

CONFERENCE REPORT

Truth, Accountability, and Asset Recovery

How Transitional Justice Can Fight Corruption

August 2020



Cover Image: Young Armenian protesters gather outside the Government House in the capital, Yerevan, during the 2018 Velvet Revolution that ended a decade of authoritarian rule. Chief among protesters' grievances was widespread corruption. (Narek Aleksanyan)

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Ruben Carranza

About the Author

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An online annex to this report, available at www.ictj.org, includes the full texts of the presentations shared by the panelists.

About ICTJ

The International Center for Transitional Justice works across society and borders to challenge the causes and address the consequences of massive human rights violations. We affirm victims' dignity, fight impunity, and promote responsive institutions in societies emerging from repressive rule or armed conflict as well as in established democracies where historical injustices or systemic abuse remain unresolved. ICTJ envisions a world where societies break the cycle of massive human rights violations and lay the foundations for peace, justice, and inclusion. For more information, visit www.ictj.org

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ABBREVIATIONS

EU	European Union
GCOI	The Gambia Commission of Inquiry
IMF	International Monetary Fund
IMAC	International Mutual Assistance in Criminal Matters
INLUCC	National Anti-Corruption Commission (Tunisia)
NGO	Nongovernmental organization
SLA	State Litigation Agency (Tunisia)
TDC	Truth and Dignity Commission (Tunisia)
TJRC	Truth, Justice, and Reconciliation Commission (Kenya)
TRC	Truth and Reconciliation Commission (South Africa)
TRRC	Truth, Reconciliation, and Reparations Commission (the Gambia)
UNCAC	UN Convention Against Corruption
WHO	World Health Organization

Introduction

On March 2 and 3, 2020, two weeks before the World Health Organization (WHO) declared a COVID-19 global pandemic, transitional justice and anti-corruption policymakers, experts, and activists from the Gambia, Kenya, South Africa and Armenia met with their counterparts in Tunisia for a two-day conference entitled, “Truth, Accountability and Asset Recovery: How Transitional Justice Can Fight Corruption,” organized by ICTJ with the support of Tunisia’s National Anti-Corruption Commission (INLUCC) and the Government of the Federal Republic of Germany. This diverse group of leaders came together to share solutions to a common problem: How can countries emerging from dictatorship, war, or political transitions hold corrupt ex-rulers accountable, recover their ill-gotten assets, and ensure that those harmed the most by human rights violations and large-scale corruption can achieve justice, obtain reparations, and overcome marginalization?

For many countries pursuing transitional justice, including those represented by participants in the conference, the health and economic impact of the pandemic has made it more urgent to find and design solutions that advance accountability for both human rights violations and corruption. In Kenya, for example, citizens questioned the government’s use of \$12 million in COVID-19-related aid from the World Bank, “amid reports that the lockdown intended to curb the spread of the virus had worsened poverty, even forcing a mother to cook stones to make her eight children believe she was preparing food for them.”¹ In Tunisia, INLUCC “identified 11 instances of suspected corruption and conflicts of interest” related to a government deal to acquire millions of facemasks.² At the conference, participants brought up the role of the World Bank and the International Monetary Fund (IMF) in enabling corruption during dictatorship or in facilitating state capture through privatization. Ninety-seven human rights and anti-corruption groups have jointly reminded the IMF, which has offered loans to pandemic-hit countries even as it continues to set austerity as a condition, that “transparency and accountability are key to making sure the money the IMF is disbursing actually goes to protecting lives and livelihoods.”³

This report gives an overview of the conference and its five panel discussions.⁴ It presents the thematic questions posed in each panel and summarizes the panelists’ statements and the comments and questions from moderators, other panelists, and participants in the audience. By design, the premise of the conference was clear: The practice by mainly global

1 BBC, “Coronavirus in Kenya: Fearing ‘Money Heists’ amid Pandemic,” May 7, 2020, www.bbc.co.uk/news/world-africa-52540076

2 Asharq Al-Awsat, “Tunisian President to Review of Findings of Face Masks Deal Investigation,” April 27, 2020, <https://english.aawsat.com/home/article/2255036/tunisian-president-review-findings-face-masks-deal-investigation>

3 “Letter to IMF Managing Director Re: Anti-corruption and the Role of Civil Society in Monitoring IMF Emergency Funding,” *Human Rights Watch*, May 4, 2020, www.hrw.org/news/2020/05/04/letter-imf-managing-director-re-anti-corruption-and-role-civil-society-monitoring

4 This report is based on an early draft written by ICTJ Program Writer Emma Merritt-Cuneo, who took notes during the conference.

South countries of including accountability for corruption in their transitional justice processes has settled the debate over whether accountability for corruption should be part of transitional justice.⁵

In 2008, the Kenya Truth, Justice and Reconciliation Commission began investigating land-grabbing, large-scale corruption, and violations of economic and social rights. Soon after the Arab Spring in 2011-2012, Tunisia took the most significant steps when it established the Truth and Dignity Commission (TDC) with a mandate that covered violent political repression as well as corruption under former President Ben Ali. In its recently released final report, the commission examines the extent of the corruption and how the development policies and austerity measures imposed by international financial institutions such as the World Bank and the IMF enabled it.⁶

In 2016, the post-dictatorship government in the Gambia created a truth commission to examine human rights violations as well as a separate commission of inquiry to investigate ex-dictator Yahya Jammeh's corruption and identify his ill-gotten wealth. The latter commission is now considering using part of those assets to fund reparations. Although corruption was excluded from the mandate of South Africa's Truth and Reconciliation Commission, activists in 2017 created the People's Tribunal on Economic Crime that linked the continuity of post-apartheid corruption to the failure to address it in earlier transitional justice processes. In 2018, the South African government then created the Judicial Commission of Inquiry into Allegations of State Capture to investigate specific economic crimes during and after apartheid. After the 2018 revolution in Armenia that ended a decade of authoritarian rule in the post-Soviet state, the new government embarked on prosecutions for corruption and human rights violations and is now considering a truth commission that would examine specific cases of corruption and human rights violations since 1991.

These processes informed the conference, and the panelists who were directly involved in them discussed the challenges, successes, and lessons learned. This report's original intent was to highlight the most important lessons from these experiences and promote South-South exchanges on transitional justice and accountability for corruption. However, the unprecedented global pandemic during which the conference took place has given it another equally relevant purpose. As ICTJ pointed out in a recent special report on COVID-19, "The pandemic is bringing to the surface underlying inequalities, including the unequal access to health care."⁷ With this in mind, the author hopes this report will also offer policymakers practical approaches to transitional justice that can help address those underlying inequalities, such as measures aimed at improving access to health care for the most vulnerable, and initiatives to use recovered ill-gotten assets to fund reparations for victims.

5 See Ruben Carranza, "Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes," *International Journal of Transitional Justice* 2, 3, December (2008): 310-330, <https://doi.org/10.1093/ijtj/ijn023>

6 Olfa Belhassine, "Tunisia's Truth Commission Versus France, the IMF and the World Bank," *JusticeInfo.net*, September 3, 2019, www.justiceinfo.net/en/truth-commissions/42302-tunisia-truth-commission-vs-france-imf-world-bank.html

7 ICTJ, "Special Report on COVID-19: Keeping Justice in Sight," May 19, 2020, <https://www.ictj.org/news/special-report-covid-19-keeping-justice-sight>

Opening Statements: Tunisian Government Representatives and ICTJ

Moez Ouertani representing President Kais Saied:⁸ Corruption is a challenge we cannot overcome easily. Many mechanisms are available to deal with corruption but a developing state does not necessarily have the capacity to deal with all of them. Transitional justice offers Tunisia a way to examine violations and crimes that a normal system cannot easily deal with. Combating corruption requires the use of all available means and is not limited to state authorities. NGOs and civil society must play a role in this effort. Since 2011, Tunisia has worked to fight corruption including establishing various institutions such as the National Anti-Corruption Commission (INLUCC). We have also passed laws to protect whistleblowers. The president will implement the necessary recommendations from transitional justice institutions to unveil the truth, recover ill-gotten assets, and pursue accountability.

Judge Youssef Bouzakher, President of the Tunisia Supreme Judicial Council: The government is committed to implementing the principles of transitional justice in all fields, particularly in the fight against corruption. We are bound to uphold Article 148 of the constitution that makes transitional justice a constitutional-level state policy. Some societies have opted to address social and economic rights violations and corruption, but these were very simple attempts to address these violations. Article 8 of Tunisia's transitional justice law deals with these violations more comprehensively. Unfortunately, the Truth and Dignity Commission did not concentrate on violations of social and economic rights and now the Specialized Chambers have to deal with corruption cases. Selected judges are now being trained in the field of transitional justice and financial investigations by UN agencies and the Ministry of Justice. We intend to stand up to anyone who attempts to prevent us from doing our work. In the interest of the country, we cannot go back to a "normal" judicial system. This conference will hopefully let us learn about comparative examples and help us move forward.

Chawki Tabib, Chairperson of INLUCC: We cannot talk about anti-corruption efforts in Tunisia without talking about transitional justice. The main characteristic of the former regime was corruption. To ensure that the aims of the revolution are upheld, we need to ensure that a connection is established between corruption during the dictatorship and the system of corruption we inherited. The Truth and Dignity Commission and other institutions have succeeded in unveiling the dictatorship's corruption. However, accountability for those crimes has not progressed as expected. This is due to a lack of resources and the actions of individuals from the past regime implicated in corruption. But we have to acknowledge the

⁸ Moez Ouertani serves as a principal advisor to the Tunisian president and is in charge of relations with constitutional institutions and civil society.

state of confusion that has characterized the different stages of transitional justice and asset recovery in Tunisia. We need to raise awareness among the Tunisian people, especially youth who did not experience the past regime. Corruption is not confined to the Ben Ali regime. It continues in 2020. The problem is in the system and not just with individuals. There is a state within the state that stands in the way of reforms and good governance, that seeks to cut resources we need to fight corruption or to obstruct needed legislation. We have had many successes but we can do better.

Anna Myriam Roccatello, ICTJ Deputy Executive Director: This conference reflects the philosophy of ICTJ, which is to provide space for discussing and sharing different experiences of transition. After authoritarian leaders are gone, the work of transforming institutions remains to be done and is sometimes a painful and daunting task. At ICTJ, we



(Left to right) Moez Ouertani, Judge Youssef Bouzakher, Chawki Tabib, Anna Myriam Roccatello, and Mohammed Azer Zouari open the conference on March 2, 2020. (Christopher Boland/ICTJ)

have learned that addressing human rights violations and victims' needs is essential but is not enough when guarantees of nonrecurrence are considered as an afterthought. Preventing the recurrence of abuses is not only a matter of applying human and financial resources, being more transparent, or creating accountable institutions, it is learning as a society that certain behavior is no longer acceptable. This requires a lot of work. But the fact that we have many representatives of state institutions and movements who made the Tunisian and Armenian revolutions and the transition in the Gambia possible, who are still fighting

in Kenya and South Africa to achieve good governance and a better future, is why we are here today. The choice of holding this conference in Tunis is not random. It is meant to pay tribute to all those who fought for dignity, which is a very important concept in transitional justice. We cannot achieve dignity by merely recognizing rights in our laws. We need to provide the means to enforce those rights. We look forward to learning from the different experiences present here in addressing corruption as one of the causes of political repression and conflict.

Panel 1: What Is Transitional Justice and How Can It Pursue Accountability for Large-Scale Corruption and Economic Crimes?

Moderator:
Reem El Gantri,
ICTJ Senior Expert
and Libya Program
Coordinator

- **Ruben Carranza,** ICTJ Senior Expert
- **Michael Marchant,** Investigation and Advocacy Researcher for Open Secrets South Africa
- **Layla Riahi,** Member of Manich Msemah campaign and cofounder of the Tunisian Observatory of the Economy

Reem El Gantri: While transitional justice mechanisms have stayed the same, the scope of transitional justice has progressed over the years. We need to ensure that the scope is consistent with the context and with both post-authoritarian and post-conflict challenges.

We need to be innovative and creative if we are to achieve the goals of transitional justice. This panel represents a stocktaking of how transitional justice has tried to deal with corruption generally.

Ruben Carranza: It is important to describe the relationship between human rights violations and large-scale corruption, whether under dictatorships, during conflict, or in countries under state capture.⁹ Those who commit human rights violations protect themselves from accountability by committing corruption and accumulating ill-gotten assets. They then use these assets to commit more human rights violations and corruption, as well as to undermine and resist accountability. This is what the concept “mutually-reinforcing impunity” means. The 2008 International Journal of Transitional Justice paper that I wrote asked whether transitional justice should engage with corruption and economic crimes.¹⁰ The answer is yes. The paper pointed out that the fear that doing so would overburden truth commissions or would detract from prosecuting crimes was already disabused by early examples of mechanisms with double or parallel mandates, such as those in Chad, the Philippines, and South Korea, which covered both kinds of abuses. Since then, other examples that participants in this conference will discuss show that it is not only possible but necessary for transitional justice to look into both human rights violations and economic crimes. Why? Addressing corruption as part of transitional justice can (1) end mutually reinforcing impunity, (2) provide a more complete picture of the past, (3) break the myth of the “incorruptible dictator,” (4) finance reparations, and (5) open a discussion about the accountability of business and economic actors during dictatorship and conflict.

⁹ See the Panel 3 discussion later.

¹⁰ See Ruben Carranza, “Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes,” *International Journal of Transitional Justice* 2, 3 (2008): 310-330, <https://doi.org/10.1093/ijtl/ijno23>

But addressing corruption within transitional justice also raises its own questions. Do victims of human rights violations and citizens who are ultimately victims of corruption understand justice in the same way? Do we hold accountable only those who directly committed corruption or also those who enabled corruption? By “enabling,” do we include banks and international financial institution that lent money to dictators knowing how corrupt they were? Do we hold corporations who pay bribes accountable? Should we ban corruption-enabling oligarchs from public contracts, and not just politicians from public office, if truth seeking shows them to be complicit in corruption? In Tunisia, there have been attempts at reconciliation over corruption. What does “reconciliation” mean between the corrupt and the state? How can citizens object? And what conditions would be necessary?

Another question is the definition of corruption itself. The 2003 UN Convention Against Corruption (UNCAC) has no definition for corruption,¹¹ as states could not agree on it. This shows that corruption can mean something different in each context. In the UN committee that drafted the UNCAC, it was proposed that political parties also be held accountable for corruption. It was not adopted because two states strenuously objected: China and the U.S. What does this tell us? That the political elite’s fear of accountability for corruption transcends ideological views, a fact that transitional justice will need to take into account.

Michael Marchant: South Africa’s original transitional justice process did not deal with corruption. The Truth and Reconciliation Commission [TRC] was remarkable, but it did not examine the underpinnings of the regime, particularly the role of its intelligence services and of large corporations in maintaining apartheid, and how these groups empowered the regime and allowed the regime to criminally extract money. The TRC process did not dismantle these corrupt and criminal networks, but since then there have been new opportunities to do so.

South Africans have a poor understanding of the role of corruption in the country’s past. During apartheid, South Africa defied the United Nations’ 1977 arms sanctions by spending up to \$60 billion in weapons through its domestic industries with financing from international financial institutions. The TRC only held three days of hearings on the role of corporations and domestic industry in maintaining apartheid. If the TRC had dealt with this, perhaps we would have a better understanding of how corruption and economic crimes allowed apartheid to continue.

The limited knowledge about the role of corruption in South Africa’s past has impacted our ability to address current large-scale corruption. An initiative of civil society, the 2017-2018 People’s Tribunal on Economic Crime has held public hearings involving “UN arms-sanctions-busting during apartheid, the 1999 arms deal, and contemporary State capture.”¹² Their public hearings were livestreamed and the tribunal offered an opportunity for whistleblowers to come forward when authorities did not want to investigate. At the level of the state, the government’s Judicial Commission on State Capture faces a difficult task,¹³ both because of the TRC’s failure and because, as it looks to develop evidence of the role of corruption, it cannot make binding decisions. Since there was no effort to learn about this past, inquiries now have to argue for the first time that corruption happened and is pervasive. This has shown that if you don’t disrupt the network, then recurrence is inevitable. It is an ongoing process that South Africa has to grapple with.

11 UN General Assembly, *United Nations Convention Against Corruption*, October 31, 2003 (A/58/422), available at www.refworld.org/docid/4374b9524.html

12 The People’s Tribunal on Economic Crime, “What Is a People’s Tribunal?,” <https://corruptiontribunal.org.za/>

13 See the Judicial Commission of Inquiry into Allegations of State, Corruption and Fraud in the Public Sector including Organs of State, <https://sastatecapture.org.za/>

Layla Riahi: First, there is the idea of a transition and, second, there is the science of transition. One school of thought views political change as transitioning toward a liberal economy. In some transitions in southern and eastern Europe, in Latin America, and in Sub-Saharan Africa, we see structural changes implemented to establish a market economy. These economic policies connected to a transition are the changes that we usually do not speak about. This is how, in Tunisia, a post-dictatorship elite evolved and used their power to gain even more power and used that power, even under both Tunisian presidents, to sell and then buy privatized state companies.

In the science of transitions, we must study what we want to achieve for our economy [in order to] save the state from the hegemony of one economic approach and develop an alternative economic system in which dignity is upheld. Since Tunisia's independence, the state has set a minimum wage, and, in order to keep pace with salaries, economic policy was used to determine and set the prices of basic items, from eggs to wheat. But while doing so stabilized life in urban areas, it has also enabled corruption and has led to low incomes for Tunisians in rural regions. The problem is that, at the domestic level, Tunisians do not have the freedom to determine the type of transition we need to pursue in order to achieve dignity and equality. We cannot do this because Tunisia simply follows what the IMF and World Bank dictate, when we should be answering the question of what social change we need and seek. Because past regimes only sought to preserve their own economic interests and to amass wealth, our transition must prioritize dismantling their networks of corruption and be guided by what Tunisians want from the transition. If transitional justice loses that relationship with Tunisian society, it cannot be effective and we risk going back to the corruption of the past.

Rafik Grigoryan, First Deputy Minister of Justice, Armenia: What tools are available to South Africa's commission on state capture? Does it have access to bank secrecy and are there restrictions on working with international lawyers?

Michael Marchant: The commission has the power to search, but its power related to banks is unknown to the public. These banks refuse to answer questions about bank records during the public hearings and always request a secret session. Thus, Open Secrets South Africa recommended that the commission on state capture instead subpoena banks to say how they get the information that they were giving to the commission. The commission gets information mostly because it has been successful at accessing domestic bank accounts. Senior prosecutors within South Africa make visits to the jurisdiction where the money has disappeared to and work with foreign authorities. This is now a challenge; this groundwork should have been done by the TRC.

Question from the audience: It is very challenging to undertake this work when the judicial system is not yet reformed. Is there an order or a sequence to doing these reforms and then pursuing prosecution?

Ruben Carranza: You are talking about Tunisia but this is also a problem in Armenia: How do you pursue accountability for corruption when your judicial system is still perceived as corrupt? In the short term, it is important not to be paralyzed by the assumption that judges carried over from the past will not act. This assumes that they did not stop a dictator because they were corrupt. Their inaction could have been fear. When you remove fear, they might now act. Programs that focus on training and technical capacity are not enough if judges do not understand that they are free to make and implement decisions. This is where it could be important to have South-South exchanges between judges so they understand each other's experiences under dictatorships. While we reform the judiciary, we need to

ensure that assets acquired by corrupt ex-officials are frozen, so that those assets don't disappear. This is also why it's important to pursue civil cases to recover assets and not just criminal cases to prosecute corruption. Putting someone in jail is important, but it does not bring back assets, and, in the event a dictator dies, civil cases can continue against their family members.

Panel 2: What Are the Challenges for Truth Commissions and Commissions of Inquiry in Examining Corruption and Economic Crimes?

Moderator:
Didier Gbery,
Head of ICTJ
Gambia Program

- **Bai Mass Saine,** Commissioner, the Gambia Commission of Inquiry to Investigate the Financial Activities of Public Bodies, Enterprises, and Offices as Regards to Dealings with Former President Yahya Jammeh and Connected Matters
- **Patricia Nyaundi,** Executive Director, Kenya Truth, Justice, and Reconciliation Commission
- **Mohammed Azer Zouari,** ICTJ Tunisia Program Legal Officer¹⁴

Didier Gbery: More and more truth commissions have the role of investigating human rights violations and economic crimes. To do so, countries use different approaches. Some have one commission in charge of investigating both violations; others have two different commissions. Investigating stolen assets at home and abroad is a complex undertaking for those doing it domestically as well as internationally. This panel will try to examine the challenges, learn from other experiences, and make recommendations on how countries engaged in transitional justice can push for accountability for economic crimes.

Bai Mass Saine: The Gambia Commission of Inquiry [GCOI] is different from Gambia's Truth, Reconciliation, and Reparations Commission [TRRC] in that the TRRC does not investigate financial crimes, which were the main [focus of the] GCOI mandate. The commission did struggle with legitimacy in the beginning, particularly in the selection and credibility of the commissioners to ensure that they were not part of the former regime. In the end, the commissioners were nonpartisan and gender-balanced and came from various professions. To do its work, a team of five police officers supported the commission. They identified individuals to give initial statements and moved to obtain more substantive statements. Based on the statements, they decided what to pursue further. The commissioners were not allowed to do face-to-face interviews but the commissioners could intervene, ask questions, and direct further investigations at any point in this process during its 20 months of operation.

The willingness of the Gambia's Central Bank to cooperate was essential in ensuring the quality of the GCOI's findings. This was important because under dictator Jammeh, the Central Bank became Jammeh's personal commercial bank. Jammeh would withdraw millions

¹⁴ The organizers originally invited Khaled Krichi, who was a commissioner of the TDC and chairperson of the TDC's Arbitration and Reconciliation Committee, and is now a Member of Parliament. He accepted the invitation, but in the end did not attend. In his place, Mohammed Azer Zouari was asked to discuss the TDC's findings on corruption and what is publicly known about the work of the TDC's Arbitration and Reconciliation Committee.

of dollars from the Central Bank without any record or letter. He would transfer millions of dollars into the Swiss bank where he had accounts with no record at the destination that these funds were in his name. Disclosures from foreign banks were crucial but getting them was always a major challenge. The abilities of the commission's investigators influenced the quality of information we received and determined how much we learned.

In terms of land and property, we found that it was Jammeh who dictated the final price of the 40 estates in Banjul that he took over from private individuals. These have already been confiscated by the commission and sold by the current government—but doing this does create a risk of another instance of state capture. There was opposition from people closely associated with Jammeh, who said that the commission had no reason to confiscate their property. The commission had to issue interim orders to act quickly; otherwise, money and assets could disappear. Some individuals did take the commission to court, but because of the merit of our actions and the independence of the judiciary, these cases were thrown out.

The government accepted 95 percent of the commission's recommendations, but those that involved certain specific individuals were not. The government said that these individuals had no choice but to follow Jammeh's orders. It is now up to the Ministry of Justice and the judiciary to implement the recommendations of the commission. It is also up to the president and his cabinet to use the assets and money the commission recovered to fund reparations.

Patricia Nyaundi: In Kenya, we are dealing with a failed transition. After the 2002 elections, there was a great belief that the political scene was clear. In reality, it was the same politicians just in different positions. The political elite hijacked the democratization process and portrayed themselves as the champions of democracy in order to maintain the status quo. The credibility of the Truth, Justice, and Reconciliation Commission [TJRC] and its commissioners was challenged constantly, until it submitted the final report.¹⁵ Tensions rose between the TJRC and the political elite in their attempt to maintain power. The funding to the commission was low, and this impacted its capacity and its ability to efficiently work. Additionally, there was a perception that the pursuit of justice and accountability would threaten the desire for peace and national cohesion. There was a thinking to let the past be the past and that this process would reopen wounds in society. Further hurting the TJRC process was the number of other initiatives ongoing at the same time. This included a national conversation on land reform, a constitutional review process to name a few. It was overwhelming to decide which process got priority and national attention. In the end, the TJRC found itself to not be a priority.

The TJRC also faced internal challenges. Its broad mandate to investigate violations from 1963 to 2008, and the addition of economic crimes to human rights violations, was a huge task, especially with minimal resources. The commission had to prioritize what it thought was possible, while considering the response from the public. Much more was invested in the documentation of civil and political rights violations, as opposed to grand corruption and economic crimes. The TJRC lacked the mandate to offer incentives, such as amnesties, to perpetrators to encourage statement-giving. Also, the TJRC lacked civil society's engagement; in fact, civil society challenged the TJRC on the agenda the commission was pursuing. Moreover, part of the statute that created the commission was interpreted to allow Members of Parliament to exercise discretion when it came to implementing the commission's recommendations in its report. Additionally, staff capacity was limited. Commissioners did not have experts with qualifications to look into and investigate economic crimes. They had

¹⁵ In the 2002 election, the political faction that had ruled Kenya since independence in 1963 lost to a coalition of opposition parties. Once in power, the coalition created the Task Force on the Establishment of a Truth, Justice, and Reconciliation Commission led by Professor Makau Mutua. The taskforce recommended that Kenya establish a truth commission with a mandate to examine physical integrity violations as well as corruption and other economic crimes including landgrabbing. But a commission was not established until 2008 and only after the post-election violence of 2007-2008. See Makau Mutua, "Republic of Kenya Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission," *Buffalo Human Rights Law Review* 10 (2004): 15-214, <https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1120&context=bhrlr>

to instead rely heavily on existing reports to draw the link between economic crimes and the impact on citizens' enjoyment of human and cultural rights.

Mohammed Azer Zouari: Article 8 and 45 of the transitional justice law established two parallel processes: a system of referring cases for prosecution before specialized criminal chambers in Tunisia's courts and the Arbitration and Reconciliation Committee within the TDC to oversee an arbitration process that included corruption cases. Arbitration is normally used to settle commercial disputes. While using arbitration in corruption cases is innovative, it is also difficult to use it in that context because the entire state is often the victim of corruption. In its final report, the TDC found six areas of the economy that it said were the most affected by corruption: (1) real estate, (2) the banking system, (3) natural resources, (4) public administration, (5) privatization, and (6) customs and importation. Overall, the TDC received 11,000 statements and held one public hearing on the theme of corruption. In the hearing, we saw a Ben Ali family member provide information on the ways through which they unlawfully acquired state assets.

There are several challenges now in pursuing accountability for corruption in Tunisia. After 2013, the political climate changed and, in 2015, the then president proposed an amnesty for corrupt businessmen linked to Ben Ali, calling it a form of reconciliation. Because of the opposition of youth groups led by the Manich Msamah movement, the reconciliation bill was not adopted for over a year. Later, however,

amnesty was offered to middle-level bureaucrats suspected of corruption during the Ben Ali dictatorship who were willing to come forward to admit involvement in corruption but who allege that they did not personally benefit from it; this process however did not specify a mechanism for validating an amnesty applicant's claims about not profiting from corruption.¹⁶ It is notable, however, that the new president has not pursued any amnesty proposal. The specialized criminal chambers also face challenges with respect to corruption cases involving business-related corruption. The TDC did not finalize its investigations that would have expedited the trial of these cases involving businesspersons. Instead, the commission prioritized investigations related to corruption committed by government officials and bureaucrats.

With respect to arbitration, the commission reported that they concluded 19 arbitration agreements with Ben Ali-connected family members and businesspersons and delivered 9 arbitration decisions pertaining to corruption. The mechanism requires perpetrators not only to apologize for and recognize the economic crimes they committed, but to also show how they obtained their assets. Since the arbitral decisions have not been published by the TDC, their criteria for these decisions remain unknown to Tunisians. The transitional justice law did not provide any remedy and power to the TDC in cases in which alleged perpetrators refused to come forward. As a result, 3,728 cases have been left undecided by the TDC. This



Surahata Janneh (left), chairman of the Gambia Commission of Inquiry into financial crimes hands over a findings report to President Adama Barrow (right) on March 29, 2019. (Lamin Kanteh/EyeAfrica)

¹⁶ See ICTJ, "ICTJ Denounces the Passage of Tunisia's New 'Administrative Reconciliation' Law that Grants Amnesties to Public Officials for Corruption" (2017), <https://bit.ly/3eNOqDb>

number includes cases involving human rights violations and corruption, including 685 arbitration claims submitted by the state as a victim of corruption under the dictatorship.

Didier Gbery: How have you collaborated with foreign countries to recover ill-gotten assets?

Bai Mass Saine: In the Gambia, there were Jammeh properties in Maryland, USA. By working with the Gambian Ministry of Justice using mutual legal assistance processes with the U.S., we showed that public funds were used to purchase the properties and, with witness testimony, showed how the purchases happened as well as the involvement of the Gambian embassy to purchase the property in the U.S. This work between the Gambia and the U.S. government is still ongoing.

Rafik Grigoryan: Did your commission rely on its own findings to seize ill-gotten assets or did you need to go to court?

Bai Mass: All of us in the commission had expertise, including in forensic accounting and banking, and this allowed us to support our recommendation for the government to seize ill-gotten assets. We followed the transfers of funds and the banking process involving assets that came to our attention. We traced the transactions and purchase prices, some of which showed assets bought at 10 times Jammeh's salary as president. Half the time it was not the president himself doing the sale in person but a proxy. This made it very challenging and difficult, but, with the whole picture coming from the statements and tracing the process, it was easier to make the conclusion that these transactions were effected with ill-gotten assets. We then had to decide what to do with the property that we had the power to confiscate. We decided to return the properties to the state. Now, the state is deciding how to transfer some of the assets to the truth commission, so they can be used to fund reparations.

Rafik Grigoryan: Did you get testimony from people who were involved in committing economic crimes?

Patricia Nyaundi: If the commission had the mandate to issue amnesties, it may have helped to convince people to come forward to give statements. But amnesty remains a very contested issue and there in Kenya it was felt it shouldn't be offered for gross violations of human rights or for large-scale corruption.

Sona Ayvazyan, Executive Director, Transparency International Armenia: What would be a solution, or a best formula, for civil society to help a fact-finding or truth commission?

Patricia Nyaundi: There is a clear role for civil society to educate the public on the process and mobilize them to participate. In Kenya, we felt one of our success stories in mobilizing civil society was when the majority of statements came from the public. But civil society support for the process was not as strong as it could have been because of their mistrust in some of the commissioners. Civil society must be involved in the process and not just as observers.

Question from the audience: In Kenya, how independent is the judicial system from political pressure?

Patricia Nyaundi: The judiciary has benefited from reforms but still appears stuck when it comes to corruption and economic crimes. I believe this is because money is power. When money is in the hands of the political class, who are motivated to not give up ill-gotten wealth, we will have a situation where judges can perform well to protect human rights yet face challenges when it comes to deciding on cases involving corruption.

Panel 3: How Can Transitional Justice Processes That Deal with Corruption Help Reform Justice and Other State Institutions?

Moderator: Maria Abrahamyan, ICTJ Armenia Program Coordinator

- **Rafik Grigoryan**, First Deputy Minister of Justice, Armenia
- **Anna Myriam Roccatello**, ICTJ Deputy Executive Director
- **Judge Walid Malki**, Member of the Tunisia Supreme Judicial Council

Maria Abrahamyan: In your experience, while institutional reforms are still being put in place, how can rights be vindicated and accountability pursued through existing judicial authorities? In the long term, how can we best pursue transitional justice including reforms in the judiciary?

Anna Myriam Roccatello: Any institutional reform effort needs to be based on the past abuses or structural issues. No specific remedy for addressing violations and abuses can be considered satisfactory without a long-term strategy to ensure inclusive and transparent institutions. In post-conflict contexts, we want to go after the perpetrators of torture, sexual violence, and repression; but how can we do that and trust institutions that were a part of the abusive system? In the field of rule of law that is applied in post-conflict societies, transitional justice is sometimes not seen as politically viable and resources are instead directed toward establishing and running institutions without sufficient investment in addressing the causes of political crises. One phenomenon to note is that leaders of armed groups involved in the conflict often get a political position in the post-conflict government. In those positions, and because of the connections and power they acquired during the conflict, they tend to get involved in serious but not conflict-related crimes. So, a strategy to consider should be to prosecute them for organized criminal activity, including economic crimes such as embezzlement, illegal trading in weapons, and human trafficking, rather than for international crimes.

The judicial response is only one of the many processes that need to be put in place in a transition. While criminal prosecutions may not yet be possible with the legal institutions we inherit, there are a number of steps we can already take to develop those institutions and ensure that in the near future they will be able to perform independently, professionally, and effectively. It is therefore very important to make a thorough evaluation of the state of the institutions and identify the needs to progressively enable prosecution and other forms of accountability. This includes both horizontal (institution versus institution) as well as vertical (citizens versus institution) accountability. However, this certainly requires time, and ill-gotten assets, for example, can disappear before effective legal actions are possible.

We need however to remember that even when prosecution for corruption is not viable, developing our institutions remains paramount for building a foundation for a just and equitable society. In this project, the resilience and persistence of civil society and victims' groups are essential. It is what makes commissions of inquiry or even prosecutions possible decades later.

As underlined by Patricia, the political and social energy needed to sustain multiple transitional justice initiatives is considerable. How civil society prioritizes their engagement in different processes is an issue. Any serious reform process takes time, even in a developed democracy. You can never ensure that an institution works perfectly. That is why establishing permanent mechanisms of accountability are so important. Freedom requires constant vigilance, and justice requires consistent engagement. On the other hand, we understand that victims expect and have a right to an immediate response. Satisfaction does not come from just one process, but from a combination of processes including prosecuting perpetrators and recovering assets. At the same time, while we may not be able to bring all perpetrators of corruption to justice, if we establish reliable and professional institutions, such as a financial police force, an ombudsman, to mention a few, that is already a significant step toward achieving a satisfactory response.

Maria Abrahamyan: Among other consequences of the 2018 revolution in Armenia is the challenge of reforming the country's post-Soviet judicial institutions. I would like to ask Rafik Grigoryan to share the Armenian experience so far.

Rafik Grigoryan: After Armenia became independent from the Soviet Union in 1991, high levels of corruption remained. After the 2018 revolution, one of the new government's first steps has been to adopt anti-corruption reforms over a five-year period. In that period, we will introduce constitutional, electoral, and judicial reforms. We will cleanse the judicial system of corrupt judges. If a judge or civil servant cannot explain why their wealth is way above their salary, they can be prosecuted; if they cannot explain how they obtained those assets, the state can confiscate them.

At the same time, we will establish a truth commission that will deal with specific kinds of human rights violations and abuses since 1991. This includes abuses connected with elections, political persecution after elections, the use of eminent domain power to unfairly and unjustifiably take away citizen's property and the deaths of soldiers in non-combat situations. However, we did not include corruption as a general subject of truth-seeking because we felt it would not be efficient given the pervasive nature of corruption. We have started our reforms in every field, but now I see the issues Tunisia is facing, and these meetings are very important to learn from other experiences.

Maria Abrahamyan: What would be the main lessons learned to take into account in implementing judicial reforms?

Anna Myriam Roccatello: There is no single reform measure that can simultaneously take out judges not abiding by professional principles and also recreate an institution that enjoys society's trust and confidence. Judicial reform is a wide term. In reality, we are talking about reforms to change human resources and the scrutiny of judges, and to appoint judicial professionals who apply fairness, independence, and professionalism at the highest level.

Vetting processes that are well thought out can determine who is performing according to those standards and will offer alternatives for those who are not operating at that level, for instance, dismissal, other less sensitive positions, or early retirement. However, transitional vetting needs to be complemented by permanent reforms which include longer-term trainings—longer than a weeklong seminar—to ensure that those who stay after the vetting

process or those who are newly appointed are continuously challenged and improve their understanding and ability to make sound judicial determinations.

In post-conflict countries though, the culture within the judiciary is equally important. In Armenia, for example, a country that has just come out of decades of authoritarian rule, what do we consider to be a corrupt judge or what understanding of judicial independence can we expect from judges? To be courageous and independent despite undue political pressure and serious threats is not something a society that lacks a true democratic culture can produce overnight. To conclude, I would say that judicial reforms must include a combination of different elements: immediate response such as special courts for cases related to past abuses, vetting, upgrading resources and professionalism, and continuous training together with rigorous permanent disciplinary procedures.

Rafik Grigoryan: Solving the problems of the constitutional court is not the same as solving the problems of the judicial system. Our reforms aim to have disciplinary proceedings in order to help cleanse the judicial system, because according to our constitution you cannot terminate a judge without a disciplinary proceeding. This should be more difficult than a vetting process.

Walid Malki: Despite the gains after the Tunisian revolution, there is still a long road ahead to reform the judiciary in Tunisia. Establishing an independent judiciary is the only way to start.

We want legislative and judicial reforms and are drafting laws to meet the ambitious needs of Tunisians and ensure the right to a fair trial and due process without delay. These are important principles, and we want to criminalize disruption of court proceedings and ensure mechanisms to implement reforms. Furthermore, the composition of the courts needs to inspire confidence in victims. We must ensure that police provide effective security of the courts as well as judicial independence. Right now, the executive branch can still interfere in the judiciary, particularly in allocating budgets. On the other hand, judges and prosecutors must distance themselves from political affiliation.

The judiciary is an important body to counter corruption; however, we cannot do this without independent judges. We need to hold judges to account, dissolve institutions that obstruct the adjudication of corruption cases, and elevate the academic level of administrative staff. We need to pursue specialization within the judiciary to technically improve all decisions.

Anna Myriam Roccatello: Transitional justice measures are still often understood as temporary or a form of “extraordinary justice,” and this can contribute to misconceptions. Specialization is sometimes needed to address particularly complex cases, but the experience and knowledge acquired in dealing with sensitive cases need to trickle down to the rest of the institution to have an effective impact. In Italy, specific anti-mafia institutions were



Tunisian protesters in the capital, Tunis, demonstrate against government corruption on February 2, 2019. (Hammadi Lassoued/Nawaat)

established according to a national strategy. The creation of this structure was essential to tackle the problem, but it was and remains not always easy to manage the relations with other judicial and investigative bodies. It can only handle a certain number of cases and has left a number of related cases to the “ordinary” judiciary that do not always have the same level of resources. Specialization is needed for a specific problem, but how do we move from specialization to maximize the learning drawn from specialization?

Walid Malki: Specialization started with anti-terrorism and anti-corruption. But you have to come up with judges who are competent and experts in these areas. It required building capacity through the high judicial council and to develop a judicial strategy.

Wachira Maina: There are various issues with the Kenya judicial vetting process. Witnesses who gave testimony were not given immunity, so if someone said they bribed a judge then they could face criminal charges. Some decisions of the vetting board were challenged in court and decided by judges still waiting to be vetted. Furthermore, some judges had previously been found unfit as lawyers, yet the vetting proceedings focused only on their performance as judges.

Question from the audience: Corruption in Tunisia goes back 60 years, and even after the revolution it continues and is linked to the liberal system. Should we get out of the liberal system?

Rafik Grigoryan: With reference to liberal or illiberal, in our country people raise this question because they feel reforms are not going the way they want. Lawfulness is the core of our principles, and fairness is our essence. We will not infringe on these principles.

Question: from the audience: If we dismissed half of the officials from Ben Ali’s dictatorship, would our situation be better? How can we trust and recover hope among victims when the transitional justice special court is taking so long?

Walid Malki: Not all judges under Ben Ali were corrupt. But in the 10 years since the revolution, there have been both dismissals and renewals among judges including some who were working during the Ben Ali period. Time has an important value when it comes to transitional justice; the system is an ever-changing one. Delays in the legal proceedings are caused by different problems, like the refusal of perpetrators to appear in court and the need for the Specialized Chambers to complete the work that the TDC was mandated to carry out but did not complete.

Panel 4: What Are the Challenges in Holding Perpetrators of Corruption During Dictatorship Accountable and in Ending State Capture?

Moderator:
Agatha Ndonga,
Head of ICTJ Kenya
Office

- **Wachira Maina**, Kenyan Lawyer and author of the 2018 Africa Center for Open Governance report, *State Capture: Inside Kenya's Inability to Fight Corruption*
- **Sona Ayvazyan**, Executive Director, Transparency International Armenia
- **Judge Najet Bacha**, Commissioner, INLUCC

Wachira Maina: Kenya has tried virtually everything to address large-scale corruption from 1990 until 2018. We have had eight different mechanisms to address past violations and all have failed. The conclusion must be that there is something much deeper happening in Kenya. This is state capture.

Despite all these efforts, corruption still rises and has transitioned between regimes. It is likely to transition again after the 2022 election. In an environment like this, regimes that prioritize justice, lose power. To keep power, they must also use government finances and reward key groups on whom they depend for support. When we have had financiers and their supporters heavily invested in the economy, Kenya has had predictable economic conditions. Those groups rely on government contracts. As long as the government provides them these contracts, they are fine. This is however detrimental to a healthy economy and for stable economic policy. It leads to high levels of impunity and to high levels of corruption, as the system will not punish its own supporters.

In terms of the ethnic and geographic make up of voters and electoral support, we can see that a more narrow base of voters has led to greater state capture, while a wider base of voters has led to lesser capture. The current government has narrowed more and more its electoral base. It now has one of the weakest mandates of any government in Kenyan history. While a plutocracy is not incompatible with inclusive politics, malignant state capture is incompatible with mass and more democratic politics. We need to worry about state capture, because capture can easily become stable or even permanent.

Having democratic institutions alone cannot get rid of state capture because state capture destroys hope in democracy. It creates a bogus democracy, which drives people away from moderate stances and makes the extremes look more desirable. The characteristics of state capture are (1) power is held by the president or military; (2) they control the cash, treasury, and revenue; (3) formal structures remain as does separation of powers, but the real power

resides in parallel structures; (4) oversight is eroded; (5) police are in the pocket of whoever is in power; (6) loyalty rather than lawfulness is rewarded; (7) the few essential services projects implemented, such as schools and hospitals, are given exaggerated visibility; (8) taskforces or independent inquiries are set up to provide the illusion of investigating problems and to drain the energy of the opposition; and (9) control over the electoral management body.

State capture can end (1) when a terminal crisis occurs which results in the system's collapse, for example what happened in Sudan, and (2) the progressive undermining of long-term investment and growth renders the system unsustainable. What can society do? In Kenya, the new constitution has opened up new spaces at the local level and at the level of the judiciary. Civil society can work to collect evidence for future prosecution and pursue and advocate for external prosecutions.

Sona Ayvazyan: With the fall of the Soviet Union, Armenia gradually developed a corrupt and autocratic regime where most decision making served only a few people and groups. In 2003, Armenia formally declared a fight against corruption, adopted laws and the international anti-corruption agenda, but nothing changed. There was no political will. The whole nation was exposed to corruption in various forms, from tax evasion to rigged contracts. The government used organized crime, including during elections, and this created a very intimidating environment.

After growing disappointment, peaceful protests in 2018 threw out the regime. The main promise of the new government is to fight corruption. This is the first time we have witnessed a true fight against corruption. Many criminal cases have been opened against current and past political leaders. There is increasing trust in this government to fight corruption, and people are eager to see perpetrators be brought to justice and have their ill-gotten assets recovered.

However, there are six major challenges for Armenia. (1) There was never an official recognition of the problem. Civil society believes and demands that a transitional justice process should have started with recognition of the problem of state capture to help develop a common understanding of what it is. (2) People expect a quicker response. There is still not a fact-finding commission a year later.¹⁷ Legislation for an anti-corruption enforcement body is still being worked on. This leads to more disappointment among supporters, fuel for the opposition, and time for perpetrators to hide assets. (3) The target and scope of institutional reforms are still unclear. (4) Trust in the judiciary continues to decrease and judges and law enforcement perform poorly. (5) There is a lack of qualified human resources as a result of poor education during the previous regime. (6) Public engagement represents a challenge. Proper communication from anti-corruption and transitional justice bodies is difficult, and there is the danger that gaps in communication are filled with false information.

Najet Bacha: We diagnosed state capture in Tunisia as a phenomenon happening outside the state. After the revolution, we established a fact-finding committee with experts and lawyers from across the country to document instances of corruption before the revolution. But corruption remained after the revolution. Tunisians see and experience it. For example, a survey shows 70 percent of Tunisians have accepted corruption as a part of Tunisian culture, including NGOs, and many people said they have paid bribes. Some say that while corruption is wrong, it can facilitate their everyday lives. This is proof that we need to find ways to limit corruption because it has led to the impoverishment of working classes, to human rights violations, and to the infiltration of terrorism. We need to involve all citizens and the media in this fight.

¹⁷ The government of Armenia has drafted a bill to create a "fact-finding commission" that proposes to investigate certain cases of corruption, election fraud, and killings. See Arshaluys Mgdesyan, "Does Armenia Need a Truth Commission?" *Institute for War and Peace Reporting*, March 13, 2020, <https://iwpr.net/global-voices/does-armenia-need-truth-commission>.

Our strategy from 2017-2020 has six goals: (1) increase political will; (2) encourage contributions from Tunisian citizens; (3) promote transparency; (4) end impunity; (5) build the capacity of those involved in fighting corruption; (6) coordinate among various stakeholders, particularly the public sector. We have no budget for implementation, but with regard to increasing political will, we have implemented initiatives with international organizations.

Before the revolution, state capture was outside the state, but now it is inside the state. It is among Members of Parliament and decision makers and even in organizations that claim to fight corruption, but hinder the work of Tunisians. I hope more efforts will be made and coordination will increase. Coordination is what is missing, as we cannot end corruption on our own. We need to unite efforts and consolidate political will.

Agatha Ndonga: What is the position of youth, and what role do the youth have to deter corruption in the future?

Wachira Maina: In Kenya, youth have said, “it didn’t matter how you made money; it only mattered that if you were in charge, you make money.” The required asset declarations in Kenya are subject to abuse, as they remain confidential and civil servants are allowed to be investors, so it is not too difficult for them to explain their wealth when it doesn’t match their salary. This became clear in the police vetting process where officers earned 5 to 10 times their official salary.

Sona Ayvazyan: In Armenia, youth fueled the revolution and protests. But now, those under the age of 25 have a lower interest in politics and they feel that they did their job with the revolution. They just want the government to operate, even if their expectations are high. They will likely be more disappointed. Additionally, many nongovernmental organizations are corrupt, because the previous government had been creating pro-government NGOs to show international donors that government officials cooperated with civil society. International assistance would then be channeled through these organizations; now, the same perpetrators of corruption and abuse in the past are creating human rights organizations. It is unclear where the money comes from. Transparency is needed and declaration of assets is needed to also show conflicts of interest.

Najet Bacha: In Tunisia, youth drove the revolution. But the same youth had low interest in elections, and the revolution largely benefited the older generation. Youth’s aspiration turned into a daze, and this has led to emigration. Tunisian legislation has expanded the scope of asset declarations and it is now compulsory for civil servants. Government officials including members of parliament are now required to make asset declarations, but not officials of political parties.

Ruben Carranza: Do we only hold oligarchs and ex-dictators accountable, or do we also hold accountable those international financial institutions that promote privatization that then facilitates state capture?

Wachira Maina: Privatization enables state leaders to sell assets to themselves unlawfully by transferring them from the public sector into the private sector. The problem of state capture is understanding how much the private sector has extended its reach into public affairs. But this leaves your question open. We need to get to the heart of what is state capture and what drives it.

Sona Ayvazyan: I believe that the World Bank is still learning and they didn’t know that they were feeding state capture. But they were experimenting on people to develop their expertise without care for the consequences. It is still important to see where ill-gotten assets from privatization have gone and to return them.

Najet Bacha: Every Tunisian needs a degree of attentiveness when it comes to corruption. Auditing and oversight institutions are needed, as are civil society and citizens' involvement. If they all apply vigilance, we could reduce the threat of corruption and prevent attempts to grab state funds. We have to change our behavior and combat the culture of corruption. We need to use all possible means to combat corruption. Even if we cannot change it now, we need to speak out to disrupt it.

Question from the audience: Can trust in the state or building confidence in government institutions dismantle the system of corruption?

Wachira Maina: The long-term effect of corruption is to erode confidence in the state. People start to trust only non-state actors like religious groups, families, and their own ethnic communities. These are generally high-trust entities. While trust can undermine corruption, the long-term impact of a highly corrupt environment is that trust is gone. State capture means repurposing government institutions for personal benefit and for the benefit of a limited number of people who can influence the government. Capture is not just corruption, and this is very difficult to overcome with mere trust.

Sona Ayvazyan: I don't think more trust in the state and in government institutions alone will help as simple trust can also contribute to corruption and a lot of processes can go wrong. A watchdog organization or oversight institution, instead of just trust, should be constant.

Najet Bacha: Trust is not sufficient. We need to change mentalities. We need to raise awareness of the dangers of corruption and count on civil society for support.

Panel 5: How Can Transitional Justice Support Asset Recovery and the Right to Reparations?

Moderator: Ruben Carranza, ICTJ Senior Expert	<ul style="list-style-type: none">• Commissioner Adelaide Sosseh, Deputy Chairperson and Chairperson of the Reparations Committee, the Gambia Truth, Reconciliation and Reparations Commission (TRRC)• Niccolo Salvioni, Swiss lawyer and expert in international asset recovery litigation and counsel in international mutual assistance cases• Judge Chadli Rahmani, Director, Tunisia State Litigation Agency (SLA)
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Ruben Carranza: The question in this panel combines two elements of transitional justice: asset recovery and economic crimes. Recovering assets is a transitional justice measure. It is meant to punish perpetrators by taking away their ill-gotten assets, to seek truth by finding out what happened to those assets, and it has a reparative justice component because it can lead to funding reparations. In the Philippines two of those mechanisms—asset recovery and reparations—took place. I was a commissioner in the asset recovery commission in the Philippines, which recovered \$680 million from the Swiss bank accounts of the family of Ferdinand Marcos; from that money, \$200 million was used to fund a reparations program and memorialization. In this discussion, we want to hear what other countries are doing to link asset recovery to reparations.

Adelaide Sosseh: The Gambia came out of dictatorship in 2016 and is in the process of transitioning to democracy. Central to the transition is a system of transitional justice to [help the country] come to terms with the past. In 2017, a series of laws setting up a constitutional review, a truth commission, and a national human rights body were established. These institutions form the broader transitional justice framework within the country.

The TRRC has a two-year mandate and is expected to establish a record of human rights violations from 1994 to 2017. Furthermore, reparations are a key component of its mandate. Embedded in the commission title, it shows that reparations are required to recognize victims' suffering and promote reconciliation and ensure non-repetition. A reparations policy has been developed, but, for some, knowing what happened to their loved one is enough. In the interim, we are providing medical, educational, and psychosocial support.

The TRRC has created a better understanding of how the Jammeh dictatorship operated and the power and wealth he and his family amassed. There was limited knowledge before, because Jammeh suppressed the media so there would be no investigation into these crimes. While Jammeh's assets located within the country were largely recovered, those located abroad

are extremely difficult to recover. Jammeh still has access to and is using them to maintain power and influence over his loyalists in the Gambia. They are demanding his return. He continues to transfer money to his cronies to carry out activities on his behalf. To succeed in this work, we have to work in partnership with other organizations.

To be eligible for reparations, victims must have testified during a public hearing or have submitted a written testimony. We fear that many victims are yet to be identified, particularly victims of sexual and gender-based violence, and provisions must be made to ensure they will receive reparations. Another challenge is the TRRC's limited capacity to provide psychosocial support to victims. The public hearings have traumatized the nation. To ensure that the "Never Again" agenda succeeds, victims need to receive reparations and there has to be a shift in the mindset of Gambians. With only a year left in the TRRC's mandate, civic education and the continued engagement of civil society are crucial.

Niccolo Salvioni: Transitional justice structures like truth commissions are important mechanisms for dealing with a troubled past. But in order to identify and recover illicit assets, they should have a specific power to ask for international assistance in criminal matters, which in Switzerland is governed by the law on international mutual legal assistance in criminal matters, or IMAC law. A post-conflict or post-authoritarian state could open a criminal proceeding that guarantees the most basic procedural rights for the accused and ask the Mutual Assistance Unit within the Federal Department of Justice and Police for assistance on the basis of a bilateral treaty between the relevant requesting state and Switzerland or on the basis of the IMAC law. The request must be based on evidence. But if, for example, the number of a Swiss bank account cannot be specified in the request, and depending on the gravity of the case, a bank alert may already be circulated among banks.¹⁸

While the definition of "criminal matters" under the IMAC appears to exclude assistance to transitional justice commissions, certain arbitration and other settlement procedures may, however, fall within its scope. Also, while international judicial cooperation in criminal matters can generally only be granted in cases involving the prosecution of criminal offenses initiated in the requesting state,¹⁹ Switzerland has granted assistance for investigations conducted by administrative authorities, if those investigations are the preliminary stage of a procedure that later involves judicial authorities.²⁰ The same applies to a parliamentary committee of inquiry that could lead to criminal proceedings.²¹ While it is difficult to apply this to those truth commissions whose work is not preparatory to a criminal trial, cooperation can be envisaged if their mandate or work relates somehow to criminal investigations.

With respect to freezing and returning ill-gotten assets, the Federal Department of Foreign Affairs has a unit, the Section on Restitution of Illicit Assets, that coordinates the administrative procedure for freezing and asset recovery. The Federal Act on the Freezing and Restitution of Illicit Assets Held by Foreign Politically Exposed Persons recognizes the possibility of a settlement between parties. Thus, it is conceivable to coordinate between the criminal proceeding and the work of a truth commission or any other commission with the mandate to investigate corruption and pursue the recovery of ill-gotten assets. Under Swiss criminal procedure, the foreign party claiming ownership of Swiss assets can surrender and waive their claims in exchange for withdrawing criminal proceedings in Switzerland and abroad, including for instance money laundering cases in Switzerland.

More broadly, the Swiss Task Force on Dealing with the Past, the Section on Restitution of Illicit Assets, and the Division for International Legal Assistance could offer solutions

¹⁸ See Swiss Confederation Federal Department of Justice and Police, *International Mutual Assistance in Criminal Matters: Guidelines, Ninth Edition* (2009), 39, note 279.

¹⁹ Decision of the Federal Tribunal 132 II 178 Consideration 2.2.

²⁰ Decision of the Federal Tribunal 109 Ib 50 Consideration 3.

²¹ Decision of the Federal Tribunal 126 II 316; see also Decision of the Federal Tribunal 133 IV 40.

that align with the interests of a transitional justice body and integrate this in the asset recovery process. It is important to note that, in the Swiss Foreign Illicit Assets Act, the asset recovery and restitution process is meant to pursue goals that are consistent with transitional justice objectives, such as reparations. The same law also allows the Swiss government to give technical support and expert assistance in recovering ill-gotten assets. This means that after the forfeiture of ill-gotten assets, Switzerland remains interested in monitoring how recovered assets are used, including their allocation to fund reparations programs designed by a transitional justice body.

Judge Rahmani: The State Litigation Agency [SLA] was created in 1962 to be the lawyer for the state. But since the revolution, we have also been tasked with the recovery and confiscation of the Ben Ali dictatorship's assets. The recovery of assets has been carried out through multiple mechanisms. The SLA is part of a committee, along with the Central Bank and the Ministry of Finance, which will oversee cases regarding stolen assets. Since 2011, the European Union has taken measures to freeze the assets of Ben Ali. We cooperate with the EU as well as with peer institutions around the world and have managed to identify various ill-gotten assets linked to Ben Ali abroad.

The legal and financial issues involved are complex and make our work difficult. Information from international institutions is not always available, and at times not reliable. One specific burden is to show to the Council of Europe, which oversees compliance with European human rights standards, that we complied with due process requirements, so that freeze orders in Europe will stand. The main issue is ensuring the right of the accused to trial without undue delay. This can get complicated in Tunisia where lawyers cannot represent the accused unless the accused person is present in the hearings. The absence of the defendants in court has caused delays in the proceedings. The SLA has managed to extend the order to freeze the assets for an additional year but we need more resources.

In our strategy, the recovery of assets is pursued in five stages: (1) data and evidence collection, (2) freezing ill-gotten assets by taking judicial measures, (3) pursuing criminal proceedings, (4) enforcing court decisions, (5) and finally recovering assets. The first stage

demands expertise. There are some who say that asset recovery can be achieved in two years, but it can take much longer. We have been working under the transitional justice law, but the support we have received as well as the state's policies related to ill-gotten assets has not been consistent. We aspire to become a permanent and more effective accountability institution for the benefit of all Tunisians beyond our contribution to the transitional justice process.

Michael Marchant: I was struck by the long list of ill-gotten assets currently and previously held in Switzerland. This is not accidental. The Swiss system is favorable to dirty money, and we are seeing new tax havens, too. Just as much as corrupt politicians have captured our states, corrupt interests capture those states that are tax havens as well.



ICTJ Senior Expert Ruben Carranza responds to questions on asset recovery while moderating a panel discussion of the topic on March 3, 2020. (Christopher Boland/ICTJ)

Rafik Grigoryan: Armenia is only starting its own transitional justice process. What can we do now to avoid the problems that Tunisia has encountered?

Judge Rahmani: When Tunisia began pursuing ill-gotten assets, the process we opted for was based on criminal prosecution. Since then, there have been other proposals. Parliament has considered enacting a reconciliation law, for example [that would grant amnesty in return for surrendered assets], given the difficulty of following and tracking the money. There are also proposals to use civil cases to recover ill-gotten assets and to scrutinize transaction which have violated ordinary citizens' rights. Another proposal is to establish a broader task force within the government that can mobilize more capacity and expertise to help solve these cases.

Agatha Ndonga: There is an asset recovery agency in Kenya, but most Kenyans don't know it exists. It does not even have a website. There have been assets recovered and returned to Kenya, but there is no transparency in how the funds are used. What can we do to hold asset recovery agencies and the government itself accountable?

Ruben Carranza: This is why it is important to draft a reparations law. It makes it difficult for Swiss banks to refuse the return of assets. It's a way of pressuring, or even shaming them, into acting faster and ensuring that funds are used appropriately. A law that states recovered funds will be used for reparations is a good way to convince foreign countries to return assets and to ask that the government receiving the assets allocate them for reparations. Before the election, the current Tunisian president said that recovered assets should go to the development of marginalized regions; if adopted, that could help put pressure on foreign governments and banks in returning Ben Ali assets to Tunisia.

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