights violations and for groups targeted for collective punishment by former (and in the case of Syria, current) authoritarian regimes have been sidelined by the focus on prosecuting individuals for conflict-related crimes. This makes it less likely that human rights violations that were the subject of Arab Spring grievances would be examined and

2- See for example: [“Not Without Dignity: Views of Syrian Refugees in Lebanon on Displacement, Conditions of Return, and Coexistence,”](#) which examines attitudes toward return and co-existence among selected Syrian refugee communities.



In Libya particularly, this should also mean linking the root causes of continuing conflict and violence to the sectarian and identity-based tensions that were suppressed by the Libyan State under Gaddafi

acknowledged through truth-seeking and reparations measures. This is not suggesting that victims of more recent conflict-related crimes in Syria, Yemen or Libya do not deserve justice and accountability; but this means that an examination of both the root causes of sectarian division, the record of authoritarian rule and the impact of foreign military intervention in these countries will likely be put off if not altogether set aside in favor of documenting crimes committed during the conflict. Moreover, the focus on documenting crimes as such will -- given the nature of what is being documented -- privilege prosecutions of perpetrators as a transitional justice mechanism in terms of funding, international community attention and Western media coverage.

A transitional justice agenda for Syria, Yemen and Libya should therefore consciously make clear that these countries are both post-authoritarian and, perhaps eventually, post-conflict. What does this mean for Libya? It means that there should be an effort to broaden both the understanding of what parts of a country's multiple experiences with authoritarianism, conflict and political upheavals TJ can address. This also means that there should also be an effort to ensure that technical assistance, funding and the design of documentation, the focus of assessments of ongoing and possible TJ initiatives, and technical assistance for TJ, in general, should ensure that the right to truth, the right to reparation and, where timely, institutional reforms, are not put off or given

lesser priority than prosecutions.

In Libya particularly, this should also mean linking the root causes of continuing conflict and violence to the sectarian and identity-based tensions that were suppressed by the Libyan State under Gaddafi, exploited by foreign State and non-State interventions and now used by different armed groups to justify their existence and conduct. While waiting for the fragile peace in Libya to be consolidated and for a settlement of the violent disputes over political power, it may also be possible to explore transitional justice processes that can support the consolidation of peace, political settlement and ultimately, co-existence within its fractured society.

Tunisia's transitional justice process, on the other hand, moved forward despite challenges and interruptions posed by distrust between secular and Islamist groups, and attempts by the former dictator and his allies to achieve impunity. What Libya can learn from Tunisia is the ways by which civil society engagement, the involvement of victims groups and locally-driven initiatives can help overcome challenges and consolidate steps already taken.

The overlaps and differences in the Tunisian and Libyan transitions

It is important to emphasize that despite the characterization of the Arab Spring as a regional event, there are inherent, significant differences between the Tunisian and Libyan contexts [as there are among the countries that underwent transitions in that period] that help account for why transitional justice has advanced in Tunisia but not in Libya – or elsewhere in the region. Tunisia, in the words of ICTJ's former Tunisia country program director, "remains the only flower of the Arab Spring."³ The demography, history and even geography of Tunisia, as well as social movements that confronted dictatorship even prior to the Arab Spring, were built around organized workers and marginalized communities in its poorest governorates and neighborhoods. The large percentage of young, unemployed, but educated and social-media savvy citizens was arguably the most decisive factor in winning a revolution that had been in the making since 2008.⁴

3- <https://www.peaceinsight.org/blog/2015/05/transitional-justice-tunisia-implications-political-change/>

4- <https://www.nytimes.com/2014/05/14/world/africa/tunisian-discontent-reflected->



The country's first post-dictatorship president has one of the clearest explanations for why the transition in Tunisia did not degenerate into armed conflict as it did in Libya and elsewhere in the region. "Tunisians," according to former president Moncef Marzouki, "are neither smarter nor more peaceful or tolerant than other Arabs or any human beings." He says:⁵

"Fortunately the population of Tunisia is much more homogeneous than that of the neighboring countries. Made of 99% of Arab Moslem Sunnis. The middle class represents a large proportion of the society. Our military is professional, has no history of being involved in economic activity or in politics. Civil society is strong, vigilant and yet responsible, inflexible and yet peaceful. Most importantly, secular and Islamist opponents to the dictatorship have learned to go beyond their disagreement and work together at least since the late 1990s. It's easy to understand that reaching a political consensus is much less probable in countries where you have an extremely heterogeneous population like Syria; or in countries where you have a military institution deeply involved in politics and economy like in Egypt; or in societies without a strong civil society like in Yemen or Libya."

Libya and Tunisia were ruled by authoritarian regimes for most of their post-independence history. Those authoritarian regimes relied on what has been described as the "mutually-reinforcing"⁶

[in-protests-that-have-idled-mines.html](http://www.moncefmarzouki.com/2019/02/10/the-arab-spring-has-just-started/?lang=en)

5- M. Marzouki, "The Arab Spring Has Just Started," (2017) <http://www.moncefmarzouki.com/2019/02/10/the-arab-spring-has-just-started/?lang=en>

6- <https://www.ictj.org/plunder-pain-should-transitional-justice-engage-with-corruption-and-economic-crimes>

abuses of repression and corruption to maintain power. Both Ben Ali and Gaddafi cast themselves as rulers protecting their countries from radical Islamists. But their versions of secularism manifested in different (and initially, even opposing) ways. Ben Ali presented himself as a pro-Western successor to the equally authoritarian Habib Bourguiba, firmly on the side of Western countries that ignored his regime's corruption as long as he pursued a common counter-terrorism agenda. Gaddafi, on the other hand, portrayed himself as a believer in Nasserite-style socialism and as a supporter [and funder] of national liberation movements that were hostile to Western governments. As one comparison of Ben Ali and Gaddafi put it:

"Tunisia watchers could see that Ben Ali was the darling of the western embassies. Well known to the French and American militaries, he was someone the diplomats believed could be trusted to maintain Tunisia's secular, pro-western policies and keep the country out of the orbit of its dangerous, larger neighbor, Gaddafi's Libya."⁷

That Gaddafi, like Ben Ali, eventually worked with Western counter-terrorism efforts against Al Qaeda, and openly courted Western leaders such as Tony Blair, Nicholas Sarkozy, and Silvio Berlusconi showed that self-interest and his regime's continuity in power through his son was more important than his supposed ideological preferences. Unlike Gaddafi's single-party rule, Ben Ali's regime held elections in which other political parties could, in theory, participate [even if Ben Ali would always win].⁸ These elections gave Tunisian opposition activists, labor organizers and Islamist opponents of the regime the experience of challenging dictatorship and the opportunity to openly organize even under repressive conditions, experiences and opportunity that Libyans did not have under Gaddafi's rule.

The presence and role of civil society in articulating grievances

The impact of Ben Ali's State-capture-based corruption, the inequality and rural marginalization caused by World Bank-supported economic policies and his violent suppression of both the

7- <https://www.theguardian.com/world/2011/jan/15/ben-ali-power-tunisia>

8- <https://www.theguardian.com/commentisfree/2009/oct/19/tunisia-elections-rigging-ben-ali>



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Moncef Marzouki
former president

Islamist movement and leftist labor agitation within the national labor union UGTT eventually combined into a common set of grievances that primed the revolution. These grievances have been largely reflected in the design of transitional justice mechanisms in Tunisia. On the other hand, because Gaddafi initially and generously shared oil wealth with the population, it was often said that Libya “enjoy(ed) a relatively high standard of living by African standards.”⁹ But this did not last and like other rulers in the region’s oil-rich kingdoms, the trade-off to the relative fulfillment of economic and social rights was the surrender of political and civil rights. Moreover, as Juan Cole points out, Gaddafi “became vindictive against tribes in the east and in the southwest that had crossed him politically, depriving them of their fair share in the country’s resources.” Cole says that in the decade before Gaddafi’s ouster,

“Extreme corruption and the rise of post-Soviet-style oligarchs, including Qaddafi and his sons discouraged investment and blighted the economy. Workers were strictly controlled and unable to collectively bargain for improvements in their conditions. There was much more poverty and poor infrastructure in Libya than there should have been in an oil state.”¹⁰

Hence, while working-class and poor communities among the two countries’ populations had in common grievances involving corruption, political repression and increasing marginalization, the presence of a relatively experienced, organized and working-class-led civil society in Tunisia made a difference, both during the events leading to the transition and in the process of determining what transitional justice would look like in the country. The revolution in Tunisia was made possible by working-class and youth-led movements honed in the ways of challenging a dictatorship. The grievances they shared – corruption, unemployment, and the repression of both Islamists and left-wing activists – made it possible to design a transitional justice agenda that would address those larger society-wide grievances as well as different individual and collective experiences of pain, loss and injustice. These movements and the post-dictatorship political parties that they are linked to were the foundations for civil society engagement once transitional justice policy-making was underway in Tunisia.

9- <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/2668509/Colonel-Muammar-Gaddafi-pledges-free-market-reforms-in-Libya.html>
10- <https://www.juancole.com/2011/08/top-ten-myths-about-the-libya-war.html>



The process and outcomes of transitional justice policymaking

By comparison, as the scholar Gilbert Achar points out, “in countries like Syria or Libya, due to extremely dictatorial governments, there were no preexisting autonomous organized groups, whether political or even social.”¹¹ Whether or not the transition in Libya would have turned out differently had there been no months of sustained airstrikes by Western forces will always be a matter of speculation.¹² But the combination of Gaddafi’s militarized res-

11- <https://www.jacobinmag.com/2015/12/achchar-arab-spring-tunisia-egypt-isis-isil-assad-syria-revolution/>

12- One report published just before the airstrikes began pointed out that “antigovernment protesters in Libya, like those in Tunisia and Egypt, have drawn broad popular support — and great pride — from their status as homegrown movements that have defied autocrats without outside help. Any intervention, even one with the imprimatur of the United Nations, could play into the hands of Colonel Qaddafi, who has called the uprising a foreign plot by Western powers that seek to occupy Libya.” “If he falls with no intervention, I’d be happy,” one rebel leader said. “But if he’s going to com-



ponse and the foreign military backing for the armed movements against his regime changed the revolution. It transformed different tribal groups that were coalescing into a broad but peaceful movement into one in which the same people were characterized as *thuwars* – rebel fighters in a war.¹³

Tunisia's process was marked by meaningful civil society engagement. The earliest TJ measures were ad hoc and short-term responses to immediate needs of victims and ways to quell rising expectations. A Ministry of Human Rights and Transitional Justice was created. Urgent reparations measures were offered.¹⁴ In 2011, one of three ad hoc commissions created was a 'National Fact-Finding Commission to look at violations committed during the revolution. This commission reported 338 dead and 2147 injured.¹⁵

Of all the countries that went through transitions in the Arab Spring, only Tunisia succeeded in creating a functioning truth commission, the Instance Vérité et Dignité or IVD. The 2013 organic law¹⁶ that created the IVD or the Truth and Dignity Commission was a product of wide-ranging, public debates over what a Tunisian transitional justice approach should be. The law governing transitional justice was passed by an elected parliament, but not until after an official national dialogue was carried out across the country. The dialogue process was a deliberate, democratic and, novel exer-

mit a massacre, my priority is to save my people." <https://www.nytimes.com/2011/03/02/world/africa/02libya.html?auth=login-smartlock>

13- <https://www.theatlantic.com/international/archive/2011/07/how-libyan-rebels-came-be-called-rebels-against-their-will/352629/>

14- [COUNTER-TERRORISM REPORTS]

15- <https://www.ictj.org/news/fact-finding-commission-counts-338-deaths-and-2147-wounded-tunisian-revolution>

16- <https://www.ohchr.org/Documents/Countries/TN/TransitionalJusticeTunisia.pdf>

cise for a country that had just emerged from years of dictatorship.¹⁷ The commission itself was constituted through a flawed but nonetheless significantly consultative process.¹⁸ Even with the internal disputes and external challenges it went through, the IVD gathered over 60,000 statements and conducted several public hearings. As of this writing, the IVD is set to release its final report.

In contrast, Libya’s earliest attempts at transitional justice policymaking under the un-elected National Transitional Council (NTC), were characterized by “the lack of transparency, the question of legitimacy (and) fears that the laws served the interests of specific groups (such as protecting members of the NTC from future prosecution and appeasing militia groups)”¹⁹ According to former ICTJ expert Marieke Wierda, “unlike in Tunisia, there was no broad public consultation on the law (Law 17²⁰), despite the importance of the social issues at stake.”²¹ Subsequent changes to the law in 2013 (Law 28²²) by the elected General National Council (GNC) led to improvements, such as a Fact-Finding and Reconciliation Committee that more closely resembled a truth commission. Despite these changes, the FFRC has remained non-functional and “there was no known activity by the commission during the year (2018).”²³

Aside from the IVD, Tunisia’s TJ law creates several institutions that are envisioned to carry on the transitional justice process after the IVD submits its report. The law creates specialized criminal

17- It must be noted that Morocco, prior to the events of the Arab Spring, had a truth commission. See: <https://www.ictj.org/news/morocco-still-model-justice-mena-questions-remain>

18- <https://www.asf.be/blog/2017/02/08/appointment-of-members-to-the-truth-and-dignity-commission-in-tunisia-a-call-for-transparency/> Also see: <https://www.ictj.org/news/ictj-program-report-tunisia>

“The process of the selection of commissioners followed the promulgation of the law. A committee of selection was created within the National Constituent Assembly and a call for nominations was published in January 2014. The names of the commissioners were announced in early May. ICTJ continues to play an active role in this process. We prepared a memo on the selection of commissioners and the best practices based on comparative experiences. We also provided the deputies with a communication strategy, which underscored the importance of involvement and the sense of ownership of the process by all Tunisians.

19- https://www.chathamhouse.org/sites/default/files/public/Research/Middle%20East/0512libya_summary.pdf

20- Law No. 17 of 2012 on Laying the Foundations of National Reconciliation and Transitional Justice, and its amendments

21- Marieke Wierda, “Confronting Gaddafi’s Legacy,” in *The Libyan Revolution and its Aftermath*, Peter Cole editor.; Brian McQuinn editor. Oxford: Oxford University Press 2015

22- Law 29 of 2013 on Transitional Justice

23- <https://www.state.gov/j/drl/rls/hrrpt/2017/nea/277255.htm>



the features of the UN-sponsored Misrata-Tawergha reparations-for-return agreement underline the problematic way reconciliation is framed in Libya

chambers to hear and try criminal cases referred by the IVD. In Libya, criminal prosecutions are focused on cases now pending at the International Criminal Court (ICC) involving crimes committed during the conflict. The Tunisia and Libya transitional justice laws vest the IVD and FFRC respectively with power to calculate the amount of compensation for victims, alongside other forms of reparation. The two laws also create a fund from which the compensation payments will be made. The focus on compensation and the apparent preference for a judicial approach to compensation suggests that the attitude toward reparation in both countries (and perhaps across the region) is still tied to the payment of money – which can create problems in the long-term in countries where competition over victimization exists.

While the revolutions in both countries were driven by corruption as a grievance, the Libyan law only contains a brief provision “encouraging the returning of illicitly-gained public funds” which,

if returned “voluntarily” will extinguish criminal proceedings. While the Tunisia version creates a more complex arbitration process, the idea is the same: a negotiated outcome in which the return of stolen assets can extinguish liability. In Tunisia, and as it should in Libya, this raises questions around the transparen-

cy of the arbitration process. Already, a so-called “administrative reconciliation law” was passed in Tunisia granting amnesties to government officials who were complicit in corruption under Ben Ali but who claim to not have profited from it. ICTJ has criticized that law, along with the civil society and youth groups that once carried the revolution. The Libyan equivalent has not yet run into the same problems simply because it hasn’t been implemented. But because these blanket amnesties can interrupt (or even end) transitional justice, it will be important for Tunisians to step across ideological and sectarian boundaries and oppose impunity.

Both Tunisian and Libyan efforts at transitional justice policy-making have recognized distinct grievances that were emblematic of each country’s transition. For Tunisia, the marginalization of regions that were excluded by Ben Ali’s economic and social policies and targeted for repression because they were bastions of Islamist or left-wing opposition is articulated as a distinct grievance. In Libya, the displacement of civilians is regarded as a specific violation requiring transitional justice policymaking. The treatment of displacement as a subject of transitional justice is important; if it is taken seriously in Libya, it may help offset the implications of the UN-sponsored Misrata-Tawergha agreement in which the people Misrata – seen as anti-Gaddafi -- are to be given compensation before the displaced people of Tawergha, seen as pro-Gaddafi, can leave internal displacement camps and return to their original communities. Because this effectively makes a trade-off between the right to reparations and the right of displaced persons to return, it is problematic.

What can interrupt transitional justice?

While both the Tunisian and Libyan laws mention reconciliation, the Tunisian process highlights dignity more than reconciliation while the Libyan law not only states “(its) objective is to reach national reconciliation” but also refers to “community reconciliation.” These different emphases reflect the contexts of the two countries and how their transitions unfolded. Unlike Libya, Tunisia’s divisions are not tribal but more religious and ideological. Nonetheless, those divisions led to an early distrust of the transitional justice process among secular activists, who saw it as one that would favor the many Islamists, who were victims of human rights violations. These divisions have interrupted transitional jus-

tice in Tunisia a number of times, creating tension and even instances of political violence. If there are issues that could interrupt the pursuit of transitional justice in Tunisia, it would be any of two possibilities: the possibility of sectarian and secular groups escalating these tensions and, equally problematic, the possibility of an amnesty for corruption and human rights violations that could seriously undermine the process itself.

On the other hand, the features of the UN-sponsored Misrata-Tawergha reparations-for-return agreement underline the problematic way reconciliation is framed in Libya. The agreement is supposed to “achieve and consolidate reconciliation, peace and social harmony between Misrata and Tawergha.” In the process, however, it may legitimize the extraction of vengeance in what should be a transitional justice process that avoids it. As discussed at the beginning of this paper, the shift from protest to war led to the de-prioritization of transitional justice measures dealing with the 42 years of Gaddafi’s rule and an emphasis on war crimes, crimes against humanity and human rights violations committed during the 9 months of armed conflict. This kind of paradigm shift during a transition has been a subject of reflection within ICTJ: “in delicate transitional moments, political forces can easily sideline or quash victims’ demands for justice, while formulaic approaches, sometimes championed by the international community, can overwhelm weak institutions and lead to very limited results.”²⁴

24- <https://www.ictj.org/news/new-book-ictj-justice-mosaics>