

Transitional Justice and the Prosecution of Political Leaders in the Arab Region

A Comparative Study of Egypt, Libya,
Tunisia and Yemen

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Introduction

On the morning of 3 August 2011, shocking live images of former Egyptian President Hosni Mubarak in a courtroom cage lit up television screens in Egypt, the Arab region and beyond. When asked to confirm his presence in the courtroom, he responded: ‘afandim, ana mawgood’ (‘your honour, I am present’). Mubarak’s statement quickly became a popular ring tone for mobile phones in Egypt, as if to assert time and again that the impossible had now become reality. For many Egyptians, Mubarak’s incarceration was a powerful symbol of the revolution’s success in ousting him and in marking a new, post-Mubarak era. Alongside him in the dock were his two sons, former Minister of Interior Habib El Adly and several of his aides. The dock was thus teeming with some of Egypt’s most notorious symbols of oppression.

Less than two months earlier, former Tunisian President Zine El Abidine Ben Ali was tried in absentia and the International Criminal Court (ICC) issued arrest warrants for Libyan leader Muammar Gaddafi, his son Saif al-Islam Gaddafi and the Chief of Intelligence Abdullah El Senussi. Meanwhile, Yemeni President Ali Abdallah Saleh agreed to step down in a deal that guaranteed his immunity from prosecution. Such was the rapid unfolding of decisions regarding the prosecution of political leaders in the Arab region, all within a matter of months following the massive anti-government uprisings of the Arab Spring. Prosecutions of former leaders and other high-level government officials emerged as the single most pursued route of transitional justice—something that was almost non-existent prior to the 2010/2011 uprisings in the Arab region.¹

The jubilation that the images of Mubarak in the dock triggered, however, quickly subsided. Apart from the generic concerns surrounding politicised trials, deeper questions surrounding the premise of transition began to emerge. Is the toppling of a leader sufficient for a meaningful transitional justice process to unfold? What role do ‘deep state’, or entrenched, institutions play in shaping the direction of transitional justice? To what extent can the uprisings and their aftermath be described as *transitions*? With certain exceptions, the investigations and trials that took place in Egypt, Libya, Tunisia and Yemen were limited to crimes perpetrated during the uprisings, leaving decades of atrocities unaddressed. Moreover, while several high-level officials were prosecuted, many others did

¹ Exceptions include the trial of former Iraqi president Saddam Hussein.

not face trial. What explains this limited content and extent of the trials? To what extent can a 'global accountability norm' be invoked when international actors pursue it in one context (Libya) but completely ignore it in another (Yemen)? Whose interests does transitional justice serve and to what end?

This book argues that transitional justice in the Arab region presents the strongest challenge yet to the transitional justice paradigm, which presumes a shift from violent, non-liberal rule to peaceful, liberal-democratic rule. Through a comparative case study of Egypt, Libya, Tunisia and Yemen, this book presents a critique of mainstream transitional justice theory. This theory is built on the underlying assumption that transitions constitute a shift from non-liberal to liberal-democratic regimes, where measures—often legal—are taken to address atrocities committed during the prior regime.² Together with domestic prosecutions, this book also takes into account the role of international actors in shaping transitional justice decisions, especially within the context of the ICC's involvement in Libya and the role of international actors in negotiating an immunity law in Yemen. Using scholarly literature and the findings generated from interviews in each of the four case studies, the book challenges the predominant understanding that transitional justice uniformly occurs in liberalising contexts. The findings of this research therefore build on the growing critical literature that claims that transitional justice is an under-theorised field that must further develop to take into account non-liberal and complex transitions.

This book thus makes four principal arguments for how the Arab region cases challenge the transitional justice paradigm.

First, the nature of the transitions that took place in the Arab region was non-paradigmatic in that they did not constitute a shift from violent dictatorships to liberal democracies. This warrants a rethinking of transitional justice and its pursuit in varied contexts.

Secondly, the cases demonstrate that both domestic and international actors pursue competing accountability agendas, thereby weakening global accountability norm claims. The contradictory role of international actors in Libya and Yemen—pushing for criminal accountability in the former and immunity in the latter—exemplifies the need to deconstruct the varied objectives of transitional justice actors.

Thirdly, the limited content and extent of the investigations and prosecutions that have taken place in all four case studies further underline the need to develop transitional justice theory. The emphasis on corruption and economic crimes, particularly in Egypt and Tunisia, was used as a means to scapegoat certain high-level individuals to deflect attention from the lack of accountability for a more comprehensive set of human rights violations and their perpetrators.

Fourthly, the Arab region cases demonstrate the perils of pursuing prosecutions using weak and politicised judiciaries. Executive power meddling and inadequate

² See, eg, RG Teitel, *Transitional Justice* (Oxford, Oxford University Press, 2000); RG Teitel, *Globalizing Transitional Justice: Essays for the New Millennium* (Oxford, Oxford University Press, 2014).

legal frameworks are a principal challenge to the pursuit of fair prosecutions. The book therefore argues that a rethinking of transitional justice needs to take into account the absence of pre-existing democratic structures and what this absence means for criminal accountability prospects in diverse transitional contexts.

The term ‘transitional justice’ is used here to describe the processes that actors take to address past atrocities. Actors include the state, civil society, victims, the military, individual lawyers, politicians and the judiciary.³ Transitional justice processes include a range of mechanisms, such as domestic and international prosecutions, institutional reform, vetting, reparations and truth commissions. This book, however, focuses on decisions regarding the prosecution of political leaders to ensure a rigorous comparison between the four country case studies. More importantly, the focus on prosecutions is driven by their centrality in the pursuit of transitional justice in the Arab region. The book therefore calls for a rethinking of transitional justice theory and practice. It does so by examining two principal questions.

First, what factors led to decisions regarding the prosecution of political leaders in Egypt, Libya, Tunisia and Yemen? The term ‘political leaders’ here includes heads of state, former ministers and other high-ranking government officials.⁴

Secondly, the book considers why there has been an emphasis on corruption and socio-economic crimes over civil and political rights crimes in the investigations and trials that have already taken place. The first question is addressed by examining the trigger and driving factors that led to the decision to prosecute or not. The second question is addressed by exploring the shaping factors that affect the content and extent of decisions regarding prosecution. ‘Content’ refers to the types of charges and accusations in the investigations and trials. ‘Extent’ refers to the selection of individuals who were prosecuted and/or investigated. This trigger–driving–shaping mechanism is used as a general prism through which the material gathered from the interviews is analysed.⁵

This book, then, does not aim to define what is meant by the term ‘justice’. Nor does it seek to determine whether certain transitional justice mechanisms such as prosecutions or truth commissions should be implemented or not. Instead, the term ‘transitional justice’ is used primarily in reference to how the various actors in the four case studies pursue, shape and block criminal accountability for past atrocities. In doing so, the book provides a critical inquiry of the liberal assumptions of the transitional justice paradigm. Laurel E Fletcher and Harvey Weinstein note that the most influential transitional justice scholarship tests,

³ Chapters 2–5 contain a more detailed explanation of the various actors involved in driving and shaping transitional justice processes.

⁴ See the Methodology section for an explanation for why the term ‘political leaders’ encompasses these individuals.

⁵ See the Methodology section for an explanation of the merits of the trigger–driving–shaping prism.

applies, evaluates or theorises the ‘accepted transitional justice paradigm’ and largely falls short in questioning the ‘foundational assumptions of the field’.⁶ This book aims to address this shortcoming of the field. It does so through scholarly research and a critique largely based on findings from almost 50 field interviews on the prosecution of political leaders in Egypt, Libya, Tunisia and Yemen between 2012 and 2017.

Significance of the Arab Region

The merits of examining how the Arab region is shaping transitional justice do not only have to do with challenging the predominant understanding that transitional justice occurs in liberalising contexts. Five additional points further illustrate the significance of this research.

First, most criminal prosecutions in the Arab Spring countries have dealt almost exclusively with crimes committed during the transition, as opposed to crimes during the decades of repressive rule prior to the political transitions. Moreover, most of the complaints and charges to date have had to do with corruption and financial crimes, as opposed to human rights violations. The reasons behind this duality of charges are unclear in the literature on the prosecution of political leaders. Scholars have flagged this as an area that requires closer attention.⁷ Most transitional justice research focuses on the outcome of the decision to prosecute or not, without examining the shape that these decisions take as a result of the processes they emerge from and the contexts within which they unfold. The emphasis on corruption and socio-economic crimes in the investigations and trials that have taken place in the Arab region therefore warrants a closer examination. These practices have profound implications for the study of transitional justice because they weaken long-standing scholarly assumptions of the liberalising direction of transitions and of transitional justice.

Secondly, an inquiry into efforts to prosecute in the pre-transition period—before the 2010/2011 Arab Spring uprisings—is necessary in order to understand the development and execution of the prosecutorial strategy in the four countries after the uprisings.⁸ Such an inquiry provides insight into the formative stages of these decision-making processes. Instead of judging the prosecutions and the decisions related to them solely on their outcome, the trigger-driving-shaping prism serves to ensure a focus on the very making of these decisions. For example, while many would label the Mubarak and Ben Ali trials in Egypt and Tunisia as

⁶ LE Fletcher and HM Weinstein, ‘Writing Transitional Justice: An Empirical Evaluation of Transitional Justice Scholarship in Academic Journals’ (2015) 7 *Journal of Human Rights Practice* 177, 189.

⁷ EL Lutz and C Reiger (eds), *Prosecuting Heads of State* (New York, Cambridge University Press, 2009) 280–82.

⁸ This point is elaborated upon in the next section.

show trials or politicised trials that fell short in ensuring justice, this conclusion does not take into account the complex factors and the relationship between these factors that formed the processes leading up to the prosecutions. An inquiry into the formative stages of decisions regarding prosecutions, then, reveals that a variety of factors and actors shaped the decisions. As a result, attributing unfair trials to one factor, such as a politicised and weak judiciary, falls short of a more comprehensive explanation. Such simplistic inferences fail to take into account other significant factors, such as the nature of the transition, civil society, the role of international actors and legal challenges, that shaped transitional justice across the four countries. It is these factors that the research on which this book is based aims to identify and explain.

Thirdly, the four case studies are examples of the need to examine whose interests transitional justice serves and what those interests are.⁹ Such an analysis is important for the deconstruction of the use and abuse of transitional justice in varied political contexts. The roles of the judiciary, the military, civil society and interim governments, for example, vary significantly and must be taken into account when addressing the use of transitional justice mechanisms. By examining the factors that triggered, drove and shaped decisions regarding the prosecution of political leaders in Egypt, Libya, Tunisia and Yemen, this research will enhance our understanding of how transitional justice is pursued in such non-paradigmatic contexts.

Fourthly, the timing of this research and of the questions asked in every interview conducted across the four countries is crucial. The book analyses the details of the early stages of decisions regarding prosecution from actors who were directly and indirectly involved in the prosecutions. As time passes, memory of such details will wane, as was the case in Latin America and other parts of the world. Kathryn Sikkink has described this dilemma and called it the ‘frailties of human memory’:¹⁰

When I first started the research for this book, I wracked my brains for a memory of the first time one of the activists from Argentina or Uruguay mentioned the possibility of prosecuting state officials for human rights violations, and I could not pinpoint the moment. Surely Emilio Mignone or Juan Mendez, each immersed in the human rights legal culture of the time, was already talking about prosecutions in 1981? Emilio Mignone died in 1998, and I can no longer rely on his impeccable memory. Juan Mendez can’t pinpoint the moment, either ... For almost two years I was part of a network that later became a main advocate for individual criminal prosecution, and yet I cannot identify the instant when the idea first appeared and started to flourish. So, my research began as a kind of detective work to locate the sources of the ideas and practices that I would later call the ‘justice cascade’.¹¹

⁹ T Obel Hansen, ‘Transitional Justice: Toward a Differentiated Theory’ (2011) 13 *Oregon Review of International Law* 1, 2–3.

¹⁰ K Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York, WW Norton, 2011) 11.

¹¹ *ibid.*, 10–11.

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

Finally, the context of the Arab countries and their transitions are fundamentally different from previous studies on countries in other regions. Factors that have played an important role in countries in Latin America, such as international and regional human rights mechanisms and the use of universal jurisdiction laws, may not be as relevant to the Arab region.¹² This book thus presents an opportunity to think critically about how the Arab region is shaping transitional justice theory and practice.

This book does not attempt to propose a new theory of transitional justice. Rather, it seeks to challenge the predominant transitional justice paradigm, generally understood as a set of mechanisms to address past atrocities through the use of judicial and non-judicial measures, by arguing that it falls short in explaining non-paradigmatic transitions. The Arab region case studies herein present a strong challenge to the existing theory of transitional justice, which is rooted in liberal and hence non-universal values.

Significance of Pre-transition Decisions Regarding Prosecution

Certain iconic human rights cases in pre-transition Egypt, Libya and Tunisia served as major triggers, or turning points, that led to decisions to prosecute high-level officials in those three countries. These cases targeting pre-transition high-level officials have, with the exception of Yemen, trickled into post-2011 efforts to prosecute. Marked by the public outrage in response to the original crimes and the persistent efforts of civil society and individual lawyers to see the cases through, these triggers were milestones in the long and difficult road to accountability for political leaders in these countries. This is why it is crucial to identify pre-transition triggers and to analyse their impact, if any, in subsequent decisions to prosecute former political leaders.

One of the objectives of this book, then, is to explain the factors that led to decisions to prosecute political leaders or not. The research aims, in part, to explain what, if any, efforts were pursued to prosecute political leaders before, during and shortly after the 2010/2011 uprisings in Egypt, Libya, Tunisia and Yemen.

¹² Tunisia, however, benefited significantly from universal jurisdiction laws in pre-transition prosecution efforts, as explained in chapter 3.

The question regarding pre-transition decisions to prosecute is important for three reasons.

First, as explained above, the timing of this inquiry was crucial, as it allowed for interviews with individuals both directly and indirectly involved in the prosecutions shortly after they had taken place or, as in many cases, while they were still ongoing. This has helped to ensure an accurate explanation of the formative stages of the decisions regarding prosecution.

Secondly, an inquiry into efforts to prosecute in the pre-uprising period is necessary in order to understand the development and execution of the prosecutorial strategies in the four countries after the uprisings.¹³ It provides insight into the formative stages of these decision-making processes. This is not to say that clear decisions to prosecute political leaders had begun before the ouster of the four leaders in 2011. On the contrary, the interview responses show that, for a variety of reasons, very little was done in terms of attempts to hold political leaders accountable in a court of law. However, certain iconic cases that implicated—whether implicitly or explicitly—high-level government officials reveal attempts to achieve some form of accountability within a difficult and opaque judicial environment pre-transition.

Finally, an inquiry into the formative stages of decisions regarding prosecutions reveals that a variety of factors and actors triggered, drove and shaped the decisions. As mentioned earlier, attributing unfair trials to one factor, such as a politicised and weak judiciary, falls short of a more comprehensive explanation. The scope of this part of the research is counter-intuitive in the transitional justice literature, which focuses primarily on post-transition efforts to prosecute. Before explaining the methodology used in more detail, the next section situates this book within the transitional justice literature.

The Arab Region: Rethinking Transitional Justice Scholarship

The Absence of a ‘Return to a Liberal State’

The ambiguity of the transitions in the Arab region has led some to conclude that transitions simply did not take place.¹⁴ However, transitional justice processes do take place in ambiguous political transitions. The fact that decisions regarding prosecution were taken—even in the case of Yemen, where an immunity law

¹³ The implications of these prosecutorial strategies for transitional justice are discussed in chapter 6.

¹⁴ RG Teitel, ‘Transitional Justice and the Power of Persuasion: Philosophical, Historical and Political Perspectives’, paper presented to the Panel, American Political Science Association annual conference, Chicago, September 2013.

was passed—is important in that it challenges the predominant understanding of transitional justice as a process that can only occur in a liberalising context. These arguments have profound implications for the study of transitional justice because they weaken long-standing scholarly assumptions of the liberalising directions of transitions and of transitional justice.

Trials are usually at the forefront of transitional justice mechanisms and serve as a strong symbol of a break with the former regime. Some argue that transitional justice is under-theorised, as it is increasingly unable to explain its divergent objectives in varied contexts.¹⁵ Others, such as Paige Arthur, argue that there is no single theory or definition of transitional justice.¹⁶ In their analysis of transitional justice scholarship between 2003 and 2008, Fletcher and Weinstein note that few scholars have questioned the foundational assumptions of the field.¹⁷

A rapidly expanding field, transitional justice is broad, inter-disciplinary and evolving in radical ways. Transitional justice and its various mechanisms, including truth commissions, reparations, vetting and prosecutions, are spread widely and draw scholarly attention from lawyers, political scientists, anthropologists, sociologists and historians. Prosecutions, however, are the most pursued mechanism of transitional justice, and the Arab region is not an exception to this trend.¹⁸ It is, then, a field that possesses highly political attributes, but is heavily legalistic in its application. Sharp critiques the tendency of actors to pursue a top-down approach to transitional justice that is focused on ‘technocratic legalism’ that wrongly overlooks the ‘underlying politics of transitional justice interventions.’¹⁹ Nagy similarly critiques the heavy influence of the ‘international legalist paradigm’ and notes that ‘The problem is not with law and human rights per se but with the depoliticised way in which “justice” can operate.’²⁰ Such calls to take the political and the contextual into account are certainly crucial to understanding both how transitional justice operates in various contexts and the limitations of the transitional justice paradigm as it currently stands.

Globally, the number of prosecutions of political leaders has increased significantly.²¹ Since 1990, more than 85 heads of state have been prosecuted. Political and military leaders in Latin America, Europe, Africa and Asia have been put on trial for massive human rights violations and for corruption. In Latin America, leaders in Argentina, Chile and Peru have all faced prosecution. This

¹⁵ See S Buckley-Zistel, TK Beck, C Braun and F Mieth (eds), *Transitional Justice Theories* (Abingdon, Routledge, 2014).

¹⁶ P Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’ (2009) 31 *Human Rights Quarterly* 321, 359.

¹⁷ Fletcher and Weinstein, above n 6.

¹⁸ Truth commissions have also increasingly become a popular mechanism of transitional justice.

¹⁹ DN Sharp, ‘Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice’ (2013) 26 *Harvard Human Rights Journal* 149, 150.

²⁰ R Nagy, ‘Transitional Justice as Global Project: critical reflections’ (2008) 29 *Third World Quarterly* 275, 278, 279.

²¹ Lutz and Reiger, above n 7, 12.

phenomenon has been described as a ‘justice cascade,’ which largely originated in Latin America and has reverberated throughout the world, leading to an increase in universal jurisdiction laws.²² This wave of trials and legal transformations is also referred to as the ‘Pinochet Effect,’ following one of the most notorious attempted prosecutions of former political leader, General Augusto Pinochet, who led Chile from 1973 to 1990.²³

Neil Kritz’s three volumes on transitional justice, published in 1995, in many ways set the stage for further scholarship on the dilemmas of what became known as transitional justice in various parts of the world.²⁴ Ruti Teitel’s work on transitional justice in 2000 laid the foundations of transitional justice theory and highlighted it as a process of liberalisation.²⁵ Teitel’s account of transitional justice is built on the underlying assumption that transitions constitute a shift from authoritarian, non-liberal regimes to liberal-democratic ones.²⁶ Recognising the extraordinary role of law in transitions and the thin line between fair prosecutions and politicised justice, Teitel describes transitional justice as:

[C]ontextualized and partial: it is both constituted by, and constituted of, the transition. What is ‘just’ is contingent, and informed by prior injustice ... While the rule of law ordinarily implies prospectivity, transitional law is both backward- and forward-looking, as it disclaims past illiberal values and reclaims liberal norms.²⁷

Teitel attributes criminal justice to this ‘liberalizing ritual’ of states undergoing political transition and explains that criminal proceedings affirm ‘the core liberal message of the primacy of individual rights and responsibilities.’²⁸ She emphatically denotes the significant role of criminal prosecutions as the ‘leading transitional response’ that is able to publicly and authoritatively convey ‘the political differences that constitute the normative shift from an illiberal to a liberal regime.’²⁹

The unfolding of decisions regarding prosecution in the Arab region, however, challenges Teitel’s description of criminal prosecutions as a ‘liberalizing ritual’. While Teitel begins with a caveat mentioning that her book rejects ‘the notion that the move toward a more liberal democratic political system implies a universal or ideal norm’, she provides no explanation for how transitional justice operates in non-paradigmatic, illiberal transitions. While she presents a powerful analysis of

²² E Lutz and K Sikkink, ‘Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America’ (2001) 2 *Chicago Journal of International Law* 1, 5.

²³ N Roht-Arriaza, *The Pinochet Effect: Transitional Justice in the Age of Human Rights* (Philadelphia, University of Pennsylvania Press, 2005).

²⁴ NJ Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vols 1–3 (Washington DC, United States Institute of Peace, 1995).

²⁵ Teitel, *Transitional Justice*, above n 2.

²⁶ *ibid*; Teitel, *Globalizing Transitional Justice*, above n 2.

²⁷ Teitel, *Transitional Justice*, above n 2, 96.

²⁸ *ibid* 30.

²⁹ *ibid* 104.

the role of law in transitions, or in times of political change, Teitel's point of departure is rooted in transitions constituting a shift from authoritarian rule to liberal democratic rule.³⁰ This is unhelpful in the case of the Arab Spring.

The Necessity of Pre-existing Democratic Institutions

Much of the scholarly work on transitional justice is based on the premise that democratically functioning institutions pre-existed the transition to a certain extent, allowing a legitimate transitional justice process to take place. Lutz and Reiger argue that 'accountability, by itself, is neither sufficient nor possible absent other functioning democratic institutions, including an independent judiciary'.³¹ Luc Huyse argues that the democratic institutions that existed prior to the four years of repressive rule in Belgium, France and the Netherlands were able to survive and were not completely eliminated following World War II. This meant that 'four years of occupation and collaboration were insufficient time for the authoritarian regime's legal culture and codes to take root'.³² This may, as Huyse suggests, explain the speed with which prosecutions were initiated.³³ In contrast, the communist regimes in Czechoslovakia, Hungary and Poland lasted for 40 years after World War II. This meant that decision making on crime and punishment was much slower and 'The legal culture created by communism was firmly established and [proved] hard to eradicate'.³⁴

The early transitional justice literature contrasts ruptured and negotiated transitions. Despite, or perhaps in response to, this dichotomous approach, commentary on prosecution decisions in transitions that do not neatly fall within those two categories began to emerge almost simultaneously. Jose Zalaquett, for example, points to lingering political constraints, even in cases where a democratic election has taken place. In his discussion on Argentina, he contends that 'the government may have had the legitimacy of a democratic election, but the military remained a cohesive force with control over the weapons'.³⁵ Zalaquett attributes this to the initial failure of the Argentinian authorities to continue to carry out prosecutions of military chiefs. It points to an ethical dilemma undergirding decisions regarding prosecution. Zalaquett quotes Max Weber in his explanation of this dilemma:

In ambiguous transitional situations, dealing with past human rights violations is indeed a wrenching ethical and political problem ... The approach of democratic leaders in

³⁰ *ibid* 5.

³¹ Lutz and Reiger, above n 7, 4.

³² L Huyse, 'Justice after Transitions: On the Choices Successor Elites Make in Dealing with the Past' in NJ Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol 1 (Washington DC, United States Institute of Peace 1995) 111.

³³ *ibid*.

³⁴ *ibid*.

³⁵ J Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations' in Kritz, above n 32, 205.

such difficult transitional situations should, then, be based on the ethical maxim that Max Weber lucidly characterized in his famous lecture, *Politics as a Vocation*: political leaders should be guided by the ethic of responsibility, as opposed to the ethics of conviction ... He stressed the fundamental difference between acting according to an ethical precept regardless of the outcome, and acting while considering the predictable consequences of one's action. In Weber's view, politicians must always be guided by an ethic of responsibility.³⁶

Ambiguous transitions, then, are not a new phenomenon that arose out of the Arab Spring experiences. The classic case of Argentina and several other Latin American countries point to the shortcomings of the ruptured versus negotiated transition argument. This is especially the case when analysing the course of decisions regarding prosecution over time. As Sikkink notes, the examples of Guatemala, Chile and Uruguay show that 'a ruptured transition was no longer a precondition for prosecutions'.³⁷ In fact, it may have never been a precursor to prosecutions, as the case of Argentina in the early post-transition period shows. Moreover, countries that underwent heavily pacted or negotiated transitions began to pursue prosecutions, especially since the 1990s. This, Sikkink argues, illustrates that 'the political world is not static'.³⁸ The dichotomy of ruptured versus negotiated transitions and their impact on the prosecution of political leaders is therefore no longer sufficient to explain decisions regarding criminal accountability for crimes of the former regimes. This point, however, has not been adequately developed in the literature, as the reflections on the Arab region in chapter 6 will discuss.

Critical Transitional Justice Literature

The proliferation of transitions that do not follow the path from dictatorship to liberal democracy have prompted some scholars to re-examine the principles and objectives of transitional justice. Cases such as Uganda, Colombia, Sudan and Morocco illustrate that transitional justice takes place in situations where there has been no fundamental transition, or where human rights abuses continue to be perpetrated.³⁹ Mainstream transitional justice theory, operating on the assumption that transitional justice occurs in liberalising contexts, has thus come under increasing scrutiny in recent scholarship. Obel Hansen, Hannah Franzki and Maria Carolina Olarte critique the limitations of this liberal conception of transitional justice by pointing to the simple fact that 'transitional justice occurs in radically different contexts'.⁴⁰ Cases displaying varied, non-liberal transitions

³⁶ *ibid.*

³⁷ Sikkink, above n 10, 83.

³⁸ *ibid.*

³⁹ T Obel Hansen, 'The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field' in Buckley-Zistel et al, above n 15, 109. See also N Roht-Arriaza, 'Editorial Note' (2013) 7 *International Journal of Transitional Justice* 383.

⁴⁰ Obel Hansen, *ibid.*

where transitional justice is actively pursued cannot, then, be explained by the mainstream theory of transitional justice.

Given that transitional justice can limit liberalisation and democratisation, it is important to examine whose interests transitional justice serves.⁴¹ Rather than conform to a blueprint that was developed in Latin America or Eastern Europe, or by international NGOs, prosecutions and other transitional justice mechanisms are pursued for various reasons in varied contexts. On a theoretical level, critics of mainstream transitional justice theory point to its inherently political and liberal values, despite its proponents advocating it as a universal phenomenon that could and should apply across states.⁴² Franzki and Olarte, for instance, reflect on transitional justice as part of a 'demo-liberal project'.⁴³ They go further and attribute transitional justice to the broader neo-liberal socio-economic order. They charge transitional justice with falling short in addressing structural inequalities, even enabling them.⁴⁴ Transitional justice, then, is a highly political project that aims to strengthen liberal democracy and market economy. As a result, it perpetuates social inequality in certain contexts, exacerbating injustices that the 'demo-liberal' project proclaims to address.

Paul Gready and Simon Robins similarly discuss the 'foundational limitations' of transitional justice.⁴⁵ They describe two principal limitations: the pursuit of liberal democracy as the endpoint of transitional justice and the overly state-centric approach to transitional justice processes. They argue for a transformative justice that places an emphasis on process rather than on predetermined outcomes.⁴⁶ This, they contend, should be done by involving victims and survivors as agents of change and through less top-down approaches whereby the state drives the transitional justice process.⁴⁷ They add that, 'In addition to the transitional justice agenda being externally driven in many contexts, the state-centric focus it brings to examining violent pasts discourages the engagement of affected populations'.⁴⁸ While Gready and Robins are critical of the overbearing role of external actors in local transitional justice processes, they note that certain types of external intervention can facilitate these processes. These external interventions, however, should take on a multi-dimensional approach that incorporates anthropology, social science, development and human rights. Finally, they argue that reparations are the best mechanism for addressing socio-economic grievances as they offer 'both corrective and distributive justice'.⁴⁹

⁴¹ Obel Hansen, above n 9, 18.

⁴² See, eg, the International Center for Transitional Justice (www.ictj.org) and the Coalition for the International Criminal Court (www.coalitionfortheicc.org).

⁴³ H Franzki and MC Olarte, 'The Political Economy of Transitional Justice. A Critical Theory Perspective' in Buckley-Zistel et al, above n 15, 202.

⁴⁴ *ibid* 202, 206.

⁴⁵ P Gready and S Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice (2014) 8 *International Journal of Transitional Justice* 339, 341.

⁴⁶ *ibid* 352, 358.

⁴⁷ *ibid* 360.

⁴⁸ *ibid* 343.

⁴⁹ *ibid* 347.

Socio-economic Accountability and Transitional Justice

Accountability for corruption and economic crimes and their role in prosecutions vis-à-vis human rights violations have important implications for transitional justice research. One debate centres on whether or not transitional justice mechanisms, including prosecutions, should expand to address corruption and socio-economic crimes. Sharp argues that economic violence has been the 'blind spot of transitional justice' as it is rarely scrutinised with regard to human rights violations.⁵⁰ Others question why trial charges are heavy on one set of crimes at the expense of the other. Lutz and Reiger emphasise that trends to prosecute perpetrators who engage in corruption have been 'largely unremarked by the international justice movement' and should be explored further.⁵¹ They cite the Asian examples of South Korea, India, Pakistan, Nepal, the Philippines and Indonesia, where senior officials were tried for corruption and financial crimes, but not for human rights crimes. They posit that reasons for this include the lower costs of trying former leaders for financial crimes than for human rights crimes (as a smaller number of people are usually implicated in economic crimes) and political will. Significantly, they note that popular opinion may find a government official's involvement in corruption and financial crimes more disturbing than that official's perpetration of human rights crimes, such as murder and torture.⁵² Still others critique the transitional justice project itself for enabling socio-economic inequalities, making it difficult to seek accountability for such crimes, as Franzki and Olarte explain.⁵³

In her account of the status of transitional justice in Egypt, Reem Abou-El-Fadl argues that conventional transitional justice falls short in addressing key developments in Egypt. The former regime's violation of social and economic rights, she argues, is inadequately addressed in the transitional justice literature. She observes that stolen public funds and related crimes were a core focus of the 2011 uprising in Egypt and their articulation in the demands of the protesters played a key role in bringing former state officials to trial. She concludes that the Egyptian case points to the importance that transitional justice practitioners take historical context into account to ensure a more comprehensive implementation of justice measures that better suits the needs of Egypt.⁵⁴ The slogan of the Egyptian uprising, 'ish, horreyah, 'adalah igtima'eyah' (bread, freedom, social justice), attests to the importance Egyptians attached to ensuring that both their socio-economic and human rights are respected.

⁵⁰ DN Sharp, 'Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice' (2012) 35 *Fordham International Law Journal* 780, 782.

⁵¹ Lutz and Reiger, above n 7, 10.

⁵² *ibid* 281.

⁵³ Franzki and Olarte, above n 43.

⁵⁴ R Abou-El-Fadl, 'Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will' (2012) 6 *International Journal of Transitional Justice* 318.

Scholars and practitioners have thus been consumed with the tendency of transitional countries to include human rights crimes at the expense of socio-economic rights crimes in their transitional justice mechanisms.⁵⁵ As a result, two discernible attributes of the existing literature on this issue emerge. First, much of the literature on transitional justice is prescriptive and makes the case for how socio-economic rights should be included in transitional justice mechanisms.⁵⁶ A stronger account for the few yet significant cases in which corruption and socio-economic crimes were the focus of prosecutions, as in the Asian examples cited by Lutz and Reiger and others, should therefore take hold.⁵⁷ The Arab region's emphasis on accountability for corruption as opposed to civil and political rights violations presents an additional set of countries where this holds true. Secondly, several explanations have been proposed for why socio-economic rights have not been included. For example, transitional justice is largely drawn from international human rights law, which has traditionally viewed economic and social rights as entitlements rather than rights.⁵⁸ Other explanations include the difficulty in ascribing responsibility to individuals for socio-economic crimes and that social justice is a longer-term political process that short-term transitional justice mechanisms cannot fully take into account.⁵⁹ Moreover, scholarly discussions on the inclusion of economic and social rights in transitional justice mechanisms focus on their place in truth commissions and reconciliation deals, with limited discussion on their place in criminal prosecutions.

Transitional Justice and the Arab Spring: Emerging Scholarship

With the exception of a small body of emerging literature, the Arab region has been underexplored in the global transitional justice literature. This is in part because the Arab region is relatively new to transitional justice.⁶⁰ However, most of the transitional justice literature on the Arab region that has emerged since the Arab Spring uprisings does one or more of the following: it assesses how well

⁵⁵ See also Greedy and Robins, above n 45, 339, although they argue that socio-economic crimes are best addressed through reparations, which can offer both 'corrective and distributive justice' (347, 356).

⁵⁶ See L Arbour, 'Economic and Social Justice for Societies in Transition', paper presented at the Second Annual Transitional Justice Lecture, New York University School of Law, 25 October 2006; L Waldorf, 'Anticipating the Past? Transitional Justice and Socio-Economic Wrongs' (2012) 21 *Social and Legal Studies* 171; L LaPlante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2008) 2 *International Journal of Transitional Justice* 331.

⁵⁷ Lutz and Reiger, above n 7. Also, General Augusto Pinochet was charged with corruption in Chile, including tax evasion and holding secret bank accounts abroad worth more than \$25 million. See Transparency International, 'Chile Sets Precedent for Holding Dictators Accountable for Corruption', Press Release, 25 November 2005, available at www.transparency.org/news/pressrelease/chile_sets_precedent_for_holding_dictators_accountable_for_corruption.

⁵⁸ Arbour, above n 56.

⁵⁹ Waldorf, above n 56, 171.

⁶⁰ Exceptions include Morocco's transitional justice process and the Saddam Hussein trial in Iraq.

the Arab region cases ‘fit’ within the predominant transitional justice paradigm; it describes transitional justice processes as they have unfolded in some of the Arab region countries; or it calls for increased attention to socio-economic justice in transitional situations by drawing from examples from the Arab region, particularly Egypt and Tunisia.

With few exceptions, then, most of the literature on transitional justice and the Arab region is drawn from political science-based analyses with little rigorous comparative reflection.⁶¹ Moreover, it is based on the assumption that the Arab region has experienced non-transitions or stalled transitions.⁶² While there is welcome critique of the inability of mainstream transitional justice to explain the unfolding of transitional justice in certain cases in the Arab region, such critiques rarely question the foundational assumptions of the field.

Methodology

It is useful to briefly revisit the book’s two principal research questions to explain the methodology pursued. First, what trigger and driving factors led to the decision to prosecute former political leaders or not? Secondly, what shaping factors affected the content and extent of decisions regarding prosecution? Although not explicitly framed as such, process tracing entails the identification of factors that play a triggering, driving or shaping role in processes. Alexander George and Timothy McKeown’s definition of process tracing is particularly useful here:

[Process tracing] attempts to uncover what stimuli the actors attend to; the decision process that makes use of these stimuli to arrive at decisions; the actual behavior that then occurs; the effect of various institutional arrangements on attention, processing, and behavior; and the effect of other variables of interest on attention, processing, and behavior.⁶³

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

The material collected for each case study is analysed by identifying what factors triggered, drove and shaped decisions regarding prosecution. The trigger–driving–shaping mechanism does not explain the process of prosecution from

⁶¹ One exception to this is Ibrahim Fraihat’s comparative study of Libya, Yemen and Tunisia, in which he argues for the importance of women, civil society and tribes in shaping national reconciliation in these countries: I Fraihat, *Unfinished Revolutions: Yemen, Libya and Tunisia after the Arab Spring* (New Haven, Yale University Press, 2016).

⁶² CL Sriram (ed), *Transitional Justice in the Middle East and North Africa* (New York, Oxford University Press, 2016).

⁶³ AL George and TJ McKeown, ‘Case Studies and Theories of Organizational Decision Making’ in RF Coulam and RA Smith (eds), *Advances in Information Processing in Organizations*, vol 2 (JAI Press, 1985) 35.

start to finish. Rather, it is a prism through which the research collected is analysed and used to develop an explanation of how decisions regarding the prosecution of political leaders emerged and developed before and during the highly contentious period of transition. For instance, the identification of trigger factors provides insight into the formative stages of these decision-making processes. It contributes to an inquiry into efforts to prosecute in the past—before the 2010/2011 uprisings—which is necessary in order to understand the development and execution of the prosecutorial strategy in the four countries after the uprisings. Following a detailed presentation of findings from the interviews, each case study's conclusion summarises the key triggers, drivers and shapers based on these findings. Each case study begins with the trigger factors, which are the factors that led to decisions to prosecute or not. The various factors that drove these decisions and pushed and pulled them in different directions are subsequently addressed. Finally, the shaping factors that impacted the content and the extent of the prosecutions are discussed.

The significance of analysing the data through a trigger–driving–shaping prism lies in its facilitation of an in-depth understanding of the dynamics of the processes within which these factors operate. The primary function of this prism is to make sense of the processes that unfolded over time, while taking into account various contextual factors. This is particularly useful for a comparative case study and helps prevent false generalisations that do not take case-by-case specificities into account.

The arguments presented in this book are thus based on both primary and secondary sources. In addition to a critical analysis of the relevant scholarly literature, the research relied heavily on national, regional and international media reports to obtain details concerning the status of prosecutions in each country. An electronic database was compiled, consisting of news articles, reports and commentaries by both individual experts and NGOs for each country throughout the six years during which the research was conducted. Close monitoring of media reports and of new scholarly literature was important because of the developing nature of decisions regarding prosecution in the four case studies and the consequent emerging literature on the Arab region.

The core of the research is drawn from interviews conducted in the four case studies. Between 2012 and 2017, 48 interviews with 44 different interviewees were conducted in Egypt, Libya, Tunisia and Yemen. Twelve interviews were conducted in Egypt, nine in Libya, 15 in Tunisia and ten in Yemen. The interviews were conducted in Arabic, English and French. The interviews were with human rights lawyers and activists, independent experts, civil society leaders, national and international NGO officials, United Nations officials, government officials, including a former minister of justice, journalists and legal professionals, including lawyers, judges and a prosecutor. The interviews were semi-structured to ensure a focused comparison of data across the cases. This was done through the use of a set of questions asked of each individual, followed by additional questions generated by the responses received and by the particular context of the case study.

Challenges

Certain challenges resulted in a limited number of interviews conducted in Libya and Yemen, in comparison with the other case study countries. This was for four reasons.

First, the security situation in Libya was such that the mobility of some interviewees whose offices were difficult to visit was restricted. The first court hearing for Saif al-Islam Gaddafi and the 36 other defendants coincided with my visit to Tripoli, which created a precarious security environment. Precautions were therefore understandably taken by certain interviewees and by myself so as to avoid any danger during transport between interviews.

Secondly, given the high sensitivity of the Saif al-Islam Gaddafi and Abdullah El Senussi cases, and given that there had been several assassinations and death threats targeting lawyers and judges who were potentially involved in their defence, the Libyan human rights lawyers I interviewed refused to discuss the trial of those particular individuals.⁶⁴ However, I was able to access two Libyan judges, who have since moved to Tunis. One of them has made his views and analyses available through his writings in a number of online outlets. The other was interviewed via email. The insights from these two judges were particularly helpful in illuminating certain aspects of the Libyan case study. A third challenge to conducting research interviews in Libya was obtaining a visa to travel there. This challenge was eventually overcome with the help of friends, acquaintances and the Libyan ambassador to Qatar, and by the relentless efforts of the Office of the High Commissioner for Human Rights in Qatar, for which I was conducting a short consultancy at the time. Finally, the general opacity surrounding the legal cases in Libya made it difficult to obtain details on the status of the prosecutions.

There were similar challenges with regard to research interviews in Yemen. Thanks to the help of a friend and former colleague based in Yemen, I was able to obtain a visa and travelled to Sanaa in January 2014. There had been two security incidents involving a small bombing and an assassination on the same morning of my arrival in Sanaa. However, as is often the case in such contexts where there are regular fluctuations in the security situation, things returned to normal the next day and I was able to conduct more interviews than initially anticipated. I was also fortunate to have stayed at the hotel where the final stage of the National Dialogue Conference was taking place, which meant that I had relatively easy interview access to a number of key individuals who were attending the talks. The difficulty in accessing Yemeni judges for interviews was partially overcome through acquaintances, who put me in touch with a judge who had recently gone into exile. His views figure in the Yemeni case study in this book.

⁶⁴ Abdullah El Senussi was Muammar Gaddafi's intelligence chief and brother-in-law. His case is discussed in chapter 4.

No significant challenges were encountered during my research in Egypt and Tunisia. There were, however, certain risks in Egypt, such as surveillance by security officers due to the perceived controversial nature of the topic of the interviews. To reduce this risk, the interviews were conducted in safe, public spaces (eg an office or a café).

Access to prosecutors in Egypt, Libya, Tunisia and Yemen proved difficult. This is because they and other members of the judiciary in all four case studies faced security threats. A review of government and ministry websites in Egypt, Libya, Tunisia and Yemen reveals little more than general descriptions of the function of public prosecutors. As a result, one of the interviews was conducted with a former prosecutor. This stemmed from a number of challenges to do with the ongoing nature of the prosecutions and the general lack of security, which prevented prosecutors from providing commentary on such issues. Former Libyan prosecutor general Abdelaziz al-Hasadi was killed in February 2014, as was the former Egyptian prosecutor Hesham Barakat in June 2015. Both signify the highly controversial nature of their mandate and of the prosecutions in general. Once the trials come to a close, prosecutors may be more forthcoming with their insight into decisions regarding the prosecution of political leaders. Their reflections will be important in further research on criminal accountability within a non-paradigmatic transitional justice context.

An Expanded Definition of ‘Political Leaders’

In this book, the term ‘political leaders’ is not restricted to heads of state, as in, for example, the work of Lutz and Reiger.⁶⁵ Rather, it includes other high-level regime officials, including former ministers, police chiefs and military chiefs. The reasons for this expanded focus are fourfold.

First, several high-level government officials other than heads of state have been investigated and/or tried, signalling a more extensive criminal accountability strategy than one that solely targets heads of state. Thus, a more limited focus on heads of state only would significantly limit the strength of the explanations surrounding the pursuit of transitional justice.

Secondly, scholarly literature on the prosecution of political leaders criticises the shortcomings of analyses focused on the prosecution of one individual, using the argument that the guilty individual (usually a head of state) does not necessarily reflect the wrongdoings of the entire regime.

Thirdly, some victims and other justice seekers prefer to see the prosecution of a particular leader, who is not necessarily the head of state. This is because certain individuals, such as the former ministers of interior in all four case studies, are

⁶⁵ Lutz and Reiger, above n 7.

in many ways regarded as having a more direct role in orchestrating the crimes committed, particularly torture.

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

Case Selection

The Arab region is important for the development of transitional justice research and practice, not least because of the varied types of transitions that have emerged since 2011 and the divergent transitional justice paths pursued. The cases around which the transitional justice field was formed are drawn largely from Eastern Europe and Latin America, which shaped the ‘normative assumptions’ of the field and represented transitions that resemble ‘Western liberal market democracy’.⁶⁶ This contrasts with the varied transitions that have unfolded in the Arab region.

Egypt, Libya, Tunisia and Yemen share crucial attributes that make this comparative study possible. In all four countries, massive uprisings took place within the same time period, the leaders were toppled and a drastic political transition ensued. Almost simultaneously, a flurry of activity surrounding the prosecution of political leaders unfolded in all four cases. The absence of trials in Yemen did not mean that the question of prosecution was laid to rest definitively. On the contrary, several large protests in response to the immunity law took place, keeping the issue of accountability in the limelight.

The four case studies, however, are also sufficiently different to enable a meaningful comparative study. Egypt and Tunisia prosecuted their political leaders and issued verdicts. Libya’s transition emerged from a violent civil war between Gaddafi loyalists and anti-Gaddafi militias, and with the North Atlantic Treaty Organization’s military intervention to oust Muammar Gaddafi and his regime. Following arrest warrants issued by the ICC, Libya decided to prosecute its leaders domestically and refused to hand over suspects to the ICC in The Hague.⁶⁷

⁶⁶ Sharp, above n 19, 149.

⁶⁷ ICC arrest warrants were issued for Muammar Gaddafi, Saif al-Islam Gaddafi and Abdullah El Senussi in June 2011. Following the death of Muammar Gaddafi on 20 October 2011, the ICC terminated its case against him. In April 2013, the ICC issued an arrest warrant under seal for Al-Tuhamy Mohamed Khaled, former head of the Libyan Internal Security Agency. The warrant was unsealed in April 2017.

It also won an admissibility appeal for El Senussi, resulting in the annulment of his ICC arrest warrant in July 2014. Former Yemeni President Saleh negotiated his ouster with heavy regional and international involvement. Geopolitics figured heavily in domestic decisions regarding prosecution in Yemen. The most influential regional and international players were Saudi Arabia and the Gulf Cooperation Council, the USA, the European Union and the United Nations. The Yemeni parliament passed an immunity law that protected Saleh and his aides from prosecution.⁶⁸ These varied transitions provide an abundance of material for the rethinking of predominant understandings of transitional justice.

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

As the first country in the Arab region to undergo a transitional justice process, Morocco is a well-known example in discussions on transitional justice in the Arab region. While it did not experience a mass anti-government uprising followed by a flurry of prosecutions, Morocco did undergo an elite-led transition that aimed to break with past human rights violations. This transition was very different from those of the Arab Spring in that it did not involve the overthrow of the leader. Rather, following pressure from civil society and victims, the leader agreed to establish an advisory council on human rights, which eventually led to a more comprehensive transitional justice process that has been in place for over a decade. This book, then, will discuss the implications of the Moroccan experience for the newer, core case studies.⁶⁹

⁶⁸ Law No 1 of 2012 Concerning the Granting of Immunity from Legal and Judicial Prosecution, Amnesty International (22 January 2012) available at <https://www.amnesty.org/download/Documents/24000/mde310072012ar.pdf> (in Arabic).

⁶⁹ See chapter 6 for this discussion on Morocco.

Structure of the Book

In the chapters that follow, the findings for Egypt and Tunisia are presented first, followed by Libya and Yemen. This is because Egypt and Tunisia are the two case studies that are the most advanced with regard to the number of prosecutions and verdicts issued for former political leaders. The findings for Libya and Yemen will demonstrate similarities with Egypt and Tunisia, but will also highlight significant differences in the factors that triggered, drove and shaped decisions regarding prosecution there.

In Egypt (chapter 2), certain iconic legal cases concerning police brutality as well as high-level corruption cases related to the illegal sale of land figured in the pre-uprising period. Apart from the re-emergence of some of these iconic cases in accountability efforts in the post-2011 period, the human rights prosecutions were largely limited to the 18-day uprising. Corruption cases, on the other hand, spanned the pre-uprising period. The emphasis on such crimes was a way to shroud the neglect of accountability for widespread torture, killings, and other civil and political rights abuses committed for decades prior to the uprising. The military-controlled transition and the politicised judiciary in Egypt are two underlying and closely related factors that have shaped the content and the extent of prosecutions in this way. The military and other state agencies worked to ensure that investigations and trials did not extend ‘too far’ so as not to harm their political interests and subject themselves to human rights prosecutions. The victims, activists and lawyers who were active in pursuing prosecutions were pre-occupied with the more recent crimes of 2011 because, practically, they are easier to prosecute. The emphasis on corruption and economic crimes in Egypt was a way to scapegoat certain high-level individuals to deflect attention from the lack of accountability for a more comprehensive set of human rights violations and their perpetrators.

The historic activism of the Tunisian Bar Association, workers’ movements, human rights activism and significant pressure by a group of lawyers (the Groupe de 25) in the immediate aftermath of Ben Ali’s ouster together formed a diverse protest movement in Tunisia (chapter 3) that contributed to efforts to prosecute Ben Ali and his aides. Moreover, a military that had been marginalised and victimised by both Ben Ali and his predecessor, Habib Bourguiba, served as a major driver of some of the decisions to prosecute former leaders of the Ben Ali regime. To a large extent, Tunisian workers’ movements constituted one of the strongest opposition forces for the Tunisian government. Consequently, the role of these workers’ movements and the history of deep inequalities and corruption in Tunisia significantly shaped the emphasis on corruption and socio-economic crimes in the prosecutions that have taken place. However, Tunisia’s transitional justice process has seen a waning of the prosecutorial focus on corruption and economic crimes. This waning has been attributed to the establishment of the

Truth and Dignity Commission in 2014 and to a reliance on foreign models of transitional justice that foreground accountability for civil and political rights violations.

The anti-government uprising in Libya (chapter 4) was largely sparked by the harsh oppression and lack of accountability for the widespread and systematic crimes committed throughout Muammar Gaddafi's rule. With the exception of some politicised efforts by Gaddafi himself to hold certain high-level officials opposed to him accountable, there were no major efforts to prosecute political leaders in Gaddafi's Libya. There were, however, efforts aimed at accountability through financial compensation of the regime's victims. This was especially prominent in the case of the 1996 Abu Salim prison massacre, the impact of which continues to loom large over accountability efforts more than 20 years later. The Security Council's referral of the Libyan situation to the ICC has had significant implications for the domestic prosecution of former leaders. It has, perhaps more importantly, raised questions surrounding the motives of both international and domestic transitional justice actors, particularly in a transition characterised by ongoing violence. Moreover, rival governments in Libya have played a direct role in steering criminal accountability for certain former leaders, namely Saif al-Islam Gaddafi, in different directions.

Unlike Egypt, Libya and Tunisia, Yemen's ousted President Ali Abdallah Saleh stepped down after securing his immunity from prosecution. It is several years since the so-called transition, yet Saleh still retains significant control in Yemen (chapter 5). The country has been reeling from a devastating war, fought primarily between the 'Arab coalition', led by Saudi Arabia, and the Houthis and their allies. Prior to the outbreak of this war, Yemeni civil society activists worked hard to find ways to circumvent the immunity law, especially when it became clear that protests calling for its reversal would be completely ignored. Both the Libyan and Yemeni case studies raise questions about the merits of examining the unfolding of transitional justice there through the battered peace versus justice debate, not least because of the absence of any monolithic understanding of 'peace' or 'justice'.

Chapter 6 critically reflects on the findings from the four case studies by assessing their implications for transitional justice scholarship and practice. Several questions about the foundational assumptions of transitional justice emerge. To what extent can we speak of a 'transition' in the Arab Spring countries, particularly one that does not have attributes typical of the paradigmatic transitions that have largely shaped the transitional justice field? How can effective prosecutions run their course without pre-existing institutional structures that are equipped to implement and oversee them and other transitional justice processes? To what extent can we refer to a 'global accountability norm' when international actors pursue it in one context (Libya) but completely ignore it in another (Yemen)? The book ends with a brief conclusion (chapter 7) summarising the importance of the findings and with questions for further research.

Conclusion

This book constitutes the first empirical contribution of its kind with original material from 48 in-depth interviews across four countries. It expands the analysis of individual criminal accountability to high-level political, military and police chiefs in addition to heads of state. It investigates both pre- and post-transition efforts regarding the prosecution of such political leaders. This scope of the inquiry is, as explained, counter-intuitive in the transitional justice literature, which focuses primarily on post-transition efforts to prosecute. As such, it analyses the non-paradigmatic nature of the Arab Spring transitions by investigating the pre-transition period and by reflecting on its impact on post-transitional prosecutorial decisions.

Transitional justice scholarship is under-theorised.⁷⁰ There is a need for more nuanced, context-driven theories of transitional justice that take into account its use in non-liberal transitions. With few exceptions, Latin American countries underwent transitions that pushed the military back to the barracks and brought in civilian, democratic rule. Prosecutions of those responsible for the heinous crimes committed there are still ongoing, more than three decades later. But not all transitions occur in liberalising contexts. The Arab Spring thus presents an important opportunity to diversify the theory and practice of transitional justice.

⁷⁰ For discussions on the under-theorisation of transitional justice, see N Palmer, P Clark and D Grenville (eds), *Critical Perspectives in Transitional Justice* (Cambridge, Intersentia, 2012).