

Howard Varney
Katarzyna Zduńczyk
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Transitional Justice in Tunisia

Tension between the Need for Accountability and Due Process Rights

INTRODUCTION

Background

Following the end of the 23-year rule of Ben Ali, the Tunisian interim government took steps to transition the country toward democracy. On October 23, 2011, the 217-member National Constituent Assembly (NCA) was elected and mandated to draft a new constitution, which was finally promulgated on January 27, 2014, as the Constitution of the Republic of Tunisia (hereinafter “the Constitution”).¹ The constitution-framing process faced various obstacles and political deadlocks. However, it resulted in the adoption of a new constitution that is based on respect for human rights and separation of powers as well as supremacy of law. Furthermore, the Constitution has opened a new era for the people of Tunisia and paved the way for the building of democratic institutions and upholding of fundamental human liberties.²

Transitional Justice in Tunisia

One of the first challenges the interim government faced was how to balance various policy and legal considerations, such as the need for peace and economic growth, against the demand for justice, while respecting due process rights. Pursuing justice in a transitional context may take the form of multiple measures and goes beyond the pursuit of criminal prosecutions.³ Tunisia’s Basic Law on Transitional Law (hereinafter “the TJ Law”), the first law of its kind in the world and adopted by the NCA in December 2013, is a case in point.⁴ Despite its flaws, the TJ Law introduced a fairly comprehensive framework to redress past abuses and to hold perpetrators to account.

The TJ Law brought to life the Truth and Dignity Commission (TDC), which is empowered to investigate and expose the truth about human rights violations committed during the former regimes. The same TJ Law also stipulates that the Specialized Criminal Chambers (SCCs) mandated to investigate and prosecute those responsible for gross human rights violations should be created in the courts of first instance. Explaining the rationale for the SCCs, Judge Walid Melki stated, “The intention of the legislators was to deal with impunity for serious human rights violations, and dealing with impunity that cannot happen in ordinary courts.”⁵ Regrettably, some

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¹ *La Constitution de la Tunisie actuellement en vigueur, adoptée le 26 janvier 2014 et promulguée le 10 février 2014* [2014] (hereinafter “Constitution”).

² The Carter Centre, *The Constitution-Making Process in Tunisia: Final Report 2011–2014* (2014). Available at https://www.cartercenter.org/resources/pdfs/news/peace_publications/democracy/tunisia-constitution-making-process.pdf (last visited July 20, 2017).

³ UN-SC/GA, Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, § 7 (August 23, 2004): 4.

⁴ ICTJ, and R. El Gantri, *One Year After the Creation of the Truth and Dignity Commission* (2015). Available at <https://www.ictj.org/publication/tunisia-transition-one-year-after-creation-truth-dignity-commission> (last visited July 20, 2017); Basic Law relating to the Establishment and Organization of Transitional Justice, 24 December 2013 [No. 2013-53].

⁵ ICTJ, *Tunisia’s Specialized Judicial Chambers: Q&A with Judge Walid Melki* (2014). Available at <https://www.ictj.org/news/tunisia-specialized-judicial-chambers-walid-melki> (last visited July 20, 2017).

ABOUT THE AUTHORS

Howard Varney is a Senior Program Adviser with the ICTJ. His areas of expertise include investigations, prosecutions, institutional reform, reparations and public interest litigation. Howard is also a practicing advocate at the Johannesburg Bar.

Katarzyna Zduńczyk is a legal professional currently working as a Rapporteur for the International Organizations project at the Oxford University Press. She specializes in criminal justice and international human rights law and has previously worked at the International Criminal Court and interned the International Center for Transitional Justice.

four years after the adoption of the TJ Law, the Tunisia government has still not operationalized these special courts.⁶

In the immediate aftermath of the revolution, the Tunisian interim government was under intense pressure from the public to undertake firm and decisive steps aimed at making a decisive break from the repressive past. Policy makers responded with a number of ad hoc transitional justice measures.⁷ The first signs of tensions between the desire for justice and respect for due process rights arose during the military and criminal trials of Ben Ali and certain senior officials from his inner circle. Observers raised concerns over the speed of these proceedings, the use of military courts, the fact that Ben Ali was tried *in absentia*, and that the charges did not reflect the seriousness of crimes committed.⁸ Another shortcoming was that the Tunisian Penal Code did not provide for the characterization of international crimes and lacked provisions related to command responsibility.⁹

In this regard, a case known as the Barraket Essahel affair requires special attention. Former Interior Minister Abdallah Kallel and three other high security officials were tried before the military courts for the 1991 arrest, detention, and torture of military officers who were allegedly plotting against the government. Although Tunisia ratified the Convention against Torture (CAT) on September 23, 1988,¹⁰ the crime of torture was not incorporated into Tunisian law until in 1999. For this reason Abdallah Kallel and others were ultimately convicted for “violence exercised against others,” and the sanctions imposed were not so severe. The military court ruled that trying and convicting them for torture would violate the principle of nonretroactive application of law.¹¹

TENSIONS BETWEEN DESIRE FOR JUSTICE AND NEED FOR ACCOUNTABILITY

Article 148(9) of the Constitution reflects this dilemma. It stipulates that in the context of transitional justice, “the invocation of the non-retroactivity of laws, the existence of previous amnesties and pardons, the force of *res judicata*, and the prescription of a crime or a punishment are considered inadmissible.” The TJ Law also provides that cases arising from the violations stipulated in the same law shall not be subject to prescription,¹² while cases referred by the TDC to the public prosecutor may not be rejected on the basis of the principle of *res judicata*.¹³ Article 148(9) of the Constitution, and the aforesaid provisions of the TJ Law, are inconsistent with Tunisia’s international law obligations as well as the preamble of the Constitution and other rights and principles enshrined in the Constitution.

Guarantees Provided in the Constitution of Tunisia

The preamble refers to the “highest principles of universal human rights” and stipulates that the republic of Tunisia guarantees a respect for human rights and freedoms and is based on the supremacy of law.¹⁴ Accordingly, the preamble confirms that Tunisia is founded on the rule of law, meaning Tunisia respects the principle of *legality*, as well as the principle of *res judicata* and the

6 The Specialized Chambers were established in 2014 but are yet to be operationalized. See Decree Relating to the Establishment of the Criminal Chambers Specialized in Transitional Justice within the Tribunal of First Instance the Courts of First Instance Sitting in the Appeal Courts of Tunis, Gafsa, Gabés, Sousse, Le Kef, Bizerte, Kasserine, and Sidi Bouzid, August 8, 2014 [no. 2014-2887].

7 These measures included: dissolution of the Ben Ali’s political party, the Constitutional Democratic Rally; announcement of the general legislative amnesty for political prisoners; creation of two commissions of inquiry mandated to investigate past abuses; and adoption of reparations to the martyrs and wounded of the revolution. See D. Preysing, *Transitional Justice in Post-Revolutionary Tunisia (2011–2013)* (2015), 96–108.

8 ICJ, *Tunisia: The Specialized Criminal Chambers in Light of International Standards* (2016). Available at <https://www.icj.org/wp-content/uploads/2016/11/Tunisia-Memo-on-SCC-Advocacy-Analysis-Brief-2016-ENG.pdf>, 3 (last visited July 20, 2017).

9 HRW, *Tunisia: Hope for Justice on Past Abuses: Specialized Chambers Should be Independent, Fair* (2014). Available at <https://www.hrw.org/news/2014/05/22/tunisia-hope-justice-past-abuses> (last visited August 13, 2017).

10 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85 (hereinafter “CAT”).

11 On Barraket Essahel case, see HRW, *Tunisia: Reform Legal Framework to Try Crimes of the Past* (2012). Available at <https://www.hrw.org/news/2012/05/03/tunisia-reform-legal-framework-try-crimes-past> (last visited July 20, 2017).

12 Article 9, Loi organique 2013-53 du 24 décembre 2013, relative à l’instauration de la justice transitionnelle et à son organisation [2013] Journal Officiel De La République Tunisienne n° 105 (hereinafter “TJ Law”).

13 *Ibid*, Article 42.

14 Article 2 of the Constitution.

nonretroactive application of laws. This principle entails a “requirement that the specific crimes, punishments, and courts be established legally—within the prevailing legal system.”¹⁵ Together with the principle of nonretroactivity of laws, which prohibits *post facto* criminalization of conduct, this stipulation enhances certainty of law, upholds justice and fairness for accused persons, and reduces the prospects of abuse of power.¹⁶

Although many rules make up the principle of legality in criminal law, the central rule remains: *nullum crimen sine lege, nulla poena sine lege*,¹⁷ which entails the principle of nonretroactivity of law.¹⁸ Article 28 of the Constitution articulates this principle by stipulating that punishment may be imposed only by virtue of a legal provision issued prior to the occurrence of the act in question. Furthermore, article 27 of the Constitution provides for due process guarantees such as the presumption of innocence and “all guarantees necessary for [the accused’s] defense throughout all the phases of prosecution and trial.” The latter encompasses the principle of *ne bis in idem*¹⁹ and its broader expression of *res judicata* that results from a judicial decision by a competent, independent, and impartial court carried out with strict adherence to the right to a fair trial.²⁰

The principle of *res judicata* remains a guarantee against abuse of the punitive power of the state. Both the principle of nonretroactivity of law and the authority of *res judicata* and *ne bis in idem* have been enshrined in a number of regional and international treaties as well as nonbinding instruments of international organizations.²¹ The principle of legality is accepted as a norm of customary international law.²² There is little doubt that both principles qualify as the *highest* protections known in international law. Given that “the preamble is an integral part of the Constitution” and “Constitution’s provisions should be understood and interpreted in harmony, as in indissoluble whole,”²³ it is difficult to reconcile article 148(9) with the preamble and the other constitutional protections discussed above.

Guarantees Provided under International Law

Article 148(9) of the Constitution and articles 9 and 42 of the TJ Law contradict international conventions ratified by Tunisia as well as rules of customary international law.

Relationship between Domestic and International Law under the Constitution

The relationship between Tunisian domestic law and international law is regulated by article 20 of the Constitution, which stipulates that ratified international treaties have a status superior to that of laws but inferior to that of the Constitution. Treaties of significant importance for the functioning of the state are approved and ratified by the Assembly of the Representatives of the People (ARP), while others of a technical nature may be ratified by the president.²⁴ Treaties of significant importance, among other treaties, include those “containing provisions of legislative character.”²⁵

Accordingly, it can be said that Tunisia has adopted a monist model to regulate the relationship between international and domestic law since treaties, once ratified, are directly incorporated

¹⁵ K. S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (2008), 157.

¹⁶ C. Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (2011), 300.

¹⁷ The principle “no crime or penalty without a law.”

¹⁸ Gallant, *supra* note 15, 12.

¹⁹ Nobody shall be twice tried for the same offence (double jeopardy).

²⁰ E.g., Human Rights Committee, Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights Sixty-first session concerning Communication No. 577/1994, UN Doc. CCPR/C/61/D/577/1994, November 6, 1997.

²¹ Gallant, *supra* note 15, 157; Cf. Convey, “*Ne Bis in Idem* in International Law,” *International and Comparative Law Review (ICLR)* 3 (2003): 217.

²² *Ibid.*

²³ Articles 145 and 146 of the Constitution.

²⁴ Articles 62, 65, 67, 77, and 92 of the Constitution. Article 67: “Commercial treaties and treaties related to international organisations, to borders of the state, to financial obligations of the state, to the status of individuals, or to dispositions of a legislative character shall be submitted to the Assembly of the Representatives of the People for ratification.”

²⁵ Article 67 of the Constitution: “Sont soumis à l’approbation de l’Assemblée des représentants du peuple, les traités ... portant des dispositions à caractère législatif. Les traités n’entrent en vigueur qu’après leur ratification.” (Emphasis added.)

into Tunisian law without the need to domesticate them through national legislation.²⁶ Therefore, international human rights treaties binding upon Tunisia have become *ex proprio vigore*²⁷ part of the Tunisian national legal system and as such must be directly enforced by Tunisian institutions, including the SCCs.²⁸ However, the Constitution takes precedence over ratified international treaties, and the Constitutional Court is competent to oversee their constitutionality before ratification.²⁹

In terms of international law, Tunisia must fully comply with all treaties it has ratified unless it has filed an appropriate reservation or until it withdraws from the treaty.³⁰ Moreover, Tunisia may not invoke domestic law to justify the breach of international law. This rule has been clearly spelled out in article 27 of the Vienna Convention on the Law of Treaties (VCTL), to which Tunisia is a state party.³¹ The rule has been confirmed in numerous judgments of international bodies and tribunals and has been referred to as one of the most fundamental principles of international law.³² Tunisia remains obliged to act in conformity with international law and bears responsibility for any breaches thereof.³³ As a responsible and respected member of the community of nations, it must be assumed that Tunisia will comply with treaties that it has ratified. When considering an apparent conflict between domestic law and binding international law, an interpretation that avoids a conflict should always be preferred over one that results in a conflict.³⁴

The status of customary international law is not explicitly dealt with either in the Constitution or in the TJ Law. While the omission of the customary international law in article 20 of the Constitution is unfortunate, Tunisia remains obliged to comply with it.³⁵ Courts are required to interpret customary international law in the light of the Constitution.³⁶ Article 102 of the Constitution,³⁷ read together with the preamble, requires the Tunisian state, in particular the judicial authority, to uphold entrenched rights and freedoms and ensure that all are protected from violations.³⁸ Courts are accordingly enjoined to ensure that rights and freedoms of persons are upheld and that they are protected from all violations, be they violations of national or international law. The latter will undoubtedly include customary international law.

Secondly, the International Covenant on Civil and Political Rights (ICCPR), ratified by Tunisia in 1969,³⁹ stipulates in article 15(2) that a state party may indict, bring to trial, and punish any person for any conduct “which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.” Article 15(2) of the ICCPR clearly allows for the enactment of laws criminalizing conduct proscribed under customary international law.⁴⁰

26 In principle, the domestic view of a relationship between the domestic and international law has been characterized by dualist and monist models. However, “the two theories do not explain the whole of the problem, but largely lay down the outline within which the question can be solved.” In, e.g., Morina, Korenica, and Doli, “The Relationship between International Law and National Law in the Case of Kosovo: A Constitutional Perspective,” *International Journal of Constitutional Law (I-Con)* 9 (2011): 274, 279.

27 *Ex proprio vigore* is a Latin term meaning “of its own, inherent force.”

28 Morina and others, *supra* note 26, 283.

29 Articles 20 and 120 of the Constitution.

30 See e.g., Articles 19–21, 54–56 of the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331 available at <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> (last visited September 28, 2017). Ratified by Tunisia on June 23, 1971.

31 *Ibid.*

32 E.g., *The Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Order)*, Advisory Opinion, April 26, 1988, ICJ Reports (1988) 12.

33 M. N. Shaw, *International Law*, 6th ed. (2008), 138.

34 A. Peters, “Supremacy Lost: International Law Meets Domestic Constitutional Law,” *Vienna Online Journal on International Constitutional Law (VOJICL)* 3 (2009): 170, 177–78. See e.g., Charming Betsy principle for the interpretation of the US-American statutes. According to this canon, US national statutes should be interpreted in such a way that the interpretation does not conflict with international laws. This principle evolved from the case, *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (U.S. 1804).

35 Article 38(1)(b) of the Statute of the International Court of Justice (1945), 33 UNTS 993.

36 Shaw, *supra* note 33, 172.

37 The judicial authority is independent. It assures the administration of justice, the supremacy of the Constitution, the sovereignty of the law, and the protection of rights and freedoms.

38 Article 49 of the Constitution (emphasis added).

39 International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (hereinafter “ICCPR”).

40 Textual and purposive analysis of this part of the text read together with article 38(1) of the Statute of International Court of Justice allows one to assert that “relevant rules of international law” include rules of customary international law. Article 38(1) of the Statute of International Court of Justice 1945, available at http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf (last visited September 29, 2017).

Thirdly, while interpreting international treaties judges should adhere to rules contained in article 31 of the VCLT. This article sets out acceptable methods of interpreting treaties and stipulates that courts should take into account “any subsequent practice in the application of the treaty” as well as “any relevant rules of international law applicable in the relations between the parties,” which would include rules of customary international law.

In light of the above, judges sitting in the SCCs should be encouraged to develop a progressive and purposeful interpretation of the Constitution as well as the TJ Law. If courts interpret the Constitution so as to exclude the direct applicability of customary international law in Tunisia, it would significantly undermine the process of transitional justice process.⁴¹ This is so because prior to Tunisia’s ratification of the Rome Statute of the International Criminal Court (hereinafter “ICC Statute”)⁴² and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)⁴³ in 2011, international crimes such as genocide, crimes against humanity, war crimes, or enforced disappearances were not outlawed in Tunisia, even though they were prohibited under customary international law.⁴⁴

International Treaties Binding upon Tunisia

The provisions in article 148(9) relating to the exclusion of the nonretroactivity of law and *res judicata* remain controversial and are at odds with Tunisia’s international law obligations. Tunisia ratified the Universal Declaration of Human Rights (UDHR); the ICCPR on March 18, 1969; the African [Banjul] Charter on Human and Peoples’ Rights on March 16, 1983 (hereinafter “African Charter”)⁴⁵; the Additional Protocol I and II to the Geneva Convention of August 17 1949⁴⁶ on August 9, 1979; and the Convention on the Rights of the Child on January 30, 1992 (CRC).⁴⁷ The principles of nonretroactivity of laws and *res judicata* in various forms and articulations are included in some of these treaties.⁴⁸

In 2011 Tunisia became the first North African country to accede to the ICC Statute. That same year, Tunisia ratified the 2002 United Nations Optional Protocol to the Convention against Torture (OPCAT)⁴⁹ and the ICPPED as well as the Optional Protocol to the International Covenant on Civil and Political Rights.⁵⁰

PRINCIPLES OF NONRETROACTIVITY OF LAWS AND RES JUDICATA

Tunisia is under an international obligation to investigate and prosecute gross human rights violations and international crimes and to provide remedies to victims.⁵¹ However, in some circumstances a strict application of the principle of legality and *res judicata*, including the non-retroactivity of laws, may appear to constitute a legal obstacle in bringing perpetrators to justice.

41 The preamble of the Constitution of Tunisia states that the state “guarantees respect for human rights and freedoms” and “supports all victims of injustice.” Moreover article 23 of the Constitution purports: “The state protects human dignity and physical integrity, and prohibits mental and physical torture. Crimes of torture are not subject to any statute of limitations.” Article 108 of the Constitution stipulates that “[...] law facilitates access to justice [...],” while article 148(9) states that “The state undertakes to apply the system of transitional justice in all its domains and according to the deadlines prescribed by the relevant legislation.” In this regard Tunisia ratified the ICC Statute and ICPPED only in 2011, while the crime of torture was incorporated into Tunisia law only in 1999. If one excludes customary international law from a law applicable in Tunisia, victims of human rights violations will be denied access to justice and a right to an effective remedy while perpetrators of international crimes will go unpunished. This will be in a clear violation of the above Constitutional provisions, especially articles 23 and 148(9) of the Constitution.

42 Rome Statute of the International Criminal Court 1998, 2187 UNTS 3 (hereinafter “ICCSt.”).

43 International Convention for the Protection of All Persons from Enforced Disappearance 2006, 2716 UNTS 3 (hereinafter “ICPPED”).

44 ICJ, *The Specialized Criminal Chambers*, *supra* note 8, 10.

45 African [Banjul] Charter on Human and Peoples’ Rights 1982, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (hereinafter “African Charter”).

46 Protocol Additional to the Geneva Conventions of August, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977 (hereinafter “AP I”); Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977 (hereinafter “AP II”).

47 Convention on the Rights of the Child 1989, 1577 UNTS 3 (hereinafter “CRC”).

48 E.g., article 7 of the African Charter stipulates: “No penalty may be inflicted for an offence for which no provision was made at the time it was committed.”

49 United Nations Optional Protocol to the Convention against Torture 2002, 2375 UNTS 237 (hereinafter “CAT Protocol”).

50 Optional Protocol to the International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

51 E.g., Human Rights Committee, General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, March 24, 2004, UN Doc. CCPR/C/21/Rev.1/Add. 1326 May 2004; the Preamble of the ICCSt.; A. Cassese, *International Criminal Law* (2003), at 302–303 referring to the Bosnian genocide case, ICJ judgment July 11, 1996, §31; Cf. R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (2007), 59.

In light of this, and following the trials of the Interior Minister Abdallah Kallel and others, the framers of the Constitution included article 149(8). This section suggests that the exclusion of these principles was rash and unnecessary.

Nonretroactivity of Laws

Nonretroactivity of Laws under International Law

The framers of both the UDHR and the ICCPR rejected the notion that only a written statute could be the source of criminal proscription.⁵² They accepted that the principle of legality would be upheld even when common law and international customary law criminalized conduct.⁵³ Indeed, the “penal aspects of international law derive from ‘conventions’, ‘customs’, and ‘general principles of law’ all of which are among the sources of this legal discipline as enunciated in Article 38 of the International Court of Justice (ICJ) statute.”⁵⁴

Nonetheless, states are still under obligation to uphold the principle of nonretroactivity of laws. Not only is the principle of legality, including the nonretroactive application of law, enshrined in international law, it is also nonderogable in character.⁵⁵ In international law the principle tends to be interpreted in a less rigid way than at the domestic level.⁵⁶ In addition, the penal provisions of international crimes tend to be described in broad and general terms without providing much details on the elements of responsibility.⁵⁷

In the circumstances, all the crimes falling within the SCCs’ subject matter jurisdiction should conform to the principle of legality, including nonretroactivity of laws. The latter should be understood in line with article 15(1) of ICCPR ratified by Tunisia in 1969, which stipulates, “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under *national* or *international* law, at the time when it was committed.”⁵⁸ Consequently, conduct not prohibited under domestic law may still be deemed to be criminalized, if at the time when it was committed it was a criminal offence under binding international law.⁵⁹

Moreover, article 15(2) of ICCPR stipulates as follows: “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at *the time when it was committed*, was criminal according to *the general principles of law recognized by the community of nations*.” This clause addresses the central tension faced by jurists in Tunisia when dealing with the prosecution of past gross violation of human rights.⁶⁰ Article 15(2) confirms that customary international law is a source of criminal prohibition that does not violate the nonretroactivity of laws.⁶¹

Accordingly, Tunisia may investigate and prosecute individuals accused of gross human rights violations, even though those violations were not criminalized or incorporated into domestic law so long as they constituted acts or omissions prohibited under binding international law or customary international law at the time when they were committed.⁶² In pursuing such cases, courts should assess the foreseeability and accessibility of the criminal rules in question.⁶³ This test has been developed by the European Court of Human Rights and requires that the legal basis for a conviction has to be sufficiently clear and its scope must be foreseeable for an accused, although absolute precision is not necessary.⁶⁴

52 Gallant, *supra* note 15, 160.

53 *Ibid.*

54 C. Bassiouni, *International Criminal Law, Volume I, Sources, Subjects and Contents*, 3rd ed. (2008), 5.

55 Article 4(2) ICCPR.

56 C. Bassiouni, *International Criminal Law Conventions and Their Penal Provisions* (1997).

57 Bassiouni, *Crime against Humanity*, *supra* note 16, 304.

58 Article 15(10) ICCPR (emphasis added). *See also*, e.g., article 11(2) UDHR; article 40(2)(a) CRC.

59 Bassiouni, *Crime against Humanity*, *supra* note 16.

60 Gallant, *supra* note 15.

61 M. Nowak, *U.N. Covenant on Civil and Political Rights: CCRPR Commentary*, 2nd ed. (Kehl, Strasbourg: N.P. Engel, 2005), 367–68.

62 Cryer, *supra* note 51, 61; Court of Cassation, Judgment 26.1.1984; JCP (1984) II G No. 20,197; RGDIIP (1984), 971.

63 *Prosecutor v. Milutinovic et al.*, Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction—Joint Criminal Enterprise, ICTY Appeals Chamber (IT-99-37-AR72), May 21, 2003, §38-42.

64 *See e.g.*, *The Sunday Times v. United Kingdom*, ECtHR (1979) Series A, No. 30, §49. In *Soros v. France* (no. 50425/06, § 52, 6 October 2011), the ECHR concluded that a degree of imprecision arising from the way in which a statute has been drafted is not on its own sufficient to constitute a violation of article 7, if in the majority of cases the meaning is clear enough and the meaning is only doubtful in a minority of cases.

However, for an effective application of international law, international crimes should ideally be enacted into domestic substantive law and procedural rules before they are prosecuted.⁶⁵ Tunisia ought to enact legislation incorporating international crimes into its domestic legal system. Although such legislation would be applied *ex post facto* the committal of the crimes, read with articles 15(1) and 15(2) of the ICCPR, the principle of nonretroactivity of laws would not be violated. Tunisia would not be criminalizing behavior that was previously lawful; instead it would be creating a new jurisdiction for its prosecution.⁶⁶

The UNTAET Regulation, which established the Special Panels within the East Timorese judiciary, emphasized the principle of nonretroactivity of laws by requiring that the prohibited conduct must have been a crime either under international law or the laws of East Timor.⁶⁷ It further stressed that “The present Section shall not affect the characterization of any conduct as criminal under principles and rules of international law independently of the present regulation,” thus incorporating the reading of article 15(2) ICCPR.⁶⁸

Nonretroactivity of Laws and Material Jurisdiction of Specialized Chambers

For the purpose of analyzing further the principle of nonretroactivity of laws, a closer scrutiny of jurisdictions *rationae materiae*⁶⁹ and *rationae temporis*⁷⁰ of the SCCs is necessary.

According to the TJ Law, the subject matter jurisdiction of SCCs covers crimes pertaining to gross violations of human rights as specified in international agreements ratified by Tunisia and in the TJ Law, which among others include deliberate killing, rape and any form of sexual violence, torture, enforced disappearance, and execution without fair trial guarantees.⁷¹ Moreover, the SCCs have been entrusted in adjudicating cases referred by the TDC that relate to election fraud, economic crimes and financial corruption, misuse of public funds, and forced migration for political reasons.⁷²

It should be noted the gross human rights violations to large extent overlap with the concept of international crimes.⁷³ Although international crimes have not been explicitly provided for in the TJ Law, if Tunisia is to comply with its international obligations, such crimes will have to be taken into account. The SCCs could have reference to the provisions contained in the ICC Statute.⁷⁴ Beyond what has been provided for under the TJ Law, Tunisia could also investigate and prosecute the following crimes:

- Torture and *other cruel, inhuman, and degrading treatment* (emphasis added)⁷⁵;
- Transnational organized crime⁷⁶;
- Human trafficking⁷⁷;
- Recruitment of children into the armed forces⁷⁸;
- Child labor⁷⁹;

65 Judgment, *Hissein Habre v. République du Senegal* (ECW/CCJ/JUD/06/10), November 18, 2010.

66 Spiga, “Non-retroactivity of criminal law,” *Journal of International Criminal Justice (JICJ)* 9 (2011): 5, 14.

67 UNTAET, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, June 6, 2000, UN. Doc. UNTAET/REG/2000/15, Section 12(1) (hereinafter “UNTAET Reg.”).

68 Section 12(3) UNTAET Reg.

69 Subject matter jurisdiction.

70 Temporal jurisdiction.

71 Article 8 TJ Law.

72 *Ibid.*

73 A. Smeulers and F. Grünfeld, *International Crimes and Other Gross Human Rights Violations around the World* (2011), 20.

74 Cryer, *supra* note 51, 61.

75 Article 6 and 7 ICCPR; CAT Protocol.

76 United Nations Convention against Transnational Organized Crime 2000, 2225 UNTS 209 (Tunisia signed December 13, 2000 and ratified June 19, 2003).

77 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000, 2237 UNTS 319 (Tunisia signed December 13, 2000 and ratified July 14, 2003); Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime 2000, 2241 UNTS 507 (Tunisia signed 13, 2000 and ratified July 14, 2003).

78 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts 2000, 2173 UNTS 222 (Tunisia signed April 22, 2002 and ratified January 2, 2003); CRC, *supra* note 47.

79 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999, 2133 UNTS 161 (Tunisia ratified February 28, 2000); CRC, *supra* note 47.

- Forced labor⁸⁰;
- Terrorism (including financing)⁸¹;
- Crimes against international protected persons⁸²;
- Other forms of sexual violence⁸³;
- Genocide, crimes against humanity, and war crimes.⁸⁴

Nonretroactivity of Laws and Temporal Jurisdiction of Specialized Chambers

In light of the above, one has to inquire whether article 8 and related crimes have been criminalized under Tunisian or international law, including treaty law and customary international law, at the time when they were committed.

The answer to this question will depend on the jurisdiction *rationae temporis* of the SCCs. While the latter has not been explicitly provided for in the TJ Law, it stipulates the TDC's "work shall cover the period extending from 1 July 1955 up to the issuance of [the TJ Law],"⁸⁵ meaning from July 1, 1955, to December 24, 2013. Consequently, given that the TJ Law states that the TDC refers cases to SCCs,⁸⁶ it could be asserted that the temporal jurisdiction of both institutions overlaps.

Crimes against Humanity and War Crimes

Although Tunisia didn't ratify the ICC Statute until June 24, 2011, crimes against humanity, war crimes, and genocide have been prohibited under treaty and customary law long before this date. Crimes against humanity constitute certain inhuman acts, often criminalized under domestic law (ordinary crimes), which are committed in the context of a widespread or systematic attack directed against a civilian population.⁸⁷ There is no specific international treaty dealing with crimes against humanity; nevertheless, such crimes were included in the Nuremberg Charter as well as in the statutes of international and internationalized bodies,⁸⁸ and following the International Military Tribunals (IMT), they have passed into customary international law.⁸⁹ Similarly, war crimes were proscribed at the level of treaty law by the four Geneva Conventions of 1949 (to which Tunisia acceded in 1957) and the two additional protocols of 1977 (to which Tunisia acceded in 1979), as well as by international customary rules,⁹⁰ many of which the Hague Conventions of 1907 already embraced.

Gross human rights violations enumerated under article 8 of TJ Law, if committed in a specific context, will amount to international crimes, namely crimes against humanity or war crimes. However, if the material or mental elements of these crimes are not met, perpetrators might still be held accountable for gross human rights violations, such as deliberate killings and sexual offences, which are criminalized by the Tunisian Criminal Code. Judges of the SCCs should con-

80 Convention concerning Forced or Compulsory Labour 1930, 39 UNTS 55 (Tunisia ratified December 17, 1962); Abolition of Forced Labour Convention 1959, 320 UNTS 291 (Tunisia ratified January 12, 1959).

81 International Convention for the Suppression of the Financing of Terrorism 1999, 2178 UNTS 197 (Tunisia signed November 2, 2001 and ratified Jun 3 10, 2003); OAU Convention on the Prevention and Combating of Terrorism 1999 (Tunisia signed July 14, 1999 and ratified November 13, 2001); Protocol to the OAU Convention on the Prevention and Combating of Terrorism 2004 (Tunisia ratified December 18, 2007).

82 International Convention on the Prevention and Punishment of Crimes Against International Protected Persons 1973, 1035 UNTS 167 (Tunisia signed May 15, 1974 and ratified January 21, 1977).

83 ICCPR; CAT; Optional Protocol to the Convention on the Elimination of Discrimination against Women 1999, 2131 UNTS 83 (Tunisia accessed September 23, 2008).

84 ICCSt., Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277 (Tunisia acceded Convention on November 29, 1956) (hereinafter "Genocide Convention"); AP I and AP II.

85 Article 17, TJ Law.

86 Article 8 and 42, TJ Law.

87 Cryer, *supra* note 51.

88 Article 6 of the Charter of International Military Tribunals, August 8, 1945 (hereinafter "IMT Charter"); article 2 of the Special Court for Sierra Leone approved by SC Res.1315, August 14, 2000 (hereinafter "SCSLSt."); article 3 of the Statute of the International Criminal Tribunal for Rwanda adopted by the SC Res. 955, November 8, 1994 (hereinafter "ICTRSt."); article 7 ICCSt; Article 2 SCSLSt; Statute of the Iraqi Special Tribunal adopted by the Iraqi Governing Council on December 10, 2003 (hereinafter "ISTSt"), available at <http://web.archive.org/web/20071013130404/www.iraq-ihl.org/en/staute.html> (last visited August 26, 2017).

89 Bassiouni, *Crime against Humanity*, *supra* note 16, 169.

90 ICRC, Database on Customary International Law, available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home> (last visited July 20, 2017).

sider these international treaties and jurisprudence to fully reflect the seriousness of these crimes. In this regard, multiple international treaties are binding upon Tunisia, especially the ICCPR, ratified on March 18, 1969.⁹¹

Torture

There is an absolute and clear prohibition of torture under international law and the prohibition amounts to *ius cogens*.⁹² The crime of torture has been included in a statute of special chambers as a separate crime⁹³ and is also a material element for crimes against humanity, war crimes, and genocide.⁹⁴ CAT compels state parties to incorporate the crime of torture into their domestic legal systems. Tunisia ratified CAT in 1988, but it was not until 1999 that the crime was included in the Tunisian Criminal Code. The definition of torture, however, is not entirely consistent with CAT.⁹⁵ As a response to an endemic use of torture under the former regimes, article 23 of the Constitution embraces the prohibition of torture.

CAT was adopted in 1984 to “make more effective” the already existing prohibition [of torture] under international law.⁹⁶ This is a clear indication that this prohibition already existed under customary international law before the CAT was adopted.⁹⁷ The House of Lords in 1999 in the second extradition decision relating to General Augusto Pinochet had little difficulty in holding that torture was outlawed in terms of customary international law prior to the 1984 CAT.⁹⁸ Accordingly, the SCCs could classify acts of torture committed between 1984 and 2013 as crimes without violating the principle of nonretroactivity of laws.

Enforced Disappearance

The ICC Statute expressly includes the crime of enforced disappearance as a crime against humanity.⁹⁹ Nevertheless, even before this time, it constituted a crime under international law.¹⁰⁰ The crime of enforced disappearance is recognized under a few international documents,¹⁰¹ including the ICPPD, which was ratified by Tunisia in 2011. However, there is no agreement on whether the prohibition against enforced disappearance has passed into customary international law, and, if so, when this happened.¹⁰² Cassese, for example, argues that enforced disappearance was not a crime under customary international law when the ICC Statute was adopted in 1998.¹⁰³ Because Tunisia did not accede to the ICPPD until 2011, judges of the SCCs will have to determine whether the prohibition is part of customary international law, and if so, when this occurred.¹⁰⁴

However, even if it is determined that the crime of enforced disappearance has not developed into a peremptory norm of customary international law, in certain circumstances, those re-

91 For Deliberate killing see: articles 2 and 6 ICCPR (ratified by Tunisia on March 18, 1969); article 6(1) CRC (ratified by Tunisia on January 30, 1992); article 4 of African Charter (ratified by Tunisia on March 16, 1983); for rape and sexual violence, see: articles 2 and 7 ICCPR; articles 2, 4, 16 CAT (ratified by Tunisia on September 23, 1988); articles 2, 19(1), and 34 CRC; articles 2 and 5 of African Charter; article 6 Convention on the Elimination of All Forms of Discrimination Against Women 1979 (ratified by Tunisia in September 20, 1986).

92 A peremptory norm from which no derogation is permitted. See: Cryer, *supra* note 51; see also: article 5 of the Universal Declaration of Human Rights 1948; article 7 ICCPR; articles 4 and 5 of the African Charter; articles 129 and 130 of Geneva Convention III (Prisoners of War); articles 146 and 147 of Geneva Convention IV (Civilians).

93 See e.g., section 7 UNACT Reg., article 3 of Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, January 15, 2001, as amended by NS/RKM/1004/006, October 27, 2004 (hereinafter “ECCCSt”).

94 See e.g., article 6 ICCSt, article 7(1)(f) ICCSt., article 8(2)(a)(ii) ICCSt.

95 ICJ, *The Specialized Criminal Chambers*, *supra* note 8.

96 Preamble CAT.

97 See also: articles 2 and 7 ICCPR; article 37(a) CRC; article 5 of African Charter; articles 2.4, 16 CAT.

98 Lord Browne-Wilkinson, Lord Goff of Chieveley, Lord Hope of Craighead, Lord Hutton, Lord Saville of Newdigate, Lord Millett, and Lord Phillips of Worth Matravers, Opinions of the Lords of Appeal for Judgment in the Cause: *Regina v Bartle and the Commission of Police for the Metropolis and Others (Appellants) Ex Parte Pinochet (Respondent)*, *Regina v Evans and Another and The Commissioner of Police for the Metropolis and Others (Appellants) Ex Parte Pinochet (Respondent) On Appeal from the Divisional Court of the Queen’s Bench Division*, House of Lords, March 24, 1999.

99 Article 7 (1)(i) ICCSt.

100 Cryer, *supra* note 51, 216, referring to Nuremberg Judgment, reproduced (1947) 41 AJIL 172, 230.

101 UN Declaration on the Protection of All Persons from Enforced Disappearance 1992; Inter-American Convention on the Forced Disappearance of Persons 1994; ICCSt.

102 W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), 180.

103 Cassese, *supra* note 51.

104 ICRC, *supra* note 90, rule 98 states that the prohibition of enforced disappearance constitutes a norm of customary international law applicable in both international and noninternational armed conflicts.

sponsible for this crime may be prosecuted without violating the principle of nonretroactivity of laws. The SCCs could hold that enforced disappearances constitute a “continuing” crime, meaning that “the crime continues to be committed for as long as the whereabouts or fate of the person who has disappeared remain concealed.”¹⁰⁵ In the spirit of article 17(1) of the ICPPD, the crime of enforced disappearance should be treated as “a unique and consolidated act, and not a combination of acts.”¹⁰⁶ Accordingly where enforced disappearances commenced before the entry into force of the ICPPD in Tunisia and the whereabouts of the disappeared persons have not been disclosed, the SCCs may conclude that such violations are continuing because the crimes have not ended.¹⁰⁷

Other Article 8 Crimes

The SCCs will face challenges when dealing with article 8 violations that are referred to the SCCs by the TDC.¹⁰⁸ While such conduct can constitute a violation of international human rights law, such as the rights protected by the International Covenant on Economic, Social, and Cultural Rights (ICESCR),¹⁰⁹ it will not necessarily attract individual criminal responsibility under international law. Accordingly, conduct not prohibited under international law or by a general principle of law recognized by the community of nations must have been criminalized under domestic law at the time when it was committed.¹¹⁰ Otherwise, the principle of nonretroactive application of laws will be violated, giving rise to a breach of international law by Tunisia. While some of the crimes, such as financial corruption, have been included into the Tunisian Penal Code,¹¹¹ others, such as election fraud and forced migration for political reasons, constitute a novelty under both domestic and international law.¹¹²

However, the SCCs should consider whether the general definition of fraud and/or corruption in the Tunisian Penal Code are broad enough to cover acts of electoral fraud.¹¹³ In some countries electoral fraud is outlawed in specific electoral legislation, but in other countries fraudulent electoral practices violate general laws, such as those that criminalize fraud,¹¹⁴ bribery, corruption, forgery, identity theft, intimidation, harassment, or libel.¹¹⁵

Principle of *Res Judicata* and Its Interpretation under International Law

The Tunisian Constitution provides for the nonapplicability of the principle of *res judicata* with regard to transitional justice processes.¹¹⁶ This principle, which relates to binding and final effect of judgments, has been recognized widely under national and international legal systems.¹¹⁷ The principle *ne bis in idem*, or double jeopardy, constitutes a narrower expression of *res judicata*, setting out a prohibition that nobody should be tried twice for the same offence.¹¹⁸ Although the principle of *res judicata* may vary in content and as such has not been expressly included in the UDHR or the African Charter, it has been recognized as one of the fundamental principles

105 Judgment, *Castillo Páez case*, Supreme Court of Justice (Peru), First Provincial Criminal Chamber, Case No. 0012-2006-HC/TC, December 18, 2007, § 3(ii) and (iv).

106 Article 17(1) ICPPED, *supra* note 43.

107 See GA General Comment on Enforced Disappearance as a Continuous Crime by Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/16/48, January 26, 2011, § 39.

108 Election fraud, economic crimes and financial corruption, misuse of public funds, and forced migration for political reasons.

109 International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3.

110 Articles 15 (1) and (2), ICCPR.

111 See article 97 of the Tunisian Criminal Code.

112 HRW, *Tunisia: Hope for Justice on Past Abuses: Specialized Chambers Should be Independent, Fair* (2014) available at <https://www.hrw.org/news/2014/05/22/tunisia-hope-justice-past-abuses> (last visited August 13, 2017).

113 See articles 83 (corruption) and 291–292 (fraud) of the Tunisian Criminal Code.

114 In general, fraud is a broad term that refers to any conduct involving dishonesty or misrepresentation that causes actual or potential prejudice to others. It essentially involves intentional deception for monetary, personal, or other gain or advantage. Fraud invariably involves some sort of false statement, misrepresentation, or deceitful conduct.

115 In the Czech Republic and Eritrea there is no legislation criminalizing electoral misconduct. See IDEA, *Electoral Justice Regulations around the World: Key findings from International IDEA's global research on electoral dispute-resolution systems*, 2016, available at <https://www.idea.int/sites/default/files/publications/electoral-justice-regulations-around-the-world.pdf>.

116 Article 148(9).

117 Cryer, *supra* note 51, 67.

118 ICJ, *International Law and the Fight against Impunity: A Practitioners Guide* (2014), 432, available at <https://www.icj.org/wp-content/uploads/2015/12/Universal-Fight-against-impunity-PG-no7-comp-Publications-Practitioners-guide-series-2015-ENG.pdf> (last visited July 20, 2017).

in international law.¹¹⁹ Indeed article 14(7) of the ICCPR provides that “[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”

This protection is included in the Tunisian Criminal Code, which states, “[n]o one who has been acquitted may be prosecuted again for the same acts, even if they are classified as a different offence.”¹²⁰ The principle of *res judicata* applies only if an investigation and trial were conducted with respect for fair trial guarantees and regardless of acquittal, dismissal, or conviction.¹²¹

Instead of applying article 148(9) of the Constitution in a manner that violates Tunisia’s international law obligations, judges in the SCCs could interpret the article in a manner that is consistent with international law. Such an interpretation could be guided by solutions adopted in the statutes of the international tribunals. In this context, the SCCs would need to examine the content of a plea of *res judicata* from a substantive perspective. This would involve a determination on how genuine the previous proceedings were. According to the ICC Statute, a case is inadmissible unless the conduct of proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) ... were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.¹²²

The phrase “for the purpose of shielding the person concerned from criminal proceedings” constitutes an expression of bad faith on the part of state by acting duplicitously to ensure impunity from justice.¹²³ Similar provisions have been included in the statutes of other international tribunals or internationalized bodies, which are also aimed at excluding proceedings aimed at “shielding the accused from criminal responsibility” from the protection of the principle.¹²⁴

AMNESTIES AND STATUTE OF LIMITATIONS

In terms of article 148(9) of the Constitution, amnesties, pardons, and statute of limitations are excluded from the context of transitional justice. It is generally accepted that statutory limitations do not apply to war crimes,¹²⁵ genocide, crimes against humanity, and torture.¹²⁶ Indeed, with regard to the crime of torture, the Tunisian Constitution expressly prohibits any prescription.¹²⁷ Article 148(9) remains consistent with Tunisia’s international obligations in respect of such international crimes. It is also noted that in 1972 Tunisia acceded to the Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes against Humanity.¹²⁸ The ICC Statute also explicitly provides that statutory limitation do not apply to crimes under its jurisdiction.¹²⁹

119 Hereinafter, the principle of *res judicata* also encompasses *ne bis in idem*.

120 Art. 132bis.

121 ICJ, *A Practitioners Guide* (2014), *supra* note 118, 431. See also: Van Den Wyngaert and Stessens, “The International non-bis in idem Principle: Resolving Some of the Unanswered Questions,” *The International and Comparative Law Quarterly* (ICLQ) 48 (1999): 779.

122 See: articles 17(1)(c), 20(3)(a), and (b) ICCSt.

123 K. Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court* (2010), 68.

124 See: article 10 of the Statute of the International Criminal Tribunal for the Former Yugoslavia adopted by the SC Res. 837, May 25, 1993 (hereinafter “ICTYSt”); Art.9 of the Special Court for Sierra Leone approved by SC Res.1315, August 14, 2000 (hereinafter “SCSLSt”); UNTAET Reg. section 11(2), article 35 new ECCSt.

125 ICRC, *supra* note 90, rule 160.

126 Cassese, *supra* note 51, 319; judgment, Furundzija (IT-95-17/1-T), Trial Chamber II, December 10, 1998, § 157.

127 Article 23 of the Constitution.

128 Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes against Humanity 1968, 754 UNTS 73 available at http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.27_convention%20statutory%20limitations%20warcrimes.pdf (last visited September 29, 2017).

129 Cryer, *supra* note 51, 65. See also, e.g., section 17(1) UNTAET Reg.

The nonapplicability of *previous* amnesties¹³⁰ and pardons (fr. “[...]l’existence d’une amnistie ou d’une grâce antérieure [...]”) remain largely compatible with international law. Amnesties granted for gross human rights violations are incompatible with states’ obligations under international law.¹³¹ However, states continue to introduce them, especially in political negotiations as incentives to cease hostilities.¹³² Nevertheless states remain bound by international treaties, which impose a duty to investigate and prosecute gross human rights violations and to provide the remedies to victims.¹³³ Furthermore, the statutes of some internationalized bodies prohibit amnesty for crimes under their jurisdiction.¹³⁴

Although the inclusion of nonapplicability of amnesties in the Tunisian Constitution remains in line with Tunisia’s international obligations, the wording of the article raises concern as it refers to “*previous*” amnesties only. As recently demonstrated by the adoption of the so-called Reconciliation Bill, this clause may be interpreted to mean that only amnesties and pardons granted during the rule of previous regimes would not constitute a bar to prosecution before the SCCs, while those introduced by the new government as part of the so-called reconciliation and peace efforts remain admissible.¹³⁵

CONCLUSION

Although transitioning from an oppressive past is beset with significant challenges, lasting peace “cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.”¹³⁶ Justice should be framed on the bedrock of legitimacy. Legitimacy rests on respect for the rule of law and the human rights of all, including those of perpetrators. Such respect ultimately ensures that the past will not be repeated. Article 148(9) of the Constitution and certain clauses in the TJ Law have the potential to undermine the legitimacy of Tunisia’s transition.

In the longer term consideration should be given to effecting appropriate amendments to article 148(9) of the Constitution and certain clauses of the TJ Law to bring them in line with Tunisia’s binding international law obligations, as well as principles enshrined in the Constitution.¹³⁷

Since a constitutional amendment is unlikely to happen in the foreseeable future, courts in Tunisia, particularly the SCCs, should be encouraged to prefer any reasonable interpretation of article 148(9) and the TJ Law that is consistent with international law over any other interpretation that is inconsistent with international law.

130 See Tunisian Basic Law on Transitional Justice and Cases Relating to the Period from December 17, 2010 to February 28, 2011, [No. 2014-17], June 12, 2014. Article 1 of this Law stipulates: “Acts undertaken to ensure the success of the revolution between December 17 and February 28, 2011 shall not be subject to criminal liability.

Those held liable by court decision for committing such acts during the specified period shall benefit from a general legislative amnesty. Court of appeal prosecutors shall receive certificates in this regard in accordance with their respective competence.”

131 Human Rights Committee, General Comment No. 20 on article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), UN Doc. HRI/GEN/1/Rev.9 (Vol. I), March 10, 1992, §15; ICJ, *A Practitioners Guide*, *supra* note 118, 269.

132 Mallinder, “Exploring the Practice of States in Introducing Amnesties,” in K. Ambos et al. (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development, The Nuremberg Declaration on Peace and Justice* (2009), 127.

133 ICJ, *A Practitioners’ Guide*, *supra* note 118, 269.

134 Article 10 SCSLSt. provides that an amnesty granted for crimes against humanity shall not be a bar to prosecution; article 40 of ECCCSt. excludes amnesties for multiple crimes under its jurisdiction. See also articles 6 and 16 of approved by SC Res. 1757, 2007 (hereinafter “STLSt”); the ICC does not explicitly exclude amnesties but admissibility is determined by the considerations set out in article 17, ICCSt.

135 Al-Monitor, Marta Bellingeri, *Tunisian Initiative Takes to Streets against Reconciliation Law*, September 22, 2017, available at <http://www.al-monitor.com/pulse/originals/2017/09/tunisia-administrative-reconciliation-law-social-movement.html> (last visited September 29, 2017). See also Tolbert, ICTJ, *Tunisia’s Reconciliation Bill Threatens Gains of the Revolution* (2015), available at: <https://www.ictj.org/news/tunisia-reconciliation-bill-danger-gains-revolution> (last visited on July 17, 2017); ICTJ, *Laundering the Corrupt Is a National Priority? Tunisian Civil Society Again Opposes National Reconciliation* (2017), available at <https://www.ictj.org/news/tunisia-civil-society-reconciliation-bill> (last visited on July 17, 2017).

136 UNSC, Report of the Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, August 3, 2004, UN Doc. S/2004/616, §2.

137 The process of amending the Constitution is long and complex as it requires the constitutional check of the amendment by the Constitutional Court and an approval by two-thirds of the members of the ARP (article 144). Moreover, the president may refer a constitutional amendment to a referendum. Aside from removing the non-applicability of nonretroactive application of laws and *res judicata* from article 148(9), consideration should be given to amending article 20 to incorporate binding international law, inclusive of customary international law, as law in Tunisia.

It is possible for Tunisia to hold perpetrators to account without violating constitutional and international norms of due process. This briefing has offered examples of how a purposive interpretation of the principle of legality and *res judicata* can achieve this objective.

Where it is not possible to prosecute certain gross human rights violations under article 8 of the TJ Law without offending constitutional and international law safeguards, and where the TDC has not dealt adequately with such violations, consideration could be given to the holding of “truth trials” as initiated in Argentina.¹³⁸ These “were an innovation in [the country’s] justice, and possibly in the rest of the Americas. They were unlike ordinary criminal trials in that judicial action was expressly limited to investigation and documentation, without there being a possibility of prosecution or punishment. They were based on the right (both of the relatives and of society as a whole) to know the truth...”¹³⁹

138 HRW, *The Truth Trials*, available at: https://www.hrw.org/reports/2001/argentina/argen1201-04.htm#P218_57995 (last visited June 1, 2017).

139 Ibid.