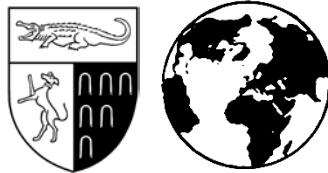


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## The Efficacy of Lustration Laws Within the Pyramid of Accountability: Libya Compared

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### I. INTRODUCTION

The massive, widespread revolutions of 2011 instilled hope across the twenty-five or so countries of the Middle East and North Africa (MENA). Totalitarian regimes were removed, and a new era beckoned. Alongside other modes of accountability, including the trials of former officials, the new Libyan government implemented lustration laws to assist the passage to a post-Qaddafi era.

Transitional periods for regimes emerging from revolution against an oppressive government require a wide range of mechanisms for accountability, and cannot rely solely on the implementation of lustration laws. Because a nascent democracy demands a balance of individual rights with processes indispensable to the efficient and effective performance of law and policy, a central question is whether political exclusion in the shape of lustration laws is useful, or even necessary, for the passage to democracy.<sup>1</sup>

Libya's own timeline will determine its path towards justice. While the

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<sup>1</sup> Draft Memorandum from Tarek Mitri, Special Representative of the Sec'y Gen. and Head of Mission, United Nations Support Mission in Libya on High Commission for Integrity and Patriotism ¶ 6 (Nov. 14, 2012) (on file with authors).

political isolation laws have been implemented, lustration laws alone cannot serve the country's goals for justice. Alone, the lustration laws divide the country even further. As they stand, they cannot help unite it; overly broad lustration laws exclude too freely and indiscriminately to be effective. The Libyan lustration laws target too many people, and exclude people who were particularly active in removing Qaddafi. Lustration laws in isolation are insufficient, and further efforts to protect the new government's integrity should include both trials and a process of truth and reconciliation, which are best embedded in the writing of a new constitution. Without incorporating other measures and alternatives within a coherent policy of accountability, Libya cannot achieve the political stability it needs as the country rebuilds a society devastated by forty-two years of arbitrary rule.

The writing of a social contract for the future in the form of a constitution is also key to the success of accountability. When creating the country's constitutional document, many of the issues and atrocities can be revealed and addressed, just as a truth and reconciliation commission may try to achieve.

Libya has reached a point in its history where it must now consider alternatives to help bolster the healing process of the country. The government is called on to provide a means of healing from the atrocities and violence that its people have suffered, not only for the victims, but also to a qualitatively different extent, for the perpetrators. Post-dictatorship tribunals also serve a critical role in the process by providing a mechanism to identify persons who suffered physical abuse at the hands of previous rulers. Here also, the Libyan experience is halting so far, as the tug-of-war persists between the International Criminal Court, which has indicted Qaddafi, his son Seif, and his head of intelligence Abdallah al-Sanusi, and the Libyan government, which insists on carrying on the trials of the two survivors domestically. When all of these mechanisms—lustration, constitution writing, truth and reconciliation commissions, and judicial tribunals—are incorporated into what we call a "pyramid of accountability," the transition proves most fluid and the state is better able to provide political stability.<sup>2</sup>

For lustration laws to prove effective, it is imperative to have a stable interim government which operates at all levels of the pyramid of accountability. No doubt, countries and societies traumatized by dictatorship will balance politics and ideals to specifically meet their own needs. This balance is elusive in Libya, but a comprehensive dialogue on all levels of the pyramid will go a long way to promote stability. The government must publicly try individuals in the previous regime who have allegedly committed crimes against humanity or other serious war crimes, use truth and reconciliation commissions, incorporate these procedural safeguards into a healthy constitutional process, and draw lessons from the post-dictatorship measures adopted in other states.

In addition to the lack of attention to their place in the larger pyramid, Libya's lustration laws, which we analyze in Part III, are controversial because they target individuals using overbroad criteria, such as any affiliation to the Qaddafi regime. Affiliation is defined in the lustration laws in very general terms in determining an

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<sup>2</sup> The concept of a pyramid of accountability is developed in CHIBLI MALLAT, PHILOSOPHY OF NONVIOLENCE ch. 16 (forthcoming 2015).

individual's ability to participate in public office.

Part II provides a four-country comparative analysis that illustrates lustration legislative policies of four different post-dictatorship governments, and analyzes why they were or were not successful. Part III surveys lustration laws passed in Libya after Qaddafi's demise, and Part IV revisits the comparative register as part of a 'pyramid of accountability' which includes complementary and alternative measures to lustration. Part V then analyzes Libya in a comparative perspective and concludes by recommending supplementation of, and amendments for, some of the dispositions of Libya's current law.

## II. FOUR STATE COMPARISON

*Lustration* derives from the Latin term *lustro*, meaning "to review, survey, observe, examine."<sup>3</sup> In modern practice lustration laws are also referred to as political exclusion, isolation, screening, or vetting laws.

Lustration laws in Czechoslovakia, Romania, Iraq, and El Salvador illustrate the challenges of examining members of former regimes with a view to exclude them by law from political office or state-sponsored positions (such as a state university). Czechoslovakia underwent a nonviolent revolution ("the Velvet Revolution") in 1989. Four years later, it separated into the Czech and Slovak republics, each handling the original lustration laws very differently. Romania experienced a violent revolution resulting in the execution of the dictator and his wife after a hastily arranged trial while the former members of the regime largely remained in power in the new system. El Salvador experienced a long spate of atrocities mainly committed by the military regime. El Salvador's lustration laws were part of a slow transition away from the junta and para-military killing squads, and bore the heavy imprint of the United Nations's intervention. Iraq's dictator Saddam Hussein was removed by a U.S.-led coalition of governments, which promptly followed up with a "de-Ba'athification" model inspired by Germany's "de-Nazification". While there are many more countries that have employed lustration laws in their political transitions, the four examples (arguably five after the secession in Czechoslovakia), all with different histories of regime change provide a large enough sample with which to contrast the specific problems of the recent Libyan experience.

### A. *Czechoslovakia (The Czech Republic and Slovakia)*

The revolution that transitioned Czechoslovakia from communism to democracy was nonviolent. Its lustration model adopted the most stringent and comprehensive set of laws among the post-communist countries.<sup>4</sup> Czechoslovakia

<sup>3</sup> Roman David, *Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989-2001)*, 28 LAW & SOC. INQUIRY 387, 387-88 (2003).

<sup>4</sup> See Zákon č. 279/1992 Sb. (Czech); Zákon č. 451/1991 Sb. (Czech); see also Mark S. Ellis, *Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc*, 59 LAW & CONTEMP. PROBS. 181, 182 (1996) (stating that Czechoslovakia was one of the first countries to adopt stringent lustration laws); David Kosař, *Lustration and Lapse of Time*, 4 EUR. CONST. L. REV. 460, 461 (2008) (suggesting that parts of the far-ranging laws should

adopted lustration laws after the first free parliamentary election following the Velvet Revolution.<sup>5</sup> They were based on the principle of person-specific vetting and provided two lists to which lustration applied. The first list required a lustration procedure before individuals could assume a specific office; the second enumerated offices and activities of the communist regime that disqualified candidates from applying for public office.<sup>6</sup> It required any person seeking public office to provide a personal affidavit and a lustration certificate from the Ministry of Interior verifying that the individual was not associated with the communist regime.<sup>7</sup> The law also subjected incumbents to the lustration procedure.<sup>8</sup>

The most controversial part of the law was labeling citizens as “conscious collaborators,”<sup>9</sup> which attempted to determine whether a person consciously collaborated with the police, or acted as a non-intentional source for the police. Distinguishing between victims and informants proved difficult, and the Constitutional Court eliminated the “conscious collaborator” category.<sup>10</sup> The Constitutional Court also abolished the Independent (Appeal) Commission, and the Ministry of the Interior became responsible for administering lustration.<sup>11</sup>

After the “velvet divorce” in 1993 separated Slovakia and the Czech Republic, federal legislations remained valid in each successor state unless overruled by their respective parliaments.<sup>12</sup> Lustration remained on the books in both republics, but the form and the extent of implementation differed considerably.<sup>13</sup>

be struck down by the Czech Constitutional Court).

<sup>5</sup> Jiri Priban, *Oppressors and Their Victims: The Czech Lustration Law and the Rule of Law, in JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES* 309-11 (Alexander Mayer-Rieckh ed., 2007).

<sup>6</sup> For a full list of protected offices see Zákon č. 451/1991 Sb., § 1 (Czech) (protecting all ranks of judiciary and prosecuting officers; ranks above of colonel and higher in the Czechoslovak army including military attaches; the office of State administration of the Czech and Slovak Federative Republic, Czech Republic and Slovak Republic; the Federal Security Information Service, Federal Police Force and Palace Guard Police Force; senior and higher positions in all constitutional bodies; head of the organization and leading executives within the direct management range of State organizations and state organizations in joint ventures, state organized Czechoslovak State Railway, state banks, state broadcasting and press; and the president of Czechoslovak Academy of Science and the President of the Slovak Academy of Science). For a list of disqualifying conditions see Zákon č. 451/1991 Sb., § 2 (Czech) (stating that the disqualifying positions and activities during the former regime were linked to political bodies; repressive secret police, state security, and intelligence forces; and individuals formally and informally collaborating with these forces). Zákon č. 279/1992 Sb. was referred to as the “small lustration law” because it extended only to police force and prison guard service. See Priban, *supra* note 5, at 309-10.

<sup>7</sup> Zákon č. 451/1991 Sb., § 4 (Czech).

<sup>8</sup> *Id.* § 6(2).

<sup>9</sup> Priban, *supra* note 5, at 308, 312.

<sup>10</sup> Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, 37 COLUM. J. TRANSNAT'L L. 376, 375 (1999).

<sup>11</sup> *Id.*

<sup>12</sup> Jana Kunicová & Monika Nalepa, Coming to Terms with the Past: Strategic Institutional Choice in Post-Communist Europe 4 (unpublished manuscript) (Dec. 17, 2006), available at <http://www.sscnet.ucla.edu/polisci/cpworkshop/papers/Kunicova.pdf>.

<sup>13</sup> *Id.* at 13.

## 1. Czech Republic

The Czech Republic inherited and embraced Czechoslovakia's lustration laws, opting for parliamentary legislation instead of other transitional justice methods. The Legislature passed laws to strengthen lustration, including the Act of Lawlessness of the Communist Regime and the Resistance to It of 1993.<sup>14</sup> The 1993 Act condemned the Communist Regime by holding officers, organizers, and agitators responsible for the crimes they committed and commended those who rose against the crimes.<sup>15</sup> It was primarily drafted as a symbolic gesture, but its provisions incorporated the concept of "responsibility," and thus raised the possibility of enforcement.<sup>16</sup> However, the Act lacked a sunset provision for crimes committed between February 1948 and December 1989.<sup>17</sup> Fearing misuse, forty-one members of the parliament filed for review of the Act before the Constitutional Court.<sup>18</sup> The Court upheld the constitutionality of the Act and found that the sections dealing with "joint responsibility" are not legally binding, stating that they "represent[] the moral-political viewpoint of the Czech Republic."<sup>19</sup> Concluding that these sections could not be used to create criminal liability, the Court distinguished them from Articles 5 and 6 of the Act, which "alone use[d] . . . the precise terminology of criminal law."<sup>20</sup>

In 1996, Parliament enacted the Act of Public Access to Files Connected to Activities of Former Secret Police.<sup>21</sup> This law granted access to the files of the secret police and collaborators to persons potentially affected by the former regime's harassment policy. In 2002, the registers became available to the public, leading to a number of lawsuits from individuals demanding that their names be removed.<sup>22</sup> Czech lustration continues to be "subject to recurring political controversies."<sup>23</sup> By 2006, the Ministry of Interior has received thousands of lustration requests.<sup>24</sup>

## 2. Slovakia

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<sup>14</sup> Priban, *supra* note 5, at 320-21. See generally *Czech Republic: Constitutional Court Decision on the Act on the Illegality of the Communist Regime*, in 3 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 369-74 (Neil J. Kritz ed.,1995).

<sup>15</sup> Zákon č. 198/1993 Sb. § 1, 3 (Czech).

<sup>16</sup> Priban, *supra* note 5, at 321.

<sup>17</sup> Zákon č. 198/1993 Sb. § 5 (Czech).

<sup>18</sup> *Czech Republic: Constitutional Court Decision on the Act on the Illegality of the Communist Regime*, *supra* note 14, at 369.

<sup>19</sup> Nález Ústavního soudu zed ne 21.12.1993 (ÚS) [Decision of the Constitutional Court of Dec. 21, 1993], sp.zn. Pl. ÚS 19/93 publ. in: Sbírka nálezů a usnesení ÚS, sv 1, č. 1 (Czech).

<sup>20</sup> *Id.* at 371.

<sup>21</sup> Priban, *supra* note 5, at 322.

<sup>22</sup> *Id.*

<sup>23</sup> Kosař, *supra* note 4, at 460.

<sup>24</sup> Bureau for Crisis Prevention and Recovery, *Vetting Public Employees in Post-conflict Settings Operational Guidelines*, U.N. DEV. PROGRAMME 45 (2006), <http://ictj.org/sites/default/files/ICTJ-UNDP-Global-Vetting-Operational-Guidelines-2006-English.pdf>.

After the separation between the Czech Republic and Slovakia in 1993, Slovakia saw Vladmir Mečiar, who belonged to the Communist Party, rise to the position of Prime Minister. His government stopped enforcing the Czechoslovakian screening and lustration laws,<sup>25</sup> and they were left to expire in 1996.<sup>26</sup> Compounding an already precarious situation, former state security members used their networks to gather information, and resorted to “old methods, including murders and kidnappings.”<sup>27</sup> Although the Slovak National Council had adopted a law declaring the former Communist regime “immoral” and “illegal,”<sup>28</sup> the law remained largely symbolic with no implementation mechanism.<sup>29</sup>

The new millennium renewed Slovakia’s interest in reinstating lustration laws following “a change in the political situation and the formation of a right wing cabinet.”<sup>30</sup> In 2002, the Slovakian parliament passed a “Nation’s Memory Act.”<sup>31</sup> This law chartered an institute responsible for collecting and publishing information on secret police collaborators.<sup>32</sup> While the scope of the new law was broad, it did not stipulate any legal sanctions or block anyone from running for or remaining in public office. The newly established National Memory Institute (“NMI”) made names of Communist Party members and secret collaborators publically available.<sup>33</sup>

Reactions to the publication of secret police collaborators’ names led to a heated debate. In some cases, people holding public offices resigned upon their identification as collaborators. In other cases, identified collaborators filed lawsuits challenging the reliability of the information.<sup>34</sup> By the end of 2010, forty-three lawsuits for defamation had been filed, of which twenty-four were decided, twelve in favor of NMI, and twelve in favor of the plaintiff.<sup>35</sup> This instilled in the larger public the sense that the files were not accurate and the courts were concerned with manipulation of information, and a high risk of “incorrectly labeling as a collaborator an innocent person.”<sup>36</sup>

## B. Romania

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<sup>25</sup> Pavel Zacek, *The Cases of Czechoslovakia and the Czech Republic*, in PAST AND PRESENT: CONSEQUENCES FOR DEMOCRATISATION 9, 9 (Margraditsch Hatsuhikjan & Corrina Noak-Aetopulos eds., 2004).

<sup>26</sup> Martin Kovanic, *Transitional Justice Dynamics in Slovakia: From Silence to the Nation’s Memory Institute*, 7 CEU POL. SCI. J. 385, 399 (2012).

<sup>27</sup> *Id.*

<sup>28</sup> Ellis, *supra* note 4, at 183.

<sup>29</sup> Kovanic, *supra* note 26, at 399.

<sup>30</sup> Zacek, *supra* note 25, at 10.

<sup>31</sup> Law no. 553/2002 (Slovk.).

<sup>32</sup> *Id.* at §§ 7-8.

<sup>33</sup> Priaban, *supra* note 5, at 437; *see also id.* at 409 (discussing how (1) ten countries belonging to the Eastern European Bloc, including East Germany, preserved voluminous archives of surveillance done by previous communist regimes s; (2) these archives have become an object of political struggle; and, (3) the files have become a part of political life).

<sup>34</sup> Kovanic, *supra* note 26 at 404.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

Unlike the rest of Eastern Europe, Romania underwent a violent revolution against the Ceausescu dictatorship. Romanians struggled to determine which transitional mode to adopt after the 1989 revolution. The majority favored reconciliation because of the violent nature of the revolution and the strong presence of Communist Party members among the elites. Others believed that lustration was the *sine qua non* condition to render the democratization process in Romania irreversible. These two positions formed the main poles of the public debate.<sup>37</sup> In May 2010, over twenty years later, the Romanian Chambers of Deputies approved a Law of Lustration which temporarily limited access to certain public functions for members of the repressive bodies and of the leadership of the communist regime between March 1945 and December 1989.<sup>38</sup> The determination did not last long. After twenty-nine Senators and fifty-eight Deputies filed complaints, the Constitutional Court found the law unconstitutional.<sup>39</sup>

In February 2012, the Romanian Chamber of Deputies approved revised lustration laws.<sup>40</sup> The revised law created a five-year period during which former Communist party members were restricted from “being called” (i.e., holding any of the public positions catalogued by the law that are either elected or appointed).<sup>41</sup> Within thirty days of becoming effective, the law required officials holding any of the catalogued positions to disclose whether they had been a member of a Communist party between 1945 and 1989.<sup>42</sup> While some people claimed that the law would have minimum effect and mainly impact the lower levels,<sup>43</sup> others were relieved to see some justice even if it came two decades late.<sup>44</sup> However, on March 28, 2012, the Romanian Constitutional Court ruled these lustration laws unconstitutional.<sup>45</sup> In 2013, the Senate of the Romanian Parliament also rejected the laws citing the Romanian Constitutional Court’s decision.<sup>46</sup> Following the

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<sup>37</sup> HOLGER DIXORINA REBEGEA, THE SHORT HISTORY OF THE ROMANIAN LUSTRATION LAW, COUNTRY REPORT 1-2 (July 21, 2010).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1.

<sup>40</sup> *Id.*

<sup>41</sup> Paul Ciocoiu, *Lustration Law Passed in Romania, a Symbolic Act*, SOUTHEAST EUROPEAN TIMES, Mar. 9, 2012, [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/features/setimes/features/2012/03/09/feature-02](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2012/03/09/feature-02).

<sup>42</sup> *Id.*; Law 282/2006, art. 2 (Romania), available at [http://www.cdep.ro/pls/proiecte/docs/2006/cd282\\_06;1.pdf](http://www.cdep.ro/pls/proiecte/docs/2006/cd282_06;1.pdf). (stating that a person who meets any criterion referenced in Article 1 may not hold any of the specified positions for a period of 5 years from the date of entry into force of the law)

<sup>43</sup> Ciocoiu, *supra* note 40; Law 282/2006, art. 2 (Romania), available at [http://www.cdep.ro/pls/proiecte/docs/2006/cd282\\_06;1.pdf](http://www.cdep.ro/pls/proiecte/docs/2006/cd282_06;1.pdf).

<sup>44</sup> Ciocoiu, *supra* note 40.

<sup>45</sup> *Id.*

<sup>46</sup> Romania Curtea Constituțională [Constitutional Court of Romania], Decizia nr. 308, Dosarul nr. 604A/2012 (Mar. 28, 2012) (Romania), available at <http://www.cdep.ro/proiecte/2006/200/80/2/decizia308.pdf>.

<sup>47</sup> Valeriu Ștefan Zgonea, Președintele Camerei Deputaților [President of the Chamber of Deputies], Statement addressing the Romanian Senate (February 12, 2013), available at <http://www.cdep.ro/proiecte/2006/200/80/2/as282rx2.pdf> (stating that the law was reviewed and rejected by the Senate on February 12, 2013, and that the law is now to be determined by

Senate's decision, the Chamber of Deputies debated the revised law, adopted in 2012, but the majority of the Chamber ultimately decided to reject it despite the revisions.<sup>47</sup> This may not be the end of the protracted process. Even though it is hard to evaluate the impact of the lustration laws in Romania, it is clear that the issue of the responsibility of former agents of the repression has not been forgotten.<sup>48</sup>

### C. El Salvador

After twelve years of a fierce war between El Salvador and the guerrilla movement, the Farabundo Martí National Liberation Front (FMLN), the parties signed a peace agreement in 1992, which ended armed conflict and promised several political reforms. The reforms constituted the most "thoroughgoing democratization that Salvadoran society had undertaken since its independence,"<sup>49</sup> including demilitarization.<sup>50</sup>

Constitutional reform also redefined roles for the armed forces, limiting them to the external defense of the country. Police functions, once entrusted to the armed forces, were separated out, and given to a newly established police force, the National Civilian Police.<sup>51</sup> The military was also deprived of its paramilitary support network, reducing the total number of forces. Reforms also included the creation of institutions to protect human rights, bolstered independence of the judiciary, and the establishment of the Commission on the Truth in El Salvador ("Truth Commission").<sup>52</sup>

In parallel, the U.N. Secretary General appointed an ad-hoc commission which began reviewing the records of military officers in May 1992.<sup>53</sup> "The commission named 223 military personnel, including about 100 officers and the Minister of Defense and Public Security, Gen. René Emilio Ponce."<sup>54</sup> The

the Chamber of Deputies).

<sup>47</sup> *Transcript of the Debate During the Chamber of Deputies Meeting on March 19, 2013*, ROMANIAN PARLIAMENT (Mar. 19, 2013) (debating merits of the use of lustration laws), <http://www.cdep.ro/pls/steno/steno.stenograma?ids=7241&idm=15>; *Result of the Final Vote at the Chamber of Deputies Meeting on March 19, 2013*, ROMANIAN PARLIAMENT (Mar. 19, 2013), <http://www.cdep.ro/pls/steno/steno.stenograma?ids=7241&idm=21,003>.

<sup>48</sup> See generally Andrew Higgins, *In Trial, Romania Warily Revisits a Brutal Past*, N.Y. TIMES, Sept. 29, 2013, <http://www.nytimes.com/2013/09/30/world/europe/in-trial-romania-warilly-revisits-a-brutal-past.html> (reporting that Romania has started conducting trial of people, who were officers during the communist era, over their involvement in the Communist-era abuses).

<sup>49</sup> Rubén Zamora & David Holiday, *The Struggle for Lasting Perform: Vetting Processes in El Salvador*, in JUSTICE AS PREVENTION: SETTING PUBLIC EMPLOYEES IN TRANSNATIONAL SOCIETIES 80, 82 (A. Mayer-Rieckh & P. de Greif eds., 2007).

<sup>50</sup> *Id.* at 83.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Monika Nalepa, *Lustration Report for Post-Conflict 14* (Justice Fighting Impunity and Promoting Int'l Justice: European Initiative for Democracy and Human Rights, Working Paper, 2009), available at [http://www3.nd.edu/~mnalepa/index\\_files/2%20Lustration%20Report%20\\_bb\\_x.pdf](http://www3.nd.edu/~mnalepa/index_files/2%20Lustration%20Report%20_bb_x.pdf).

<sup>54</sup> *Id.*

President, Jose Napoleon Duarte, agreed to remove the officers, except for Ponce, and the FMLN began to destroy its weapons.<sup>55</sup> The President also formed a special commission to curb human rights violations in the army, and to remove from office persons linked to activity such as the death squads.<sup>56</sup>

The United Nations also appointed a truth commission to investigate human rights abuses. Subsequent to the Commission's March 1993 report "recommending purging, barring and disqualifying elements of the armed forces from public service," 103 military personnel were removed from office.<sup>57</sup> The Commission also recommended that members of the Supreme Court resign due to their failure to protect human rights.<sup>58</sup> Even those in the ARENA [Nationalist Republican Alliance]-controlled legislative assembly, who pushed to enact an amnesty law that would forgive all crimes committed before 1992 agreed that the law should only be implemented after the truth and ad hoc commissions' recommendations have been adopted.<sup>59</sup>

#### D. Iraq

Iraq's Lustration laws, the "de-Ba'athification" laws, were introduced in April 2003 to prevent members of the disbanded Baath Party, a key instrument of oppression of Saddam Hussein, from returning to power.<sup>60</sup> Because between 1.2 and 2 million Iraqis are believed to have been members of the Baath party, the lustration laws significantly impacted the organization of Iraq's military and government.<sup>61</sup>

Through the Coalition Provisional Authority (CPA), U.S. officials adopted a broad "de-Ba'athification of Iraqi Society," which sought to eliminate the Baath Party by "removing its leadership from positions of authority and responsibility."<sup>62</sup> Senior members belonging to the top four ranks of the Baath party were excluded from public administration positions and individuals at any level of Baath party membership were excluded from management positions. Equating party membership and rank with responsibility, the exclusions assumed that those individuals must have committed serious human rights violations.

A second order dissolved the Iraqi armed forces and other organizations "which might otherwise afford Baathists opportunities to return to power."<sup>63</sup>

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 13.

<sup>57</sup> *Id.* at 14.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Miranda Sissons & Abdulrazzaq Al-Saiedi, *A Bitter Legacy: Lessons of De-Ba'athification in Iraq*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE 9 (Mar. 2013), <http://ictj.org/sites/default/files/ICTJ-Report-Iraq-De-Ba'athification-2013-ENG.pdf>.

<sup>61</sup> *Id.* at 6.

<sup>62</sup> 2 STEFAN TALMON, THE OCCUPATION OF IRAQ: THE OFFICIAL DOCUMENTS OF THE COALITION PROVISIONAL AUTHORITY AND THE IRAQI GOVERNING 53 (2013); see also Roman David, *From Prague to Baghdad: Lustration Systems and their Political Effects*, 41 GOV. AND OPPOSITION 347, 366 (2006).

<sup>63</sup> Sissons & Al-Saiedi, *supra* note 60, at 11.

Conflating the total disbandment of the army with the more nuanced political exclusion policy of high members of the Baath party was a serious mistake which created a cloud over the whole process. As the conflated policy turned into a massive object of criticism, CPA head Paul Bremer cancelled the disbandment of the army by keeping soldiers on the payroll, and relaxed the de-Ba'athification law in April 2004.<sup>64</sup>

One month before the 2005 elections of a 275-member parliament, the de-Ba'athification committee submitted 185 names to the electoral commission in charge of vetting members running for election.<sup>65</sup> Many candidates questioned the de-Ba'athification committee's evidence and refused to concede to its decision. The de-Ba'athification committee responded by raising the issue with the Supreme Judicial Court.<sup>66</sup> The Court ruled in the de-Ba'athification committee's favor, "forcing the electoral commission to respect the committee's findings."<sup>67</sup>

Of note is the fact that a parallel vetting and selection process among Iraqi judges and prosecutors got under way.<sup>68</sup> In 2003, all sitting judges and prosecutors were subjected to a vetting process, and the new appointees underwent a careful selection process. Any former Baath Party member was banned from becoming a judge.<sup>69</sup> This standard was almost impossible to maintain because party membership was strongly enforced among judges and prosecutors during Hussein's rule, eliminating any institutional memory within Iraq's new judiciary. The de-Ba'athification commission intervened successfully three times in judicial assignments directly related to the Hussein trial: the first in July 2005, when administrative staff were dismissed (but judicial staff were not); the second in January 2006, when a judge was removed and transferred to another case; and the final time also in 2006, when an internal tribunal de-Ba'athification committee was created, resulting in the dismissal of several staff and more changes to judicial assignments.<sup>70</sup>

In December 2008, the Iraqi parliament passed the Accountability and Justice

<sup>64</sup> Nalepa, *supra* note 53, at 28.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> This was largely impelled by the systematic use by Saddam Hussein of judges to give legal cover to his atrocities, best documented in the Dujail trial, where the trial court rendered its judgment on November 5, 2006. For a full translation of the trial court decision, see *Al-Dujail Lawsuit (Case)*, MIZNA MANAGEMENT LLC (Nov. 5, 2006), <http://gjpi.org/wp-content/uploads/dujail-first-instance-eng.pdf>; see also Issam Saliba, *Translation of the Appellate Decision Affirming the Death Sentence Against Saddam Hussein*, LIBRARY OF CONGRESS, <http://www.loc.gov/law/help/hussein/appellate.html> (last updated July 3, 2007) (providing a succinct translation of the dispositive parts of the appellate decision). The appellate decision was final. It summarized the prior proceedings, concluded that the appeal was timely filed, discussed extensively all the defense arguments (immunity, competence of the court, evidence and facts, chain of command), and reaffirmed the death sentence against Saddam Hussein. *Id.* For a timeline of the Dujail trial, excerpts of the decision, comments and further literature, see CHIBLI MALLAT, IRAQ: GUIDE TO LAW AND POLICY 176-90 (2009).

<sup>69</sup> Sissons & Al-Saiedi, *supra* note 60, at 16.

<sup>70</sup> *Id.* at 16-17.

Law, which removed restrictions imposed on middle-ranking Baath members.<sup>71</sup> However, efforts to tame the impact of Iraqi lustration failed to stop the conflict because excluded and marginalized Baathists resisted the new system.<sup>72</sup> The extensive dismissals or exclusions also resulted in a lack of qualified professionals to run the administration, the security, and the police.<sup>73</sup>

Amidst a resurgence of widespread civil strife, the de-Ba'athification Commission continued its work. For the national parliamentary elections which took place in early 2010, the Commission again vetted a number of parliamentary candidates, which led to the disruption of the electoral process. It also led to the assassination of the president of the Commission, an occurrence which illustrated the limits inherent to raw political exclusion measures in the continuously charged atmosphere of Baghdad.

### III. LIBYA

#### A. *Basic Historical Context*

A sovereign government since 1951, the Libyan monarchy was overthrown in 1969 by Qaddafi (Mu'ammar al-Qadhdhafi) in a military coup. In mid-February 2011, a peaceful demonstration in Benghazi led to a brutal response from the police, heralding another outbreak civil unrest in the Middle East and adding momentum to the so-called ‘Arab Spring’ which had started in Tunisia and Egypt and spread across the MENA region. After security services fired against initially nonviolent demonstrators, the protestors seized control of Benghazi by force on February 20, 2011. Protests then spread across the country, resulting in widespread armed rebellion against Qaddafi.<sup>74</sup> Unlike Tunisia, Egypt, and Yemen, where the 2011 revolutions brought down the dictator with little or no violence, the Libyan revolution turned violent almost immediately after the outbreak of demonstrations in mid-February 2011.

In the following weeks, Qaddafi and his forces soon reclaimed many of the rebel-held areas, but in March 2011, the United Nations responded to the imminent threat to Benghazi by passing Security Council Resolution 1973, which demanded an immediate ceasefire and authorized “all necessary measures” to protect civilians.<sup>75</sup> Two days later, a multi-state coalition began bombing Qaddafi’s forces.<sup>76</sup>

The rebels hastily organized interim government, the National Transitional Council (NTC), and the rebellion’s freshly appointed leader, Mustafa Abdel Jalil, announced himself in Behghazi on March 5, 2011.<sup>77</sup> The NTC finally took over

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<sup>71</sup> *Id.* at 18.

<sup>72</sup> David, *supra* note 62, at 367.

<sup>73</sup> *Id.*

<sup>74</sup> For an account of the revolution, see ETHAN DANIEL CHORIN, EXIT THE COLONEL: THE HIDDEN HISTORY OF THE LIBYAN REVOLUTION 201-02 (2012).

<sup>75</sup> S.C. Res. 1973, para. 4, U.N. Doc S/RES/1973 (Mar. 17, 2011).

<sup>76</sup> CHORIN, *supra* note 74, at 227.

<sup>77</sup> *Id.* at 204; *see also* Administrator, *Council*, NAT'L TRANSITIONAL COUNCIL (Apr. 4, 2012, 1:16 PM), available at

Tripoli at the end of the summer,<sup>78</sup> and was recognized as the legitimate governing body of Libya by the United Nations on September 16, 2011.<sup>79</sup> After Qaddafi's death at the hands of anti-regime militias on October 20, 2011, the new government implemented lustration laws to ensure that former regime members would not return to power.

### B. *The Lustration Laws*

In 2012, the NTC passed Law No. 26 on The High Commission for the Implementation of Integrity and Patriotism Criteria.<sup>80</sup> The law treated all individuals associated with the previous regime in the same way, regardless of their alleged crimes. Article 8 excluded from public office those who defected and became active members of the rebellion. This Article restricted certain positions held prior to, or during the revolution, "regardless of his position or his positive attitude towards 17th February revolution."<sup>81</sup> This included: "Presidents of student unions after 1976," "[a]nyone known to praise the regime of Muammar Qadhafi or the themes of the Green Book, either through the media or direct contact with the public," and "[a]nyone who was a business partner with Muammar Qadhafi's sons and their institutions."<sup>82</sup> After a strong backlash against its overbreadth, the NTC amended Article 8 later that year.<sup>83</sup> The amendment improved the status of public officials sympathetic to the revolution who joined within the first month providing an "exception of public posts and positions, occupants of which had joined the 17 February Revolution prior to 20 March 2011."<sup>84</sup>

The public debate continued, and a new lustration law, Law No. 13, was passed in 2013.<sup>85</sup> Much like its Czechoslovakian counter-part, the law articulates standards for public office on a strict basis. Anyone who assumed a position in the former regime may not hold public office.<sup>86</sup>

Article 2 of Law 13 prohibits anyone linked to the Qaddafi regime from

<sup>78</sup> [http://ntc.gov.ly/index.php?option=com\\_content&view=article&id=4:2012-04-04-12-43-02&catid=1:2012-04-04-12-40-59&Itemid=2](http://ntc.gov.ly/index.php?option=com_content&view=article&id=4:2012-04-04-12-43-02&catid=1:2012-04-04-12-40-59&Itemid=2)

<sup>79</sup> CHORIN, *supra* note 74, at 253.

<sup>79</sup> Press Release, General Assembly, After Much Wrangling, General Assembly Seats National Transitional Council of Libya as Country's Representative for Sixty-Sixth Session, U.N. Press Release GA/11137 (Sept. 16, 2011), available at <http://www.un.org/News/Press/docs/2011/ga11137.doc.htm>.

<sup>80</sup> Law on the High Commission for the Implementation of Integrity and Patriotism Criteria, art. 8 (Law No. 26/2012) (Libya) (on file with authors), replaced by Law on Political and Administrative Isolation (Law No. 13/2013) (Libya) (on file with authors, English and Arabic)

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* Emulating Mao's Red Book, Qaddafi's Green Book (first published in 1975) was a hodge podge collection of reflections that featured an alleged 'Third Way' partly based on the Islamic tradition.

<sup>83</sup> On the Amendment of Law No. 26 of 2012: On the High Commission for the Implementation of Integrity and Patriotism Criteria (Law No. 39/2012) (Libya) (on file with authors)

<sup>84</sup> *Id.* art 2(a).

<sup>85</sup> Law on Political and Administrative Isolation (Law No. 13/2013) (Libya) (on file with authors).

<sup>86</sup> *Id.* art. 1.

holding a government-related position.<sup>87</sup> These individuals also may not hold high administrative positions,<sup>88</sup> and there is no allowance for “mitigating circumstance; for example many of those who could be isolated spent long periods holding the dangerous position of being publically opposed to Qaddafi.”<sup>89</sup> The law treats all former officials in the same blanket manner. It does not distinguish between those who continued to support Qaddafi throughout the Revolution and those who actually abandoned him at great risk to participate actively in his removal from power.

Article 3 creates the High Commission for the Application of Public Positions Standards.<sup>90</sup> To protect the integrity of the Commission, members of the Commission must be politically neutral Libyan citizens, over the age of 35, and have a law degree.<sup>91</sup> These individuals must be known for their integrity, and may not have been convicted of a felony or a misdemeanor “involving moral turpitude” or have been dismissed from employment for a non-political reason.<sup>92</sup>

Article 10 gives the Commission the “right to investigate” candidates for positions specified in Article 2. The Commission is “entitled to request all information which it deems necessary” and can “summon the person concerned to hear his/her statement.”<sup>93</sup> The Commission must then reach a simple majority decision within 21 days.<sup>94</sup> Decisions of the Commission can be appealed to the Court of Appeals, but the appeal must be lodged within a 10 day period.<sup>95</sup>

Any person who provides inaccurate information or does not complete the Commission’s questionnaire shall be punished with at least a year of prison.<sup>96</sup> This punishment applies to any official refusing to provide or help the Commission with documents it may request. Members of the Commission themselves may not have charges brought against them and they enjoy immunity from lawsuit or investigation.<sup>97</sup>

Close observers of the Libyan lustration process identify two potential consequences of affording the Commission such extensive rights. First, “[i]t could allow corruption within the Commission, remaining unchecked, as civilians are unable to initiate proceedings against Commission members, and there is no mechanism for them to push the General National Congress (GNC) to do so.” Second, “[p]owerful parties within the GNC that are likely to lose members or allies through the Commission’s work, could use constant interpellations and

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<sup>87</sup> *Id.* art. 2.

<sup>88</sup> *Id.* art. 2(4).

<sup>89</sup> Tarek Megirisi, *Analysis of Legislation No. 13 2013: Structure, Criteria, and Committee*, SADEQ INST. 2 (June 2013), [http://www.sadeqinstitute.org/wp-content/uploads/2013/07/Policy-Brief\\_Megirisi-Political-Isolation-Part-1.pdf](http://www.sadeqinstitute.org/wp-content/uploads/2013/07/Policy-Brief_Megirisi-Political-Isolation-Part-1.pdf).

<sup>90</sup> Law No. 13/2013, art.3 (Libya).

<sup>91</sup> *Id.* art. 5.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* art. 10.

<sup>94</sup> *Id.* art. 11.

<sup>95</sup> *Id.* art. 12.

<sup>96</sup> *Id.* art. 17.

<sup>97</sup> *Id.* art. 9.

dismissals as a tool both for intimidating members of the Commission, as well as stalling their work.”<sup>98</sup>

### C. Effects

The lustration law as it exists in Libya is vague and gives the Commission wide discretion regarding interpretation; the impact of the lustration law remains unclear, and an unclear criminal law is always problematic. Libya lacks a committed outside force to enforce the laws, and the absence of a professional administration, which has been either corrupted or destroyed by the old regime, deprives the courts of an essential domestic apparatus to guide or relay policy. The current law is problematic because both enforcement and failure of enforcement have manifestly undesirable consequences.

The Libyan political isolation law does not only impose unfair restrictions on individuals’ rights to hold public office, but also affects support for the new government. In large part because the revolution was violent, sixty or more militias have had unfettered authority on the area they control since the fall of Qaddafi.<sup>99</sup> The lack of government control is manifest in several instances of militia attacks ranging from the killing of the U.S. consul in Benghazi to the surrounding of parliament and the ministries, notably the justice ministry. These attacks were perpetrated in order to pass overbroad legislation that serves militias’ immediate political purposes, including the passage of the lustration law.

Libya experienced a brief respite from conflict immediately following the fall of Qaddafi, but it was soon engulfed in an internal conflict between competing visions of how to proceed. The government which emerged after two successive free elections is seeking stability through the rule of law; the militias have been acting with a general disregard for any law by clinging to revolutionary legitimacy.<sup>100</sup> For Libya, this ongoing struggle between the government and the militias continue to dwarf all other issues.<sup>101</sup> In light of this power struggle, the lustration law has turned into a tactical instrument in the greater political conflict. Some Islamist groups in particular, sought lustration laws passed in terms broad enough to push rivals who had actively fought Qaddafi out of the political process.<sup>102</sup> These political conflicts continue to contribute to the chaos, including a standoff between the forces of former General Khalifa Haftar’s “Libyan National

<sup>98</sup> Megirisi, *supra* note 89, at 4.

<sup>99</sup> Alfred Stephan & Juan J. Linz, *Democratization Theory and the “Arab Spring,”* 24 J. OF DEMOCRACY 15, 27 (2013) (quoting Robert F. Worth, *In Libya, the Captors Have Become the Captive*, N.Y. TIMES, May 9, 2012, <http://www.nytimes.com/2012/05/13/magazine/in-libya-the-captors-have-become-the-captive.html>).

<sup>100</sup> Eljarh, Mohamed, *Libya’s Fight for the Rule of Law*, Foreign Policy, FOREIGN POLICY, 4 April 2013, [http://transitions.foreignpolicy.com/posts/2013/04/04/libya\\_s\\_fight\\_for\\_the\\_rule\\_of\\_law](http://transitions.foreignpolicy.com/posts/2013/04/04/libya_s_fight_for_the_rule_of_law).

<sup>101</sup> *Id.*

<sup>102</sup> Tarek Megirisi, *Analysis of Legislation No.13 2013: Impact on Libya’s Political Sphere*, SADEQ INSTITUTE 3 (June 2013), [http://www.sadeqinstitute.org/wp-content/uploads/2013/07/Policy-Brief\\_Megirisi-Political-Isolation-Part-2.pdf](http://www.sadeqinstitute.org/wp-content/uploads/2013/07/Policy-Brief_Megirisi-Political-Isolation-Part-2.pdf)

Army” and Parliament in spring 2014,<sup>103</sup> and the total collapse of law and order in the summer of 2014 between the elected Parliament and the Islamic groups.

Lustration is also of fundamental concern because its effects are in tension with the principles that are emerging in the slow but critical constitutional process in Libya. Libya’s lustration laws conflict with the purposes of the interim constitution, which was written with the “hope of seeking a society of citizenship, justice, equality, blooming, progress and prosperity. Wherein there is no place for injustice, tyranny, despotism, exploitation and dictatorship.”<sup>104</sup> The purpose of any constitution is to promote equality of law and justice for all, which is hindered by lustration laws limiting an individuals’ ability to seek employment or hold public office.

Specifically, the current lustration laws prevent any former government officials from holding future public office, regardless of whether they actively worked against Qaddafi before or during the Revolution.<sup>105</sup> The law also isolates individuals who did business with the Qaddafi’s family<sup>106</sup> or who “became rich” at the expense of the Libyan people,<sup>107</sup> in a country plagued by forty years of continued Qaddafi-centered corruption, and where subsidies from the government affect over 80 percent of the population.<sup>108</sup> The law also requires the isolation of any board member of a company in which the Qaddafi government was part owner.<sup>109</sup>

Lustration laws do not provide a serious process of prosecution and trials for people who have committed serious crimes. As a broad application of exclusion and isolation, they have proved politically polarizing. They undermine the emergence of democratic bodies and legitimate state institutions. Much concern over these laws has been expressed within the wider human rights community, exemplified by the United Nations’s reaction to legislative lustration.<sup>110</sup> Blanket exclusions based on affiliation rather than conduct are subject to manipulation,<sup>111</sup> and it is the position of representatives of the United Nations that exclusion for minor abuses unduly infringes on individual human rights to freedom of

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<sup>103</sup> Ahmed Elumami, *Libya congress to vote after renegade general’s threat*, REUTERS, May 25, 2014, <http://uk.reuters.com/article/2014/05/25/libya-crisis-idUKL6N0OB0IF20140525>.

<sup>104</sup> *Draft Constitutional Charter for the Transitional Stage: The Constitutional Declaration*, TRANSITIONAL NATIONAL COUNCIL 2 (Mar. 8, 2011), <http://www.wipo.int/edocs/lexdocs/laws/en/ly/ly005en.pdf>.

<sup>105</sup> Law No. 13/2013, art. 1(1)(6) (Libya).

<sup>106</sup> *Id.* art. 1(1)(10).

<sup>107</sup> *Id.* art. 1(2)(6).

<sup>108</sup> Interview with Tarek Mitri, U.N. Special Envoy to Libya, in Tripoli, Libya (Jun. 25 2013).

<sup>109</sup> Law No. 13/2013, art. 2(4) (Libya).

<sup>110</sup> See, e.g., Tarek Mitri, Special Representative of the Secretary-General and Head of United Nations Support Mission in Libya, *Briefing to the Security Council* (June 18, 2013), available at [http://unsmil.unmissions.org/Portals/unsmil/Documents/SC%20Briefing%20June%202013%20\\_12%20June%202013\\_%20check%20against%20delivery.pdf](http://unsmil.unmissions.org/Portals/unsmil/Documents/SC%20Briefing%20June%202013%20_12%20June%202013_%20check%20against%20delivery.pdf).

<sup>111</sup> Memorandum from Representative of the Sec’y Gen. and Head of Mission, United Nations Support Mission in Libya on Considerations in Relation to the Draft Political and Administrative Isolation Law to the General National Congress 2, ¶ 2 (February 23, 2013) (on file with authors).

expression, association or assembly.<sup>112</sup>

Nor can lustration be conceived outside a pyramid of accountability of which it forms an integral part. The pyramid includes at the top, fair trials for leading members of the former regime who have committed crimes against humanity through the four decades of dictatorship. With the execution-style death of Qaddafi on 20 October, 2011, the central pillar of the regime of arbitrariness and cruelty disappeared prematurely, leaving countless questions of victims unanswered, and preventing the closure badly needed for survivors of unlawful arrest and torture, their relatives, and the public at large. With lower level trials operating in the face of a continued absence of trust between the Libyan judiciary and the International Criminal Court, the picture of justice in Libya appears lacking both domestically and internationally. With a haphazard process of compensation to the families of “martyrs” killed during the 2011 revolution,<sup>113</sup> the connection between the late-stage victims of the Qaddafi-era repression and their killers was severed. Even serious fact-finding missions have not been undertaken in spite of pressing demands for unveiling the brutal past of Libya, without which no reconciliation is possible. And with a constitutional process which has barely started in earnest three years after the revolution had succeeded, a central forum for debate and rapprochement between the heirs to forty years of dictatorship is still missing.

#### IV. ALTERNATIVES AND COMPARATIVES IN THE PYRAMID OF ACCOUNTABILITY

Lustration laws cannot be considered outside a particular political atmosphere. A country’s reckoning with its past is inevitably determined by a host of political and factual considerations. Regardless of these fleeting conditions, lustration laws always operate within the pyramid of post-revolution accountability. Two of the most widely used are trials and Truth and Justice Commissions. These are alternative measures to lustration laws that have been utilized by other countries during times of transition.

Truth commissions are “non-judicial bodies, but in some cases are granted the ability to refer case information to the courts or tribunals.”<sup>114</sup> According to the United States Institute of Peace, truth commissions can recommend reforms within the government and other social structures that perpetuated abuse. Recommendations may also advocate for reparation to victims, propose memorialization efforts and reconciliation plans, and implicate the bodies or groups most responsible for any abuses committed. In some instances, individual perpetrators may be named. In other instances, commissions have been forced to end their mandates prematurely due to political opposition or lack of funding.<sup>115</sup>

Trials are another option for a transition and can be implemented in the form of domestic or international prosecutions, or a hybrid between the two. They

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<sup>112</sup> *Id.* at 2, ¶ 4.

<sup>113</sup> *Libya’s New Rulers to Compensate Fighters; Sirte Battle Rages On*, AL-ARABIYA NEWS, Oct. 19, 2011, <http://english.alarabiya.net/articles/2011/10/19/172657.html>.

<sup>114</sup> *Truth Commission Digital Collection: About Truth Commissions*, U.S. INST. OF PEACE, <http://www.usip.org/publications/truth-commission-digital-collection> (last visited Apr. 18, 2014).

<sup>115</sup> *Id.*

provide the state an avenue for the investigation and prosecution of actions violating international law, including violations of humanitarian law and the law of armed conflict. Trials over international human rights violations can be traced back to the Nuremberg trials, and have evolved into the present day International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR).<sup>116</sup> According to the International Center of Transnational Justice, “investigations and trials of powerful leaders (whether political or military) help strengthen the rule of law and send a strong signal that violations will not be tolerated in a rights-respecting society.”<sup>117</sup>

How did this pyramid of accountability operate in the countries examined?

*Czechoslovakia.* Czechoslovakia conducted some domestic trials under a new constitution, established by a freely elected parliament. Judges and lawyers had little to no experience prosecuting because the trial system was so new, which led to some individuals being improperly charged or not tried at all.<sup>118</sup> Rather than establishing a Truth and Justice Commission, parliament created the Office for Documentation and Investigation of the Crime of Communism. The office collected and archived information regarding all “injustices, atrocities and crimes related to the communist regime and its officials, and to create a memento for future generations.”<sup>119</sup> The office was also charged with “filing cases and prosecuting individuals who are still subject to criminal liability, acting as both a symbolic and pragmatic institution.”<sup>120</sup>

Past regime leaders were dealt with through haphazardly applied lustration laws, but the laws were too strict and in many cases implicated individuals who had simply been “talked to” by former regime leaders regardless of whether they had cooperated.<sup>121</sup>

The implementation of the transition tools was poor at best. The trials allowed many individuals responsible for atrocities to go unpunished because of the new and unfamiliar system and the inexperience of the participants. The lustration laws were criticized for lacking safeguards against false accusations and for having an inappropriate screening process. “[O]bservers continue to criticize the law in theory for engendering employment discrimination,”<sup>122</sup> even after the Constitutional Court struck down the portion that included those who had simply been “talked to.”

*Romania.* Throughout its leadership transition, Romania utilized trials, a truth and justice commission, and lustration laws. These efforts were unsuccessful, partially because of the timeline during which they were implemented, and partially

<sup>116</sup> *Criminal Justice*, INT'L CTR. FOR TRANSITIONAL JUST., <http://ictj.org/our-work/transitional-justice-issues/criminal-justice> (last visited Apr. 18, 2014).

<sup>117</sup> *Id.*

<sup>118</sup> Adrienne Quill, *To Prosecute or Not to Prosecute: Problems Encountered in the Prosecution of Former Communist Officials in Germany, Czechoslovakia, and the Czech Republic*, 7 IND. INT'L & COMP. L. REV. 165, 189 (1996-1997); see also JOHN BORNEMAN, SETTLING ACCOUNTS 153 (1997) (stating that there were ten trials and only two convictions).

<sup>119</sup> Bureau for Crisis Prevention and Recovery, *supra* note 24, at 47.

<sup>120</sup> *Id.*

<sup>121</sup> Quill, *supra* note 118, at 187.

<sup>122</sup> *Id.*

because of the narrow focus of the investigations. In the first such trial, conducted on December 25, 1989, the former communist leader, Nicolae Ceasescu and his wife Elena, were given a hasty verdict and then executed for their crimes by firing squad on the same day. The Romanian lustration laws were not put into place until after the leadership changed and led to highly unnecessary, unconstitutional, and ineffective laws,<sup>123</sup> also affecting the viability of the Truth and Justice Commission. Because powerful players from the former regimes were still in power during the Truth and Justice Commission's inquiry, many observers were also skeptical that the commission would uncover unpleasant instances that implicated them. The narrow scope of the Truth and Justice Commission meant that the investigation focused on "the involvement of the army, the militia and the secret state security forces in the anticomunist Revolution of December 1989,"<sup>124</sup> while not addressing the harm that had taken place during the former communist leadership. As a result, the truth commission's results were widely ignored.<sup>125</sup>

When viewed in isolation, it is clear that the tools used in the Romanian transition were neither productive nor effective. By all accounts, the trial of Nicolai and Elena Ceausescu was a sham.<sup>126</sup> Romania's Truth Commission report, the Tismăneanu report, was widely criticized as a political tool for Romanian President Traian Băsescu.<sup>127</sup> Additionally, the decision of the High Court of Cassation and Justice that lustration was unconstitutional,<sup>128</sup> the Senate's rejection of the law,<sup>129</sup> and the Chamber of Deputies' reexamination and rejection of the law in 2013,<sup>130</sup> all resulted in an overall sense of failure in dealing with the dictatorial past. None of the tools in the accountability pyramid were used to complement the others, and implementation of the lustration laws undermined their very purpose.

*El Salvador.* After the United Nations brokered a peace accord in 1992, Commission on the Truth for El Salvador was implemented in order to address human rights violations,<sup>131</sup> and an ad hoc commission was formed to deal with the vetting process of military and government officials.<sup>132</sup> The Truth Commission of El Salvador was an early model commission based on the experiences of

<sup>123</sup> See *supra* Part II.B.

<sup>124</sup> Lavinia Stan, *Truth Commissions in Post-Communism: The Overlooked Solution*, 2 OPEN POL. SCI. J. 1, 3 (2009).

<sup>125</sup> *Id.*

<sup>126</sup> Sinziana Demian, *In Romania, Ceausescu's Death Haunts Christmas*, GLOBAL POST, Dec. 25, 2009, <http://www.globalpost.com/dispatch/europe/091224/romania-nicolae-elena-ceausescu>.

<sup>127</sup> Alina Hoga, *Coming to Terms with the Communist Past in Romania: An Analysis of the Political and Media Discourse Concerning the Tismaneanu Report*, 2 STUD. OF TRANSITION STATES AND SOCIETIES, issue 2, 2011, at 21, available at [http://www.tlu.ee/stss/wp-content/uploads/2011/03/Artikel-nr\\_2\\_Hoga.pdf](http://www.tlu.ee/stss/wp-content/uploads/2011/03/Artikel-nr_2_Hoga.pdf).

<sup>128</sup> Romania Curtea Constituțională [Constitutional Court of Romania], Decizia nr. 308, Dosarul nr. 604A/2012, 14 (Mar. 28, 2012) (Romania), available at <http://www.cdep.ro/proiecte/2006/200/80/2/decizia308.pdf>.

<sup>129</sup> Zgomea, *supra* note 46.

<sup>130</sup> See *Transcript of the Debate During the Chamber of Deputies Meeting on March 19, 2013*, *supra* note 47.

<sup>131</sup> Margaret Popkin, *The Salvadoran Truth Commission and the Search for Justice*, 15 CRIM. L. F. no. 1, 2009, at 2.

<sup>132</sup> Zamora & Holiday, *supra* note 49, at 83.

commissions established in Argentina and Chile, but the El Salvadoran model was somewhat hampered because the regime responsible for many of the human rights violations remained in power.<sup>133</sup>

The United Nations administered the truth commission and was given just six months to complete its work. The commission found that ninety-five percent of the human rights violations were committed by government forces and came to strong conclusions on many controversial cases, which named several members of the military, judiciary and opposition leaders for their roles in these atrocities.<sup>134</sup>

In the months following the publication of the truth commission's final report, high-level leaders in the armed forces, who were identified as violators of human rights, were removed from office.<sup>135</sup> Otherwise, the consequences for those named by the commission were minimal and as a result many government officials escaped into retirement.<sup>136</sup>

*Iraq.* In Iraq, domestic prosecution and trial by a special criminal court was the main form of justice and accountability for atrocities and human rights violations committed by the old regime. Law No. 10 of 2005 confirmed the establishment of the Iraqi High Criminal Tribunal as a successor to the 2003 CPA-established Iraqi Special Tribunal for Crimes Against Humanity.<sup>137</sup> The tribunal was composed of local judges and prosecutors and was created under Iraqi national law to try Iraqi nationals accused of genocide, crimes against humanity, war crimes, and other serious crimes committed between 1968 and 2003.<sup>138</sup>

From October 2005 until November 2006, the tribunal tried eight people accused of crimes against humanity in a massacre of 148 villagers in Dujail, all Shi'i.<sup>139</sup> The defendants included Saddam Hussein, former President of Iraq, Barzan Ibrahim al-Tikriti, former chief of intelligence, Taha Yasin Ramadan, former Vice-President, and Awwad Hamed al-Bandar, the judge who presided over the tribunal which sentenced to death the Dujail villagers.<sup>140</sup> On November 5, 2006, Saddam Hussein was found guilty of all charges relating to the Dujail massacre and sentenced to death.<sup>141</sup> The case went on appeal, but his appeal failed.

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<sup>133</sup> Popkin, *supra* note 131, at 1; see also Margaret Popkin, *The Salvadoran Truth Commission and the Search for Justice*, in TRUTH COMMISSIONS AND COURTS: THE TENSION BETWEEN CRIMINAL JUSTICE AND THE SEARCH FOR TRUTH 105, 122 (William A. Schabas & Shane Darcy eds., 2004) ("In this context, victims and their representatives in El Salvador have not been able to bring sufficient pressure to achieve justice or secure compensation. Despite important advances in judicial reform, the justice system has yet to rely on the Truth Commission's findings, implement the recommendations of the Inter-American Commission on Human Rights, or otherwise rely on international law developments in the struggle against impunity.").

<sup>134</sup> PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 50 (2d ed. 2011).

<sup>135</sup> *Id.* at 51.

<sup>136</sup> *Id.*

<sup>137</sup> Law of the Supreme Iraqi Criminal Tribunal, Law No. 10 of 2005 (Iraq).

<sup>138</sup> See *id.* art.1.

<sup>139</sup> *Judging Dujail: The First Trial before the Iraqi High Tribunal*, HUM. RTS. WATCH 2 (Nov. 2006), <http://www.hrw.org/sites/default/files/reports/iraq1106webcover.pdf>.

<sup>140</sup> *Id.* at 2 n.1.

<sup>141</sup> Basil Adas, *Saddam ... a year after*, GULF NEWS, Dec. 30, 2007, <http://gulfnews.com/saddam-a-year-after-1.219856>.

He was executed by hanging on December 30, 2006.<sup>142</sup>

For the purpose of delineating transitional justice, there was support for holding perpetrators accountable through domestic legal trials, with limited input from foreign advisors.<sup>143</sup> The results are checkered, and questions about who should be tried and where the line should be drawn persist to date, along with questions about the controversial imposition of the death penalty.<sup>144</sup> Within the Baath party, there were many layers of leadership, including Saddam and his inner circle; mid-ranking members; and the general Baath party membership. Other groups formally outside the party, including intelligence and security services, police, and judges, were also responsible for large-scale human rights abuses.<sup>145</sup>

The attempt to achieve truth and reconciliation in Iraq took a very different route than the cases of South Africa or El Salvador, mostly because the brutality did not end with the collapse of the regime. The invasion of Iraq did not stop the bloodshed. An estimated 600,000 executions were carried out under Saddam Hussein, but over 60,000 deaths have occurred between 2003 and 2008 in a civil war that continues to date.<sup>146</sup> Until the guns fall silent, there is no room for a serious process of truth and reconciliation, let alone for closure through accountability.

## V. CONCLUSION AND RECOMMENDATIONS

It is possible that lustrations laws may be dispensable where the combined action of all other components of the pyramid of accountability works well. They can, however, serve a unique and useful purpose in the reconstruction of a post-revolutionary society. In order to ensure that purpose is constructive and in accordance with their intended function within the pyramid of accountability, lustration laws should:

(1) *have a finite life span.* To protect the integrity of democracy and ensure that people can choose their own political leaders, lustration must expire after a maximum of a decade or so. On that score, Libyan legislation has been reasonable. But if amending the sunset provisions is allowed, then such amendments must be passed with an extraordinary majority.

(2) *be specific, and avoid over-inclusion.* A lustration law cannot be overly broad; it may not include more persons than necessary to prevent, and preferably deter, members active in their support of the former dictator. In order to exclude

<sup>142</sup> For the first instance and appellate decisions in English translation, see sources cited *supra* note 68. For a timeline of Hussein's trial, see MALLAT, *supra* note 68, at 176-78.

<sup>143</sup> *Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction*, INT'L CTR. FOR TRANSITIONAL JUST. (May 2004), <http://www.ictj.org/sites/default/files/ICTJ-Iraq-Voices-Reconstruction-2004-English.pdf>.

<sup>144</sup> See *Amnesty International Urges Halt to Executions*, IRAQ-BUSINESS NEWS, Sept. 27, 2013, <http://www.iraq-businessnews.com/2013/09/27/amnesty-international-urges-halt-to-execution-s/>; see also *Amnesty International: Torture in Iraq*, IRAQ-BUSINESS NEWS, Mar. 11, 2013, <http://www.iraq-businessnews.com/2013/03/11/amnesty-international-torture-in-iraq/>.

<sup>145</sup> *Special Report 104: Establishing the Rule of Law in Iraq*, U.S. INST. OF PEACE 3-6 (2003), <http://www.usip.org/sites/default/files/resources/sr104.pdf>.

<sup>146</sup> Jeremy Sarkin & Heather Sensibaugh, *Why achieving reconciliation in Iraq is possible: Suggestions for mechanisms and processes including truth and reconciliation commissions*, 23 FLETCHER J. OF HUM. SECURITY 5, 6 (2008).

people associated with the former regime, “association” needs to be clearly delineated. This is where Libya’s lustration laws need to be urgently revisited.

(3) *be consonant with the capacity of a traumatized country, in particular its judicial apparatus.* Because of the dire need for experienced judges and prosecutors, states should consider a reappointment process for judges and prosecutors. Competent national judges and prosecutors are not readily available in a country emerging from a systemic commitment to unpunished crimes. As a recent example of the failings of the judiciary in Libya, Amnesty International issued strong criticism of the trial by video-link of Qaddafi’s son, Seif al-Islam, noting that “the accused is in unofficial custody and the court cannot enforce its authority over him.”<sup>147</sup> Libya might benefit more actively from experienced professionals from outside the country, in frameworks which can assist the sharp learning curve needed to adapt the best comparative practices to its needs.

(4) *include a workable and transparent vetting process.* Vetting should be based on conduct rather than affiliation. Prosecutions must be limited to those individuals who have committed serious human rights violations. A vetting process should be included to ensure that an administrative and professional void is not created when forming the new government, especially in a country like Libya where the revolution could not have succeeded without genuine defections from the former regime. The vetting body itself needs to be independent, impartial, and competent, a standard which can be partly achieved by a transparent process of designation to ensure that its members are broadly accepted. The information presented to the body must be open to public access, which would ensure accountability for the body’s actions. The body must also have adequate resources to fulfill its mandate within the given time period.

In short, due process is of critical importance for both lustration and the other modes of accountability. In the case of Libya, due process is not adequately present within these processes. If due process is not made a priority by post-Qaddafi governments vis-à-vis a pyramid of accountability that includes a comprehensive approach to victim compensation, truth commission, lustration, fair trials, and proper constitution-making, the closure on forty years of this Caligula-like dictatorship will be hard to achieve. The progress of international criminal accountability has been a crucial step for human rights and justice. At the same time, this development has created risks for meaningful human rights protection. New, more appropriately broad language would put international criminal justice in proper perspective and could invigorate human rights protection. It may also save the international rule of law from the hubris of its claims.

The continuing trauma of Libya, reinforced by ill-thought lustration laws and ad hoc governmental measures, reached a new depth in August 2014, when a newly elected parliament, meeting outside a militia-controlled capital, made an official appeal for international help.<sup>148</sup> Part of this help will be direly needed to fix the

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<sup>147</sup> *Libya: Trial of former al-Gaddafi officials by video link a farce*, AMNESTY INT. (Apr. 14, 2014), <http://www.amnesty.org/en/news/libya-trial-former-al-gaddafi-officials-video-link-farce-2014-04-14>.

<sup>148</sup> Chibli Mallat and Duncan Pickard, *President Obama can still help Libya*, WASH. POST, Aug. 18, 2014,

pyramid of accountability.