

## **POMEPS Conversation 2 with M. Cherif Bassiouni**

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**Marc Lynch:** I'd like to welcome you to a special episode of the Middle East channel editors video blog. We have with us today Dr. Cherif Bassiouni, one of the world's leading scholars of international law and the chairman of the recent of Bahrain independent commission of inquiry. Professor Bassiouni spoke today at George Washington University's Institute for Middle East Studies annual conference and he agreed to sit down speak with us a little bit about some issues of interest to foreign policy readers. So first of all thank you, Professor Bassiouni, for joining us. So I think that looking back at your role in Bahrain's independent commission of inquiry, when I look at it, it looks to me like most people would agree, that the report itself was very hard-hitting, did an outstanding job of documenting the realities of what happened on the ground in Bahrain, and yet many people have been disappointed with a follow-up. And you have been more optimistic or more positive about the Bahraini government's reception of the report. Could you say a little bit about how you see the last few months and the prospects for change in Bahrain?

**MCB:** Yes, I think it's important for the reader to, the viewer in this case, to know that this is the first time in the Arab world, the Muslim world as well, in which a national government establishes a totally independent international commission to investigate its violations. You either have a UN commission, and I was chair of four such UN commissions including recently Libya, or you have a national truth commission, which is consistent of national folks. But to have a government appoint a group of independent international expert is quite new and quite courageous, frankly. In the Commission operated with total independence. Before accepting the appointment, I went to Bahrain, privately, met with his majesty the king and basically, you know, just as I'm sitting with you, I said, you know, here is my Wishlist. Then I gave him a three-page memo saying this is what I want. I want total independence. I want total autonomy. And I mean just to give you an idea, the first day that I was there with my team I woke up a number of them at two in the morning and we went down and inspected every prison in the country. Came in, knocked at the door the prison at two in the morning, three in the morning,

you know, woke up the guards. The guards say who are you? Well, I go I'm chairman of the independent commission. Well we heard about you, we saw you on television and radio. I came to see the prison. They were flabbergasted. And I went in, and I woke up the prisoners and talked to them. And from that day on, there was not a single recorded case of torture in Bahrain until we left, not one. So, I know we did some good. During that period of time, I was able to cause the release of over 300 persons who had been in jail by showing that they had been wrongly jailed, I was able to get 1,300 misdemeanor convictions reexamined and retried. So, we were able to do a lot of good in addition to, as you said, had the total independence and access in our investigation. We produced a report which, you know, we read in the face of the King and the Prime Minister and 600 senior government officials. It was like reading an indictment in front of the government officials. They accepted it. The King accepted to implement it. He established the National Commission. The National Commission went on to issue its report which came out on March twentieth. We had 39 recommendations, some of them could be implemented immediately, like reinstate to all of the students that were fired, reinstate some of the employees, establish compensation, things like that. Others will require more time in terms of capacity building of the system. The attorney general's office needs strong capacity building and other institutions of justice needs strengthening. So, some things need some time to be done, and it's not that I'm looking for excuses for the government, but that's a fact.

**Marc Lynch:** But many people, especially civil society, activists, and members of the opposition, are very disappointed with the follow up. They see the changes as largely superficial. I have seen them describe it as 39 recommendations the government checks the box, but it doesn't actually deliver on the spirit of the recommendations and they complained that in terms of the deeper political reforms, nothing has really changed. That that was the conclusion of Amnesty International yesterday or the day before, that since last February really nothing has changed.

**MCB:** Well, I think we should sort of draw a line between these two conclusions. With respect to institutional changes, in the nature of political changes, in social, economic, in my opinion this is not taken place there. But this was not the mandate of the Commission. The Commission dealt with specific violations human rights law. We dealt with excessive use of force and

demonstrations. We dealt with torture. We dealt with mistreatment of people, killing, destruction of religious property, firing people from their jobs, firing students, violations of freedom of expression, and that's what we addressed. And I think the government, in respect to these issues, is, has proven to be genuine in its intention, has done a lot. But there's still more to be done. And that is to be entirely distinguished from the constitutional changes. You know, you have a society in which sixty percent of the population is Shia and forty percent is Sunni, but basically all of the power is in the hands of the Sunni, that can't be. You know, things have to change on that front. These are the causes and agree unless you change the causes, unless you cure these causes, you're still going to have these types of outcomes.

**Marc Lynch:** So, you see a sharp distinction between on the one hand, limited compliance with specific human rights issues and the broader issues of political change and inclusion?

**MCB:** Absolutely. I mean I'll give you an example. I think it was in March, I was asked to come back to Bahrain for a brief period of time to make an assessment of how much things have changed. And during my presence there, there was a massive demonstration by the opposition, mostly Shia, in which all of the Shia leaders, clerics were on the street. Now they claim a hundred thousand people, the government claims 60,000 but the point is 60,000 people on a total population of 600,000 people in Manama and the demonstration went without anybody being injured or interfered with, you know, you have to admit this is progress. It's not going to solve the problem of Shia representation in Parliament.

**Marc Lynch:** Right.

**MCB:** But in respect to observing the rights of people, to express their opinion, there's more of them.

**Marc Lynch:** But then I know that I friends who are journalists or civil society activist who, to this day, are being tear gassed, arrested, beaten up, people being denied access. So, the progress doesn't seem to have been as complete as we might like to see.

**MCB:** well, you know, I'm not a defender of the government, nor do I want to be in a position of defending the government. But I have to tell you that as somebody who has investigated five wars, you develop some of the sensitivities that the police investigator has, a prosecutor has. Um and if you say, you know, somebody was tear gassed, you know, on its face you say well that's terrible but then you have to look at the circumstances. And you have to look at the context, you know, was it a demonstration in which you have 100 police officer on one side 500 demonstrators on the others, were the demonstrators sending Molotov cocktails and rocks in the police, was the police prevented from using firearms, therefore they have to use tear gas? I mean all of these are things you look in the aggregate, in the investigation. The goal is to determine whether there was excessive use of force. And you really can't take just a fact, outside of the context, to make that conclusion.

**Marc Lynch:** okay, let's move beyond Bahrain a bit. I was very struck in your talk this afternoon when you were discussing Ali Abdullah Saleh and the immunity deal from the Gulf Cooperation Council transition plan. And you made the argument that regardless of the deal, there's a whole category crime, international law, which simply not be, you cannot simply grant immunity for such things because there's no legal standing for such a deal. Could you elaborate on that and say what you think might happen with Saleh and the rest of the regime elements who have been granted this immunity?

**MCB:** Well ever since Nuremberg there's been a paradigm shift in international law. The individual has become a subject of international law, the individual is subject to the mandates of international law, irrespective of what states say or do. So, the state is no longer the intermediary between the individual and international law. International law establishes certain obligations. These obligations prohibit somebody from engaging in to certain international crimes, that includes genocide, crimes against humanity, war crimes, torture, slavery, slave related practices, human trafficking. There's a whole slew of international crimes which individuals cannot claim to be immune from, including heads of state. Heads of state continue to benefit from a temporary immunity during the period in which they are in office, not so, however, if a state has acceded to the International Criminal Court statute, which in Article 27, eliminates that temporal as well as substantive immunity. But the International Court of Justice in the case of Congo vs. Belgium

very clearly said there is no such thing as substantive immunity. So, the fact that there is a political deal at a certain time that is designed to transition in a period in which to minimize the human harm, in a sense you know, one can say well fine we'll look the other way around, but it's not binding. You know, it was the same thing as when the international community tried to get Charles Taylor out of Liberia and Sierra Leone and stop the war and he was granted asylum in Nigeria. There was an agreement called the Lome Agreement which gave me immunity. About five years later, that was thrown out and he is now before the Sierra Leone Special Tribunal. So, my feeling is that the day will come when this is likely to happen with respect to Saleh.

**Marc Lynch:** You know, it's one of the more depressing things I've seen, is that at exactly the moment when many the leaders of the Arab world are speaking about accountability for crimes against humanity and in Libya and Syria, they invite Omar Bashir to attend an Arab League summit, despite the fact that he has been indicted by the International Criminal Court.

**MCB:** Well, as I said in my talk today, I think that there is a sort of disconnect in the Arab mind between what is said and what is done. There certainly is a disconnect between what governments profess and what they do. But that's not unique to the Arab world either, many governments do that. And while in the Arab world and in the Muslim world there's a lot spoken about accountability. The reality is there's very little done about it. In a study that I did, about three years ago, in which I evaluated the number of conflicts in the world between 1945 and 2008, I was flabbergasted to find out that during that entire period of time, in all of the conflicts that have happened in the Muslim world and in the Arab world in not one of them, not one of them, has there been accountability. Hafez Al-Assad killed 20,000 people, no accountability. Gamal Abdel Nasser sent the Egyptian troops in Yemen, large number of people killed, including the use of gas, which is a war crime, no accountability. You know, I mean things that are strange and I again I have to say that, you know, there are there are more Palestinians that have been killed by other Arabs, than by Israel. There are more Muslims in the world that have been killed by other Muslims than by any of anybody else. And then there's no accountability. So I think that accountability is something that is accepted as a principle in the minds of Arabs and Muslims, but when it comes to applying it in an impartial way irrespective of whose ox is going to be gored, now that becomes a horse of a different color.

**Marc Lynch:** Do you think that for example Bashar al-Assad now and Syrian regime officials should be indicted before the criminal court?

**MCB:** You know, I...

**Marc Lynch:** Or by a regional war crimes tribunal?

**MCB:** You know, I'm, my experience as chairman of the committee of inquiry in Libya about the United Nations, I was very concerned with having the Security Council refer the Libya matter to the ICC before the investigation was done. You know, I have a sense of orderliness and things, you do the investigation first, you see what the evidence is, you then indict. You don't start by indicting without getting the evidence. That's number one. Number two, you also look at national experiences. You indict when there's an opportune moment to indict, which is usually linked to the opportune moment to perform the arrest. Because if you have an institution like the ICC which starts to prematurely receive cases referred to it by the Security Council, does not have the ability to go in country. I mean, Mr. Ocampo never had the opportunity to go to Libya to investigate, although he did subsequently as a trip, never had the opportunity to investigate in Darfur. Indictments come out on some evidence gathered from abroad. It undermines the legitimacy of the court. And my fear is, that if we do the same with Syria, it's simply going to add to it. I would strongly recommend having an investigative commission as was established by the Security Council in the former Yugoslavia, which I chaired for two years, collected the evidence, I mean, the report we produced was thirty five hundred pages long, backed by seventy two thousand documents, three thousand pictures, three hundred hours or more a videotape. The Security Council established the Yugoslavia Tribunal on the basis of that. Now there was a basis, see. I would like to see the same thing done with Syria. Let's investigate, collect the evidence, accumulate it and then present it.

**Marc Lynch:** That's very interesting. With Libya right now do you think that the arrangements being made for Saif al-Islam Gaddafi to be tried are reasonable? Do you think that the ICC has a strong claim to take custody?

**MCB:** the evidence that the ICC has, which it has presented in connection with the indictment, is very limited. Simply because he was returned within a short period of time from when the conflict started. They also did not have the opportunity, nor in my opinion could they've had the opportunity, of finding out then how involved Saif Al-Islam was in the decision-making process. If you look at the history of how Maummar Qaddafi acted, I mean this was not a man who can be judged on the basis of normalcy. This was not a man who was normal. He had all sorts of psychological problems. He had more than that, he had psychiatric problems. He was heavily medicated for the psychiatric problems. He was clearly known to fluctuate, to manic and very high manic, and very depressive states. You could see it even on television, when he was in his either manic or depressive state. He was extremely secretive so you can infer from that a certain degree of paranoia. And again, self-medicating. And yeah, something that most people don't know, but he, you know, he was he was almost addicted, he had a sexual addiction. And he consumed an enormous amount of Viagra and other similar pills which had a very serious, negative effect when combined with his manic-depressive medication. And so, it's very hard to tell to what extent his decisions were made totally extemporaneously, totally on his own, with the connivance of others, with the participation of others, you know, when did somebody like Saif al-Islam come in and come out of the decision-making process? What influence did he have on his father? So, you know, to just look at a general circumstance and say well yeah there was a time when he may have had some influence, ergo this applies to all I think is unfair.

**Marc Lynch:** But you think that local courts in Libya in its current state, without a constitution, without elected government, do you think that satisfies the capable and willing clauses of complementarity?

**MCB:** Absolutely not. The court do not have the institutional capability of doing that, the judicial system has been undermined by Qaddafi for the last 42 years. You know, yes, there are some judges, yes there are some competent and honest judges, you know, the question is, if you tell me can you put five or ten judges together, have a couple of chambers of good judges, can you give them some capacity building training, can you provide them with expertise? The answer is yes, you can put together, cobble together, you know, a court that could deal with Saif

and others like Al-Senussi and others who have participated in many of the atrocities that occurred during the Qaddafi regime. That is possible to do and that would probably qualify. The problem is they would be prosecuted under domestic law, that domestic law may not correspond to the statute of the ICC. And so the question is whether the ICC will accept that as, you know, the countervailing prosecution.

**Marc Lynch:** That is fascinating to discuss. I'd like to thank you for taking the time to talk with us, both here at George Washington University and for the readers foreign policy.com. Thank you.

**MCB:** Thank you.