

5-1-2013

Examining the Dangers of a “Victor’s Justice” Trial Through the Lens of the Trials of Hosni Mubarak and Saddam Hussein

Anna Uger

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship

Recommended Citation

Uger, Anna, "Examining the Dangers of a “Victor’s Justice” Trial Through the Lens of the Trials of Hosni Mubarak and Saddam Hussein" (2013). *Law School Student Scholarship*. 174.
https://scholarship.shu.edu/student_scholarship/174

I. Introduction

The Middle East has experienced great tumult in the past decade, culminating in the “Arab Spring.” During these exciting times, Middle Eastern dictators have toppled like dominoes as Lybia’s Moammar Gadhafi, Yemen’s Ali Abdullah-Saleh, Egypt’s Hosni Mubarak, and Iraq’s Saddam Hussein have all been removed from posts from which they ruled as though kings. I will examine the trials of two of these dictators, Hosni Mubarak and Saddam Hussein, and postulate that the flaws of the trials are preventing the nations’ national reconciliation and further social and political evolution.

After this introduction, Part II will explore the rise and fall of Hosni Mubarak and Saddam Hussein, the flawed trials which were used to prosecute them and the path of Egypt and Iraq after their dictator’s trials. Part III will explore the policy rationales underlying dictator trials, policy prescriptions for trying dictators and how the trials of Hosni Mubarak and Saddam Hussein differed from those policy prescriptions and the reason, if any, behind that deviation. Part IV will explore the process of national reconciliation within the framework of tribunals and further fact finding missions and how Egypt and Iraq fell short of that framework. Part V will present my conclusion that a trial of a deposed dictator is not sufficient to achieve the national reconciliation necessary to allow for a nation’s further development.

II. It has been argued that “prosecution is the only real means of retribution.”¹

A. The Last Pharaoh of Egypt: Hosni Mubarak

Hosni Mubarak (“Mubarak”) was a military man before becoming a politician, first attending the Royal Military Academy and then enlisting in the Egyptian air forces.² Mubarak

¹ GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 388 (The New Press, 3d ed., 1997).

would rise through the ranks of the military until April 1975 when he was appointed to his first political post as Vice President by then-President Anwar Sadat.³ Subsequently, President Sadat would be assassinated and Mubarak would be appointed President in October 1981, a post that Mubarak retained for the next three decades.⁴

Under Mubarak's rule, Egypt became an autocratic political system dominated by the executive branch.⁵ Mubarak governed Egypt as though it was an absolute monarchy, becoming deeply involved in all decisions, regardless of how big or small, which involved the state and, at times, eschewed even advisors.⁶ While Mubarak did undertake limited economic reforms, the process was slow and in 1997, privatization schemes accounted for only approximately 15% of the known public sector.⁷ In spite of Mubarak's economic reforms, the Egyptian economy continued to rely heavily on its two historic engines of growth, the public sector and oil.⁸ While Egypt did experience a period of economic growth in the late 1990's, the economy spiraled downward after the 9/11 terrorist attacks on America.⁹ Mubarak's attempt to curtail Egypt's post-9/11 downward economic spiral was viewed with suspicion by the Egyptian public as Mubarak awarded key governmental positions to loyal associates, such as his own son Gamal Mubarak; a move that many feared to be a precursor to the hereditary transition of power from

² Charles Robert Davidson, *Reform and Repression in Mubarak's Egypt*, 24 FLETCHER F. WORLD AFF. 75, 75 (2000).

³ *Id.*

⁴ *Id.* at 75; see also *Profile: Hosni Mubarak*, BBC NEWS, April 13, 2013, <http://www.bbc.co.uk/news/world-middle-east-12301713>.

⁵ Davidson, *supra* note 2, at 80 (While Hosni Mubarak was re-elected to the post of president four times, three of those contests were unopposed. While the fourth election heralded the participation of opposition parties, critics alleged that the elections were heavily rigged in favor of Mubarak's National Democratic Party.); *Hosni Mubarak: Profile*, *supra* note 4; see also *Egypt*, FREEDOM HOUSE, 2009, <http://www.freedomhouse.org/report/freedom-world/2009/egypt> (the contested September 2005 elections consisted of low voter turnout and intimidation of voters by government forces).

⁶ Davidson, *supra* note 2, at 80.

⁷ See generally, *id.*

⁸ Alison Elizabeth Chase, *The Politics of Lending and Reform: The International Monetary Fund and the Nation of Egypt*, 42 STAN. J. INT'L L. 193, 212 (2006).

⁹ *Egypt*, *supra* note 5.

father to son.¹⁰ Furthermore, regardless of the official economic statistics, many Egyptians believed Mubarak's economic policy to have enriched a select few who were a part of the Mubarak inner circle while consigning the remainder of Egypt's 80 million citizens to live in squalor.¹¹

Egyptians lived under martial law for the entirety of Mubarak's reign.¹² Martial law was instituted after President Sadat's assassination and allowed security forces to detain civilians with no warrants and to try civilians in military courts.¹³ Opposition groups argued that martial law allowed the Mubarak regime to repress political expression, repress freedom of the press and intimidate journalists.¹⁴

After nearly three decades of rule, Mubarak's fall from power was practically instantaneous as Mubarak resigned from the presidency after street protests lasting a mere 18 days.¹⁵ The street protests which would lead to Mubarak's down fall were inspired by the events of neighboring Tunisia as a group of Egyptians youths organized a protest, through social media such as Facebook, Twitter, and Facebook, for January 25, 2011, Egypt's National Police Day holiday.¹⁶ Tens of thousands of Egyptian citizens responded to the protestor's call and streamed into Cairo's Tahrir Square.¹⁷ In responding to the protests at Tahrir Square, police officers used excessive force, including tear gas bombs and non-lethal weapons and arrests, to dispel the

¹⁰ *Id.*

¹¹ Sarah Mikhail & Dina Zayed, *Egypt puts Mubarak on Trial, Transfixing Arab World*, REUTERS, Aug. 3, 2011, <http://www.reuters.com/article/2011/08/03/us-egypt-mubarak-idUSL6E7J301D20110803>.

¹² *Profile: Hosni Mubarak*, AL JAZEERA, last modified Feb. 11, 2011, <http://www.aljazeera.com/focus/2009/12/200912693048491779.html>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Hosni Mubarak Trial Resumes After Two Month Delay*, GUARDIAN, Dec. 28, 2011, <http://www.guardian.co.uk/world/2011/dec/28/hosni-mubarak-trial-resumes>; see generally Ahmed Eldakak, *Approaching Rule of Law in Post-Revolution Egypt: Where We Were, Where We Are, and Where We Should Be*, 18 U.C. DAVIS J. INT'L L. & POL'Y 261, 267 (2012).

¹⁶ *Id.* at 268.

¹⁷ *Id.* at 269.

largely peaceful protestors.¹⁸ The excessive force used by the police officers would not deter the protestors who gathered in even greater number in Tahrir Square the following day.¹⁹

Protest organizers would subsequently organize another day of protests, scheduled for January 28, 2011.²⁰ While the Mubarak regime attempted to prevent the protests by restricting internet and telephone services, the protestors were undeterred and gathered in even greater numbers to protest, numbering more than a million around the country.²¹ Police continued to use excessive force to dispel the protestors, leading to clashes between police and protestors in which the police were overwhelmed.²² The absence of police presence on the street left a vacuum, filled by the Army Forces troops and tanks ordered by Mubarak to protect public property under attack.²³

On January 29, 2011, Mubarak attempted to appease the protestors by firing his cabinet and appointing a vice president, Omar Suleiman, a long standing demand of Egyptians.²⁴ Unappeased, the protestors continued to demonstrate until February 2, 2011, which would prove to be a dramatic turning point for the protestors.²⁵ On February 2, armed thugs attacked protestors in Tahrir Square while the Army Forces stood by idle and made no attempt to stop the violence.²⁶ The February 2 violence provided the necessary impetus to force the Army Forces to take actions and, over the next several days, the Armed Forces pursued and arrested the armed thugs.²⁷ The violence perpetuated by the armed thugs against the protestors on February 2 would result in the deaths of approximately 850 protestors and comprise the future charges against

¹⁸ *Id.*

¹⁹ *Id.* at 270.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 271.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 272.

²⁶ *Id.* at 273.

²⁷ *Id.*

Mubarak.²⁸ The massacre would also sound the death knell for Mubarak's reign as president as various military officials signaled that he would be stepping down in accordance with protestor demands.²⁹ On February 10, Mubarak delegated his powers to the newly appointed vice-president, Omar Suleiman, but remained on as president of Egypt.³⁰ Protestors, unsatisfied with Mubarak remaining in power in any capacity, continued to protest until February 11, when Vice President Suleiman finally announced that Mubarak has resigned and the Supreme Council of the Armed Forces ("SCAF") would rule Egypt.³¹ In a text issued by the military, Communique 2, the military promised to ensure a peaceful transition of power.³² Once again, Egyptians would have to rely on the military to put the country in order.³³

After Mubarak's resignation as president, he re-located to the Red Sea resort town of Sharm el-Sheikh.³⁴ The decision to put Mubarak on trial was made only after mass demonstrations by Egyptian citizens calling for Mubarak to be held accountable.³⁵ Mubarak's detention pending investigation began on April 13, 2011,³⁶ and he would subsequently be flown

²⁸ Mikhail & Zayed, *supra* note 11.

²⁹ Chris McGreal & Alexandra Topping, *Mubarak Resignation Rumours Grow*, GUARDIAN, Feb. 10, 2011, <http://www.guardian.co.uk/world/2011/feb/10/mubarak-resignation-rumours-grow>.

³⁰ Eldakak, *supra* note 15, at 274.

³¹ *Id.* at 274-75.

³² McGreal & Topping, *supra* note 29; *see also Text of Communique No. 2 from the Egyptian Military*, MCCLATCHY NEWSPAPERS, Feb. 12, 2011, <http://www.mcclatchydc.com/2011/02/12/108638/text-of-communique-no-2-from-the.html> (the military would also promise such landmarks of democracy as holding elections and lifting emergency rule).

³³ Karl Vick, *Egypt's Last Pharaoh? The Rise and Fall of Hosni Mubarak*, TIME, Feb. 12, 2011, <http://www.time.com/time/world/article/0,8599,2048689,00.html> (the military had previously deposed of the last pharaoh of Egypt, Farouk I, in 1952); *see also Text of Communique No. 2 from the Egyptian Military*, *supra* note 32.

³⁴ *Egypt's Hosni Mubarak Appears in Court*, AL-JAZEERA, last modified Aug. 3, 2011, <http://www.aljazeera.com/news/middleeast/2011/08/2011837525919537.html>.

³⁵ *How Will Mubarak's Trial Shape Egypt's Transition?* PBS NEWSHOUR, May 25, 2011, http://www.pbs.org/newshour/bb/world/jan-june11/egypt_05-25.html.

³⁶ *Egypt: Q&A on the Trial of Hosni Mubarak*, HUMAN RIGHTS WATCH, May 28, 2012, <http://www.hrw.org/news/2012/05/28/egypt-qa-trial-hosni-mubarak>.

into Cairo from Sharm el-Sheikh to be put on trial.³⁷ Mubarak would plead innocent to charges of corruption and to giving orders to kill protestors.³⁸

While Mubarak had been battling illness, and was carried into the courtroom on a hospital stretcher, an Al-Jazeera correspondent reported that Mubarak had dyed his hair black and looked well and alert at the time of the trial.³⁹ From the inception of the trial, it was clear that the trial would prove to be divisive as skirmishes between Mubarak's supporters and critics,⁴⁰ forced riot police to separate the two groups.⁴¹ Groups of Mubarak supporters and critics demonstrated outside the courtroom for the duration of the trial.⁴²

In addition to the feuding factions of Mubarak critics and supporters clashing outside the courtroom,⁴³ the trial inside the courtroom was also marred by uncertainty and feuds.⁴⁴ A source of controversy was whether Mubarak should be tried in an Egyptian criminal court or a revolutionary tribunal.⁴⁵ The advantage of trying Mubarak in a revolutionary court is that it would allow Egypt to try Mubarak for all the crimes which he committed during his rule.⁴⁶ Ultimately, Mubarak would be tried in an Egyptian criminal court to ensure that the verdict

³⁷ *Egypt's Hosni Mubarak Appears in Court*, *supra* note 34; Chris Irvine & Tom Chivers, *Hosni Mubarak Trial: As it Happened*, THE TELEGRAPH, Aug. 3, 2011, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/8678565/Hosni-Mubarak-trial-as-it-happened.html>.

³⁸ *Id.*

³⁹ *Egypt's Hosni Mubarak Appears in Court*, *supra* note 34.

⁴⁰ Larbi Sadiki, *Egypt: The Trial of a Century*, AL-JAZEERA, Aug. 15, 2011, <http://www.aljazeera.com/indepth/opinion/2011/08/201181511221937632.html> (The critics of Mubarak represent the majority of the public, including former Mubarak supporters, and unify in vilifying the Mubarak era of dictatorship and corruption. However, there are some Mubarak supporters and include one group named *Ehna Asfeen ya Rayyis* [O president, we are sorry]); *see also* Mikhail & Zayed, *supra* note 11; Irvine & Chivers, *supra* note 37.

⁴¹ *Egypt's Hosni Mubarak Appears in Court*, *supra* note 34.

⁴² *See Military Ruler Testifies in Mubarak Trial*, AL-JAZEERA, last modified Sept. 25, 2011, <http://www.aljazeera.com/news/middleeast/2011/09/201192410551080602.html>.

⁴³ Sadiki, *supra* note 40.

⁴⁴ *Id.*

⁴⁵ *Egyptians Dismayed by Mubarak Retrial*, THE EGYPTIAN GAZETTE, Apr. 21, 2013, <http://213.158.162.45/~egyptian/?action=news&id=29099>.

⁴⁶ *Id.*

would be accepted by the international community.⁴⁷ International acceptance of the verdict would allow Egypt to repatriate money held in foreign bank accounts by Mubarak and his associates.⁴⁸ However, there would be two major disadvantages to trying Mubarak in an Egyptian criminal court, Mubarak would only be charged with the January 25 through January 31 protestor deaths rather than crimes which he committed during his nearly three decade rule, and the court would require a higher burden of proof, in which Mubarak could only be convicted for his own actions, rather than crimes which occurred during his rule.⁴⁹

Another source of disagreement was whether Mubarak should be tried in a military court or civilian court.⁵⁰ Proponents of trying Mubarak in a civilian court argued that Mubarak forfeited his military rank and became a civilian when he was appointed to the post of deputy president and therefore, Mubarak should be tried as a civilian.⁵¹ Proponents of trying Mubarak in a military court argued that after Mubarak forfeited his position as president, he reverted to his military rank pursuant to Law 35 of 1979, allowing for top generals to be restored to their military rank upon the expiration of their civilian assignments.⁵²

On August 3, 2011, Mubarak's trial in a civilian tribunal pursuant to the Egyptian criminal code began.⁵³ Mubarak was charged with violating Article 40 of the Egyptian criminal code, prohibiting the incitement of a felony, when he ordered his security forces to use live ammunition against peaceful prosecutors between January 25 and January 31, 2011.⁵⁴ While the

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Sadiki, *supra* note 40.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Gregg Carlstrom, *Q&A: The Mubarak Retrial*, AL-JAZEERA, last modified Apr. 13, 2013, <http://www.aljazeera.com/news/middleeast/2012/05/201253118819749554.html>.

⁵⁴ *Id.*, see also *Egypt: Q&A on the Trial of Hosni Mubarak*, *supra* note 36.

trial would commence on August 3, 2011,⁵⁵ it was delayed for 2 months in late October as lawyers for the victims filed a motion seeking presiding Judge Ahmed Refaat's recusal due to a perceived bias.⁵⁶ The allegations of bias were based on the following: Judge Refaat's brother wrote pro-Mubarak articles, Judge Refaat investigated two judges who had spoken out against alleged rigging of the 2005 Egyptian elections; and Judge Refaat had given preferential treatment to defense counsel over counsel for the victims in the Mubarak trial.⁵⁷ The Cairo Appeals Court subsequently rejected victims' counsel's motion to remove Judge Refaat for lack of evidence and the trial resumed on December 28, 2011.⁵⁸ On June 2, 2012, Judge Refaat announced his verdict: life imprisonment.⁵⁹ In explaining his decision, Judge Refaat cited the conflicting testimony of the prosecutor's witnesses as well as a lack of technical evidence that would sufficiently demonstrate that the victim's cause of death were gunshot wounds.⁶⁰

Mubarak's verdict was subsequently overturned and a retrial ordered which would focus on whether Mubarak failed to prevent the killing of protestors in the 2011 uprising that overthrew his regime.⁶¹ Originally scheduled for April 13, 2013, the re-trial however the proceeding was unexpectedly postponed when the judge, Mustafa Hassan Abdallah unexpectedly recused himself from the trial.⁶² The reason for Judge Abdallah's recusal remains a mystery, as

⁵⁵ *Mubarak on Trial: Middle East Live- Wednesday 3 August 2011*, GUARDIAN, Aug. 3, 2011, <http://www.guardian.co.uk/world/middle-east-live/2011/aug/03/egypt-syria-libya-middle-east-unrest>.

⁵⁶ Mohamed Fadel Fahmy, *Mubarak Trial Put on Hold in Egypt*, CNN, Oct. 30, 2011, <http://www.cnn.com/2011/10/30/world/meast/egypt-mubarak-trial>.

⁵⁷ *Egypt: Q&A on the Trial of Hosni Mubarak*, *supra* note 36.

⁵⁸ *Id.*

⁵⁹ Anwaar Abdalla, *A Disappointing Verdict in the Mubarak Trial*, THE WASHINGTON TIMES, Jun. 4, 2012, <http://communities.washingtontimes.com/neighborhood/egypt-pyramids-and-revolution/2012/jun/4/disappointing-verdict-mubarak-trial/>.

⁶⁰ *Id.*; see also *Egyptians Dismayed by Mubarak Retrial*, *supra* note 45 (Mubarak was sentenced to life imprisonment rather than the death sentence because Judge Refaat could find no clear evidence that Mubarak gave instructions to shoot the protestors.)

⁶¹ *Egyptian Appeals Court Orders Mubarak Retrial*, THE JORDAN TIMES, Jan. 14, 2013, <http://jordantimes.com/article/egyptian-appeals-court-orders-mubarak-retrial>.

⁶² Ben Brumfield & Salma Abdelaziz, *Judge Walks Out on Retrial of Deposed Egyptian President Hosni Mubarak*, CNN, Apr. 13, 2013, <http://www.cnn.com/2013/04/13/world/meast/egypt-mubarak-retrial/index.html>.

various news sources have cited a variety of reasons , including a medical condition affecting his eyes⁶³ or a possible conflict of interests based on his earlier acquittal of the Camel Battle defendants,⁶⁴ Mubarak’s re-trial has been re-scheduled for May 11, 2013.⁶⁵

The reversal of the Mubarak verdict had been widely expected by trial pundits, as even Judge Refaat, the presiding judge, “criticized the prosecution's case, saying it lacked concrete evidence and that nothing that it presented to the court proved that the protesters were killed by the police.”⁶⁶ The decision to retry Mubarak was greeted by some with delight, as crowds gathered to celebrate the verdict.⁶⁷ However, these demonstrations paled in comparison to the mass celebrations which greeted Mubarak’s original guilty verdict in June 2012.⁶⁸ There is a hope that the decrease in the fervent support for Mubarak indicates that the country, as a whole, has moved past the Mubarak era to concentrate on the problems at hand, including a “crippling economic crisis and anx[iety] over its future direction.”⁶⁹ Mubarak continues to divide the nation and to draw both supporters and protestors.⁷⁰ On the first scheduled date of the retrial, April 13, 2013, dozens of protestors, as well as pro-Mubarak activists, surrounded the courthouse.⁷¹ Once

⁶³ *Id.*

⁶⁴ Ahmed Aboul Enein, *Mubarak Ordered back to Tora, Retrial in May*, DAILY NEWS: EGYPT, Apr. 17, 2013, <http://www.dailynewsegypt.com/2013/04/17/mubarak-ordered-back-to-tora-retrial-in-may/>; *Egypt:24 Acquitted in ‘Camel Battle*, N.Y. TIMES, Oct. 10, 2012, http://www.nytimes.com/2012/10/11/world/middleeast/egyptian-court-acquits-24-mubarak-loyalists-in-camel-battle.html?_r=0 (The Camel Battle defendants, comprised of a total of 24 individuals. were accused of charging into protester crowds in Cairo on camel-back and were subsequently acquitted of manslaughter and attempted murder charges by Judge Abdallah.)

⁶⁵ Aya Batrawy, *Egypt Court Sets May 11 for Mubarak Retrial*, ASSOCIATED PRESS, Apr. 17, 2013, <http://news.yahoo.com/egypt-court-sets-may-11-mubarak-retrial-134751204.html>.

⁶⁶ *Egyptian Appeals Court Orders Mubarak Retrial*, *supra* note 61.

⁶⁷ *Id.* (“A small crowd of Mubarak loyalists in the courtroom erupted with applause and cheers after the ruling was read out. Holding portraits of the former president aloft, they broke into chants of "Long live justice". Another jubilant crowd later gathered outside the Nile-side hospital where Mubarak is being held in the Cairo district of Maadi, where they passed out candy to pedestrians and motorists.”)

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Brumfield & Abdelaziz, *supra* note 62.

⁷¹ *Id.*

again, police forces had to separate the pro and anti-Mubarak protestors.⁷² Mubarak's transfer from court house to prison was also delayed by pro-Mubarak demonstrators.⁷³

Many Egyptians fear that the Mubarak retrial is merely a show trial and Mubarak himself will never be brought to justice.⁷⁴ However, a retrial simply presents a new opportunity for the nation to be torn asunder as prosecutors in the retrial will be allowed to present information which was not presented in the original trial.⁷⁵ During the retrial, the prosecution will be able to argue that Mubarak watched the revolt unfold around him in his palace via a live television feed.⁷⁶ If the prosecution were to offer such evidence, it would be in direct contradiction to the defense's argument that Mubarak did not realize the extent of the protests and was not aware of the killings.⁷⁷ While the additional fact finding that will be allowed at the retrial may reassure the many Egyptians who believed the first trial to be a mere show trial or were disillusioned with the trial process because Mubarak's conviction was for a failure to stop the killings rather than actually ordering the killings, the truth which the additional fact finding unearths could also bring unrest to the nation.⁷⁸ The report, besides showing that Mubarak was aware of the demonstrations and subsequent violence, also implicates military and security officials in the deaths.⁷⁹ As these military and security officials are part of the post-Mubarak government under

⁷² *Id.*

⁷³ Batrawy, *supra* note 65.

⁷⁴ Brumfield & Abdelaziz, *supra* note 62 (Galal Faisal Ali, whose brother Naser died in the protests is quoted as saying "The government is not giving us the moral support we need and they're allowing this circus of a trial to continue. We were hoping for a death sentence but the way it's going, we may see Mubarak free, and his sons free, which means my brother died for nothing.")

⁷⁵ *Egyptian Appeals Court Orders Mubarak Retrial*, *supra* note 61.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Egyptian Appeals Court Orders Mubarak Retrial*, *supra* note 61.

current president Mohamed Morsi (“Morsi”),⁸⁰ any implication of the officials in the Mubarak-era violent repressions of demonstrators may start a backlash against the fragile current regime.⁸¹ Conversely, it is also possible that the possible implication of Mubarak-era government officials currently working for the Morsi government may lead to a repression of the Mubarak trial by the Morsi government in an attempt to prevent the association of the Mubarak government with the new “democratically” elected Morsi government.

Morsi’s party, the Freedom and Justice Party, has criticized the judiciary in recent months, arguing that the acquittals of Mubarak-era figures show that the revolution is not complete.⁸² In a rare display of solidarity, the opposition has agreed with the premise that the judiciary is still too pro-Mubarak and has argued that the Morsi government has not done enough to reform the judiciary.⁸³ This is a concern shared by the wider Egyptian population who reason that Mubarak and Mubarak-era officials cannot be brought to justice when the judicial system used to try them retains officials whose appointments were made by Mubarak or Mubarak-era officials.⁸⁴

In an attempt to complete the revolution, whereby the crimes committed during the revolution would be exposed, Morsi’s government has formed a commission, comprised of judges, security officers, rights lawyers and families of victims, to investigate the human rights violations that occurred in the time period between the 2011 protests which toppled Mubarak and the nearly 17 months of military rule that followed.⁸⁵ However, human rights groups and several

⁸⁰ Mohamed Morsi’s name has also been translated as “Mursi,” I shall use the “Morsi” spelling throughout this paper.

⁸¹ *Egyptian Appeals Court Orders Mubarak Retrial*, supra note 61.

⁸² Batrawy, supra note 65.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Rights Activists say Egypt’s Morsi is Ignoring Commission Report Detailing State Atrocities*, WASHINGTON POST, Apr. 20, 2013, http://www.washingtonpost.com/world/middle_east/rights-activists-says-egypts-morsi-is-ignoring-commission-report-detailing-state-atrocities/2013/04/20/3c9ec59e-a9d3-11e2-9e1c-bb0fb0c2edd9_story.html.

members of the commission accuse Morsi of not only ignoring the finding reported in the commission's report but also of a lack of transitional justice to ensure that Mubarak, and Mubarak era officials, are held accountable for the crimes that occurred during the protests.⁸⁶ However, Morsi is stuck between a proverbial rock and a hard place, while he requires the support of both the military and the police; an adoption of the commission's findings would alienate both the military and the police as the commission's findings most likely implicates both the military and police.⁸⁷

After the nearly 17 months of military rule, which are the subject of the commission's report, elections were held on June 24, 2012 and Mohamed Morsi of the Muslim Brotherhood was elected as Egypt's president.⁸⁸ Morsi has not fulfilled the democratic promise that was inherent in Egypt's first election since the toppling of the Mubarak regime. Since his election, Morsi, and his Muslim Brotherhood party, has been accused of stifling dissent, putting on trial workers of foreign nongovernmental organizations, drafting a constitution which excluded opposition minorities and was deemed to be too vague to protect citizen rights, and imposing martial law after violent protests.⁸⁹ Furthermore, Egypt has struggled financially under Morsi as tourist revenues plummeted, foreign investment decreased, youth unemployment has increased, fuel shortages, bread shortages and violent protests near one of Egypt's most important economic

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ David D. Kirkpatrick, *Named Egypt's Winner, Islamist Makes History*, N.Y. TIMES, June 24, 2012, http://www.nytimes.com/2012/06/25/world/middleeast/mohamed-morsi-of-muslim-brotherhood-declared-as-egypts-president.html?_r=0&pagewanted=all.

⁸⁹ Ved P. Nanda, *The Arab Spring, the Responsibility to Protect, and U.S. Foreign Policy – Some Preliminary Thoughts*, 41 DENV. J. INT'L L. & POL'Y 7, 9 (2012); Salma Abdelaziz, *Morsy signs Egypt's Constitution into Law*, CNN, Dec. 26, 2012, <http://www.cnn.com/2012/12/25/world/africa/egypt-constitution>; see also *Morsi Declares Martial Law in Parts of Egypt After Days of Clashes*, ALBAWABA NEWS, Jan. 28, 2013, <http://www.albawaba.com/news/egypt-martial-law-466667>; *Egypt's NGO Crackdown*, AL-JAZEERA, last modified Dec. 31, 2011, <http://www.aljazeera.com/programmes/insidestory/2011/12/201112319284865888.html> (“Egyptian security forces have stormed the offices of at least 17 human rights and pro-democracy groups across the country...accused by Egypt's military rulers of destabilising security by fomenting protests with the help of foreign funding.”)

resources, the Suez Canal have all taken a toll on the Egyptian economy.⁹⁰ Egypt also continues to experience political turmoil as the minority opposition believes that their voice is not being heard in government while continuing street protests demand a complete overhaul of government.⁹¹

B. *The Butcher of Bagdad: Saddam Hussein*

Saddam Hussein (“Saddam”) rose to power in the Ba’athist military coup of 1968 as head of the security forces.⁹² Saddam would subsequently be promoted to vice president and take over the presidency in 1979 after the resignation of Ahmed Hassan Al-Bakr.⁹³ Saddam’s rule of Iraq was characterized by a brutal and systematic repression of all citizens and punctuated by atrocities committed by both Hussein and his fellow Ba’ath officials.⁹⁴ Atrocities carried out by the Saddam regime has resulted in the death and displacement of Iraqi citizens,⁹⁵ the death and displacement of Iraq’s Kurdish population,⁹⁶ repression of various cultures,⁹⁷ and the invasion of

⁹⁰ *Suez Canal residents defy President Morsi’s Curfew*, ATLANTIC COUNCIL, Jan. 29, 2013, <http://www.acus.org/egyptsource/top-news-suez-canal-residents-defy-president-morsis-curfew>; David D. Kirkpatrick, *Short of Money, Egypt Sees Crisis on Fuel and Food*, N.Y. TIMES, Mar. 30, 2013, <http://www.nytimes.com/2013/03/31/world/middleeast/egypt-short-of-money-sees-crisis-on-food-and-gas.html?pagewanted=all>; *Egypt’s Morsi Plans to Reshuffle Cabinet*, AL-JAZEERA, Apr. 20, 2013, <http://www.aljazeera.com/news/middleeast/2013/04/201342016485641796.html>.

⁹¹ Abdelaziz, *supra* note 89; *Egypt’s Morsi Plans to Reshuffle Cabinet*, *supra* note 90.

⁹² M. Cherif Bassiouni, *Introduction*, in SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL 1, 9 (Michael P. Scharf & Gregory S. McNeal eds., 2000).

⁹³ *Id.*

⁹⁴ Michael J. Frank, *Justice For Iraq, Justice for All*, 57 OKLA. L. REV. 303, 308 (2004).

⁹⁵ *See generally* U.S. DEPARTMENT OF STATE, LIFE UNDER SADDAM HUSSEIN: PAST REPRESSIONS AND ATROCITIES BY SADDAM HUSSEIN’S REGIME (2003), <http://2001-2009.state.gov/p/nea/rls/19675.htm> (approximately 900,000 Iraqis were displaced by Hussein’s policies as Kurds fled Hussein’s Arabization campaigns, which forced Kurds to renounce their Kurdish identity or lose their property, and Marsh Arabs who fled when their marshes were dried up as part of the government’s campaign for agricultural use); *The Mass Graves of al-Mahawil*, HUMAN RIGHTS WATCH, May 29, 2003, <http://www.hrw.org/node/12322/section/3> (multiple mass graves were discovered near the al-Mahawil military base, believed to be victims of the violent campaign undertaken by the Hussein government in the wake of the failed Shi’a uprising of 1991)

⁹⁶ U.S. Department of State, *supra* note 95 (Hussein’s 1987-1988 campaign of terror against Kurdish villagers included the use of chemical agents against the villages and resulted in the death of upwards of 50,000 Kurdish citizens and destruction of some 2,000 villages); *see also* David A. Korn, HUMAN RIGHTS IN IRAQ 8 (1990), <http://www.hrw.org/sites/default/files/reports/Iraq90N.pdf> (“After using chemical weapons to crush a Kurdish

Kuwait on August 2, 1990.⁹⁸ Saddam's rule would effectively end with the March 2003 invasion of Iraq by the United States.⁹⁹ While there were a myriad of reasons given for the invasion of Iraq,¹⁰⁰ and there is dispute as to whether the invasion was legal under the auspices of international law,¹⁰¹ what would be undisputed is that the United States played an integral part in the trial of Saddam subsequent to his capture on December 13, 2003 by American forces.¹⁰²

The purpose of the Iraqi High Tribunal (Tribunal) was to prosecute former Iraqi leaders, including Saddam, "for war crimes, crimes against humanity, genocide, and the crime of aggression."¹⁰³ The Tribunal was established on December 10, 2003 by the United States-appointed Iraqi Governing Council and subsequently ratified by the Iraqi National Assembly.¹⁰⁴ Immediately upon the establishment of the Tribunal, a criticism levied against the Tribunal was that the process of setting up the Tribunal was not sufficiently transparent, as the drafters did not consult experts on international war crimes tribunals and the statute was not made available for public comment prior to its ratification.¹⁰⁵

insurgency in 1987 and 1988, the Iraqi government [] engaged in a forced relocation program of such proportions that it threatens Kurdish ethnic identity and cultural survival.")

⁹⁷ U.S. Department of State, *supra* note 95 (Hussein implemented regulations which put severe restrictions on the religious practices of Shi'a Muslim and instituted a policy of Arabization whereby Kurds had to choose between revoking their Kurdish identity or forfeiting their property to the government.)

⁹⁸ 1990: *Iraq Invades Kuwait*, BBC NEWS, Aug 2, 1990, http://news.bbc.co.uk/onthisday/hi/dates/stories/august/2/newsid_2526000/2526937.stm.

⁹⁹ Melissa Patterson, *Who's got the Title? Or, the Remnants of Debellatio in Post-Invasion Iraq*, 47 HARV. INT'L L.J. 467, 467 (2006).

¹⁰⁰ Victor David Hanson, *Why Did we Invade Iraq?* FREE REPUBLIC, Mar. 26, 2013, <http://www.freerepublic.com/focus/f-news/3000898/posts>.

¹⁰¹ Contrast David Brown, *Iraq and the 800-Pound Gorilla Revisited: Good and Bath Faith, and Humanitarian Intervention*, 28 HASTINGS INT'L & COMP. L. REV. 1, 1 (2004) with wen MacAskill & Julian Borger, *Iraw War was Illegal and Breached UN Charter, says Annan*, GUARDIAN, Sep. 15, 2004, <http://www.guardian.co.uk/world/2004/sep/16/iraq.iraq>.

¹⁰² See generally *The Rise and Fall of a Dictator*, CNN, Dec. 14, 2003, <http://www.cnn.com/2003/WORLD/meast/12/14/sprj.irq.saddam.profile/>.

¹⁰³ M. Cherif Bassiouni, *Introduction*, in SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL, *supra* note 92, at 3.

¹⁰⁴ *Basic Information about the Iraqi High Tribunal*, in SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL, *supra* note 92, at 57.

¹⁰⁵ *Try Saddam in a Credible Court*, HUMAN RIGHTS WATCH, Dec. 23, 2003, <http://www.hrw.org/news/2003/12/22/try-saddam-credible-court>.

The Tribunal consisted of two 5-person trial chambers and one 9-person appeals Chamber.¹⁰⁶ The Tribunal statutes were crafted from a hybrid of Iraqi and international law.¹⁰⁷ While the Tribunal was¹⁰⁸ staffed exclusively with Iraqi prosecutors and judges, it would look to the United Nations Tribunals for legal precedent and use international experts to advise the legal staff comprised exclusively of Iraqi prosecutors and judges.¹⁰⁹ Additionally, the Tribunal functioned as a hybrid legal instrument as it had the authority to prosecute crimes under both international and Iraqi laws.¹¹⁰

The Tribunal statute drew from the International Criminal Court Statute for the creation of jurisdiction over war crimes, crimes against humanity and genocide.¹¹¹ The Tribunal statute also drew from Iraqi laws pre-dating Saddam Hussein's 1968 ascension to power for the creation of jurisdiction over judiciary manipulation charges, the waste of national resources and public funds and assets, and an act of aggression against a fellow Arab country.¹¹² In addition to resurrecting pre-Saddam Iraqi laws, the Tribunal further minimized the influence that Saddam's reign had on it by ensuring that the Tribunal's exclusively Iraqi judges were not members of Saddam's Ba'ath Party.¹¹³ It was the responsibility of the Iraqi Governing Council, in association

¹⁰⁶ *Basic Information about the Iraqi High Tribunal*, in SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL, *supra* note 92, at 57.

¹⁰⁷ *Id.* at 58.

¹⁰⁸ BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, IRAQ (2011), <http://www.state.gov/documents/organization/186638.pdf> (The Tribunal was dissolved effective July 2011 with Trial Chamber 1 and Trial Chamber 2 continuing operating in order to resolve pending cases); *see also Kurds Oppose Dissolution of Court that Sentenced Saddam Hussein to Death*, EKURD.NET, <http://www.ekurd.net/mismas/articles/misc2011/4/state4993.htm> (Apr. 18, 2011) (The Kurds were opposed to the dissolution of the parliament, perceiving it to be a political move which would prevent the bringing to justice of individuals responsible for the atrocities committed under the Saddam regime.)

¹⁰⁹ *Basic Information about the Iraqi High Tribunal*, in SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL, *supra* note 92, at 58.

¹¹⁰ *Id.* at 59.

¹¹¹ MICHAEL A. NEWTON & MICHAEL P. SCHARF, ENEMY OF THE STATE 56 (2008).

¹¹² *Id.* at 59.

¹¹³ *Id.*

with the Iraqi Bar Association, which had the responsibility of vetting the Tribunal judges of Ba'ath members.¹¹⁴

Saddam Hussein would be charged with a panoply of human rights abuses, including the 1988 chemical gas attack in Halabja resulting in the death of 5,000 Kurds, the killing or deporting of more than 200,000 Kurds during the Anfal Campaign of the 1980's, invading Kuwait in 1990, the drying of rivers resulting in the deaths of hundreds of thousands of Marsh Arabs,¹¹⁵ and the Dujail campaign undertaken as retaliation for an assassination attempt against Hussein while he was visiting the region.¹¹⁶ From the inception of the trial, Saddam Hussein refused to acknowledge the Tribunal's jurisdiction over him, stating that "I didn't say 'former president,' I said 'president,' and I have rights according to the constitution, among them immunity from prosecution."¹¹⁷

Saddam Hussein's claim of immunity from prosecution and denial of the Tribunal's jurisdiction over him were for naught. On November 5, 2006, the Tribunal found Saddam Hussein guilty of "crimes against humanity inflicted upon the civilian population of Ad-Dujayl following a failed assassination attempt against Saddam Hussein that occurred there in 1982" and sentenced Hussein to death.¹¹⁸ Justice was swift and Saddam Hussein was executed less than 2 months later on December 30, 2006.¹¹⁹

Critics were swift to condemn the Tribunal as a mere puppet of the occupying power, the United States.¹²⁰ Many of these critics pointed to the de-Ba'athification of the Tribunal as

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Judging Dujail: The First Trial Before the Iraqi High Tribunal*, 18 Human Rights Watch, 1, 2 (2006), <http://www.hrw.org/sites/default/files/reports/iraq1106webwcover.pdf>.

¹¹⁷ NEWTON & SCHARF, *supra* note 111, at 3.

¹²⁰ *Id.* at 68.

evidence of the Tribunal's puppet status.¹²¹ Critics argued that since the vast majority of the Iraqi senior judges were part of the Ba'ath party, exclusion of judges affiliated with the Ba'ath party undermined the overall competency of the Tribunal judges.¹²² The Tribunal was also criticized for allowing only Iraqis to serve as judges and prosecutors.¹²³ While conceding that it was desirable for the Iraqis to play a major role in the Tribunal, critics argued that the Iraqi judicial system, isolated for years from developments in international jurisprudence and having no trials lasting more than a couple of days, was simply incapable of prosecuting a case as complex as the Saddam trial.¹²⁴

Michael P. Scharf, a vocal critic of the Tribunal, subsequently became a convert and emerged as a vocal supporter of the Tribunal. Scharf argued that the Tribunal was more independent of the United States than was popularly believed, for the following five reasons: 1) the Iraqis played a larger role in drafting the Tribunal's governing statute than widely reported by the media; 2) the United States had no direct control over the selection of the Tribunal judges; 3) the United States Department of Justice's Regime Crime Liaison Office in Bagdad maintained an arms-length relationship with the Tribunal to ensure that there would be no appearance of impropriety; 4) the Tribunal judges were incredibly committed and in many cases risked their lives by serving on the Tribunal and allowing their identities to be disclosed during the televised trial; and 5) the rules of procedure used by the Tribunal conformed to international norms.¹²⁵

Critics derided all aspects of the Tribunal as lacking the capacity to provide a fair trial to the defendant. Commentators criticized the Tribunal's statute, citing to a provision of the statute which was adopted from a 1958 Iraqi law, stating that the drafting of the provision was so vague

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Try Saddam in a Credible Court, supra* note 105.

¹²⁴ *Id.*

¹²⁵ *Id.* at 4-7.

that it was susceptible to an interpretation which would allow the statute to be applied to purely political offenses.¹²⁶ Furthermore, the administrative capacities of the Tribunal were criticized as non-existent, with Tribunal personnel themselves stating that it was difficult to even determine which documents and motions have been submitted.¹²⁷ The lack of administrative capacities was seen as detrimental to the court's ability to perform essential trial functions, such as document management and witness protection.¹²⁸

Commentators would also question the impartiality of the Tribunal due to the lack of independence granted to the Tribunal judges to fulfill their duties.¹²⁹ Critics focused on two sections of the Tribunal statute, Article 4(4) which allowed a Tribunal judge to be transferred to the Higher Judicial Council by the Council of Ministers, thereby removing the judge's right to adjudicate Tribunal cases, and Article 33 which while allowing for the de-Ba'athification of the judges did not specify the procedure to follow to determine whether the individual judge was a member of the Ba'ath party.¹³⁰ Critics argued that Article 4(4) and Article 33 allowed the Council of Ministers unbridled power to remove judges thereby curtailing the independence of the judiciary by the implicit threat hanging over each judge, that they could be removed by the Council of Ministers at any time.¹³¹ The Human Rights Watch also alleged that the Tribunal did not properly apprise defendants of the charges against and them and deprived the defendants of a reasonable amount of time to defend against the charges.¹³²

¹²⁶ *Judging Dujail: The First Trial Before the Iraqi High Tribunal*, *supra* note 116 at 8-9.

¹²⁷ *Id.* at 14, 17-18.

¹²⁸ *Id.* at 14.

¹²⁹ *Id.* at 39.

¹³⁰ *Id.*

¹³¹ *Judging Dujail: The First Trial Before the Iraqi High Tribunal*, *supra* note 116 at 39-40 (Of particular concern was the willingness of the legislature to intervene in judicial independence in order to appease public opinion, usually when a judge was perceived by the public as being sympathetic to Saddam Hussein.)

¹³² *Id.* at 44-48.

The condemnation of the Tribunal continued after the verdict sentencing Saddam to death was handed down. The Human Rights Watch argued that the evidence used to convict Saddam failed to meet the necessary burden of proof; mainly that Saddam knew and intended that his orders result in the massacre at Ad-Dujayl.¹³³ The Human Rights Watch also condemned the appeals process itself, arguing that the Tribunal statute's provision mandating an execution take place within 30 days of the final appeal ensured that Saddam's lawyers were not able to properly respond to the verdict.¹³⁴

The rationale for the criticism of the Tribunal and the international public's indignation at the Tribunal was perhaps best expressed by Professor Curtis Doebbler¹³⁵ who said:

think about it as if another country came to the United States, decided it didn't like President Bush and the Republicans in power because they thought that President Bush was a war criminal for having committed crimes of aggression against other countries, invaded the United States, and then put him on trial claiming that they would give him a fair trial. That is the situation right now that we face in Iraq.¹³⁶

III. Why try a deposed dictator?

An obvious question that may arise is why put a deposed dictator on trial at all? Why allow the deposed dictator the privilege of a trial, with all of its attendant vagaries and uncertainties, when the dictator had for so long denied that privilege to his nation's citizens?¹³⁷

Henry Kissinger argued that the trials of deposed dictators only risk fanning the flames of peace

¹³³ *Id.* at 75-83

¹³⁴ *Id.*; see also *Iraq: Saddam Hussein Put to Death*, HUMAN RIGHTS WATCH, Dec. 30, 2006, <http://www.hrw.org/news/2006/12/29/iraq-saddam-hussein-put-death>.

¹³⁵ *Doebbler, Curtis*, GENEVA DIPLOMACY.COM, <http://genevadiplomacy.com/doebbler-curtis> (last visited April 15, 2013) (an international human rights lawyer who practices before various United Nations Tribunals as well as the International Court of Justice, the African Commission and Court of Human and Peoples' Rights, and the European Court of Justice).

¹³⁶ NEWTON & SCHARF, *supra* note 111, at 67.

¹³⁷ GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES* 7 (2000).

into war as people attempt to achieve personal retribution.¹³⁸ Seemingly, the easier method would be to simply leap directly to the punishment of the deposed dictator.¹³⁹

However, the trial of a deposed dictator, as discussed using the framework of the Saddam Hussein and Hosni Mubarak trials,¹⁴⁰ can be argued to fulfill a two-fold function. The most obvious function of a trial of a deposed dictator is the same as the function of any criminal trial, to ascertain the guilt of the accused and if found guilty, to punish the defendant accordingly.¹⁴¹ However, a perhaps less obvious, but arguably more important, function of a trial of a deposed dictator is to promote a national reconciliation process by which the nation can move forward from the era of repression into a new era of freedom and liberty.¹⁴²

In looking at the Mubarak trial and whether such a trial would bring justice for Egyptians through the judicial system, commentators focused on both how the trial would proceed and what justice would be delivered.¹⁴³ The aims of the trial were as varied as the interests in Egypt. Some viewed the trial as a release valve for the anger and discontent that had been fueling the Tahrir Square, some wanted *qasas*¹⁴⁴ for Mubarak's 30 years of corruption and dictatorship, and some wanted Mubarak punished for the deaths that resulted from the violent suppression of the Tahrir Square protests.¹⁴⁵ Many Egyptians viewed the trial as a means of retaliation, or *qisas*,

¹³⁸ *Id.* at 10 citing HENRY A. KISSINGER, A WORLD RESTORED: METTERNICH, CASTLEREAGH, AND THE PROBLEMS OF PEACE, 1812-1822, 138 (1973).

¹³⁹ Bass, *supra* note 137, at 7.

¹⁴⁰ *Supra*, Part II.

¹⁴¹ Bass, *supra* note 137, at 12-13.

¹⁴² Bass, *supra* note 137, at 290-304.

¹⁴³ Sadiki, *supra* note 40; Mikhail & Zayed, *supra* note 11; *Egypt: Q&A on the Trial of Hosni Mubarak*, *supra* note 36.

¹⁴⁴ Sadiki, *supra* note 40 (defining *qasas*, alternatively spelled *qisas*, as the Quaranic word for justice); *but see* Susan C. Hascall, *Restorative Justice in Islam: Should Qisas be Considered a Form of Restorative Justice 2* (Duquesne Univ. Sch. of Law, Working Paper No. 2012-11), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2120726 (defining *qisas* crimes as intentional wounding and homicide and one in which the wronged party may forgive the defendant and demand no punishment, demand payment as compensation for the crime or may demand retaliation); MAJID KHADDURI, THE ISLAMIC CONCEPTION OF JUSTICE 145 (1984) (defining *adl* as the Quaranic word for justice).

¹⁴⁵ Sadiki, *supra* note 40.

against Mubarak for three decades of rule.¹⁴⁶ In looking at the variety of goals that Egyptians had for a Mubarak trial, it is evident that these goals would not have been fulfilled if Mubarak had simply been quietly punished.

In putting Saddam Hussein on trial, Iraqis believed that creating a neutral decision-maker, the Iraqi High Tribunal, and televising the trial would ensure a transparent trial that would aid Iraq in moving forward to a better and brighter future.¹⁴⁷ The death sentence handed down to Saddam Hussein by the Tribunal was perceived to be the precursor to a law-abiding Iraqi society whereas Saddam Hussein's execution without the intervening trial would have been merely an Iraq trapped by revenge.¹⁴⁸ However, in order for Saddam's trial to have served as a precursor to a law-abiding Iraqi society, the trial must have been perceived as free and fair. Unfortunately, Saddam's manipulation of the trial portrayed the Tribunal as unjust and a tool of the American occupiers.¹⁴⁹ Saddam argued that as he was supported by the United States during the 1980's, he could not have been the monster portrayed by the prosecutor at the trial.¹⁵⁰ Saddam's efforts to portray the Tribunal as nothing more than victor's justice is harmful to the national reconciliation that the trial should promote as it cannot provide the necessary catharsis to Iraq to allow the nation to continue their journey to a law abiding society.

The importance of a deposed dictator's trial stretches beyond the borders of the dictator's nation and into the surrounding region. Saddam's trial would be important not only in Iraq but also in Iraq's fellow Arab countries. Saddam's portrayal of himself as an Arab Muslim humiliated by American might could potentially bolster the belief held in Arab countries that

¹⁴⁶ Mikhail & Zayed, *supra* note 11 ("This is the dream of Egyptians, to see him like this, humiliated like he humiliated them for the last 30 years," said Ghada Ali, the mother of a 17-year old girl in the city of Alexandria who was shot to death during the crackdown.")

¹⁴⁷ NEWTON & SCHARF, *supra* note 111, at 1.

¹⁴⁸ NEWTON & SCHARF, *supra* note 111, at 6.

¹⁴⁹ James Kitfield, Sydney J. Freedberg Jr., & Corine Hegland, *A Tyrant's Trial*, 35 THE NATIONAL JOURNAL (Dec. 18, 2003).

¹⁵⁰ *Id.*

they are impotent in the face of American might.¹⁵¹ Saddam's role as a Ba'ath Party leader would confer further authority upon him, and give added weight to his words, in his capacity as spokesperson to the Arab peoples.¹⁵² Furthermore, Saddam's portrayal of himself as an Arab Muslim and Ba'ath Party leader humiliated by American might and unjustly removed from power would resonate especially strongly in a region replete with strongmen-led governments.¹⁵³ The sight of a fellow Arab dictator deposed by the United States and held accountable for atrocities committed during his reign can strike fear into the hearts of other Middle Eastern dictators wary of the same fate.¹⁵⁴ Many hope that the Mubarak trial will inspire fellow Arab countries to hold their dictators, and those responsible for atrocities, accountable.¹⁵⁵ Therefore, in order to ensure that the trial of a deposed dictator becomes a platform for national reconciliation, rather than a source of tension and strife within the region, the trial must not be perceived as "a bunch of Westerners imposing victor's justice."¹⁵⁶

The perception of the Saddam trial as imposed by the United States in a form of "victor's justice" was not helped by the gloating words of the then-United States President George W. Bush, who, upon hearing of Saddam's capture,¹⁵⁷ stated that, "now the former dictator of Iraq will face the justice he denied to millions."¹⁵⁸ President Bush then predicted that the Iraqi

¹⁵¹ *Id.*

¹⁵² Tarik Kafala, *The Iraqi Baath Party*, BBC, Mar. 25, 2003, http://news.bbc.co.uk/2/hi/middle_east/2886733.stm (Saddam Hussein's Ba'ath party preached a message of pan-Arab, secular nationalism.)

¹⁵³ Kitfield, Freedberg & Hegland, *supra* note 149.

¹⁵⁴ Liaquat Ali Khan, *The Dictators of the Middle East*, HUFF POST, Nov. 26, 2012, http://www.huffingtonpost.com/liaquat-ali-khan/middle-east-dictators_b_2191803.html (The Middle Eastern dictators are a legion, from the deposed Muammar Gaddafi of Lybia, to the embattled Bashar Assad of Syria, to the established hereditary fiefdoms of the Gulf State.)

¹⁵⁵ Mikhail & Zayed, *supra* note 11.

¹⁵⁶ Kitfield, Freedberg & Hegland, *supra* note 149.

¹⁵⁷ NEWTON & SCHARF, *supra* note 111, at 16-19.

¹⁵⁸ *Id.* at 19.

peoples would “not have to fear the rule of Saddam Hussein ever again. All Iraqis who take the side of freedom have taken the winning side.”¹⁵⁹

A fair trial for a deposed dictator can simultaneously promote national reconciliation and serve as a deterrent to regional strongmen. What steps can then be taken to ensure that a trial is perceived as fair rather than as enforcement of “victor’s justice”? A fair trial must be commenced at the request of the deposed dictator’s nation, ensuring that the region’s rulers are not threatened by foreign influence in a neighboring nation. However, the sight of a dictator on trial for the atrocities committed during his rule could persuade regional strongmen to be more respectful of their populations lest they meet the same fate. Saddam’s trial, despite its flaws, can be viewed as having a regional deterrence effect as it represented a watershed moment in which the adjudication of an Arab dictator signaled a warning to the rest of the region’s dictators that their populations could no longer be repressed with impunity.¹⁶⁰

The differentiation that must be drawn between the effects of a “victor’s justice” trial and the deterrence provided by a trial initiated at the request of the deposed dictator’s nation is that the source of the leaders’ fears is different. In the instance of the “victor’s justice” trial, the dictator’s fear is that the United States, or another superpower, invades their sovereign lands and then orchestrates a puppet tribunal to try the deposed dictator. In instances of a trial initiated at the request of the deposed dictator’s nation, the dictators fear their own subjects, perhaps making the dictators less likely to repress their population. However, it can be argued that a “victor’s justice” trial can also provide a deterrence effect as nations may seek accommodation with the United States.¹⁶¹ However, a “victor’s justice” tribunal may have the negative effect of causing

¹⁵⁹ *Id.*

¹⁶⁰ Kitfield, Freedberg & Hegland, *supra* note 149.

¹⁶¹ *Id.*

an arms war as nations, with North Korea being a prime example, build up military arsenals in preparation of war.¹⁶²

IV. After the Deposing of a Dictator: The Long Road to National Reconciliation

A. Tribunals: Merely the First Step on the Long Road to National Reconciliation

Commentators have argued that a fair trial can be used as a springboard to achieve a full rule of law after the fall of a dictator.¹⁶³ In order to aid the reconciliation process, a tribunal must be seen as being fair to all participants in the conflict.¹⁶⁴ An argument for trying heads of state under international auspices is that the tribunal would be perceived as fair by all participants as an international tribunal is free from the “constraints of national policies and prejudices.”¹⁶⁵ Since an international tribunal functions outside of the sphere of national politics, a belief is created that it is impartial and therefore fair to all parties.¹⁶⁶ Therefore, the international tribunal’s reputation for impartiality may promote peace and reconciliation within the nation.¹⁶⁷ A tribunal also furthers national reconciliation by providing the truth through its evidentiary, fact-finding processes.¹⁶⁸

It is also important to note that while international tribunals may be perceived as fair, they can also be perceived as mere puppets of world politics and thus a de-legitimization of the adjudicatory process.¹⁶⁹ Nations may also wish to use national tribunals to try their deposed

¹⁶² *Id.*

¹⁶³ See Eldakak, *supra* note 15, at 293 (proposing that the trial of Hosni Mubarak was an integral part of the promotion of the rule of law in Egypt); *Egypt: Q&A on the Trial of Hosni Mubarak*, *supra* note 36. (proposing the investigation and prosecution of all human rights abuses over the span of Mubarak’s 30 year rule).

¹⁶⁴ Alinikisa Mafwenga, *The Contribution of the International Criminal Tribunal for Rwanda to Reconciliation in Rwanda*, in INTERNATIONAL CRIMES, PEACE AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 1, 15 (Dinah Shelton ed., 2000).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ NEWTON & SCHARE, *supra* note 111, at 55.

dictators as a matter of pride. Iraqis chose a domestic tribunal to try Saddam because of an understandable, national pride in a long tradition of Iraqi legal institutions, from the Hammurabi Code, to the rights of citizens embedded in the Iraqi constitution as of 1921 to the integral part that the integrity of the Iraqi bar association played in the Iraq ascension to the League of Nations.¹⁷⁰ In Egypt, a national tribunal was chosen to try Mubarak, in part, to ensure that the judiciary was able to assert its independence from Mubarak-era officials.¹⁷¹

While an international tribunal may be, in theory, the perfect vehicle for reconciliation, an analysis of international tribunals in action offers a unique opportunity to compare theory and practice. The International Criminal Tribunal for Rwanda (ICTR) became the first to apprehend, arrest and try a former prime minister, Jean Kambanda.¹⁷² The trial of Jean Kambanda demonstrated that a former head of state could not be certain of immunity from prosecution.¹⁷³ The ICTR proved to all heads of states that they would be held accountable for all crimes against humanity as there was an international apparatus established for their adjudication.¹⁷⁴ An international tribunal, such as the ICTR, serves as an international deterrent of state-sponsored crimes as heads of states can no longer depend on immunity from prosecution in such cases.¹⁷⁵ Furthermore, international tribunals promote reconciliation¹⁷⁶ not only in the nation for which

¹⁷⁰ NEWTON & SCHARF, *supra* note 111, at 37.

¹⁷¹ Leila Fadel, *Mubarak Trial a 'Decisive Moment' for Egypt*, WASHINGTON POST, Aug. 2, 2011, http://articles.washingtonpost.com/2011-08-02/world/35271404_1_sharm-el-sheikh-egyptian-president-hosni-mubarak-cairo-courtroom.

¹⁷² Alinikisa Mafwenga, *The Contribution of the International Criminal Tribunal for Rwanda to Reconciliation in Rwanda*, in INTERNATIONAL CRIMES, PEACE AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 164, at 16.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Sandra Coliver, *The Contribution of the International Criminal Tribunal for the Former Yugoslavia to Reconciliation in Bosnia and Herzegovina*, in INTERNATIONAL CRIMES, PEACE AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 164, at 29, n. 2) (The enabling statute for the International Tribunal for Rwanda explicitly provides that an intended purpose of the Tribunal is the “process of national reconciliation and to the restoration and maintenance of peace.”)

the international tribunal was formed, but also the global community at large.¹⁷⁷ Even for international tribunals whose statutes do not explicitly mention the process of reconciliation as an aim, the process of reconciliation always remains an important, if implicit, objective of every international tribunal.¹⁷⁸

As this is not a perfect world,¹⁷⁹ international tribunals have not always been successful in achieving their reconciliation objective. For the International Criminal Tribunal for the Former Yugoslavia (ICTY), reconciliation was an implicit objective.¹⁸⁰ However, the ICTY was unable to meet its reconciliation objectives as individuals whose families were either killed or disappeared during the conflict rejected reconciliation, arguing that they could never forgive those who killed their loved ones and expelled them from their homes.¹⁸¹

An international tribunal may be unable to bring reconciliation to a nation's peoples for a multitude of reasons. In many instances, the tribunals were created to adjudicate incidents in which there is a clear demarcation of combatants.¹⁸² Therefore, in order for reconciliation to all of the combatants must accept the tribunal as just. A major reason for why the ICTY failed to meet its reconciliation objective is because the Tribunal was viewed as biased, and therefore unjust, by both combatants in the controversy, the Croats and Serbs.¹⁸³ Furthermore, the combatants viewed the ICTY as a mere imposition by the NATO-led occupiers, or a "victor's justice" Tribunal, rather than an impartial tribunal which could be trusted to provide a just

¹⁷⁷ *Id.* at 16.

¹⁷⁸ *Id.* at 19.

¹⁷⁹ In a perfect world, surely we would not need international tribunals to prosecute crimes against humanity.

¹⁸⁰ Sandra Coliver, *The Contribution of the International Criminal Tribunal for the Former Yugoslavia to Reconciliation in Bosnia and Herzegovina*, in INTERNATIONAL CRIMES, PEACE AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 164, at 19.

¹⁸¹ *Id.*

¹⁸² *Id.* at 20.

¹⁸³ *Id.*

result¹⁸⁴ Whether the ICTY even had jurisdiction in the controversy was also widely questioned. Many of the combatants considered the conflict to be a civil war rather than a war of aggression, negating the ICTY's jurisdiction over the controversy since an international tribunal could not have jurisdiction over a purely domestic matter.¹⁸⁵ Another source of disgruntlement with the ICTY was the lack of information made available by the ICTY.¹⁸⁶ Overall, the ICTY did a poor job of disseminating information and failed to educate the national public on what individuals were being tried, what offenses those individuals were being charged with, and what the elements of such offenses were.¹⁸⁷

The former Yugoslavian public also perceived the ICTY to be a mere tool of the NATO-led occupying forces, allowing the occupying powers to punish only those political leaders who inflicted the most gruesome suffering onto the population while allowing the remaining political leaders to consolidate their ethnic cleansing gains by providing for a partition of the country.¹⁸⁸ It can be argued that by providing for "justice" under the guise of an international tribunal, while simultaneously entrenching the ill-gotten gains of ethnic cleansing by ensuring those who fled the nation could never return, is more damaging to the process of reconciliation than doing nothing at all.

However, an international tribunal can rehabilitate itself in the eyes of those whose interests it is meant to protect. The ICTY has painstakingly battled its way to relevancy in promoting reconciliation by arresting and putting on trial more of those responsible for the ethnic cleansing.¹⁸⁹ The ICTY's renewed efforts in the arena of trying more of those responsible has,

¹⁸⁴ *Id.* at 21.

¹⁸⁵ *Id.* at 23.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 21.

¹⁸⁹ *Id.* at 27.

indirectly, allowed for the resettlement of the lands by those displaced by the ethnic cleansing.¹⁹⁰ Furthermore, the ICTY has also providing the national public with records of the trials which has led to a greater national understanding and acceptance of the atrocities that occurred.¹⁹¹

B. Promoting National Reconciliation: The Long Road After Tribunals

Justice “requires not only justice before a court of law after the fact, but preventative social justice.”¹⁹² Therefore, reconciliation in countries torn apart by a dictator’s rule must consist of a two-step process, justice in a court of law¹⁹³ and a further truth finding mission to enable the nation to heal.¹⁹⁴ An integral part of the truth finding mission is transitional justice, a concept which traces its origins to post-World War II and encompasses tribunals.¹⁹⁵ Perhaps most notably, transitional justice has been implemented by the International Military Tribunal at Nuremberg, the de-Nazification of Germany, and the trial of Japanese soldiers for war atrocities.¹⁹⁶ Transitional justice is commonly viewed as measures that a society undertakes to come to terms with national legacies of systematic human rights abuse in order to facilitate a progression from a period of violent upheaval or repression to a period of peace and rule of law.¹⁹⁷

The idea of transitional justice encompasses the use of tribunals to not only provide justice but also help heal the nation by stopping the abuses, identifying and bringing those

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 16.

¹⁹³ *See supra*, Part IV(a).

¹⁹⁴ Kitfield, Freedberg & Hegland, *supra* note 149.

¹⁹⁵ Charles Manga Fombad, *UPDATE: Transitional Justice in Africa: the Experience with Truth Commissions*, GLOBALEX: HAUSER GLOBAL LAW SCHOOL PROGRAM, Feb. 2012, http://www.nyulawglobal.org/globalex/Africa_Truth_Commissions1.htm#_edn1.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

responsible to justice and providing reparations to the victims.¹⁹⁸ Such tribunal measures include not only trials and prosecutions, discussed in the instances of Mubarak and Hussein above,¹⁹⁹ but also truth commissions.²⁰⁰ While trials are centered on the prosecution of those responsible for the systematic human rights abuses, truth commissions investigate the abuses through truth telling public hearings.²⁰¹ However, transitional measures include additional measures and methods used to promote healing within a nation, including dialogue within the society, a museum and archive memorializing the atrocities, a restitution process, educational reforms, institutional reforms, and the purging of officials implicated in the past governmental abuse from governmental agencies.²⁰² These measures, taken subsequent to a trial, are meant to prevent future abuses, preserve the nation's peace and rule of law, as well as aid in national reconciliation.²⁰³

V. Conclusion

"If there's one lesson we've learned from the transition of other traumatized societies, it's that this process of rehabilitation takes much longer than people anticipate."²⁰⁴ For instance, Argentina and Chile are still revisiting old questions that they considered long settled."²⁰⁵ In order for hard-won peace to last, transitional justice must achieve two objectives. Transitional justice must not be perceived to be a victor's justice and it must build up an infrastructure which can ensure that past human rights mistakes are not repeated. Instead of promoting peace, the flawed trials of Hosni Mubarak and Saddam Hussein have only served to fragment their nations.

¹⁹⁸ *Id.*

¹⁹⁹ *See supra* Part IV(a).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Kitfield, Freedberg & Hegland, *supra* note 149; Fombad, *supra* note 195.

²⁰³ Fombad, *supra* note 195.

²⁰⁴ Kitfield, Freedberg & Hegland, *supra* note 149.

²⁰⁵ *Id.*

Fragmentation has forced Iraq and Egypt to a standstill, as the same factions which existed under the dictator, continue to thrive and cause strife to the present day. It is not until national reconciliation is achieved that Iraq and Egypt can start to thrive socially and politically.