



Department of Political Science

Chair: Comparative Public Law

**TRANSITIONAL JUSTICE AFTER THE ARAB SPRING:
THE CASES OF LIBYA AND TUNISIA**

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Introduction

Research Background

In the recent years, the world has witnessed several democratic transitions, such as the 1989 Eastern European countries transitions from Communism to democracy. Despite the occurrence of the democratic transition processes, Eastern European countries have recently experienced a surge in populist movements, which entails that liberal democratic values are not really consolidated in those countries, and that those countries democratic regimes may have failed coming to terms with past human rights abuses. In light of this, it is important to study the democratic transition and transitional justice processes that have occurred in other parts of the world, such as in North Africa, to understand how Eastern European countries may benefit from such experiences. Hence, this thesis will focus in-depth on the transitional justice mechanisms which were put in place in Libya and Tunisia in the aftermath of the 2011 Arab Spring.

The term *Arab Spring* is used to refer to the popular uprisings which broke out in Tunisia in December 2010, “and then spread throughout the Arab world”, thanks to the massive use of social network, as the chapter dealing with the Tunisian case will demonstrate¹. In particular, the Arab countries which were affected by the Arab Spring were Tunisia, Egypt, Libya and Yemen. Within these four Arab countries, “citizens have risen up against old-entrenched dictators and their police states where kleptocracy reigned supreme. An elite surrounding gloated leaders ran mafias that left 30-40 per cent of the population mired in poverty and despair”².

The outbreak of the Arab Spring was mostly triggered by economic factors. For instance, the authoritarian governments that had ruled the four countries until 2011 were mostly underpinned by a system of nepotism, whereby citizens could only get a job on the ground of personal acquaintances, and “private businesses increasingly hired people without giving them contracts, thus avoiding paying benefits”³. Among the citizens who were the most dissatisfied with the nepotistic economic systems prevailing in their countries were young graduates, who, due to the poor economic performance, were mostly incapable of getting a job in the private sector, and they were thus forced “to want government jobs where they would not or could not be fired”⁴.

The outcome of the Arab Spring was that the authoritarian regimes of the four countries were successfully overthrown; however, only in Tunisia was the overthrow of the ruling authoritarian regime followed by a democratic transition consisting in the adoption of a constitution entrenching civil and political rights and providing for the establishment of democratic decision-making bodies; in the other

¹ Stuart Schaar, ‘The Arab Citizens’ Revolt and its Impact on Tunisia’, *The Maghreb Review*, 37 (2012), p. 334

² *ibidem*

³ *ibidem*

⁴ *ibidem*

four countries, that is in Libya, Egypt and Yemen, the overthrow of the authoritarian regimes was followed by an institutional paralysis which is still ongoing, and which has made it impossible to transition to democracy.

In the context of the Arab Spring, transitional justice, which can be briefly conceptualized as the set of mechanisms which are put in place during a regime change to foster redress for the human rights violations which were perpetrated under the previous regimes, plays a very important role. For instance, within all of the four countries, the transitional authorities that took power in the aftermath of the authoritarian regimes' overthrow attempted to put in place transitional justice mechanisms which were aimed at coming to terms with the human rights violations that had been perpetrated against the civilian population at the hand of the former regimes, and at furthering a full democratic transitions.

Research question

Which transitional justice mechanisms were put in place in Libya and Tunisia in the aftermath of the Arab Spring? To what extent were they effective in fostering redress for the human rights abuses that had been perpetrated in the two countries under the authoritarian regimes and during the revolts?

Case selection

I came up with these two cases, by following the so-called *Most Different Cases Logic*. This logic was conceptualized by Ran Hirschl, who is a Comparative Constitutional Law Professor at the University of Toronto. This logic postulates that “researchers should compare cases that are different on all variables that are not central to the study but match in terms that are, thereby emphasizing the significance of consistency on the key independent variable in explaining the similar readings on the dependent variable”⁵. The two cases that I have selected perfectly fit this logic. For instance, even if both Libya and Tunisia experienced the overthrow of their respective authoritarian regimes in the aftermath of the Arab Spring, the two countries followed completely different paths in their transition to democracy: while the Arab Spring in Tunisia culminated in the consolidation of the democratic transition process and in the adoption of a new constitutional text, the Arab Spring in Libya resulted in an institutional paralysis that made it impossible to accomplish a democratic transition in the country. A further significant difference between the two cases is that while the Tunisian transitional justice process was steered by the domestic transitional institutions, international actors such as the International Criminal Court (ICC) played a very important role in steering the Libyan transitional justice process. The only similarity between the two cases can be found in the fact that neither in Libya nor in Tunisia were any specific transitional justice mechanisms set-up, for the purpose of redressing gender-based abuses.

⁵ Ran Hirschl, ‘The Question of Case Selection in Comparative Constitutional Law’, *American Journal of Comparative Law*, 53 (2006), p. 139

Sources selection

This thesis will tap into four main types of sources: books, journal articles, United Nations General Assembly (UNGA) and United Nations Security Council (UNSC) Resolutions, and websites. Books will mostly be used in the first chapter, which will deal with the main legal and historical aspects of transitional justice mechanisms, for the purpose of describing some of the main international actors that have been contributing to playing a role in the realm of transitional justice, such as the ICC, and in the second and third chapters to describe the Libyan and Tunisian processes of democratic transition from an institutional perspective.

Journal articles will be used in all of the chapters, in particular to describe the main transitional justice mechanisms which were put in place in Tunisia and Libya in the aftermath of the Arab Spring.

Third, this thesis will tap into UNGA Resolutions to get the institutional definition of the term “transitional justice”, as well as to describe the general features of the main transitional justice mechanisms. Furthermore, UNGA resolutions will be used, for the purpose of describing the mandate of the UN Peacebuilding Commission, which is an institution that was created under the umbrella of the UN to deal with transitional justice and peacebuilding processes. A UNSC Resolution will be used in the second chapter to briefly describe how the UNSC responded to the threats to the peace that had occurred in Libya as a result of the revolts.

Finally, this thesis will tap into websites in the third chapter, to give evidence of the main legal issues posed by some of the transitional justice processes which were put in place in Tunisia.

It is important to remark that this thesis has mostly tapped into academic sources which were produced by Western European and American scholars, as the issues pertaining to transitional justice seem to have been developed much more extensively in Western Europe and the US than in Northern African countries.

When describing the sources of this thesis, it is essential to remark that since the Libyan and Tunisian transitional justice processes have recently taken place, very few academic sources had been produced on these processes. In particular, as far as the Libyan transitional justice process is concerned, due to the institutional paralysis that has underpinned the country, no data have been produced concerning the number of citizens who had appeared before the truth-seeking bodies. As far as the Tunisian case is concerned, instead a quite significant amount of data could be obtained on the effectiveness of the truth-seeking and reparations mechanisms that had been put in place by the transitional institutions, but hardly any data could be obtained on the number of citizens that resorted to the Truth and Dignity Commission (TDC), as this mechanism was set up very recently, namely in 2014, as the relevant chapter will show.

Hypotheses

The result that can be expected from this research is the following: the transitional justice mechanisms that were put in place in Tunisia and in Libya in the aftermath of the Arab Spring have been effective in fostering redress for the abuses perpetrated against the civilian population under the authoritarian regimes and during the 2011 Arab revolts. This thesis will attempt to validate this hypothesis.

Research structure

The research will be structured as follows: the first chapter will provide the legal background of the thesis, by focusing on the general institutional characteristics of the transitional justice process. After highlighting the link between democratic transitions and the transitional justice process, providing a brief historical overview of the transitional justice processes that have been implemented from the end of World War II until nowadays, the chapter will analyze the definition of transitional justice, and the features of the main transitional justice mechanisms. Then, the transitional justice endeavors undertaken by the UN and the EU will be briefly scrutinized, and finally, some of the new trends in the transitional justice debate, namely the incorporation of economic and social rights and of gender concerns in the scope of transitional justice activities will be scrutinized.

The second chapter will focus on the transitional justice process in Libya, and it will be divided into three parts: first, the Libyan failed democratic transition process will be analyzed; second, the transitional justice processes put in place by the Libyan transitional institutions and by the ICC will be explored, and the extent to which they have contributed to fostering redress for human rights abuses will be analyzed. Finally, some of the main issues that the Libyan transitional justice process has failed addressing will be discussed.

The third chapter will concentrate on the transitional justice process in Tunisia, and it will be divided into four parts: first, the Tunisian successful democratic and constitutional transition processes will be described; second, the transitional justice measures implemented by the Tunisian transitional institutions will be analyzed, by highlighting the extent to which they contributed to redressing human rights abuses; third, the truth-seeking process that was put in place after the election of the Tunisian National Constitutional Assembly will be described, by briefly focusing on its effectiveness, and finally, an overview will be made of the connection between the Tunisian transitional justice process and some of the Internet reforms that were implemented in the aftermath of Ben Ali's overthrow.

1. Transitional Justice Theoretical Background

This chapter will provide the theoretical background concerning transitional justice, and it will be divided into six main parts. The first part will provide a general description of the general features of the four main types of democratic transitions. In this respect, it is essential to state that whenever dealing with transitional justice policies, it is necessary to refer to democratic transitions, as there is a close correlation between transitional justice and democratic transition processes. This correlation has been studied by several authors, including Anja Mihr and Marten Bergsmo. According to Anja Mihr, transitional justice is one of the main components of a successful democratic transition process. For instance, as the author underlines, the various transitional justice mechanisms “can have an impact on the quality of democracy, if the newly established judiciary incriminates alleged perpetrators of past injustice and decisions against perpetrators are issued who under the old regime would have stayed unpunished. Civic trust in democratic institutions and thus the quality of democracy can also be impacted through...political elites publicly reckoning with the past”⁶. To this, Morten Bergsmo added that such transitional justice mechanisms as “retribution and reparation are needed to stabilize” a country which is undertaking a democratic transition, because “if wrongdoers are not punished and victims not compensated, the government will lose legitimacy and extremist movements may flourish”⁷.

Second, the definition of the term Transitional Justice will be analyzed, by tapping into a General Note adopted by the UN Secretary General, and the main transitional justice mechanisms will be evaluated.

After having provided a general detailed description of the main transitional justice mechanisms, this chapter will focus on the evolution of transitional justice in its three historical phases. Then, I will analyze the instruments that the United Nations (UN) and the European Union (EU) have put in place to deal with transitional justice processes.

Finally, I will explore the contemporary debates surrounding transitional justice, namely the incorporation of economic and social concerns into the definition of transitional justice, and the capability of transitional justice mechanisms to address gender crimes. These debates represent two innovative dimensions in the field of transitional justice. For instance, the traditional transitional justice debates have usually focused on redressing violations of civil and political rights, and only the most recent scholarly debates have incorporated economic and social rights issues within the scope of transitional justice.

⁶ Anja Mihr, ‘Transitional Justice: Between Criminal Justice, Atonement and Democracy’, *SIM Special*, 37 (2012), p. 20

⁷ Marten Bergsmo et al., *Distributive Justice in Transition* (Oslo: Torkel Opsahl Academic EPublisher, 2010), pp. 17-18

1.1 Democratic transitions

1.1.1 Classification of democratic transitions

The concept of democratic transitions is a very broad notion, which entails, according to Leonardo Morlino, the entrenchment of civil and political rights (CPRs) within the constitutional text of a given polity, “where necessary, the full civilianizing of society; the emergence of a number of parties and a party system, but also of collective interest groups, such as unions and interest groups”, and the establishment of democratic institutions and decision-making processes, “starting with the electoral law, specification of the relations between legislative and executive bodies, and other aspects pertinent to the functioning of the regime”.⁸ Political Science scholars have achieved consensus on the fact that democratic transitions can be classified into four main types, which include “transitions that are led by the elite of the old regime, those that are forced on the elite by the opposition, those that are bargains between the elite and the opposition, and those that are imposed by a foreign nation”⁹.

In order to illustrate the differences between the four categories of democratic transitions, it would be useful to introduce some examples. The 1970s transition that occurred in Spain can be deemed to represent an instance of elite-led transition; for instance, reforms that transformed Spain into a democratic system and into a liberal economic system were carried out by King Juan Carlos after Francisco Franco had passed away¹⁰. In order to better clarify this example, it is necessary to introduce a brief account of the Spanish transition to democracy. On July 1, 1976, after Arias Navarro’s resignation, Adolfo Suarez, who had occupied several positions under the Franco regime, was appointed as transitional prime minister, and his government lasted until June 1977, when the first democratic elections took place in Spain. Since the beginning of his mandate, Suarez had been committed to entrenching CPRs within the Spanish legal system, as well as to guaranteeing “equality of opportunity for all democratic groups”¹¹. In particular, as soon as he was appointed as transitional prime minister, Suarez amended the Spanish criminal code, “repealing the ban on political parties with the exception of those ‘that subject to international discipline intend to set up a totalitarian regime’”, he engaged with “leaders of parties and trade unions of the opposition”, and he pardoned all of those Spanish citizens who had been convicted on the ground of their political orientation, under the Franco regime¹². Prior to carrying out all of these reforms, Suarez usually consulted with the military forces, who had tightly

⁸ Leonardo Morlino, ‘Transition to Democracy. What Theory to Grasp Complexities?’, *Luiss Guido Carli Working Paper*, 6 (2014), p. 8

⁹ Eric A. Posner & Adrian Vermeule, ‘Transitional Justice as Ordinary Justice’, *Harvard Law Review*, 117 (2004), p. 769

¹⁰ *ibidem*

¹¹ Santiago Sanchez Gonzalez, ‘Emergent New Democracies: the Case of Spain’, *William and Mary Bill of Rights Journal*, 1 (1992), p. 278

¹² *ibidem*

collaborated with the Franco regime, and were thus thought to pose a hurdle to the achievement of the Spanish democratic transition. Nevertheless, Suarez always managed to achieve their “endorsement”¹³.

Unlike the Spanish transition to democracy, the late 1970s Greek transition can be considered as an instance of opposition-led transition, as it occurred thanks to the “defeat of the Greek colonels in the 1970s by a coalition of civil and military groups” that transformed Greece into a constitutional democratic polity¹⁴.

An instance of negotiated transitions can be found in the 1989 transition that occurred in Poland. For instance, when the Solidarity Union, which was opposed to the Communist Party, acquired consensus, it started to organize a series of workers’ protests, which sparked fears of social and economic unrest among the main representatives of the Communist Party. The Communist Party thus acquiesced to negotiate a transition to democracy with the Solidarity Union¹⁵.

Finally, transition to democracy in Germany in the aftermath of World War II (WWII) was imposed by foreign countries; in the aftermath of WWII, a transition from authoritarianism to democracy in Germany was accomplished by the winners of WWII, which retained political control in the country until the “elites demonstrated a commitment to liberal democracy”¹⁶. In order to better support this statement, a brief historical explanation needs to be provided. After Germany had “surrendered unconditionally in the Summer of 1945 to the United States, the United Kingdom and the Soviet Union, these three victors-later accompanied by France-together installed an occupation regime which was intended to last only until a peace treaty would define the final status and form post-war Germany would take”¹⁷. In 1949, in the aftermath of the outbreak of the Cold War between the US and the Soviet Union, the Federal Republic of Germany (FRG) was established in the area occupied by the US, the UK and France, while the German Democratic Republic (GDR) was established in the area occupied by the USSR. Nevertheless, sovereignty was not immediately acquired by either the FRG or the GDR; for instance, as von der Dunk and Kooijmans have made clear, “the three Western allies in the FRG, and the Soviet Union in the GDR, maintained their essential rights arising out of occupation, which had not yet been formally ended”¹⁸. As far as the FRG was concerned, this was finally recognized as a sovereign state only by article 1(2) of the 1952/54 Convention on Germany. Indeed, “from that time onward the Western allies were represented in the FRG by ambassadors instead of High Commissioners”¹⁹. However, despite recognizing the FRG as a sovereign state, the 1952/54 Convention on Germany

¹³ *ibidem*

¹⁴ Eric A. Posner & Adrian Vermeule, ‘Transitional Justice as Ordinary Justice’, *Harvard Law Review*, 117 (2004), p. 769

¹⁵ *ibidem*

¹⁶ *ibidem*

¹⁷ Frans Von der Dunk & Peter H. Kooijmans, ‘The Unification of Germany and International Law’, *Michigan Journal of International Law*, 12 (1991), p. 513

¹⁸ *Ivi*, p. 514

¹⁹ *ibidem*

provided, under articles 2 and 4, that the occupying forces could retain “some residual occupational rights, namely the right to station troops in West Germany territory”, and such rights “were in fact still utilized until unification”²⁰. So, as von der Dunk and Kooijmans have pointed out “the legal situation before unification...seemed to be that the three Western occupying allies, by reserving some occupational rights up until unification occurred, still retained their rights regarding the FRG and any peace treaty with Germany”²¹. As far as the GRD was concerned, instead, “the statement of 1954 and the 1955 Treaty with the Soviet Union provided for essentially the same measure of sovereignty when compared with the FRG. This time, however, the residual occupational rights to station troops became Soviet rights under the bilateral treaty of 1955”²².

1.1.2 Transitional Justice endeavors accompanying the three waves of democratization

Political Science scholars, such as Samuel Huntington conducted several studies aimed at showing whether the three waves of democratization were underpinned by any transitional justice endeavors. The first wave of democratization, as Samuel Huntington calls it, took place at the end of the 19th century, when a democratic transition occurred in Great Britain and France, and it saw the British and French elites granting the right to vote to a larger segment of their populations, and allowing some forms of political pluralism. The late 19th century democratic transitions were not accompanied by any transitional justice endeavors²³.

In the aftermath of WWII, namely from 1945 to 1962, the so-called second wave of democratization took place, and it saw the losers of WWII, namely Italy, Belgium, France, West Germany, Belgium, Denmark and the Netherlands undertaking a transition from authoritarianism to democracy. The democratic transitions that occurred during the second wave of democratization were accompanied by two main transitional justice endeavors. The first of these two transitional justice mechanisms consisted in the establishment of the Nuremberg International Military Tribunal (IMT) by the winners of WWII, which was tasked with trying Nazi criminals who had perpetrated war crimes, crimes against peace and crimes against humanity during WWII, as it will be explained more in-depth in section 3 of this chapter. The second transitional justice mechanism which was put in place in this phase was the prosecution of “collaborators and officials of the puppet governments during the war” by the French, Dutch, Danish and Belgian post-transitional governments²⁴.

From the late 1970s until 1989 the third wave of democratization unfolded. The third wave of democratization could be divided into three main different stages: the first stage, which occurred in the late 1970s consisted in democratic transitions taking place in Spain, Portugal and Greece; the second

²⁰ *ibidem*

²¹ *Ivi*, p. 516

²² *Ivi*, p. 515

²³ Eric A. Posner & Adrian Vermeule, ‘Transitional Justice as Ordinary Justice’, *Harvard Law Review*, 117 (2004), cit, p. 771

²⁴ *ibidem*

stage consisted in the 1980s democratization of such Latin American countries as Chile and Argentina and the third stage saw the transition of Eastern European countries from Communism to democracy, and it started in 1989. The third wave of democratization was accompanied by a wide variety of transitional justice mechanisms, including truth commissions, trials and lustration of former regime officials²⁵; while truth commissions were mostly put in place in such Latin American countries as Argentina, as the below sub-paragraphs will describe, lustration measures were mostly adopted in Eastern European countries, such as Czechoslovakia and Poland after the fall of Communism. In particular, in Czechoslovakia, “a lustration/decommunization law was passed in October 1991, barring former high-level party officials, members of the police forces, and their collaborators from occupying high posts within the state sector (including the military, the judiciary, universities, and state mass media) for five years”²⁶. In Poland, instead, a resolution was adopted by the parliament in 1992, which “obliged the Interior Minister in Prime Minister’s Jan Olszewski’s cabinet to provide full information about possible SB collaboration among high state officials and members of the parliament within nine days”.²⁷ What is striking about the third wave of democratization is that since the democratic transitions that occurred in this period were not imposed by foreign powers, but they were either opposition-led or negotiated transitions, the transitional justice agenda that prevailed in these transitional countries was tailored to the needs of the local populations, and it was by no means dictated by foreign powers²⁸.

1.2 Transitional justice definition and mechanisms

This paragraph will analyze the main definition of Transitional justice as provided by the UN in one of its Resolutions, and it will then look at the main transitional justice mechanisms in-depth.

As provided by the UN Secretary General in its 2010 Guidance Note, the term Transitional Justice refers to “both judicial and non-judicial processes and mechanisms, including prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations”²⁹. The aim of transitional justice is to remedy to all of the human rights violations perpetrated during the previous regime, so as to foster the reconciliation of society, “accountability” and “justice” for the victims³⁰. Before turning to the analysis of the different transitional justice mechanisms, it is necessary to define the term “social reconciliation”. Comparative Public Law and Public International Law scholarship has not come up with a definition of the term “social reconciliation” yet. Therefore, in light of the impossibility to rely upon a normative definition of

²⁵ ibidem

²⁶ Maria Los, ‘Lustration and Truth Claims: Unfinished Revolutions in Central Europe’, *Law & Social Inquiry*, 20 (1995), p. 121

²⁷ Ivi, p. 123

²⁸ Eric A. Posner & Adrian Vermeule, ‘Transitional Justice as Ordinary Justice’, *Harvard Law Review*, 117 (2004), cit, p. 771

²⁹ United Nations Secretary General Guidance Note (2010). *United Nations Approach to Transitional Justice*. Available at: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf; p. 2

³⁰ James Sweeney, ‘Restorative Justice and Transitional Justice at the ECHR’, *International Criminal Law Review*, 12(2012), p. 317

this term, it is necessary to tap into a sociological definition. In this respect, I will borrow Crossley-Frolick's definition of "social reconciliation", according to which, the term "reconciliation" refers to "the condition under which citizens can once again trust one another as citizens. That means that they are sufficiently committed to the norms and values that motivate their ruling institutions; sufficiently confident that those who operate those institutions do so also on this basis; and sufficiently secure about their fellow citizens' commitment to abide by these norms and values"³¹. After having defined the basic terms underlying the transitional justice definition, this paragraph will turn to exploring the main transitional justice mechanisms.

1.2.1 Prosecution Initiatives

One of the main transitional justice judicial mechanisms foreseen by the UNSG Guidance Note is prosecution of former regime members. This mechanism will be analyzed by focusing on the aims of prosecutions, as well as by analyzing the European Court of Human Rights' jurisprudence on prosecution of former regime members.

The underlying objective of prosecution initiatives is to subject to trial and to sentence the former regime members who are liable for breaches of international human rights law and international humanitarian law. Prosecution initiatives need to be carried-out in an impartial way, in order for them to be deemed as "credible" and "legitimate"³². The duty to prosecute those who are liable for the perpetration of international human rights and international humanitarian law breaches is born primarily by states; therefore, the main priority of transitional justice schemes should be strengthening the capability of the domestic judicial authorities in summoning witnesses, collecting proof, and "developing national investigative and prosecutorial capacities"³³. In case the prosecution of former regime members cannot be impartially and efficiently pursued by the national judicial authorities of post-conflict countries, international criminal tribunals can be set-up to carry-out this function³⁴. When analyzing the role of trials in the transitional justice process, it is essential to mention one of the main legal obstacles which make it difficult to hold former regime members to trials. The main legal factor hindering the possibility of holding trials of former regime members is the *nulla poena sine lege* principle, which is an essential component of the rule of law, and which postulates that it is illegal to punish someone for an act that was not deemed to be a breach of domestic or international legal obligations when it was perpetrated. The incompatibility of trials of former regime members with the *nulla poena sine lege* principle was underlined by Arenhovel when he studied the transitional justice processes that Eastern European countries underwent in the aftermath of Communism. In particular,

³¹ Kate A. Crossley-Frolick, 'The European Union and Transitional Justice: Human Rights and Post-Conflict Reconciliation in Europe and Beyond', *Contemporary Readings in Law & Social Justice*, p. 50

³² United Nations Secretary General Resolution (2010). *United Nations Approach to Transitional Justice*. Available at: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf, cit., p.7

³³ ibidem

³⁴ ibidem

according to Arenhovel, holding trials of former Communist regime members in Eastern European countries is in conflict with the *nulla poena sine lege* principle, as many of the measures implemented by the former Eastern European regimes, such as “the secret police shadow, the censorship, the political criteria for all decisions” were not considered to be illegal acts when they were put in place; therefore, former Eastern European regime members may defend themselves by claiming that “he or she was unaware of the now alleged criminal nature of the acts of which he or she is accused”³⁵.

After having elaborated on the purposes that prosecutions of former regime members serve, this paragraph will deal with the ECtHR jurisprudence on prosecution initiatives. The reason why it is essential to analyze the ECtHR’s jurisprudence on trials as a transitional justice measure lies in the fact that, through its landmark judgments, the ECtHR helped foster redress for those human rights violations perpetrated under the Communist regimes in Eastern European countries, and it contributed to setting out principles which were then followed in various transitional regimes. The importance of trying former regime members who are liable for human rights violations before criminal courts has been clearly expressed by the ECtHR in its recent jurisprudence. In the 2011 *Association 21 December 1989 & Others v. Romania* case, the ECtHR made three important claims concerning the importance of prosecutions of former regime members. First, the ECtHR claimed that the Romanian judicial authorities had not gathered sufficient proof to determine who was responsible for the death of a twenty years old Romanian citizen, which had occurred during the crashing of the 1989 protests against Communism. Moreover, the Court underlined that the Romanian judicial authorities should have collected a larger amount of evidence on the crashing of the 1989 protests against Communism, in such a way as to shed the light on, and prosecute those who were responsible for the violent repression. Finally, the ECtHR underscored that the Romanian judicial authorities should have guaranteed the family of the twenty years old victim the right to participate in the court hearing concerning the death of their son, so as to be enabled to find out the truth about how their son got murdered, and to get justice restored³⁶.

1.2.2 Truth-seeking process

Among the non-judicial transitional justice mechanisms foreseen by the UNSG Guidance Note is the establishment of truth commissions, which are composed of non-judicial personnel, and they are in charge of carrying-out truth-seeking processes. Truth commissions’ function will be scrutinized by focusing on their mandate, on the ECtHR jurisprudence on truth-seeking processes, and on the main advantages and disadvantages that truth-seeking processes present.

Several scholars have elaborated on the main features of truth commissions, as well as on the criteria that truth commissions should fulfill in order to qualify as such. One of the seminal scholars who

³⁵ Mark Arenhovel, ‘Democratization and transitional justice’, *Democratization*, 15 (2008), p. 575

³⁶ James Sweeney, ‘Restorative justice and transitional justice at the ECHR’, *International Criminal Law Review*, 12(2012), cit., p.322

have investigated the functioning of truth commissions in-depth is Angelika Schlunck (1998). According to Schlunck, four are the main criteria a truth commission has to fulfill, in order to qualify as such. First, the “past” should be the main concern of truth commissions; second, truth commissions should provide a general overview of the human rights violations which were perpetrated during a specific span of time, rather than focusing on a single “specific event in the past”; furthermore, truth commissions are supposedly in place for a specific and limited time frame, and they almost always issue a communication concerning the results of their investigations when their mandate expires; finally, a truth commission “is vested with a certain authority”³⁷. The main mandate of truth commissions, which are usually made-up of non-judicial or quasi-judicial personnel with an expertise in law, consists in shedding lights on the human rights violations which were committed under the previous regime, so as to identify the violations perpetrators, the factors which made it easy to commit such crimes, as well as the potential implications of such crimes. Among the activities performed by truth commissions are the organization of sessions in which the perpetrators of human rights violations are called upon to disclose the truth about their actions and the victims of human rights violations are invited to provide details on the abuses they have undergone, the launching of awareness programs, and preparation of studies that highlight how human rights violations came to the forth under the previous regime³⁸. In order to practically illustrate how many different activities truth commissions can perform, it may be useful to provide some examples: the truth commission established in El Salvador was tasked with investigating the human rights atrocities that the local militias had perpetrated in the country; the Argentinian truth commission was mandated to raise awareness on the human rights and democratic values among the Argentinian population; in Guatemala, the role of the truth commission which was put in place during the transitional period consisted in fostering the emancipation of those social classes that had lived on the fringes of the Guatemalan society, and the South African Truth and Reconciliation Commission was in charge of granting pardon to all of those public officers who had revealed the truth about the human rights violations they had committed during the Apartheid era³⁹. When studying truth commissions, it is fundamental to notice that in order for the evidence gathered by truth commissions to be safely preserved and used to foster national reconciliation, the countries in which truth-seeking processes are conducted need to offer facilities in which the records collected by truth commissions can be safely stored and accessed by the public. Nevertheless, it is quite unlikely that such facilities are offered by post-conflict countries; moreover, in those post-conflict countries where “archival systems” are present,

³⁷ Angelika Schlunck, ‘Truth and Reconciliation Commission’, *Journal of International Law and Comparative Law*, 4 (1998), p. 417

³⁸ United Nations Secretary General Guidance Note (2010). *United Nations Approach to Transitional Justice*. Available at: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf; cit., p.8

³⁹ Mark Arenhovel, ‘Democratization and transitional justice’, *Democratization*, 15 (2008); cit., p. 577

these systems are “vulnerable to efforts to destroy evidence of human rights violations”, due to a lack of police control⁴⁰.

After having provided a picture of the main functions performed by truth commissions, this paragraph will elaborate on the ECtHR jurisprudence concerning truth-seeking process. Such scholars as Sweeney clearly show that the ECtHR in particular and the Council of Europe in general have not stressed enough the importance of truth-seeking processes in the transitional justice process. Despite this, the ECtHR adopted a few landmark Resolutions, aimed at providing some guidelines on how to put in place truth-seeking processes in countries transitioning from authoritarian regimes to democratic ones, and the analysis of these Resolutions can foster a better understanding of the major public international law trends on truth-seeking processes. Among the Resolutions adopted by the ECtHR was PACE Resolution No. 1096 of 1995, which was adopted for the purpose of stepping up truth-seeking processes in Eastern European countries transitioning out of Communism; pursuant to the PACE Resolution, the Secret Services of Former Communist countries are supposed to make public all the information they hold on citizens. Moreover, in the context of the ECtHR jurisprudence, a reference to the importance of truth-seeking in the transitional justice process can be found in the *TAS V. H* case, in which the court stated that in order for a state to fully transition from authoritarianism to democracy, that state has to come to terms with the past, and disclose information on past human rights abuses⁴¹.

Finally, this sub-paragraph will analyze, with the help of the academic literature, the advantages and diadvantages presented by truth commissions as compared to criminal prosecutions. The main advantage presented by truth commissions is that they are not supposed to abide by strict international criminal law standards, and thus they are much more “flexible in hearing and accomodating witnesses, and in evaluating evidence”⁴². This point is further strengthened by other international law scholars, such as Turano. For instance, Turano has clearly stated that since there is no international legal obligation upon truth commissions to comply with due process and other rule of law guarantees which may require the victims to provide an in-depth account of the abuses they have gone through, thus potentially getting re-traumatized, truth commissions “create a more welcoming environment for victims”⁴³. Second, there seems to be enough consensus among human rights scholars on the fact that truth commissions are much more effective than criminal courts in coping with crimes of genocide and crimes against humanity which “usually occur in a certain social climate of political oppression and

⁴⁰ United Nations Secretary General Guidance Note (2010). *United Nations Approach to Transitional Justice*. Available at: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf; cit., p. 8

⁴¹ James Sweeney, ‘Restorative Justice and Transitional Justice at the ECHR’, *International Criminal Law Review* 12(2012), cit., p. 330

⁴² Angelika Schlunck, ‘Truth and Reconciliation Commissions’, *ILSA Journal of International and Comparative Law*, 4(1998), cit., p. 419

⁴³ Laura C. Turano, ‘The gender dimension of transitional justice mechanisms’, *New York University Journal of International Law and Politics*, 43(2011), p. 1084

racial prejudice towards minorities”⁴⁴; the reason for this rests in the fact that while criminal courts are merely supposed to determine who is liable for the perpetration of certain crimes on the basis of tangible proof, without taking into consideration the context in which the crimes were committed, truth commissions are aimed at providing an in-depth account of the social context in which the crimes were perpetrated, and at providing advice aimed at ensuring that such crimes are no longer perpetrated⁴⁵. This advantage that truth commissions present with respect to criminal prosecutions is also acknowledged by Turano, according to whom “trial procedures mandate an individual approach and center on the pertinent facts deemed relevant to judge the guilt of an individual. This is not a problem during peacetime when the broader context is unimportant and the main focus is on whether the accused ‘did it’. The context in which events occurred, however, takes on increasing importance when responding to harms committed during an armed conflict”, which cannot be properly analyzed and confronted unless the historical factors that facilitated the perpetration of such harms are taken into consideration⁴⁶. Despite presenting such important advantages, truth commissions also present two main disadvantages, which undermine the effectiveness of truth-seeking processes. The main disadvantage of truth commissions is that “authorities may deny access to information and confidential material”, and witnesses, fearing retaliation and threats on the part of armed groups or “members of a violent and abusive former regime who regain political power”, could refuse to give their testimony before truth commissions⁴⁷. The second disadvantage is that in order for the recommendations provided by truth commissions to be effective, these recommendations need to be implemented by domestic policy-makers, which does not always happen; indeed, it has often happened that national policy-makers disregarded truth commissions’ recommendations, by granting pardon to former public officials⁴⁸.

1.2.3 Reparations

A third transitional justice mechanism foreseen by the UNSG Guidance Note is reparations. Reparations “can include monetary compensation, medical and psychological services, health care, educational support, return of property or compensation for loss thereof, but also official public apologies, building museums and memorials, and establishing days of commemoration”⁴⁹. The use of reparations in transitional justice processes will be analyzed, by focusing on the different types of reparations, on the main international legal acts dealing with reparations, and on the ECtHR jurisprudence concerning reparations.

⁴⁴ Angelika Schlunck, ‘Truth and Reconciliation Commissions’ *ILSA Journal of International and Comparative Law*, 4(1998), cit., pp. 419-420

⁴⁵ ibidem

⁴⁶ Laura C. Turano, ‘The gender dimension of Transitional Justice mechanisms’, *New York University Journal of International Law and Politics*, 43(2010), cit., p.1076

⁴⁷ Angelika Schlunck, ‘Truth and Reconciliation Commissions’, *ILSA Journal of International and Comparative Law*, 4(1998), cit., p. 420

⁴⁸ ibidem

⁴⁹United Nations Secretary General Guidance Note (2010). *United Nations Approach to Transitional Justice*. Available at: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf; cit., p. 8

As far as the different types of reparations are concerned, scholars such as Garcia-Godos distinguish between symbolic and material reparations. Symbolic reparations consist in such actions as tributes to the victims, public apologies or rituals, which aim at “recognizing and acknowledging” the hardship that victims of human rights violations have gone through⁵⁰. Material reparations, instead, aim at granting material benefits to the victims of past human rights violations, in order to compensate them for the abuses they have undergone; material reparations could take the form of “a single lump sum, or a series of payments”, such as the restitution of previously confiscated assets, the provision of medical treatments or of pensions. The main problem with material reparations concerns the determination of the sum of money that victims should be given; in general, in accordance with public international law, each victim has to be allotted a sum of money proportional to the salary s/he will get in the future, his/her social status, and his/her daily life expenses⁵¹.

After having explored the main difference between symbolic and material reparations, it is essential to deal with how the issue of reparations is addressed by the main international law documents. The most important international law document dealing with reparations is the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which is a resolution passed by the UNGA on December 16, 2005, and which is a soft law document, as Garcia-Godos underlines, meaning that it lacks enforcement mechanisms. The preamble of this document highlights that the Basic Principles are meant to foster redress whenever human dignity is impaired by breaches of International Humanitarian Law or of International Human Rights Law. One of the main weaknesses of the Basic Principles lies in the fact that this document does not specify under what conditions breaches of International Humanitarian Law and International Human Rights Law may be deemed to be “gross”; this implies that this document does not provide its state parties with sufficient guidance on how to implement an efficient reparations program. In order to fill the Declaration’s gap, it is possible to tap into Van Boven’s 1993 list of those human rights breaches which can be deemed to be gross. Van Boven was conferred upon the mandate to conduct “a study concerning the right of restitution, compensation and rehabilitation of victims of ‘gross’ violations of human rights and fundamental freedoms” by Resolution No.13 issued by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1989⁵². In 1993 Van Boven came up with a report, which entrenched a non-comprehensive catalogue of human rights breaches which can be deemed to be gross. This catalogue included such breaches as “genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearances;

⁵⁰ Jemima Garcia-Godos, ‘Victim Reparations in Transitional Justice-What Is at Stake and Why’, *Nordisk Tidsskrift for Menneskerettigheter*, 111(2008), p. 124

⁵¹ Ivi, p. 125

⁵² Marten Zwanenburg, ‘The Van Boven/Bassiouni Principles: An Appraisal’, *Netherlands Quarterly of Human Rights*, 24 (2006), p. 649

arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race and gender”⁵³. As Zwanenburg has pointed out, even if Van Boven’s report does not provide a clear-cut definition of the expression “gross human rights violations”, at least, from this report, it emerges that the adjective “gross” refers not only to the gravity of the breach, but also “to the type of human right that is being violated”⁵⁴.

Pursuant to the Basic Principles, the Right to Remedy by and large foresees that whenever human rights abuses are perpetrated, a reparations program must be put in place to compensate victims for the harm they have undergone, human rights abuses victims must be granted “equal and effective access to justice”, and data must be available to the public opinion, concerning the human rights abuses that have been perpetrated as well as the reparations system that has been put in place to foster redress⁵⁵. The Right to Reparations foresees that reparations should be granted to all of those citizens who have been subject to atrocities perpetrated by state officials, and which represent serious breaches of International Human Rights Law and International Humanitarian Law. The Basic Principles foresees such forms of reparations as “restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition”⁵⁶.

At this point, it is necessary to analyze how the Basic Principles defines the main forms of reparations, namely restitution, compensation and rehabilitation. The underlying goal of restitution is recreating the conditions that prevailed in a victim’s life prior to the perpetration of human rights violations; the aim of compensations is to provide human rights violations victims with an amount of money proportional to the harm the victims have suffered; finally, rehabilitation is meant to provide victims with access to healthcare and psychological treatments. When analyzing the scope of the Basic Principles, it is impossible to ignore that although the Basic Principles specifically concentrates on reparations as a vehicle to foster redress for past international human rights and international humanitarian law abuses, the Basic Principles does not deny the possibility to resort to alternative transitional justice mechanisms, such as truth commissions or criminal tribunals trials. For instance, as stipulated by the Basic Principles, “in cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have a duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him”⁵⁷. Besides the Basic Principles, a further international law document which deals with reparations is the Rome Statute of the International Criminal Court. The ICC rules governing reparations for victims of

⁵³ *ibidem*

⁵⁴ *Ivi*, pp. 649-650

⁵⁵ Jemima Garcia-Godos, ‘Victim Reparations in Transitional Justice-What Is at Stake and Why’, *Nordisk Tidsskrift for Menneskerettigheter*, 111(2008), cit., pp. 114-115

⁵⁶ *ibidem*

⁵⁷ *ibidem*

crimes of genocide, crimes of war or crimes against humanity are contained in Article 75 of the Rome Statute, according to which reparations, within the context of the ICC, can take the form of “restitution, indemnification and rehabilitation”; furthermore, under Article 75 of the Rome Statute, a guilty party may be imposed by the ICC to provide victims with reparations including “restitution, indemnification or rehabilitation”⁵⁸. The Victims’ Fund, which was established in 2002 by the Assembly of the State Parties, is one of the main venues through which reparations could be contributed to victims by perpetrators within the ICC system⁵⁹.

The analysis of reparations as a transitional justice mechanism will be concluded by exploring the ECtHR jurisprudence concerning reparations schemes. It is fundamental to focus on the ECtHR’s jurisprudence on reparations, in order to analyze to what extent the ECtHR’s jurisprudence is consistent with the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The notion of restorative justice is inherent in the PACE Resolution No.1096 of 1995, which provides that all of those former Communist countries citizens who have been arrested on the ground of their political orientation should be granted access to psychological care, and that all of those citizens who have been dispossessed by the former Communist regimes should either be returned their property, or they should be given a “just compensation”, meaning an amount of money proportional to the value of the confiscated property⁶⁰. The PACE Resolution seems to be very much in line with the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. For instance, in the same way as the Basic Principles and Guidelines, the PACE Resolution clearly sets out that the amount of compensation addressed to victims of expropriation needs to be proportional to the harm suffered. One of the most important ECtHR’s judgments on the issue of reparations is the *Zvolsky and Zvolska v the Czech Republic*, in which the ECtHR clearly affirmed that restitution schemes were the only vehicle to foster social reconciliation and a democratic transition in the Czech Republic, and it observed that “the aim pursued by the Land Act is to redress infringements of property rights that occurred under the Communist regime and accepts that the Czech State may have considered it necessary to resolve this problem, which it considered damaging to its democratic regime. The general purpose of the Act cannot be regarded as illegitimate, as it is indeed ‘in the public interest’”⁶¹. According to some legal scholars, in the *Zvolsky v. Zvolska case*, the ECtHR acted beyond

⁵⁸ Ivi, p. 117

⁵⁹ ibidem

⁶⁰ James Sweeney, ‘Restorative Justice and Transitional Justice at the ECHR’, *International Criminal Law Review*, 12(2012), cit., p. 333

⁶¹ Ivi, pp. 334-335

its remit when it advocated the implementation of restitution schemes, as there is no legal basis for restitution in the ECHR⁶².

1.2.4 Institutional reform initiatives

A fourth transitional justice measure, which is judicial in nature, consists in carrying-out democratic institutional reforms, which implies developing institutions that work in accordance with the rule of law principle, that endorse democratic values, and that contribute to promoting a long-lasting peace. The aim of institutional reforms is ensuring that the new democratic institutions will no longer make the perpetration of human rights violations possible⁶³. This paragraph will illustrate one of the main institutional reform processes which are undertaken in transitional countries, namely lustration of former regime members, and it will deal with the ECtHR jurisprudence on lustration.

The lustration process consists in dismissing all of the former regime members who were involved in the perpetration of gross human rights breaches according to such scholars as Los⁶⁴. Among the most important lustration measures are “the disbandment of military, police or other security units that may have been systematically responsible for human rights violations”⁶⁵. The UNSG further points-out that the principle of non-discrimination and due process standards must be respected when dealing with the dismissal of former regime members⁶⁶. Many scholarly positions have been put forward both in favor and against the application of lustration measures in transitional societies, in particular by such authors as Viktor Osiatynski and Natalia Letki; for the sake of an in-depth analysis of lustration processes, it is necessary to analyze all of these positions. Anti-lustration scholars have expressed two main opinions against the vetting of public officials. As Killingsworth reports, the first anti-lustration position stems from Osiatynski, according to whom, in order for a full democratic transition to take place in a given polity, all of the citizens, including not only the victims but also the perpetrators of past human rights violations, need to be reconciled, and this is impossible to achieve if a portion of the citizenry, namely the perpetrators, is prevented from enjoying some civil and political rights; the second most prominent anti-lustration argument, as Killingsworth reports is that lustration measures would violate the anti-discrimination principle, which is one of the main dimensions of democracy, as they contribute to “identifying ‘a group of lepers, second class citizens, who have been deprived of certain civic liberties and, together with their families, fallen into public infamy’”⁶⁷. Pro-lustration scholars have responded to anti-lustration scholars in three main ways. First, lustration helps holding the

⁶² *ibidem*

⁶³ United Nations Secretary General Guidance Note (2010). *United Nations Approach to Transitional Justice*. Available at: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf; cit., p. 9

⁶⁴ Maria Los, ‘Lustration and Truth Claims: Unfinished Revolutions in Central Europe’, *Law & Social Inquiry*, 20 (1995), cit., p. 121

⁶⁵ United Nations Secretary General Resolution (2010). *United Nations Approach to Transitional Justice*. Available at: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf; cit., p. 9

⁶⁶ *ibidem*

⁶⁷ Matt Killingsworth, ‘Lustration and Legitimacy’, *Global Society*, 24 (2010), pp. 89-90

perpetrators of past human rights violations liable for their actions, and it is thus “justified by notions of civic justice, in that it serves to reassure citizens about moral and political responsibility for past deeds”⁶⁸. The second reason why some legal scholars support lustration measures is that citizens can feel comfortable with the newly-created transitional order providing that those who committed human rights violations during the previous regime are prevented from occupying any public positions within the transitional institutions. In other words, as claimed by Killingsworth, “breaking the general tendency of distrust towards all aspects of a public sphere demands a purge so that people can see that those steering reforms are not the same civil servants who acted against the principle of democracy”⁶⁹. Third, pro-lustration scholars argue that the violation of the principle of non-discrimination that arises when transitional authorities dismiss former regime members is justified on the ground that such dismissals are aimed at ensuring that human rights violations comparable to those committed under the past regime will be unlikely to occur again in the future⁷⁰.

As far as the ECtHR’s jurisprudence on lustration is concerned, the Court developed a significant amount of jurisprudence on this issue, and it contributed, as it will be shown below, to set out some criteria aimed at determining to what extent lustration measures can be deemed to be consistent with the ECHR. These criteria need to be analyzed in-depth, as most of them were reflected in the Tunisian and Libyan lustration measures that the second and third chapters will analyze. The most important aspect that can be noted in this respect is that the Court is keen to ensure that the human rights of those former regime members undergoing a lustration process are respected. For instance, pursuant to Article 8 ECHR, the ECtHR has stressed that former Communist countries public officials can undergo a lustration process, provided that they are able to tap into enough data to “defend themselves”⁷¹. Moreover, some restrictions have been prescribed by the ECHR to “the scope of lustration measures” through its case law⁷². In particular, when in 1991 “former Soviet intelligence (KGB) agents” had been prevented by the Lithuanian government from undertaking such private sector avenues as “lawyers, notaries, banks, economic projects, teaching”, the ECtHR deemed these lustration measures “to be discriminatory”, and it set-out five main criteria that lustration measures have to comply with, in order to be considered to be legally acceptable⁷³. First, the individuals undergoing a vetting procedure can only be prevented from holding a public administration post, but they cannot be prevented from occupying a private sector position. The rationale behind this criterion is that “while it is fair to require loyalty of public officials in high positions, this is different for the private sector, as well as for members

⁶⁸ Ivi, p. 86

⁶⁹ Ivi, pp. 86-87

⁷⁰ Ivi, p. 87

⁷¹ James Sweeney, ‘Restorative Justice and Transitional Justice at the ECHR’, *International Criminal Law Review*, 12(2012), cit., p. 331

⁷² Eva Brems, ‘Transitional Justice in the Case Law of the European Court of Human Rights’, *International Journal of Transitional Justice*, 5 (2011), p. 296

⁷³ ibidem

of parliament, who in a democracy have the right to defend the political ideology of the previous regime”⁷⁴. Second, lustration measures need to be “accessible and foreseeable”; the rationale underpinning this criterion is grounded in the rule of law principle, which foresees “the terms of the law to be sufficiently specific”⁷⁵. Moreover, the pursuit of retributive justice ought not to be the only objective underpinning lustration measures, because “punishment is in the first place a matter of criminal law”, rather than a concern of administrative and institutional reforms⁷⁶. Fourth, vetting procedures need to “allow for sufficient individualization of responsibilities”, and finally, they cannot be in force for an indefinite span of time, but they are supposed to be “temporary, as the objective need for such measures decreases with time”⁷⁷. The final criterion was respected by the lustration measures which were put in place in Libya and Tunisia, as the below chapters will show. For instance, in both countries, the lustration measures were supposed to be in force only for a limited amount of time. After having analyzed these five criteria, it is necessary to highlight that they have not been applied consistently by the ECtHR. For instance, “in a Grand Chamber Judgment sanctioning Latvia’s exclusion of active members of the former Communist Party”, it was claimed by the ECtHR that the criteria outlined in the 1991 Lithuanian case can be derogated if the lustration measures are put in place in a polity which is undertaking a democratic transition, and they thus serve a transitional justice purpose⁷⁸. In particular, in this case the ECtHR claimed that “while such a measure may scarcely be considered acceptable in the context of one political system, for example in a country which has an established framework of democratic institutions going back many decades or centuries, it may nonetheless be considered acceptable in Latvia...given the threat to the new democratic order posed by the resurgence of ideas which...may appear capable of restoring the former regime”⁷⁹. Similar arguments were put forward by the ECtHR in a 1999 case concerning Hungary, in which “members of the police” had been prevented from “joining a political party or engaging in political activities”⁸⁰. In this case, the ECtHR held that the Hungarian government’s decision did not breach the police forces’ “freedom of expression”, and could thus be deemed to be legally acceptable, in light of the Hungarian authoritarian past⁸¹.

1.2.5 National consultations

The fifth and final transitional justice measure foreseen by the 2010 Guidance Note of the UNSG on Transitional Justice is national consultations; this measure entails the involvement of all of the relevant stakeholders (particularly the victims of past human rights atrocities) in designing the

⁷⁴ *ibidem*

⁷⁵ *ibidem*

⁷⁶ *ibidem*

⁷⁷ *ibidem*

⁷⁸ *ibidem*

⁷⁹ *Ivi*, p. 297

⁸⁰ *ibidem*

⁸¹ *ibidem*

transitional justice mechanisms to be put in place in a given polity. The aim of national consultations is ensuring that policy-makers put in place transitional justice mechanisms that are catered to the needs of the specific polity. The UN could significantly help states set-up a national consultation process, by promoting the involvement of marginalized social categories, such as “victims, minorities, women and children”, by providing transitional authorities with financial support, and by hosting sessions in which all of the relevant stakeholders can come together⁸². National consultations as a transitional justice mechanism were held by the Government of Uganda in 2007. For instance, in 2007 in Uganda, the Berkeley-Tulane Initiative on Vulnerable Populations and the International Center for Transitional Justice submitted questionnaires to the citizens, in order to detect citizens’ preferences on the transitional justice mechanisms to put in place in the country; the Ugandan citizens were called upon to answer questions concerning “levels of exposure to various forms of violence (such as abductions and damage to property); prioritization of demand for such basics and services as health care, food and justice; preferences among such forms of reparation as compensation, apologies and reconciliation; and preferences between traditional and formal justice mechanisms”⁸³. Another country in which national consultations were held, as a way to boost the transitional justice process is Kosovo. In 2007, in Kosovo, the local population was called upon by the United Nations Development Program to answer questions on “how many people of various ethnicities had experienced human rights violations; levels of support for the resolution of problems of missing persons; achievement of reconciliation among ethnic communities; and degrees of preference for such forms of reparation as material compensation, rehabilitation and formal recognition of victim status”⁸⁴. Constitutional and International Law scholars seem not to have elaborated enough on this specific transitional justice measure. Two are the reasons why this may be the case. The first reason is that probably this measure was the least implemented by transitional authorities; the second reason is that this measure does not give rise to as many legal controversies as the other transitional justice processes, and thus it does not require an in-depth legal analysis.

1.3 Historical evolution of transitional justice

This paragraph will analyze the three main historical phases through which transitional justice evolved, by paying special attention to the legal innovation that were introduced during each phase. Before getting to the core of the paragraph, it is necessary to briefly mention when and how the notion of transitional justice first developed. According to Schabas, the term “transitional justice” was first

⁸² ⁸²United Nations Secretary General Resolution (2010). *United Nations Approach to Transitional Justice*. Available at: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf; cit., p. 9

⁸³ Office of the United Nations High Commissioner for Human Rights, *Rule of law tools for post-conflict states: national consultations on transitional justice*, (New York and Geneva: United Nations, 2009), p. 8. Available at: http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ_EN.pdf

⁸⁴ *ibidem*

used and thus coined in two landmark human rights seminars that took place respectively in the US and the Czech Republic in the early 1990s; the first of these conferences was the Political Justice and Transition to the Rule of Law in East Central Europe, which took place in 1991 in the United States, “under the auspices of the University of Chicago and the Central European University in Prague”⁸⁵. The second of these seminars took place in Salzburg in 1992, and it was entitled: “Justice in Times of Transition”⁸⁶. These two seminars represented the first academic effort “to apply the experience of the Latin American transitions from dictatorship of the 1980s to the political transformations in Central and Eastern Europe after the fall of the Berlin wall. This field of ‘transitional justice’ was considered to be a component of the wave of democratization that seemed to affect many regions of the world at the time”⁸⁷. These efforts were followed by Ruti Teitel’s categorization of the three main stages in the development of transitional justice, which the below sub-paragraphs will explore.

1.3.1 First stage in the evolution of transitional justice

The first stage in the evolution of transitional justice will be explored by focusing on the legal mechanisms that were developed during this phase, as well as on the implications that this first stage had on the future transitional justice developments.

In the aftermath of WWII, the first stage in the evolution of transitional justice occurred. At the beginning of this stage, the main concern was whether it was better to resort to national trials or international trials for the purpose of holding the Nazi perpetrators of human rights violations liable for the crimes they had committed⁸⁸. The winners of WWII finally decided to resort to international trials as a transitional justice mechanism, by establishing the International Military Tribunal (IMT) of Nuremberg, based on the IMT Statute. The IMT was aimed at trying Nazi criminals on grounds of crimes against humanity, crimes of war, and crimes against peace. The IMT jurisdiction gave rise to two main legal problems. First, it was difficult to see how individual perpetrators could be charged with and tried for crimes against peace, which were defined by the IMT Statute as “the planning and waging of war”; for instance, traditional public international law had deemed the waging of war as a crime that states, rather than individuals, were to be held responsible for, and it was thus controversial to hold individual perpetrators liable for the waging of war⁸⁹. Second, the IMT’s mandate to try Nazi individuals on the ground of crimes against humanity, which were defined as “the murder, extermination, enslavement and deportation of the civilian population ‘whether or not in violation of the domestic law of the country where perpetrated’”, and which thus enabled an international organization (the IMT) to step in the domestic affairs of sovereign states, gave rise to legal issues as well; for

⁸⁵ William Schabas, ‘Transitional Justice and the Norms of International Law’, *Japanese Society of International Law*, 2011, p. 1, available at: http://www.jsil.jp/annual_documents/2011/fall/schabas_trans_just911.pdf

⁸⁶ *ibidem*

⁸⁷ *ibidem*

⁸⁸ Ruti G. Teitel, ‘Transitional Justice Genealogy’, *Harvard Human Rights Journal*, 16(2003), p. 72

⁸⁹ Jan Klabbers, *International Law* (Cambridge: Cambridge University Press, 2013), p. 220

instance, many scholars considered the punishment of crimes against humanity, as foreseen by the IMT Statute, to be against the principle of legality, known as the *nulla poena sine lege* principle, because before the establishment of the IMT, the category of crimes against humanity had never been foreseen by either domestic or international law⁹⁰. Unlike in the cases of crimes against peace and crimes against humanity, no issues stemmed from the IMT prosecution of Nazi criminals on the ground of crimes of war, as traditional public international law offered several “precedents” showing that individual perpetrators rather than states could be held liable for committing crimes of war⁹¹.

The introduction of international criminal trials as a transitional justice mechanism in the aftermath of WWII had very important implications on the future of transitional justice. The first and most important novelty of the first stage in the evolution of transitional justice consisted in the fact that a whole body of international criminal law was drafted for the purpose of holding the German Reich members liable for the human rights violations they had perpetrated during WWII, and this new body of international criminal law foresaw that individuals rather than states had to be held responsible for the perpetration of human rights violations. One of the most important international criminal law treaties centered around the notion of individual criminal responsibility that were concluded after WWII was the 1948 Genocide Convention.⁹²

1.3.2 Second stage in the evolution of transitional justice

The second stage in the evolution of transitional justice will be analyzed by concentrating on its essential features, as well as on the innovations that were introduced in the field of transitional justice during this stage.

The second stage in the evolution of transitional justice started in the mid-1980s when transitions from authoritarianism to democracy occurred in such countries of the Southern Cone of South America as Chile, Uruguay and Argentina. These democratic transitions were all accompanied by transitional justice processes.

The first and most important feature of this stage is that prosecutions of former regime members were not held by international courts, but rather by domestic tribunals which none the less tended to abide by the international criminal law standards elaborated in the aftermath of WWII⁹³. In order to illustrate the resort to domestic trials as a vehicle to foster transitional justice, it may be helpful to refer to the case of Argentina. After the military rule was over in Argentina, and Alfonsín became the President of the first civilian government in 1982, he decided that all of the former regimes members who had perpetrated human rights violations from 1976 to 1982 had to be subjected to trials. Initially,

⁹⁰ *ibidem*

⁹¹ *ibidem*

⁹² Ruti G. Teitel, ‘Transitional Justice Genealogy’, *Harvard Human Rights Journal*, 16(2003), cit., p. 74

⁹³ *Ivi*, p. 76

the cases concerning the human rights violations perpetrated under the three military juntas were heard by the Supreme Council of the Armed Forces. Then, since none of the former regimes members were found to be guilty by the Supreme Council of the Armed Forces, the cases were referred to the civilian Federal Court of Appeals, which delivered its judgment on December 9, 1985. Lower-ranking officers and ordinary soldiers defended themselves, by claiming that they had committed human rights violations to respond to superior orders, and they were thus granted amnesty; General Videla, who had headed the first military junta, Admiral Massera, who had been one of the most prominent figures involved in the perpetration of human rights violations, as well as other five military leaders were sentenced to life imprisonment⁹⁴. When Alfonsín's mandate came to an end and Menem took power in 1989, thirty-nine officials who had been affiliated with the three juntas, including General Galtieri, who had headed the third military junta, were granted amnesty, and at the end of 1990 General Videla and other officers were released⁹⁵. A second important aspect of this second stage was the emergence of truth commissions as a transitional justice mechanism. The aim of truth commissions, as already specified above, is to collect records and disclose the truth about the human rights violations that were committed in a given polity in a given time frame⁹⁶. The emergence of truth commissions was experienced by all of the countries in the Southern Cone. For example, in Argentina, as soon as Alfonsín became the president of the first civilian government, he set-up the Argentine National Commission on Disappeared Persons (CONADEP), which was entrusted with carrying-out an official inquiry of all of the enforced disappearances crimes that had been perpetrated in Argentina under the rule of the three military juntas. A report entitled *Nunca Mas* (Never Again) was issued by the Commission in 1984, and it served the very important purpose of acknowledging the various crimes that Argentine citizens had undergone, whose perpetration "had for so long been officially denied"⁹⁷.

The second stage in the evolution of transitional justice had profound implications on the future development of transitional justice. First, the resort to truth commissions as a transitional justice mechanism marked the introduction of restorative justice concerns in the transitional justice agenda. For instance, by disclosing the truth on past human rights abuses and by bringing together both the victims and those who had committed human rights violations, the ultimate aim of truth commissions was to facilitate the victims' psychological recovery and to foster social reconciliation. Second, the resort to truth commissions ensured that transitional justice discourses would not only be built upon legal elements, but also on moral and psychological elements. Finally, the introduction of truth commissions in the transitional justice domain was accompanied by the emergence of non-judicial personnel dealing

⁹⁴ Jack Donnelly, *International Human Rights* (Boulder: Westview Press, 2013), p. 66

⁹⁵ Ivi, p. 67

⁹⁶ Ruti G. Teitel, 'Transitional Justice Genealogy', *Harvard Human Rights Journal*, 16(2003), cit., p. 78

⁹⁷ Jack Donnelly, *International Human Rights* (Boulder: Westview Press, 2013), cit., p. 66

with the transitional justice process, such as human rights advocates or non-governmental organizations⁹⁸.

1.3.3 Third stage in the evolution of transitional justice

The last stage in the development of transitional justice began in 1989, after the fall of the Soviet Union, and it is still ongoing. The most prominent aspect of the third stage is that the contemporary age has witnessed a surge in civil wars, failed states and political fragmentation, and specific transitional justice mechanisms were thus put in place, in order to confront these new human rights violations⁹⁹. The most important transitional justice developments of this stage deserve to be analyzed in-depth.

The most important transitional justice mechanism that came to the forth in this period was the development of a bulk of jurisprudence concerning international humanitarian law and the establishment of permanent international criminal tribunals prosecuting individuals who had committed crimes of war, crimes of genocide and crimes against humanity, such as the International Criminal Court (ICC), the International Criminal Tribunal for Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR)¹⁰⁰. Among these international criminal tribunals, the ICC deserves a special attention and a detailed description, as this court played a vital role in the Libyan transitional justice process, which is one of the case studies of this thesis.

At the end of the 1990s, plans were advanced to tackle such transnational crimes as drugs trafficking, by establishing a permanent international criminal court. These plans culminated in the conclusion of the 1998 Rome Statute by 120 states, and in the establishment of the ICC. Even if the conclusion of the Rome Statute was prompted by the need to prosecute drug traffickers, no provisions on drug trafficking can be found in the Rome Statute; instead, individuals can be prosecuted by the ICC only on grounds of crimes of war, crimes of genocide, crimes against humanity, and crimes of aggression. As stated by Jan Klabbers, “it is generally acknowledged that the jurisdiction of the ICC comprises what are often referred to as ‘core crimes’: genocide, war crimes, crimes against humanity and the crime of aggression”¹⁰¹. The definition of genocide incorporated in the Rome Statute is the one provided by the 1948 Genocide Convention, pursuant to which an act can be deemed to amount to a crime of genocide if it is aimed at destroying a group that is bound together by religious, ethnic, racial or national ties. The category of crimes against humanity comprises such offenses as “murder, extermination, rape, sexual slavery, torture, enforced disappearance...that form part of ‘a widespread and systematic attack directed against any civilian population’”; as this definition shows, in order for an offense to qualify as a crime against humanity, the targets need to be non-combatants, the offense need

⁹⁸ Ruti G. Teitel, ‘Transitional Justice Genealogy’, *Harvard Human Rights Journal*, 16(2003), cit., p. 83

⁹⁹ Ivi, pp. 89-90

¹⁰⁰ ibidem

¹⁰¹ Jan Klabbers, *International Law* (Cambridge: Cambridge University Press, 2013), p. 224

to be perpetrated based on a pre-meditated plan, and it must result in a large number of casualties¹⁰². If these criteria are not met, “the suspect may be guilty of murder or rape, or even war crimes, but not of crimes against humanity”¹⁰³. Finally, “in order to be convicted for the war crime of an unlawful attack on civilians under article 8(2)(b)(i) ICC Statute, the suspect must have directed such an attack, must have done so with civilians as object, must have done so intentionally, the attack must have taken place in the context of an international conflict and the suspect must have been aware that the conflict was going on”¹⁰⁴. Finally, crimes of aggression, according to Klabbers, represent “a special case”¹⁰⁵. For instance, as Klabbers underlines, as far as crimes of aggression are concerned, in 1998, “during the official negotiations, the parties could not reach an agreement on a definition, and thus agreed to return to the issue after the ICC’s entry into force”¹⁰⁶. In 2010, a Review Conference was held in Kampala, during which consensus was achieved by the Rome Statute state parties on a common definition of crimes of aggression, “effectively by defining aggression as the use of force in contravention with the UN Charter and borrowing examples first drawn up by the General Assembly in its 1974 Resolution containing a definition of aggression”¹⁰⁷. According to the definition which was then agreed upon, aggression “consists in the ‘planning, preparation, initiation, or execution of an act of aggression by a person in a position to exercise control over the political or military actions of a state’”¹⁰⁸. The Kampala Conference parties, however, “agreed to suspend jurisdiction over the crime until at least 30 states had ratified or accepted the amendments, and until a decision of the ASP to activate jurisdiction, with that decision not to take place before 1 January 2017”¹⁰⁹. A Resolution was finally passed by the “Assembly of States Parties to the Statute of the International Criminal Court” on December 14, 2017, which aimed to “activate the jurisdiction of the Court over the crime of aggression”¹¹⁰. In particular, under this Resolution, The Assembly of States Parties to the Statute of the International Criminal Court “decides to activate the Court’s jurisdiction over the crime of aggression as of 17 July 2018”¹¹¹. So, from July 17, 2018 onwards, the ICC will be able to exercise jurisdiction also over crimes of aggression.

As far as the ICC jurisdiction is concerned, the Court can exercise jurisdiction only “over nationals of its state parties and over the territories of its state parties”¹¹², and the Rome Statute foresees that “the temporal jurisdiction of the ICC is prospective”, which implies that only crimes which were perpetrated after July 1, 2002, that is after the Rome Statute acquired binding value, can fall under the

¹⁰² Ivi, p. 225

¹⁰³ ibidem

¹⁰⁴ ibidem

¹⁰⁵ ibidem

¹⁰⁶ ibidem

¹⁰⁷ Ivi, pp. 225-226

¹⁰⁸ Ivi, p. 226

¹⁰⁹ Dapo Akande, ‘The International Criminal Court accepts jurisdiction over the crime of aggression’, *EJIL: Talk!* (2017), available at: <https://www.ejiltalk.org/the-international-criminal-court-gets-jurisdiction-over-the-crime-of-aggression/>

¹¹⁰ ibidem

¹¹¹ ibidem

¹¹² Jan Klabbers, *International Law* (Cambridge: Cambridge University Press, 2013), cit., p. 226

jurisdiction of the ICC¹¹³. Three are the main ways in which a case can reach the ICC: first, “the prosecutor may start investigations *proprio motu*”; second, a case could be brought by the UNSC, “acting under Chapter VII of the UN Charter” before the ICC Prosecutor, and finally, a case may be brought before the ICC Prosecutor by any ICC member state¹¹⁴.

A second important transitional justice development of this period consists in the transitional justice mechanisms that were put in place in South Africa in 1995, that is after the end of the Apartheid regime, and the election of another national parliament. The South African truth-seeking process needs to be investigated in-depth, as it is a paradigmatic example in the field of transitional justice. For instance, the investigative channels pursued by the South African truth commission were then adopted by other truth-seeking bodies, such as the Tunisian Truth and Dignity Commission which will be analyzed below. Moreover, the South African truth commission is deemed to be a paradigmatic truth-seeking model, as it managed to disclose and provide a full account of all of the human rights abuses that had been committed during the Apartheid, thus contributing to restoring victims’ justice and to achieving social reconciliation in the country. In 1995 the newly elected South African Parliament passed the the Promotion of National Unity and Reconciliation Act 34, which set-out the Truth and Reconciliation Commission (TRC)’s mandate. Pursuant to the Act, the Commission was tasked with providing an overall account of all of the abuses that had been perpetrated under the Apartheid regime, in particular from March 1960 to May 1994. The TRC’s report had to take account of the causes of the abuses, the victims’ testimonies, as well as the violators’ points of view. In order to collect testimonies from victims and perpetrators, the TRC was supposed to carry-out investigative activities and “holding hearings”¹¹⁵. Three were the main channels through which the TRC’s investigative activity was carried-out. First, a significant number of inquirers were dispatched in several South African communities to gather victims’ testimonies. This process led to gathering testimonies from more than twenty-two thousand victims, and the collection of these testimonies was “then followed up with investigations to provide verification of the claims”¹¹⁶. Second, investigations of “window cases” were held, which aimed at assessing “particular types of crimes, or specific incidents that would provide insights into broader patterns of events”¹¹⁷. Third, the Commission “carried out investigations with respect to amnesty applications”¹¹⁸. Pursuant to the Promotion of National Unity and Reconciliation Act, the TRC had to include an Amnesty Committee, which would be in charge of screening amnesty applications filed by individuals who were responsible for human rights abuses. The Amnesty Committee would have to be

¹¹³ *ibidem*

¹¹⁴ *ibidem*

¹¹⁵ Hugo Van der Merwe & Guy Lamb, ‘Transitional Justice and DDR: The Case of South Africa’, *International Center for Transitional Justice*, 2009, pp. 18-19, available at: <http://ictj.org/sites/default/files/ICTJ-DDR-South-Africa-CaseStudy-2009-English.pdf>

¹¹⁶ *Ivi*, p. 19

¹¹⁷ *ibidem*

¹¹⁸ *ibidem*

composed of judicial and para-judicial personnell, who would enjoy “a level of independence from the rest of the TRC and had autonomy in exercising its decisions as to whether or not to grant amnesty”¹¹⁹. In order for amnesty to be granted, all the truth had to be revealed by the amnesty seekers on the abuses they had perpetrated; moreover, evidence had to be provided by the amnesty seekers on the fact that the abuses they had perpetrated “were politically motivated”¹²⁰. The TRC was very successful in performing its mandate, and its activity yielded very important results, in terms of disclosing patterns of human rights abuses that had been perpetrated in South Africa under the Apartheid regime. For instance, first, the TRC’s report clearly highlighted that the following human rights abuses had been perpetrated under the Apartheid regime: torture and other inhuman or degrading treatments “where lesser measures would have been adequate”, “the deliberate manipulation of social divisions in society, resulting at times in violent clashes; judicial and extrajudicial killings; and the covert training, arming and funding of offensive paramilitary units or hit squads for deployment internally against opponents of the government”¹²¹. Second, the testimonies gathered by the TRC clearly showed that the Inkatha Freedom Party (IFP) was one of the main non-state actors to be involved in the commission of “killings on a national scale, allegedly responsible for over 4500 killings, compared to 2700 attributed to the SAP and 1300 to the ANC”¹²². Third, the TRC’s report shed lights on the many gender crimes that had been perpetrated under the Apartheid regime. In particular, it came to the forth that all of those women who had been affiliated to the Liberation Movement often got convicted, and while in detention, they underwent several sexual abuses “as a form of torture”¹²³. The government that emerged from the 1994 elections put forward a reparations program that successfully targeted all of the victims that had appeared before the TRC; for instance, each victim “received a lump-sum payment of R 30.000...from the government. This was about a quarter of what the TRC had recommended and did not include any privileged access to medical, social or educational services. Payments were made directly into the bank accounts of victims and their relatives”¹²⁴, thus ensuring that each victim would be effectively compensated for the harm suffered.

1.4 Transitional justice endeavors undertaken by the UN and the EU

Among the major intergovernmental organizations which have engaged in transitional justice efforts are the UN, through the UN Peacebuilding Commission, and the European Union (EU), through several instruments entrenched in the Common Security and Defense Policy (CSDP).

¹¹⁹ Ivi, p. 17

¹²⁰ ibidem

¹²¹ Ivi, p. 6

¹²² ibidem

¹²³ ibidem

¹²⁴ Ivi, pp. 21-22

1.4.1 The UN Peacebuilding Commission

The UN Peacebuilding Commission (UNPBC) will be analyzed, by focusing on its structure, its legal powers, its mandate with regards to transitional justice, and its first attempts to engage in transitional justice efforts.

The UNPBC was created in 2005 by means of UNGA Resolution 60/180 and UNSC Resolution 1645, as a subsidiary organ of the UNGA and the UNSC; the UNPBC is accountable to the UNGA¹²⁵. The UNPBC is entrusted with carrying-out three main functions. First, it is in charge of detecting whether a state is about to fail; second, it is responsible for helping states that are about to collapse to stop this process, and finally, it is in charge of furthering states' transition from authoritarianism to democracy¹²⁶. The UNPBC gathers in the Organizational Committee, as well as in country-specific meetings. The Organizational Committee, which is in charge of performing the core procedural work of the PBC, is composed of seven Economic and Social Council (ECOSOC) members who are competent on issues concerning transition from war to peace, the five permanent members of the UNSC plus two of the non-permanent members, "five out of the top ten financial contributors to the UN budget,... five out of the top ten providers of military personnel and civilian police to UN missions" and seven other members which are appointed by the UNGA in such a way as to guarantee an equitable geographical representation within the UNPBC system; while the Organizational Committee performs the procedural work of the UNPBC, country-specific committees deal with the more substantive aspects of the UNPBC work¹²⁷.

As far as the UNPBC's powers are concerned, the UNPBC does not have the power to adopt legally binding acts, but it only has the power to provide all of the actors dealing with a country's transitional justice process with non-binding recommendations. The only way for the Commission to ensure compliance with its recommendations is to induce all of the stakeholders engaged in a country's transitional justice process to enter into an agreement, pursuant to which all of the parties commit themselves to abide by the recommendations provided by the UNPBC. As an example, under the guidance of the UNPBC, the Afghan Compact was concluded in 2001, pursuant to which all of the stakeholders involved in the Afghan transitional justice process committed themselves to comply with the UNPBC recommendations¹²⁸.

After having analyzed the composition and the powers of the UNPBC, it is necessary to focus on the role that the Commission plays with regards to transitional justice, and on the way in which the

¹²⁵ Gerhard Thallinger, 'The UN Peacebuilding Commission and Transitional Justice', *German Law Journal*, 8(2007), p. 281

¹²⁶ *ibidem*

¹²⁷ United Nations General Assembly Resolution 60/180 (2005) and United Nations Security Council Resolution 1645 (2005), paragraph 4

¹²⁸ Gerhard Thallinger, 'The UN Peacebuilding Commission and Transitional Justice', *German Law Review*, 8(2007), cit., p. 698

Commission's agenda is set. When dealing with a country's transitional justice process, the PBC performs four main functions. First, it identifies all of those factors which might have caused a conflict in a given country, and all of the potential post-conflict reconstruction mechanisms that may be put in place. In this regard, it is important to notice that the Commission pays a lot of attention to ensuring that the various post-conflict mechanisms that could be put in place are aimed at accomplishing the same goal and are not asynchronized. More specifically, "the Commission could craft viable options for transitional justice mechanisms including plans for their implementation and calibrate these efforts with other post-conflict reconstruction initiatives"¹²⁹. After having identified the causes of the conflict and the appropriate post-conflict mechanisms in a given country, the Commission usually consults with governmental and non-governmental actors that provide it with information concerning the country in question, so that the chosen post-conflict strategies will be catered to the specific post-conflict context. Third, the PBC elaborates the transitional justice strategies to be implemented, and finally the Commission provides local governments with the financial resources which are necessary to put in place transitional justice mechanisms. The fourth function is extremely important; for instance, one of the hindrances to the implementation of transitional justice schemes stems from the fact that many times war-torn countries have been depleted of most of their financial resources, and transitional governments therefore cannot allocate the country's limited amount of money to the implementation of transitional justice programs, as they have to prioritize the populations's basic needs, such as medical assistance, schooling, housing and so on. In order for the Commission to provide transitional governments with financial resources, the Commission should take advantage of such International Economic Organization as the International Monetary Fund (IMF), the World Bank Group, and the World Trade Organization (WTO). The Commission could also establish a conditionality policy, whereby only those transitional governments that abide by human rights obligations are allotted the necessary financial resources to put in place a transitional justice system¹³⁰. At this point, it is necessary to clarify how the PBC's agenda is determined, that is how the Commission decides to focus on some countries rather than on others. In this respect, it is necessary to analyze Article 12 of UNGA Resolution 60/180 and UNSC Resolution 1645 (2005). Even if Article 12 of the two Resolutions provides that the PBC's agenda is to be set by the Organizational Committee, the same article does not confer upon the Organizational Committee the power to identify by itself which war-torn or post-conflict countries the PBC should focus on. Indeed, one of the two criteria foreseen by article 12 of the two Resolutions has to be respected, in order for the Organizational Committee to initiate its work and set the Commission's agenda. The first condition is that a petition is submitted to the Organizational Committee of the PBC by the UNSG or the UNSC; second, the UNGA or the ECOSOC can ask the Organizational Committee to introduce a country that may be about to be hit by a war in the PBC's agenda, as long as the country in

¹²⁹ Ivi, pp. 698-699

¹³⁰ Ivi, p. 701

question has previously given either the UNGA or the ECOSOC the authorization to do so and that the issue has not been dealt with by the UNSC yet¹³¹. When analyzing Article 12 of the two Resolutions, two very peculiar aspects come to the forth. The first aspect is that the primary responsibility for tackling threats to international peace and security is borne by the UNSC, and that the PBC's intrusion into the UNSC's decisions is not permitted. The second important aspect is that the two founding resolutions of the PBC are clearly based upon the Principle of Non-Interference entrenched in Article 2(7) of the UN Charter, as they provide that the UNGA and the ECOSOC can trigger the PBC's intervention in a country as long as the country in question has given its consent¹³².

In order to practically illustrate how the UNPBC performs its own mandate, a case study needs to be briefly described. This sub-paragraph will take the case of Sierra Leone into account. On June 21, 2006, following Sierra Leone's authorization, the UNSC referred a case to the Organizational Committee of the UNPBC, asking it to provide Sierra Leone with guidelines concerning the transitional justice and post-conflict reconstruction processes. On July 19, 2006 the UNPBC agreed to deal with the transitional justice process in Sierra Leone. The UNPBC's work concerning Sierra Leone was articulated in two country-specific meetings. During the first country-specific meeting, two transitional justice mechanisms were put in place in Sierra Leone. First, the Truth and Reconciliation Commission was set-up, and it ended its mandate in 2004. Moreover, the UNPBC facilitated the conclusion of an agreement between the Government of Sierra Leone and the UN, which provided for the establishment of the Special Court of Sierra Leone in 2002. The Special Court for Sierra Leone prosecuted several former regime members who had perpetrated human rights violations. During the second country-specific meeting, the Commission announced that it would channel \$25 million to the transitional justice process in Sierra Leone through the Peacebuilding Fund, and it called upon the international community by and large to provide Sierra Leone with even further economic aid, "including further debt relief"¹³³; moreover, the President of the country-specific meeting was asked by the Commission to draft a blueprint specifying all of the steps that the Government of Sierra Leone and the International Community should take, so as to step-up the transitional justice process in the country¹³⁴.

1.4.2 The EU's transitional justice endeavors

When it comes to analyzing the EU's engagement in transitional justice efforts, it is quite remarkable that "transitional justice is a relatively new area of concern for the European Union. Indeed, until recently it was largely absent from the EU policies promoting democracy, the rule of law and human rights", and transitional justice objectives have rather been pursued through "other peace-

¹³¹ United Nations General Assembly Resolution 60/180 (2005) and United Nations Security Council Resolution 1645 (2005)

¹³² Gerhard Thallinger, 'The UN Peacebuilding Commission and Transitional Justice', *German Law Journal*, 8(2007), cit., p. 702

¹³³ *Ivi*, pp. 704-705

¹³⁴ *ibidem*

building and security-oriented tasks, such as crisis management, security-sector reform (SSR), and disarmament, demobilization and reintegration (DDR)”¹³⁵. In particular, this chapter will briefly concentrate on three instruments the EU uses to engage in transitional justice efforts in third countries: the 2009 Stockholm Program, the Common Security and Defense Policy (CSDP), and the Instrument for Stability (IfS).

Within the context of the Stockholm Program, which was put in place in 2009 to further the security, freedom and justice objectives entrenched in the EU’s founding treaties, the EU institutions and member states are invited by the European Council to support such transitional justice activities in third countries as the establishment of ad hoc criminal tribunals the prosecution of all the individuals responsible for crimes of war, crimes of genocide and crimes against humanity. Furthermore, the Stockholm Program is based on the idea that third countries should be helped by the EU member states and institutions to put in place truth seeking processes aimed at acknowledging the human rights violations which were perpetrated under the previous regime, in such a way as to foster social reconciliation¹³⁶. In order to help third countries put in place reconciliation mechanisms, the European Network of Contact Points for Restorative Justice is used by the EU member states and institutions; the network was established in 2001, when the Council of Ministers presidency was held by Belgium, and it is a best practice dissemination mechanism¹³⁷. The Network serves several purposes connected to transitional justice, such as the arrangement of seminars which are supposed to advocate the respect for human rights and democratic values, and the collection of data concerning reconciliation schemes which have already been put in place, so as to favor “exchange of experience between authorities, institutions and competent organizations”¹³⁸. At the core of the Network is the idea that victims of human rights abuses should be the beneficiaries of symbolic or material reparations, so that they can re-acquire trust in the institutions, and “the balance between the victim and society which has been upset by the criminal offense” can be re-established¹³⁹. At this point, some brief examples will be introduced, to show how the Stockholm Program was implemented. Under the umbrella of the 2009 Stockholm Program, “the EU has provided extensive political and financial support to the ad hoc tribunals, including the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY), the Extraordinary Chambers of the Courts of Cambodia, and the Special Court for Sierra

¹³⁵ Kate A. Crossley-Frolick, ‘The European Union and Transitional Justice: Human Rights and Post-Conflict Reconciliation in Europe and Beyond’, *Contemporary Readings in Law & Social Justice*, p. 37

¹³⁶ *Ivi*, p. 42

¹³⁷ European Parliament legislative resolution on the initiative by the Kingdom of Belgium with a view to the adoption of a Council Decision setting up a European network of national contact points for restorative justice (11621/2002 – C5-0467/2002 - 2002/0821(CNS). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2003-0147+0+DOC+XML+V0//EN>

¹³⁸ Kate A. Crossley-Frolick, ‘The European Union and Transitional Justice: Human Rights and Post-Conflict Reconciliation in Europe and Beyond’, *Contemporary Readings in Law & Social Justice*, cit., p. 42

¹³⁹ *ibidem*

Leone. It also supports the trial of the former Chadian president Hissenè Hebrè in Senegal, and the Special Tribunal for Lebanon”¹⁴⁰.

A second instrument through which the EU deals with transitional justice is the CSDP, which was established by the 2009 Lisbon Treaty. Within the framework of the CSDP, the importance of transitional justice was underlined by the Political and Security Committee (PSC), which is one of the CSDP “structures for civilian crisis management”¹⁴¹ during a 2006 summit. In particular, two main ideas related to transitional justice emerged during this summit. First, the PSC stressed that transitional justice mechanisms should be included in all of the missions conducted by the EU under the umbrella of the CSDP; second, the PSC clearly stated that the restoration of justice and accountability, based on the relevant international legal standards elaborated by the UN, should be the core priority of the CSDP operations. The PSC’s call to embed transitional justice endeavors in the CSDP missions was reinvigorated in 2008, when several reports were drafted by the General Secretariat of the Council, underscoring the need to make gender and human rights issues key priorities of CSDP operations¹⁴². Bosnia and Herzegovina is one of the main third countries in which the European Union has put in place two CSDP missions aimed at furthering transitional justice. The first of these CSDP missions came under the name of European Union Police Mission in Bosnia and Herzegovina (EUPM), and it was initiated in 2003, for the purpose of substituting the International Police Task Force (IPTF) UN-led mission, which had instead been put in place within the framework of “the larger UN Mission in Bosnia (UNMBH)”¹⁴³. The EUPM aim consisted in fostering “police reform and enhancing the rule of law in an effort to build a multi-ethnic police force in accordance with European and international standards”¹⁴⁴. The main shortcoming of the EUPM was that this Mission did not make any attempts to put in place any lustration initiatives, but it rather “abjured from instituting new vetting processes or guidelines”¹⁴⁵. For instance, many police forces who had previously been involved in the perpetration of war crimes and crimes against humanity were not removed from office¹⁴⁶. The second CSDP Mission that was put in place in Bosnia Herzegovina with the aim of furthering transitional justice was the EU Military Operation in Bosnia and Herzegovina (EUFOR-Althea), which was initiated by the European Council in 2004; seven thousand troops were originally deployed within the framework of the EUFOR-Althea Operation¹⁴⁷. At the moment, however, only one thousand six hundred troops are operational within the framework of the Mission, as Bosnia and Herzegovina is no longer in a state of political and social

¹⁴⁰ Elena Andreevskaya, ‘Transitional Justice and Democratic Change: Key Concepts’, *Lex ET Scientia International Journal (LESIJ)*, 20 (2013), P. 60

¹⁴¹ Kate A. Crossley-Frolick, ‘The European Union and Transitional Justice: Human Rights and Post-Conflict Reconciliation in Europe and Beyond’, *Contemporary Readings in Law & Social Justice*, cit., p. 44

¹⁴² *Ibidem*

¹⁴³ *Ivi*, p. 46

¹⁴⁴ *Ibidem*

¹⁴⁵ *Ibidem*

¹⁴⁶ *Ibidem*

¹⁴⁷ *Ibidem*

turmoil¹⁴⁸. A very important transitional justice objective is entrenched within the mandate of the EUFOR-Althea mission. Indeed, the EUFOR personnell is in charge of helping the “ICTY and local authorities in the detention of persons indicted for war crimes”¹⁴⁹. Crossley-Frolick has not elaborated extensively on the achievements and the shortcomings of the EUFOR-Althea operation, thus rendering it impossible to make any judgments.

A third major instrument through which the EU furthers transitional justice objectives is the Instrument for Stability (IfS), which was launched by the European Commission in 2007, for the purpose of granting crisis management technical and financial assistance to the EU’s partner countries. Among the partner countries that can benefit from the IfS resources are both post-conflict countries and countries whose political situation is stable. When it comes to partner countries whose political situation is stable, the aims of the IfS resources consist in tackling all of those transborder challenges which may trigger unrest and instability, and in enhancing the partner countries’ capacity to prevent and respond to instability circumstances. As far as post-conflict countries are concerned, instead, the aims of the IfS is to grant transitional justice assistance. In particular, within the context of the IfS, in July 2008 the European Commission mobilized a 12 million Euros fund, for the purpose of granting the transitional governments of the EU partner countries all the necessary financial assistance to set-up criminal courts in charge of prosecuting former regime members responsible for gross human rights violations, and to put in place other transitional justice mechanisms aimed at “encouraging reconciliation”¹⁵⁰. At this point, it is essential to introduce two examples which clearly illustrate how this fund contributed to fostering transitional justice in the EU partner countries. First, in 2008, through the IfS fund, 5.000.000 Euros were granted by the EU to the Colombian Government, so as to enable the latter to put in place an initiative “to assist the victims of the armed conflict, their families and the civil society organizations in their search for truth, justice and reparations”¹⁵¹. Second, the IfS also played an important role in fostering transitional justice in the Solomon Islands; for instance, through the IfS fund, the government of the Solomon Islands was granted three hundred thousand Euros, for the purpose of putting in place “a technical assistance programme to establish a credible truth and reconciliation commission (TRC) process as a way towards justice for past human rights violations and contributing to national unity and sustainable peace in the country”¹⁵².

¹⁴⁸ *ibidem*

¹⁴⁹ *ibidem*

¹⁵⁰ *Ivi*, p. 40

¹⁵¹ Laura Davis, ‘The European Union and Transitional Justice’, *International Center for Transitional Justice*, p. 14. Available at: <https://ictj.org/sites/default/files/ICTJ-IFP-EU-Justice-2010-English.pdf>

¹⁵² *ibidem*

1.5 Economic and social rights and transitional justice: a new trend

One of the new trends that have lately emerged in the field of transitional justice studies concerns the potential inclusion of economic and social rights concerns within the realm of transitional justice. This trend will be investigated by exploring the main reasons why economic and social rights concerns have not been entrenched in traditional transitional justice discourses, and by analyzing the extent to which such transitional justice mechanisms as truth commissions, trials and reparations may help address violations of economic and social rights.

1.5.1 The exclusion of ESR concerns from the traditional transitional justice discourses

Three are the main reasons why, according to legal scholars such as Cahill-Ripley and Szoke-Burke, ESR concerns have not been included in the traditional transitional justice discourses. The first reason why ESR violations have not been addressed by the traditional transitional justice mechanisms lies in the fact that, according to such scholars as Cahill-Ripley, ESR cannot be deemed to be legally binding standards, but just objectives that should be accomplished in the long-run, and hence they are unlikely to be enforced before criminal tribunals; this consideration stems from the fact that unlike the International Covenant of Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) only calls upon its parties to accomplish the goals entrenched in the Covenant gradually¹⁵³. The argument that ESR are not enforceable can be challenged on two main grounds. First, although states are called upon to accomplish the goals entrenched in the ICESCRs gradually, the commitments stemming from the ICESCRs are binding upon the Covenant state parties. Indeed, the ICESCRs clearly requires its signatories to “respect, protect, and fulfill economic, social and cultural rights”, which means that the ICESCRs signatories have to refrain from breaching their citizens’ ESR, they are supposed to achieve the objectives entrenched in the ICESCR, and they are bound to “prevent third parties from violating these rights”¹⁵⁴. Second, the consideration that ESR cannot be adjudicated before courts can also be challenged on the ground that more and more legally binding acts entrench ESR, and foresee the establishment of bodies before which ESR cases can be referred by individuals. As an example, pursuant to the Optional Protocol to the ICESCR, the Committee on Economic, Social and Cultural Rights can be referred cases by individuals concerning breaches of ESR¹⁵⁵.

The second reason why the traditional transitional justice mechanisms have not coped with ESR violations rests in the fact that if additional issues were added on the agenda of the transitional justice mechanisms, then these mechanisms would have to divert some of their attention from “upholding the

¹⁵³ Amanda Cahill-Ripley, ‘Foregrounding Socio-Economic Rights in Transitional Justice: Realizing Justice for Violations of Economic and Social Rights’, *Netherlands Quarterly of Human Rights*, 32(2014), pp. 187-188

¹⁵⁴ Sam Szoke-Burke, ‘Not Only Context: Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights’, *Texas International Law Journal*, 50(2015), p. 472

¹⁵⁵ *Ivi*, pp. 472-473

dignity of victims of physical or sexual violence”, which is deemed by many scholars to be the core concern of transitional justice¹⁵⁶. This argument has been criticized by many legal scholars on the ground that the principles of “indivisibility” and “interdependence” of human rights, which are two of the main pillars upon which current international human rights law is founded, would be significantly challenged if breaches of civil and political rights and of ESR were not redressed simultaneously. For instance, “if someone has been forcibly displaced, their home burnt down and their access to food denied and they subsequently die from starvation and exposure, this would constitute a violation not just of the right to life but also the right to food, housing and health”¹⁵⁷. Moreover, redress for the violation of some civil and political rights would make little sense if some economic and social problems were not tackled first. As an example, let us suppose psychological treatment is granted to individuals who have undergone acts of torture; this rehabilitation scheme “will be of limited effect” if the victims in question “have no home or no long-term sustainable means to support themselves to enjoy an adequate standard of living”¹⁵⁸.

1.5.2 How could ESR violations be tackled by traditional transitional justice mechanisms?

After having analyzed the main reasons why traditional transitional justice mechanisms have not coped with ESR breaches, and after having challenged these two reasons, this thesis will explore the extent to which such traditional transitional justice mechanisms as trials, truth commissions and reparations have so far helped address ESR breaches, by relying upon scholarly literature.

First, let us explore how trials could help foster redress for ESR breaches, by referring to the limited efforts made by some international tribunals. As it has already been specified in the above paragraphs, the judicial transitional justice mechanisms aimed at prosecuting the individuals responsible for gross human rights violations are either international criminal tribunals like the ICC or ad hoc tribunals which are established to deal specifically with the crimes that have been perpetrated in a given polity in a given time frame. It is important to note that within the context of these tribunals, breaches of ESR have seldom been deemed as “a part of wider gross human rights violations or as crimes in their own right”¹⁵⁹ even if provisions are embedded in the founding statutes of these courts, which could be invoked to punish ESR violations. This trend can very well be noticed in the context of the ICTY. Indeed, in the *Prosecutor v. Dragomir Milošević* case, the Pre-Trial Chamber provided an in-depth description of the violations of such ESR as the right to health, water and food which were perpetrated during the siege of Sarajevo, but it did not deem such breaches to represent either crimes of war or crimes against humanity; the destruction of houses and the interruption of food and water supplies in

¹⁵⁶ Ivi, p. 475

¹⁵⁷ Amanda Cahill-Ripley, ‘Foregrounding Socio-Economic Rights in Transitional Justice: Realizing Justice for Violations of Economic and Social Rights’, *Netherlands Quarterly of Human Rights*, 32(2014), cit., p. 190

¹⁵⁸ ibidem

¹⁵⁹ ibidem

Sarajevo was rather considered by the Pre-trial Chamber of the ICTY as the framework within which violations of civil and political rights had been carried-out¹⁶⁰. Only in one case did the ICTY consider ESR violations to amount to an international crime per se. For instance, in the *Prosecutor v. Braanin* case, the ICTY held that by depriving Bosnian Muslims and Bosnian Croats of health care provision, “employment and freedom of movement” just on the ground of their racial belongings, the Bosnian Serb authorities had perpetrated ESR violations that amounted to crimes of genocide¹⁶¹. The ICC dealt with ESR violations almost in the same way as the ICTY. Indeed, although the Rome Statute of the ICC entrenches articles that deem violations of ESR to represent crimes of war, crimes of genocide, or crimes against humanity, the ICC has never prosecuted individuals on the ground of ESR violations¹⁶². The only international court which has consistently considered ESR breaches as a ground for prosecution is the Inter-American Court of Human Rights. For instance, in the *Itango Massacre v. Colombia* case, the Court held that ESR abuses such as forcible displacement and forced labor had been perpetrated by the Colombian Government. With regards to forcible displacements, the Court ruled that the Colombian Government had to foster redress by delivering compensations to the victims, and by providing the victims of forcible displacement with housing and shelter¹⁶³.

As far as truth commissions’ involvement in ESR issues is concerned, the academic literature has identified three main reasons why truth commissions would be the best equipped transitional justice mechanism to cope with ESR breaches. First, truth commissions may actively engage in analyzing all of the social and economic factors which may have led to a conflict in a given country, thus providing the citizens of that country with detailed information about the injustices that were perpetrated in the past¹⁶⁴. While some truth commissions have fulfilled this function quite effectively, others have not done so. Among the truth commissions that effectively documented and addressed ESR violations are the Kenyan and Timor Leste truth commissions. For instance, a mandate was given to the Kenyan Truth, Justice and Reconciliation Commission (TJRC) to document all of the ESR breaches that had been perpetrated on the Kenyan territory in the aftermath of the 2007 elections, by disclosing the identity of the victims, and possibly by suggesting how redress could be fostered¹⁶⁵. In the same fashion as the Kenyan TJRC, the truth commission which was established in Timor Leste specifically documented the biases underpinning Timor Leste’s educational system and the forced displacement crimes perpetrated by the

¹⁶⁰ Ivi, p. 198

¹⁶¹ Sam Szoke-Burke, ‘Not Only Context: Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights’, *Texas International Law Journal*, 50(2015), p. 483

¹⁶² Amanda Cahill-Ripley, ‘Foregrounding Socio-Economic Rights in Transitional Justice: Realizing Justice for Violations of Economic and Social Rights’, *Netherlands Quarterly of Human Rights*, 32(2014), cit., p. 198

¹⁶³ Sam Szoke-Burke, ‘Not Only Context: Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights’, *Texas International Law Journal*, 50(2015), p. 483

¹⁶⁴ Ivi, p. 478

¹⁶⁵ Subhash Pokhrel, ‘Economic, Social and Cultural Rights in the Transitional Justice Remit’, *Kathmandu School of Law Review*, 3(2013), p. 75

authorities of Timor Leste¹⁶⁶. Unlike the Kenyan and the Timor Leste truth commissions, the South African Truth and Reconciliation Commission (TRC) and the truth commissions that were established in Peru and Sierra Leone did not address ESR breaches efficiently. Indeed, even if those South African corporations that were involved in the perpetration of human rights violations during the Apartheid regime were summoned by the TRC to disclose the truth about the crimes they had committed, the accounts provided by the South African corporations were then not included in the final report that the TRC drafted. In the same fashion as the TRC, the truth commissions that were set-up in Peru and Sierra Leone mentioned the socio-economic crimes that had been perpetrated in the two countries just for the purpose of providing a more complete picture of the context in which violations of civil and political rights had occurred, but they did not issue any recommendations on how ESR breaches were to be remedied¹⁶⁷. A second way in which truth commissions could help address violations of ESR is shaping their accounts of socioeconomic injustices in terms of human rights violations. Such a narrative could “provide civil society with a platform for advocacy”, and it may provide all of those governmental organizations that promote socioeconomic reforms with some backing¹⁶⁸. Finally, even if truth commissions, given their short-term mandate, are not able to supervise the implementation of development and economic policies, they can none the less pave the way for mechanisms that will make it easy for policy-makers to adopt long-term development policies in the future, such as “reforms designed to decentralize government decision-making or facilitate participatory budgeting by communities”¹⁶⁹.

A third transitional justice mechanism that could help confront ESR violations is reparations. As already noted above, reparations can take different forms, ranging from returning previously confiscated properties to the original owners to access to medical or educational facilities¹⁷⁰. Reparations present two problems that make them ineffective in confronting ESR breaches. The main reason why reparations are ineffective in confronting ESR breaches rests in the fact that “including ESRs within the mandate of a reparations program, which will already be chronically under-resourced, will expand the pool of victims and thus further dilute the available remedies, minimizing their restorative potential”¹⁷¹. As an example, let us assume that the rights to health and education of a sizeable portion of the population of a given state have been infringed by the government of that state; in this case, it is quite unlikely that the state will be able to compensate each single victim and to foster redress¹⁷². A second

¹⁶⁶Sam Szoke-Burke, ‘Not Only Context: Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights’, *Texas International Law Journal*, 50(2015), cit., p. 478

¹⁶⁷Lars Waldorf, ‘Anticipating the Past: Transitional Justice and Socio-Economic Wrongs’, *Social & Legal Studies*, 21(2012), p. 176

¹⁶⁸Sam Szoke-Burke, ‘Not Only Context: Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights’, *Texas International Law Journal*, 50(2015), p. 479

¹⁶⁹Ivi, p. 480

¹⁷⁰Ivi, p. 484

¹⁷¹ibidem

¹⁷²ibidem

major reason why reparations are usually ineffective in addressing ESR breaches is that reparations are catered to tackle the socio-economic problems of single victims, but they tend to leave those structural and systemic economic issues underpinning the entire economic system of a given country, such as underdevelopment or social marginalization unaddressed, thus “potentially contributing to the continuation of inequality or marginalization of specific groups, and denying the suffering of victims of those less tangible social or economic injustices”¹⁷³. According to the academic literature, the only case in which reparations have helped address structural and systemic macroeconomic problems is the case of Perú, where collective reparations schemes were devised to foster the social inclusion of the indigenous communities living in the Andes region, that lagged behind in terms of economic and infrastructural development¹⁷⁴.

1.6 Transitional justice endeavors to address gender crimes

Besides ESR, a further trend in the field of transitional justice studies concerns the potential inclusion of gender issues within transitional justice discourses. The gender dimension of transitional justice discourses deserves to be analyzed in-depth, as gender issues have played an important role in the democratic transition processes in Libya and Tunisia. For instance, Tunisian women had experienced serious human rights abuses under Ben Ali’s regime, and Libyan women suffered several forms of gender-based harm, both under Qadhafi’s regime and during the 2011 Arab revolts. Neither the Tunisian transitional justice processes nor the Libyan ones aimed at fostering redress for such crimes, as the two chapters below will show. Many scholars, such as Harris Rimmer have pointed-out that traditional international humanitarian law is biased towards “the male combatant’s experience in conflict as the standard”¹⁷⁵ and it has paid very little attention to the role that women play in armed conflicts; indeed, as the International Committee of the Red Cross has stated, international humanitarian law takes no account of the fact that women’s victimization during armed conflicts may be due to their reproductive capacities, as well as to other considerations, such as their ethnicity, their religious affiliation and their social status; moreover, international law takes no account of the fact that during contemporary armed conflicts women are no more only the victims of human rights violations, but they also act as combatants, and thus as the ones perpetrating human rights violations¹⁷⁶. The lack of gender concerns in international humanitarian law, however is detrimental to the effectiveness of the transitional justice mechanisms which are put in place in post-conflict societies. For instance, an effective peace agreement can be concluded, and a real transition to democracy can be achieved provided that an account is provided of all of the gender crimes that women have undergone during a

¹⁷³ Ivi, p. 485

¹⁷⁴ Ivi, p. 486

¹⁷⁵ Susan Harris Rimmer, ‘Sexing the subject of Transitional Justice’, *The Australian Feminist Law Journal*, 32(2010), p. 140

¹⁷⁶ ibidem

conflict. Furthermore, it is extremely important to document all of the human rights abuses perpetrated against women and to provide a full account of the gender stereotypes underpinning a given society, in order for the international community to engage in a “humanitarian intervention” which is well tailored to the needs of the post-conflict context in question; in case transitional justice mechanisms keep on neglecting gender crimes, the gender disparities underlying a given society will be exacerbated, and “sustainable peacebuilding” is not going to be accomplished¹⁷⁷. In light of the importance of including gender concerns into transitional justice discourses, this section will explore how such transitional justice mechanisms as trials and truth commissions have failed confronting gender crimes, and it will provide some recommendations, thanks to the help of scholarly literature, that criminal prosecutors and truth commissions may follow, so as to better address gender crimes.

1.6.1 Criminal prosecutions as a vehicle to redress gender crimes

With regards to gender crimes, criminal trials have not always succeeded fostering redress for three main reasons. The first reason is that very few investigative instruments are provided to investigators to detect gender crimes perpetrators and ensure they appear before criminal courts, and victims usually find it difficult to collect the proof that criminal courts need to determine whether the sexual abuse has actually been committed, and whether the alleged victim has acquiesced to the intercourse; related to this is the fact that many international criminal tribunals, such as the ICTY and the ICTR have often found it difficult to determine what the constitutive elements of gender crimes are¹⁷⁸. The lack of jurisprudence concerning gender crimes is a serious flaw that many authors have underlined. For instance, there is enough consensus among legal scholars on the fact that contemporary international law is not really clear on whether forced maternity could be deemed to amount to an international crime; yet, the international legal nature of forced maternity crimes should be clarified as far as possible, because this is a phenomenon that affects both conflict societies and societies which do not experience conflicts¹⁷⁹. Against the background of these failures, scholars have provided two main pieces of advice which may help make gender crimes prosecutions more effective. First, investigators should get acquainted with all of those skills which are necessary to detect gender crimes perpetrators and get them before criminal courts to disclose all the evidence about the sexual abuses they have undertaken. Second, in order to overcome the gender bias underlying the current international humanitarian law regime, a bulk of jurisprudence should be produced, which clearly defines what the constitutive elements of gender crimes are, and how redress for such crimes should be fostered¹⁸⁰.

¹⁷⁷ Ivi, p. 137

¹⁷⁸ Laura C. Turano, ‘The gender dimension of transitional justice mechanisms’, *New York University Journal of International Law and Politics*, 42(2010), cit., p. 1071

¹⁷⁹ Susan Harris Rimmer, ‘Sexing the subject of Transitional Justice’, *The Australian Feminist Law Journal*, 32(2010), cit., p. 140

¹⁸⁰ Laura C. Turano, ‘The gender dimension of transitional justice mechanisms’, *New York University Journal of International Law and Politics*, 42(2010), cit., p. 1072

The second reason why criminal prosecutions are not an effective vehicle to foster redress for gender crimes rests in the fact that gender crimes victims do not feel comfortable providing their testimonies to criminal courts, as they fear their personal safety may be in danger after their identity is disclosed to the accused, as due process safeguards require¹⁸¹. In particular, gender crimes victims fear that after appearing before criminal courts to disclose all the truth about the abuses they have undergone, they may be “attached” with “social stigma” either by their own families or by the members of their own communities, thus ending up being marginalized even more¹⁸². As an example, in many societies, rape is deemed to be a reason of embarrassment for the victims’ families, and thus rape victims may fear that after voicing the abuses they have undergone before criminal courts, they may be attached with social stigma and they may end-up being even more marginalized¹⁸³. Based on these fears that gender crimes victims have, they either refuse to appear before criminal tribunals to vindicate the crimes they have undergone, or they refuse to disclose all the truth, thus rendering criminal prosecutions ineffective. In order to enhance the effectiveness of criminal trials in prosecuting gender crimes, prosecutors and investigators ought to promptly inform witnesses about the potential individual “safety” risks that they run after disclosing information, so as to enable them “to make an informed decision about their participation in trials”¹⁸⁴.

A third factor that makes gender crimes criminal prosecutions ineffective rests in the due process standards according to which the accused are entitled to face their accusers, and to hear all of the accusers’ claims. Gender crimes victims may not feel at their ease with this procedure, as they may be supposed to answer specific questions concerning the abuses they have undergone, which is a traumatising experience per se, and their claims are quite likely to be forcefully rebutted by the defendants, whose only stake is being disculpated. Several authors have elaborated on how traumatic gender crimes trials may be for the victims. In particular, as Harris-Rimmer has claimed, “war crimes trials may have an ‘inherently counter-narrative effect, despite the best efforts of investigators and prosecutors’. The physical and psychological wounds as a consequence of rape and sexual abuse are often not part of accepted rape testimonies, as emotions have no place in the courtroom, if prosecutors or judges want to deal with sexual violence at all”¹⁸⁵. Furthermore, gender crimes victims are often

¹⁸¹ Ivi, pp. 1078-1079

¹⁸² Susan Harris Rimmer, ‘Sexing the subject of Transitional Justice’, *The Australian Feminist Law Journal*, 32(2010), cit., p. 140

¹⁸³ Fionnuala Aolain, ‘Gender, Truth and Transition’, *UCLA Women’s Law Journal*, 16 (2007), p. 263

¹⁸⁴ Laura C. Turano, ‘The gender dimension of transitional justice mechanisms’, *New York University Journal of International Law and Politics*, 42(2010), cit., pp. 1078-1079

¹⁸⁵ Susan Harris Rimmer, ‘Sexing the subject of Transitional Justice’, *The Australian Feminist Law Journal*, 32(2010), cit., p. 140

frustrated by the fact that they are seldom informed on how the evidence they have provided to judges is used to solve the case at hand¹⁸⁶.

1.6.2 Truth commissions as a vehicle to address gender crimes

After having described all of the problems that criminal prosecutions of gender crimes present, this thesis will focus on truth commissions as a means to foster redress for gender crimes. Truth commissions are considered by many scholars to represent the best avenue to foster redress for gender crimes, as they are more victim-centered than other transitional justice mechanisms. For instance, the aim of truth commissions is not punishing those who are liable for human rights violations, but rather hearing victims' stories, so as to provide an accurate account of past atrocities such as gender crimes and of the past socio-political conditions that facilitated the perpetration of crimes¹⁸⁷. As far as gender crimes are concerned, an assessment of the socio-political context in which the abuses were perpetrated, and of the gender stereotypes underlying a given society can enable transitional authorities to issue recommendations aimed at eradicating all of those factors that have made the perpetration of gender crimes possible¹⁸⁸. Despite the important contribution that truth commissions could give to confronting gender crimes, truth commissions have seldom engaged in this type of transitional justice effort. The three main reasons why truth commissions have not been active in remedying gender crimes will be explored in-depth.

When it comes to tackling gender crimes, truth commissions have not really played such a fundamental role so far. The lack of attention of truth seeking processes towards gender issues can be noted in three main instances. First, so far women have appeared before truth commissions as witnesses either to provide evidence on the sexual abuses undergone, or to disclose information on the human rights atrocities perpetrated against the male members of their families, and truth commissions have hardly ever paid any attention to crimes other than sexual abuse that women might have undergone during conflicts¹⁸⁹. Truth commissions' focus on sexual abuse as the only crime perpetrated against women gives rise to two main problems. First, such a focus may generate an "obsession with the woman as a sexual object, as the focus on accountability inevitably results in an emphasis on the sexual experiences and sexual vulnerability of women"¹⁹⁰. The second problem is that by focusing on sexual violence as the only form of gender crimes, truth commissions may contribute to overshadowing all of the other forms of crimes that women may undergo during armed conflicts, as well as the multiple tasks

¹⁸⁶Laura C. Turano, 'The gender dimension of transitional justice mechanisms', *New York University Journal of International Law and Politics*, 42(2010), cit., p. 1078

¹⁸⁷Ivi, pp. 1083-1084

¹⁸⁸Fionnuala Aolain, 'Gender, Truth and Transition', *UCLA Women's Law Journal*, 16 (2007), pp. 262-263

¹⁸⁹Susan Harris Rimmer, 'Sexing the subject of Transitional Justice', *The Australian Feminist Law Journal*, 32(2010), cit., pp. 137-138

¹⁹⁰Fionnuala Aolain, 'Gender, Truth and Transition', *UCLA Women's Law Journal*, 16 (2007), pp. 262-263

that women perform in modern armed conflicts, thus ultimately leading to an underestimation of women's "abilities to contribute to political transformation in a variety of ways"¹⁹¹.

Second, the ESR abuses that women may have been subjected to during conflicts are hardly ever taken into account by truth-seeking processes¹⁹². For instance, "truth commissions often focus on killings, disappearances, custodial torture, abductions, and illegal imprisonment-excluding many of the dimensions...that more fully encompass the scope of women's experience during an armed conflict"¹⁹³.

¹⁹¹ ibidem

¹⁹² Susan Harris Rimmer, 'Sexing the subject of Transitional Justice', *The Australian Feminist Law Journal*, 32(2010), cit., p.138

¹⁹³ Laura C. Turano, 'The gender dimension of transitional justice mechanisms', *New York University Journal of International Law and Politics*, 42 (2010), cit., p. 1083

2 Transitional justice after the Arab Spring: the case of Libya

This chapter will deal with the transitional justice measures which were put in place in Libya, in order to confront the crimes perpetrated during the 2011 Libyan revolts, as well as during the Qadhafi regime. This chapter will be divided into six main parts. The first part will deal with the actors that had played a role under Qadhafi's Libya, and on the main social and political actors that emerged in 2011, in the aftermath of Qadhafi's fall. The second part will deal with the main events that unfolded during the 2011 Libyan revolts that culminated in the overthrow of the Qadhafi regime, the 2011 self-proclamation of the National Transitional Council (NTC), the 2012 elections of the Grand National Council (GNC), and the 2014 elections of the House of Representatives, which culminated in an institutional paralysis. The third and fourth paragraphs will get to the core of the main issue, and they will be centered around the main transitional justice measures that were put in place in Libya. In particular, the third paragraph will explore the transitional justice measures that were adopted by the NTC, while the fourth paragraph will analyze the GNC's transitional justice endeavors. The fifth paragraph will analyze the ICC prosecutions of Muammar Qadhafi, his son and Al-Senussi, and the final paragraph will describe some issues that the NTC and the GNC should take into account to boost the effectiveness of the Libyan transitional justice process.

2.1 Libyan pre-Arab Spring and post-Arab Spring social and political actors

This paragraph will deal with the main social and political actors that played a role in Libya under Qadhafi's regime, that is from 1969 to 2011, and with the main actors that shaped Libyan politics from 2011 onwards. This analysis serves the purpose of better contextualizing the transitional institutional path that Libya undertook in the aftermath of Qadhafi's overthrow.

2.1.1 Libyan pre-Arab Spring social and political actors

Scholars such as Arturo Varvelli, Karim Mezran and Aldo Nicosia agree upon the fact that tribes have been among the most important social and political actors in pre-Arab Spring Libya. As Varvelli has stated, the term "tribe" is used to refer to "concrete communities based on more general conceptions of collective identity"¹⁹⁴. As Claudia Gazzini has underlined, the Libyan society is composed of several tribes, and each tribe is made up of different clans; in particular, around 140 tribes are based on the Libyan territory: among the tribes that are based in the Western part of Libya are the *Magariha*, the *warfalla*, the *firgan*, the *Misratan*, and the *Gaddafa* groups; among the most important tribes that are based in Eastern Libya, one can find the *Mugarba*, the *Awaqir*, the *Zuwaya*, the *Favahir*, the *Mugabra*,

¹⁹⁴Arturo Varvelli, *State-Building in Libya: Integrating Diversities, Traditions and Citizenship* (Rome: Reset-Dialogues on Civilizations, 2017), p. 90

and the *Ubaydat* groups¹⁹⁵. The social and political role played by tribes in pre-Arab Spring Libya, from 1951 till 2011 needs to be analyzed in-depth.

In 1951, after Libya had gained independence, a monarchical system emerged in the country, and King Idris became the Libyan Monarch. As Aldo Nicosia has underlined, King Idris established a tribal political system in the country, whereby political and administrative positions were occupied by tribal leaders, and the borders between the different provinces were established on the basis of tribal divisions¹⁹⁶.

In 1969, Muhammad Qadhafi overthrew King Idris's monarchy, and he acquired power over Libya; a Revolutionary Command Council was immediately established, which was initially composed of twelve members, and Qadhafi acted as the Commander in Chief of this Council¹⁹⁷. Muhammad Qadhafi's *Jamahariyya* (People's Republic) was thus established. In December 1969 the Constitution upon which the *Jamahariyya* had to be founded was enacted, and it foresaw that the Revolutionary Command Council would be the supreme power of the Libyan *Jamahariyya*, and it would be in charge of appointing the Council of Ministers. In 1971 Libya was transformed into a one party state, in which every form of political pluralism was forbidden¹⁹⁸. As confirmed by Aldo Nicosia, in the very first years of Qadhafi's rule over Libya, tribes were deprived of any economic and political role, and they were replaced by young administrators who had sworn their loyalty to Qadhafi; for instance, Qadhafi's initial institutional project consisted in dismantling the tribal political system that had been installed by King Idris, and which had been characterized by significant corruption issues¹⁹⁹.

Nevertheless, at the end of the 1970s, the initial administrative and political configuration that Qadhafi had tried to establish began to fail, and tribal groups began to penetrate various administrative posts of the *Jamahariyya*, and to get oil revenues²⁰⁰. In particular, Nicosia reports that an administrative practice began spreading in Libya, according to which administrative posts were attributed on the basis of tribal affiliations²⁰¹.

In the 1980s, in the face of mounting popular dissatisfaction with the Qadhafi regime, the Colonel decided to forge alliances with tribal leaders, and tribes became the vehicle through which Qadhafi could be sheltered from potential enemies and traitors, as Nicosia recounts. In this period, such institutions as Popular Social Commands were established in Libya, and they were entrusted with countering corruption, settling local disputes, and implementing social development plans; these Commands were presided by tribal leaders, and their establishment officially marked the recognition of

¹⁹⁵ Claudia Gazzini, 'Solo Tribù', *Limes Rivista Italiana di Geopolitica*, 1 (2011), p. 58

¹⁹⁶ Aldo Nicosia, 'Dalla Tribù alla Coscienza Nazionale', *Limes Rivista Italiana di Geopolitica*, 1 (2011)

¹⁹⁷ Karim Mezran & Arturo Varvelli, *Libia: Fine o Rinascita di una Nazione?* (Rome: Donzelli Editore, 2012), p. 26

¹⁹⁸ *ibidem*

¹⁹⁹ Aldo Nicosia, 'Dalla Tribù alla Coscienza Nazionale', *Limes Rivista Italiana di Geopolitica*, 1 (2011), cit.

²⁰⁰ *ibidem*

²⁰¹ *ibidem*

tribes as important political actors under Qadhafi's *Jamahariyya*²⁰². In the 1990s, Qadhafi assigned important posts in the secret services to members of his clans, the Qadhafia, and this clan acquired control over the most important sectors of the Libyan economy²⁰³.

Under Qadhafi's *Jamahariyya*, two specific actors were subjected to discrimination and persecution: the Muslim Brotherhood and the Libyan Islamic Fighting Group (LIFG), as Karim Mezran and Varvelli have underlined²⁰⁴. It is necessary to briefly analyze these two actors, as they re-emerged in the Libyan political scene after Qadhafi's fall, and they contributed to shaping the Libyan transitional institutional set-up. As far as the Muslim Brotherhood was concerned²⁰⁵, Qadhafi's repression vis-à-vis this movement began in the 1980s, when the Colonel obliged the Muslim Brothers to dissolve their movement, several members of the movement were persecuted and arrested by the Qadhafi regime, and several leading figures of the movement were supposed to go on exile to Europe. At the beginning of the 1990s, many of the leading figures of the Libyan Muslim Brotherhood who had gone on exile to Europe returned to Libya, and they set-up a secret Council (*Shura*) in Benghazi, where they established a political movement having a religious orientation called Libyan Islamic Group²⁰⁶. When in the mid-1990s the Libyan Islamic Group was discovered by the Qadhafi regime secret police, Qadhafi launched a brutal repression campaign vis-à-vis the Group, which culminated in the 1998 arrest of fifty-three members of the Libyan Islamic Group²⁰⁷. Most of the Libyan Islamic Group members who had been arrested were released in 2006, following petitions emanating from many human rights organizations, and upon being released, they were supposed to swear they would no longer engage in any sort of political activism²⁰⁸.

A second actor that was subjected to various forms of discrimination by Qadhafi, and which re-emerged on the Libyan political scene after Qadhafi's fall was the LIFG (Libyan Islamic Fighting Group). The LIFG emerged in the 1970s and 1980s, under the leadership of Sheykh, and its adherents were induced to take arms against the Qadhafi regime, as Mezran and Varvelli recount; this group was influenced by various currents of Islamic integralism²⁰⁹. As soon as this group emerged, the Qadhafi regime police launched a harsh repression against its members. Therefore, many leading figures of the group fled to Afghanistan and joined the local mujaheddin in their fight against the Soviet troops²¹⁰. Only in 1994 did the members of the LIFG return to Libya, where they would operate secretly. As Mezran and Varvelli underlined, it is noteworthy that the LIFG members that returned to Libya had

²⁰² *ibidem*

²⁰³ *ibidem*

²⁰⁴ Karim Mezran & Arturo Varvelli, *Libia: Fine o Rinascita di una Nazione?* (Rome: Donzelli Editore, 2012), cit., p. 55

²⁰⁵ A description of the Muslim Brotherhood's ideology will be provided in sub-paragraph 3.1.2, dealing with the social and political actors in post-Qadhafi Libya.

²⁰⁶ *Ivi*, p. 56

²⁰⁷ *ibidem*

²⁰⁸ *ibidem*

²⁰⁹ *ibidem*

²¹⁰ *ibidem*

managed to import a significant number of weapons and ammunitions from Afghanistan²¹¹. In 1995 the LIFG embarked in a war against the Qadhafi regime, which culminated in 1996, when two attempted murders were staged against Qadhafi, and they both failed. Qadhafi reacted to these attempted murders by brutally repressing the LIFG activities, and by arresting the most prominent LIFG members, who were only released in 2006²¹².

2.1.2 Libyan post-Qadhafi political and social actors

After the Qadhafi regime had fallen in 2011 and the Arab revolts had started, a series of actors appeared on the Libyan political stage, which participated in the revolts, and contributed to shaping the Libyan transitional process. Among the most important actors, we can distinguish between five categories: armed groups, tribal groups, ethnic groups, the political forces that competed for the 2012 Grand National Council elections, and tribal actors. The below analysis will attempt to show that a multitude of different social and political actors proliferated in Libya in the aftermath of Qadhafi's fall.

2.1.2.a Local Councils

Local Councils initially emerged in the aftermath of Qadhafi's fall in 2011 in several Libyan communities, and they were in most cases "established through secret initiatives for the purpose of assuming the responsibility of administering cities and regions after their liberation from the control of the *ancien regime*"²¹³. At the moment, local councils are in charge of "the local administration of the various government and service sectors. Some of them have military wings subject to their authorities"²¹⁴. The most prominent feature of these local councils is that they have always worked independently from the legitimate governmental authorities, and they tend to enforce their decisions by the use of force²¹⁵. The main issue which is currently posed by local councils is that it is impossible to get clear details on "the capabilities of its members, their political orientation and their performance"²¹⁶. That is why the Libyan transitional authorities urged the dwellers of many communities to dismantle the local councils, and to call for elections "to select new councils in a manner that reflects the struggle between political or ideological currents as well as factional regional and tribal struggles"²¹⁷.

2.1.2.b Armed Groups

Scholars such as Combaz, Riis Andersen and Mezran have reached consensus on the fact that as soon as the Arab revolts had begun in February 2011, four types of armed groups proliferated in several

²¹¹ Ivi, p. 57

²¹² Ivi, p. 58

²¹³ Youssef Mohammad Sawani, 'Post-Qadhafi Libya: Interactive Dynamics and the Political Future', *Contemporary Arab Affairs*, 5 (2012), p. 16

²¹⁴ ibidem

²¹⁵ ibidem

²¹⁶ ibidem

²¹⁷ ibidem

Libyan cities, they actively participated in the revolts, and they performed several security purposes; in other words, these four armed groups were basically in charge of “the protection of the revolution and the protection of the local community”²¹⁸.

The first type of armed groups was the so-called Revolutionary Brigades, which have been operational in such Western Libyan cities as Benghazi, Misrata and Zintan, as well as in the region of the Western Nafusa Mountains²¹⁹. Originally, the Revolutionary Brigades were involved in street fightings, and they could thus be categorized as “unorganized street fighting groups”²²⁰. Then, they turned into “organizations which became capable of attacking tank divisions”, and they thus set-up military facilities that could help them better synchronize their actions²²¹. The structure of the Revolutionary Brigades differs according to the city in which they are based: “some brigades are neighborhood and workplace brigades. Others are tribal brigades”²²². The most important feature of the Revolutionary Brigades is that they act under the authority of local councils, and “in many cases the communities and the cities have entrusted political functions to the revolutionary brigades because of lack of experienced police forces and of a national army”²²³.

The second type of armed groups was the so-called Unregulated Brigades; the Unregulated Brigades were not subjected to the authority of local councils, and several crimes have been perpetrated by the Unregulated Brigades against the Libyan civilian population²²⁴.

Third, Pro-Revolutionary Brigades were established in Libya in 2011, in order to “fill the security vacuums left behind by defeated Qadhafi forces”²²⁵. The Pro-Revolutionary Brigades initially emerged in those neighborhoods where there was a high concentration of pro-Qadhafi dwellers, such as Sirte and Bani Walid, and they are still very active in the pro-Qadhafi Libyan communities. They have intensively participated “in post-revolution conflicts, as in the...city of Zuwara”, where since 2012 there have been tensions between tribes of Berber and Arab ethnicities”²²⁶. Like the Revolutionary Brigades, the Pro-Revolutionary Brigades act under the umbrella of local councils too.

²¹⁸ Emilie Combaz, ‘Key Actors, Dynamics and Issues of Libyan Political Economy’, *GSDRC Helpdesk Research Report*, 1106 (2014), p. 12

²¹⁹ Louise Riis Andersen, ‘How the Local Matters: Democratization in Libya, Pakistan, Yemen, and Palestine’, *Danish Institute for International Studies*, 1 (2013), p. 30

²²⁰ *ibidem*

²²¹ *ibidem*

²²² *ibidem*

²²³ *ibidem*

²²⁴ *ibidem*

²²⁵ *ibidem*

²²⁶ *ibidem*

Finally, militias include “criminal networks such as smuggling networks and violent extremists, the latter possibly being imbued by Salafist ideology”²²⁷. Militias are obviously not affiliated with local councils.

2.1.2.c Ethnic groupings

The 2011 Libyan revolts witnessed an active participation of the various ethnic components of the country. Among the ethnic groups which most actively participated in the revolts were the Amazigh, the Tuareg and the Tubu.

The Amazigh are based “in the Nafusah Mountains, and in the area of Zuwarah, including a range of coastal villages between Sabratah and the border with Tunisia”²²⁸. The Amazigh had been sidelined by the Qadhafi regime, and thus they were induced to be very active in the 2011 anti-regime revolts²²⁹.

The Tuareg are mainly based in the South West of Libya, and they have always played an active role in fostering security, “with influence over political processes and trafficking and trade routes in a number of countries”²³⁰. Some scholars deem the Tuareg to be “as close to the Qadhafi regime, and emphasize that Libyan and mercenary Tuareg fought in defense of the regime. Reasons reportedly include support by the Qadhafi regime for Tuareg rebellions in Mali and Niger in the 1970s, and settlement allowances to the Tuareg in Southern Libya”²³¹. Despite this line of thinking, Combaz underlines that it is impossible to observe a single clear-cut pattern in the actions taken by the Tuareg ethnic groupings during the 2011 revolts; for instance, “different Tuareg tribes and factions have taken different courses of actions during and after the uprisings”²³².

Finally, the Tubu are based in “Sabah in the South West and Kufa in the South East” of Libya; since they were subjected to political and cultural discrimination under the Qadhafi regime, they actively engaged in the anti-Qadhafi revolts in 2011²³³.

2.1.2.d Political forces

When analyzing the actors that played a role in post-Qadhafi Libya, it is necessary to describe the main ideological aspects of the parties that competed in the 2012 Grand National Council’s elections. As Combaz has stated, the parties that ran for the 2012 elections can be gathered into four main categories.

²²⁷ *ibidem*

²²⁸ Emilie Combaz, ‘Key Actors, Dynamics and Issues of Libyan Political Economy’, *GSDRC Helpdesk Research Report*, 1106 (2014), p. 10

²²⁹ *ibidem*

²³⁰ *ibidem*

²³¹ *ibidem*

²³² *Ivi*, pp. 10-11

²³³ *Ivi*, p. 11

The first category was the so-called National Forces Alliance (NFA). As Combaz has underlined, there was not a clear-cut ideology underpinning all of the groups which gathered in the NFA; for instance, Combaz highlighted, the NFA can be better characterized as “an umbrella groups for parts of the establishment that connects back to local networks, rather than an ideology-focused grouping”²³⁴, and the NFA representatives mostly include “prominent local figures from an economically privileged class and major families”²³⁵.

The second category is represented by the Justice and Construction Party, which is made up of a significant number of Muslim Brotherhood members; the Party’s “internal cohesion is strong”, and the party has been prone to force “alliances” with other political groups, in order to “advance its own interests beyond its representatives’ bloc”²³⁶. At this point, it is necessary to briefly analyze the ideology of the Muslim Brotherhood. The Libyan Muslim Brotherhood movement was in favor of establishing a democratic regime in Libya in the aftermath of Qadhafi’s overthrow; for instance, as Sawani has noticed, the Libyan Muslim Brothers “view democracy as an instrument or technique to be utilized. They attempt to project a modern character by voicing no objection to a civil state so long as that does not clash with the primacy of Islamic *Shari’a* in legislation”²³⁷. “Secularism” is the only value that they dispise; for instance, they uphold all of the Islamic religious values²³⁸.

The third category of political forces is the Salafist one. Parties having a Salafist orientation include the al-Watan Party and the Party of Reform and Development²³⁹. According to Sawani, the most important aspect of the Libyan Salafist parties is that they have strong ideological ties with the Salafist movements of Saudi Arabia; soon after Qadhafi’s fall, they became very active within “organizations and branches in many cities”²⁴⁰. What is remarkable about the Libyan political parties that ran for the 2012 elections is that they had not really taken a clear stand in terms of the political structure that should be established in post-Qadhafi’s Libya²⁴¹. The main concern of the Libyan Salafist parties and organizations, indeed, consisted in dictating codes of conduct in various Libyan communities, rather than in developing a clear-cut political program²⁴².

²³⁴ Ivi, p. 16

²³⁵ ibidem

²³⁶ ibidem

²³⁷ Youssef Mohammad Sawani, ‘Post-Qadhafi Libya: Interactive Dynamics and the Political Future’, *Contemporary Arab Affairs*, 5 (2012), cit., p. 6

²³⁸ ibidem

²³⁹ Emilie Combaz, ‘Key Actors, Dynamics and Issues of Libyan Political Economy’, *GSDRC Helpdesk Research Report*, 1106 (2014), cit., p. 16

²⁴⁰ Youssef Mohammad Sawani, ‘Post-Qadhafi Libya: Interactive Dynamics and the Political Future’, *Contemporary Arab Affairs*, 5 (2012), cit., p. 18

²⁴¹ ibidem

²⁴² ibidem

The fourth category includes those political parties which have a secular and more progressive stance vis-à-vis human rights issues, such as the National Front Party²⁴³.

2.1.2 e Tribal groups

As Sawani has pointed out, the Libyan 2011 anti-regime revolts were “not actually based on tribalism”, and the role of tribes merely consisted in resolving any local disputes which may have arisen²⁴⁴. In this respect, the tribal groups which were based in the Eastern provinces of Libya held several meetings during the 2011 revolts, to discuss possible solutions to the Libyan crisis. As an example, in October 2011, in the city of al-Bayda, “the National Gathering for the Inhabitants (of Barqah/Cyrenaica), or the Eastern Province” took place, and it was aimed at devising some possible solutions to the Libyan crisis²⁴⁵. Three main solutions were suggested by this tribal meeting. First, the tribal groups who were involved in the Gathering underlined that a “national conciliation” strategy had to be put in place by the Libyan transitional authorities; second, “the Conference called for Libya to be administered regionally and rejected any centralism”²⁴⁶. Finally, during the Gathering, the al-Abidat tribe, “which is one of the most powerful tribes of eastern Libya”, complained about the fact that the transitional authorities were not taking action to foster redress for “the killing of their member Brigadier General a-Fattah Yunis, who defected from Qadhafi’s forces to lead the army of the revolution. Yunis was assassinated and his body mutilated by Islamists”²⁴⁷.

2.2 Historical Background: from the Arab Spring to the democratic transition

This paragraph will provide the historical background which will then pave the way for the analysis of the transitional justice measures adopted in the aftermath of the Arab Spring in Libya. This paragraph will be structured as follows: first, the unfolding of the Arab Spring in Libya will be investigated; then, the 2011 self-proclamation of the National Transitional Council (NTC) and the functioning of the NTC will be investigated, and finally the 2012 elections of the Grand National Council (GNC) and the functioning of the GNC will be analyzed.

2.2.1 The unfolding of the Arab Spring in Libya

Three are the main causes of the 2011 Arab revolts outbreak in Libya. The first cause has to do with the misuse of public funds and public resources that had underpinned Qadhafi’s regime. For

²⁴³Emilie Combaz, ‘Key Actors, Dynamics and Issues of Libyan Political Economy’, *GSDRC Helpdesk Research Report*, 1106 (2014), cit., p. 16

²⁴⁴Youssef Mohammad Sawani, ‘Post-Qadhafi Libya: Interactive Dynamics and the Political Future’, *Contemporary Arab Affairs*, 5 (2012), cit., p. 4

²⁴⁵Ivi, p. 7

²⁴⁶ibidem

²⁴⁷ibidem

instance, Libyan citizens were disappointed with the fact that Qadhafi had appropriated and wasted the Libyan “public money outside the borders of the Libyan Republic for personal reasons of leadership”²⁴⁸. Furthermore, dissatisfaction vis-à-vis the Qadhafi regime spread exponentially among Libyan citizens around 2010, due to the “failure of the economic projects during the reign of Al-Qadhafi and his sons such as ‘the Great River’ project and the nuclear project”²⁴⁹. A further economic cause of the Arab revolts in Libya rested in the Libyan citizens’ dissatisfaction vis-à-vis “the appropriation by Al-Qadhafi’s family and his tribes of the gains of the country and controlling them at the expense of the hungry and the deprived”²⁵⁰.

A second factor that has significantly contributed to sparking demonstrations against Qadhafi rested in the massive human rights violations perpetrated by the Colonel vis-à-vis the Islamist Organizations that were active in Libya, as the above paragraph has shown, as well as Qadhafi’s repression of any opposition movements²⁵¹.

Third, the revolts against Qadhafi, which culminated in the regime overthrow, may have been driven by the failure of Qadhafi’s foreign policy, in particular by “the big political failure of Qadhafi’s attempts to form union with other Arab countries such as Tunisia, Egypt and Sudan”²⁵².

In Libya, the Arab revolts against the Qadhafi regime started on February 15, 2011, and within a couple of weeks they spread to the rest of the Libyan territory, reaching Tripoli. The aim of the revolts was overthrowing the Qadhafi regime. The revolts were triggered by a specific event that took place in Tripoli on February 15, 2011, namely the conviction of Fathi Tarbel, who was a Tripoli-based lawyer who had defended the families of the one thousand two hundred victims of the 1996 Abu Selim prison revolts. After Fathi Tarbel had been arrested, rebel groups began protesting all around Benghazi, and local committees and civic and military councils spontaneously arose to restore law and order in the city. On February 22, 2011 the revolts spread to Tripoli, where they initially took the form of urban guerrilla and then escalated to a violent civil war. On February 21, 2011 the revolts were joined by Abdel Fattah Younes, who was the Commander in Chief of the Saiqa military forces in the area of Benghazi. By March 2011, more than twelve thousand Libyan military units had joined the revolts against the Qadhafi regime, and the revolts had spread almost throughout the entire Libyan territory²⁵³.

On February 26, 2011 the rebel groups and defectors of the Qadhafi regime who were taking part in the revolts established the NTC, which was led by Mustafa Abdal-Jalil, who had been Minister of Justice under the Qadhafi regime, and it proclaimed itself as the only legitimate representative of the

²⁴⁸ Ayyoush Thiab, ‘Arab Revolutions: Causes and Motives-A Sociological Analysis’, *Al-Liqa Journal*, 39 (2012), p. 45

²⁴⁹ *ibidem*

²⁵⁰ *Ivi*, p. 46

²⁵¹ *ibidem*

²⁵² *Ivi*, pp. 45-46

²⁵³ Carmela Decaro Bonella, *Itinerari costituzionali a confronto: Turchia, Libia, Afganistan* (Roma: Carocci Editore, 2013), p. 230

Libyan Republic in the first week of March 2011. The NTC initially established its headquarter in Benghazi. The main aim of the NTC was carrying on the revolts against the Qadhafi regime until achieving full liberation of the country from the regime. After achieving the full liberation of Libya from the Qadhafi regime, the aim of the NTC was holding new elections and drafting a new Constitution for Libya²⁵⁴.

In March 2011, after the Qadhafi regime had ordered some air attacks against the Libyan citizens protesting in Benghazi, the UNSC was urged by the Arab League to adopt a resolution aimed at protecting the Libyan civilian population from the air attacks ordered by the Qadhafi regime. In response to the Arab League, on March 17, 2011 the UNSC, acting under the umbrella of Chapter VII of the UN Charter adopted Resolution No. 1973. Among the measures contained in Resolution No. 1973(2011) were a no-fly zone, which was “a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians”, a ban on flights, which entailed that all of the UN member states were called upon to “deny permission to any aircraft registered in the Libyan Arab Jamahiriya or owned or operated by Libyan nationals or companies to take off from, land in or overfly their territory”, an arms embargo, an assets freeze, which implied that all of the UN member states were called upon to seize all of the financial resources “which are on their territories, which are owned or controlled, directly or indirectly, by the Libyan authorities, as designated by the Committee, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them”, travel restrictions targeting several collaborators of the Qadhafi regime, and the establishment a peace-keeping mission called United Nations Support Mission in Libya (UNSMIL), which was supposed to help the Libyan authorities pursue a democratic transition, restore the rule of law in the country, and carry out a security sector reform²⁵⁵. The EU adopted Regulation 204/2011 to translate the contents of UNSC Resolution 1973 (2011) at the EU level. Regulation 204/2011 prohibited the EU member states to sell or purchase from Libya any items that could be used by members of the Qadhafi regime for repressive purposes, and it provided for a freezing of the economic resources owned by members of the Qadhafi regime²⁵⁶.

On March 19, 2011 the French, British and American military forces launched a joint military attack against the targets of the Libyan military forces which were loyal to Qadhafi. The March 19, 2011 joint military attack was followed by a series of summits on the Libyan question. On March 29, 2011, a summit was held in London, during which NATO was conferred upon a technical role in the chain of command of the military operations in Libya. On March 31, 2011 NATO started performing its mandate in Libya, when NATO-led Unified Protector Mission was launched. The NATO-led Unified Protector

²⁵⁴ Ivi, p. 231

²⁵⁵ United Nations Security Council Resolution No. 1973 (2011). Available at: https://www.nato.int/nato_static/assets/pdf/pdf_2011_03/20110927_110311-UNSCR-1973.pdf

²⁵⁶ Carmela Decaro Bonella, *Itinerari costituzionali a confronto: Turchia, Libia, Afghanistan* (Roma: Carocci Editore, 2013), cit., p. 234

Mission was aimed at protecting the Libyan civilian population. In the meantime, the Council of the European Union launched the EUFOR military mission, which was basically a humanitarian mission, aimed at supporting the Internally Displaced People (IDPs) residing on the Libyan territory, as well as all of the humanitarian organizations operating in Libya²⁵⁷.

2.2.2 NTC's democratic transition endeavors

In the first week of August 2011 the NTC issued an institutional communication in which it defined its own official program. The program of the NTC aimed was aimed at defining the architecture of the Libyan transitional institutional set-up. The NTC's official program was divided into two main parts. The first part of the program defined the general principles upon which the new Libyan state would be founded, as well as the rights that the Libyan citizens would enjoy, while the second part of the program defined the architecture of the Libyan transitional government. The NTC program foresaw that the Libyan transition to democracy would be articulated into three main phases²⁵⁸.

The first phase would have lasted from February 17, 2011 (which was the date on which the Arab Spring revolts started in Libya) until the full liberation of the country from the Qadhafi regime; during the first phase, the Libyan institutional architecture would have been the one established in February 2011, meaning that during this stage Libya would be ruled by the NTC²⁵⁹.

The second phase of the Libyan transition to democracy would have started on the day of the proclamation of the Libyan Declaration of Liberation, and it would have lasted until the Constituent phase. During this stage, Libya would have still been ruled by the NTC, but the NTC would have also incorporated some representatives from the local councils; within thirty days from the proclamation of the Declaration of the Libyan Liberation, the NTC would have created a Libyan transitional government, and within ninety days from the proclamation of the Declaration of the Libyan Liberation, the NTC would have approved the electoral law to elect the GNC, namely the Constituent Assembly which would have been in charge of drafting the new Libyan Constitution. At this point, it is essential to clarify how the NTC program allocated powers between the NTC and the Libyan transitional government during the second phase of the Libyan transition to democracy: the NTC, which was defined by the program as the "Supreme Representative Authority of the Country" would have been in charge of promulgating laws and of voting the confidence of the transitional government by a 2/3 majority; the transitional government, instead, would have been mandated to implement the policies adopted by the NTC²⁶⁰.

²⁵⁷ *ibidem*

²⁵⁸ *ibidem*

²⁵⁹ *ibidem*

²⁶⁰ *Ivi*, p. 235

The final and third phase of the Libyan transition to democracy would have been the constituent phase, which would have begun exactly with the election of the GNC. Pursuant to the NTC program, during the first meeting of the GNC, the NTC would have been dissolved, and within thirty days, the new Libyan Prime Minister would have been nominated. The Libyan Prime Minister would have then appointed his Council of Ministers, which would have been subjected to the vote of confidence of the GNC. After thirty days from the establishment of the Libyan Government, a Libyan Constituent Body would have been appointed, which would have been in charge of coming up with a draft of the new Libyan Constitution. This Body should have then submitted the draft of the new Libyan Constitution to the GNC for approval²⁶¹.

It is worth noting that, as the rest of the paragraph will show, the Libyan institutional history did not evolve exactly as the NTC had envisaged, due to several political issues that came to the forth. Nevertheless, it is essential to analyze the NTC program, as it represents one of the first efforts to engage with the Libyan democratic transition.

On August 25, 2011 the NTC announced it would relocate to Tripoli. On October 20, 2011 Colonel Qadhafi passed away, and the full liberation of Libya from the Qadhafi regime finally took place. On November 22, 2011 the NTC formed the Libyan transitional government, and appointed Abdel Rahim al Keib as Prime Minister²⁶².

2.2.3 The elections of the GNC

The elections for the GNC were held on July 7, 2012, through a double ballot voting system. One hundred and forty two parties and more than two thousand five hundred candidates ran for the elections; some of these parties had a religious orientation, while others had a more secular agenda. Among the parties which had a religious orientation were the Justice and Development Party, which was composed for a half by representatives of the Libyan Muslim Brotherhood, and which was led by Imam Ali Sallabi, the Reform and Justice Party, which was headed by Khaled al-Werchefani, who was a former member of the Libyan Muslim Brotherhood, and the Islamic Movement for Change. Among the secular parties were the Alliance of the Libyan Patriots, which was guided by Mahmud Jibril, who had been the Libyan Prime Minister until October 2011, the National Center Party, which was headed by Ali Tarhouni, and the National Front for the Rescue of Libya, which had acted as an opposition movement in the 1980s. The elections were won by the National Alliance for Liberty, Justice and Development, which obtained 81% of the votes and 39 seats in the GNC; the Justice and Development Party obtained

²⁶¹ *ibidem*

²⁶² *ibidem*

10.27% of the votes and 17 seats in the GNC, the National Front obtained three seats, while the Alliance of the Libyan Patriots obtained 2 seats²⁶³.

After the results of the GNC elections had been published, power was transferred by the NTC to the GNC on August 8, 2012. The establishment of the GNC “marked the beginning of the first transition after over forty years of dictatorship”²⁶⁴. Nevertheless, the GNC functioning was soon jeopardized by serious political issues. The main political problem was the “re-emergence of the historical conflict between the east and the west, between Benghazi and Tripoli”²⁶⁵. A further political problem had to do with the Libyan form of government; for instance, while a presidential form of government was advocated by the secular parties, the parties which had a religious orientation would have liked the Libyan form of government to be a parliamentary one. Third, no consensus could even be achieved on the Libyan form of state; in this respect, it could be noticed that “in Tripoli people are in favor of a united and centralized state while those in Cyrenaica defend the principle of a federal state”²⁶⁶. Since these vital issues could not be worked out, a political stalemate came to the forth, which made it difficult for the GNC to adopt the necessary legislation to confront such challenges as the disarmament of the Libyan rebel groups and their possible incorporation into the armed forces of the new Libyan state, the fight against the organized criminal groups which had been exercising control over the Libyan territory since February 17, 2011, as well as ensuring that the new Libyan institutions could re-acquire control over the local courts and detention centers, which had been managed by rebel groups since the beginning of the revolts²⁶⁷.

2.2.4 The 2014 elections of the Libyan House of Representatives and the blocked transition to democracy

The elections for the Libyan House of Representatives took place on June 25, 2014, soon after the mandate of the GNC had come to an end. The voting turnout of these elections was very low, as only 18% of the Libyan citizens cast their votes. This low voting turnout led a huge portion of the Libyan citizens to contest the results of the elections themselves, and a series of disorders erupted in such Libyan citizens as Benghazi and Tripoli, “forcing the House of Representatives to set up in Tobruk”²⁶⁸, where they formed a coalition government together with Operation Dignity, which was a secular “military coalition led by General Khaslifa Haftar”²⁶⁹. The Tobruk Government incorporated

²⁶³ Ivi, pp. 239-240

²⁶⁴ Arturo Varvelli, *State-Building in Libya: Integrating Diversities, Traditions and Citizenship* (Rome: Reset-Dialogues on Civilizations, 2017), p. 106

²⁶⁵ Ivi, p. 106

²⁶⁶ ibidem

²⁶⁷ Carmela Decaro Bonella, *Itinerari costituzionali a confronto: Turchia, Libia, Afghanistan* (Roma: Carocci Editore, 2013), cit., p. 240

²⁶⁸ Arturo Varvelli, *State-Building in Libya: Integrating Diversities, Traditions and Citizenship* (Rome: Reset-Dialogues on Civilizations, 2017), cit., p. 106

²⁶⁹ Robert, M. Perito, ‘A Post-Arab Spring Test for Security Sector Reform’, *CSG Papers*, 8 (2016), p. 11

“former members of the Qaddafi government and army that had supported the revolution, militias from the city of Zintan, and Cyrenaica provincial separatists seeking regional autonomy”; the Tobruk-based government was provided with weapons by such countries as the United Arab Emirates, Saudi Arabia, and Egypt²⁷⁰. Furthermore, a sizeable number of the former GNC representatives contested “the legitimacy of this newly elected House, reinstating the National General Congress in Tripoli as a rival authority”²⁷¹, which came under the name of National Salvation Government. The GNC Government, which was mostly backed by Turkey and Qatar, was nothing more than a “coalition of Islamists, revolutionaries and business interests”²⁷². Since 2014, “Libya has found itself with two parliaments, two prime ministers and two governments”²⁷³; the executive and legislative institutions based in Tobruk enjoy international de jure recognition, while the government and the parliament based in Tripoli does not enjoy any formal international recognition. This institutional paralysis was coupled by the emergence of terrorist groups, namely ISIS (Islamic State of Iraq and Syria) and Libya Dawn perpetrating crimes against the Libyan civilian population. The Libyan institutional paralysis that came to the forth after the 2014 House of Representatives elections and the “terrorist threats” faced by Libya have contributed to hindering the process of democratic transition that the NTC had begun in 2011 and at precipitating the country in a chaos²⁷⁴.

Before moving to the core of the thesis, it is necessary to clarify that this thesis will not develop extensively on the events that followed the 2014 elections, as such events are not relevant for the purpose of analyzing the Libyan transitional justice process.

2.2.5 2016 UN failed appointment of the Government of National Unity and stalled transition

On July 11, 2015, under the umbrella of the UN, “representatives of various sectors of the Libyan society, members of parliament, of municipalities and associations” managed to conclude the Peace and Reconciliation Agreement in Skhirat, Morocco, whose objective consisted in overcoming the “dual power situation” that had arisen in the aftermath of the 2014 House of Representatives elections²⁷⁵. In particular, the Agreement set out “that the House of Representatives should remain in Tobruk”, and it provided for “the creation of a High Council of State, the formation of a Government of National Accord and the organization of elections within one year”²⁷⁶. Pursuant to the Agreement, a confidence relationship would exist between the House of Representatives and the Government of National Accord, whereby the Tobruk-based House of Representatives is supposed to “grant a vote of

²⁷⁰ *ibidem*

²⁷¹ Arturo Varvelli, *State-Building in Libya: Integrating Diversities, Traditions and Citizenship* (Rome: Reset-Dialogues on Civilizations, 2017), cit., p. 106

²⁷² Robert, M. Perito, ‘A Post-Arab Spring Test for Security Sector Reform’, *CSG Papers*, 8 (2016), cit., p. 11

²⁷³ Arturo Varvelli, *State-Building in Libya: Integrating Diversities, Traditions and Citizenship* (Rome: Reset-Dialogues on Civilizations, 2017), pp. 106-107

²⁷⁴ *ibidem*

²⁷⁵ *Ivi*, p. 111

²⁷⁶ *ibidem*

confidence or no confidence to the government of national accord”²⁷⁷. This agreement did not help resolve the Libyan institutional paralysis, but it rather resulted in a far greater institutional chaos. On August 22, 2016, “The House of Representatives (HoR), which has been locked in a power struggle with rival parliament the General National Congress (GNC) since 2014... rejected a confidence motion in the UN-backed Government of National Accord (GNA)”, which is led by al-Serraj²⁷⁸, and the UN decided to steer the Libyan “transition process” in an ambivalent way, by “recognizing al-Serraj Presidential Council as the highest authority in the country while at the same time considering the Chamber of Representatives in Tobruk as the only legislative authority”²⁷⁹. Since then, several hurdles have been posed by General Haftar “to reunifying the country under the GNA, contributing to paralyze the Tobruk Parliament, the only one officially recognized by the International Community”²⁸⁰. Thus, the UN’s attempt to resolve the Libyan institutional paralysis, and the Libyan political transition has failed.

2.3 Transitional justice measures adopted by the TNC

As the above paragraph has pointed out, Qadhafi had perpetrated several types of human rights violations during his forty-two years long regime, including murdering all of those citizens who had opposed him and depriving various Libyan regions of the possibility to exploit the country’s natural resources; after the fall of the Qadhafi regime, it was thus necessary to foster redress for all of these crimes. In light of this, in 2011, after the fall of the Qadhafi regime, the UNSC issued Resolution No. 1973 to establish a peacekeeping mission called United Nations Support Mission in Libya (UNSMIL), which was tasked to support the Libyan transitional authorities to put in place some transitional justice measures to cope with the past regime human rights atrocities. In 2012 UNSMIL issued a communication in which it listed all of the abuses that had been perpetrated by the former Libyan regime, and it prescribed the appropriate transitional justice measures that needed to be adopted to redress each abuse²⁸¹. This paragraph will analyze the main transitional justice measures which were put in place by the Libyan NTC soon after the fall of the Qadhafi regime. These two measures were the Transitional Justice and National Reconciliation Law and Law No.38, which were both passed in 2012.

2.3.1 Transitional Justice and National Reconciliation Law

The Libyan transitional justice process started in 2012, when the Transitional Justice and National Reconciliation Law was approved by the NTC. This specific piece of legislation foresaw that a

²⁷⁷ Ivi, p. 114

²⁷⁸ <http://www.middleeasteye.net/news/libyas-tobruq-government-rejects-vote-confidence-un-backed-unity-government-1184491098>

²⁷⁹ Arturo Varvelli, *State-Building in Libya: Integrating Diversities, Traditions and Citizenship* (Rome: Reset-Dialogues on Civilizations, 2017), cit., p. 140

²⁸⁰ Ivi, p. 138

²⁸¹ Christopher K. Lamont, ‘Contested Governance: Understanding Justice Interventions in Post-Qadhafi Libya’, *Journal of Intervention and Statebuilding*, 10 (2016), p. 388

series of social, judicial and administrative measures had to be adopted to tackle all of the human rights abuses that had been perpetrated against the Libyan citizens under the Qadhafi regime from 1969, which is the year when Qadhafi starting ruling over Libya, until February 11, 2011, which was the day on which the Libyan revolts that ultimately led to the fall of the Qadhafi regime started²⁸². What is remarkable about this piece of legislation is that it only targeted the members of the Qadhafi regime who had been involved in the perpetration of human rights violations during Qadhafi's forty-two years rule, but it took no account of the abuses that had been carried-out by both the rebels and the members of the Qadhafi regime during the Libyan revolts, thus leaving all of the crimes that had occurred during the revolts unaddressed²⁸³.

2.3.2 Law No. 38 on Transitional Period Special Measures

A second transitional justice measure adopted by the NTC in 2012 was Law No. 38 on Transitional Period Special Measures, pursuant to which pardon had to be granted to all of those individuals who had committed crimes during the Libyan revolts that had begun on February 17, 2011, while “detainees held in custody after the revolution who were suspected of loyalty to Qadhafi” were to be subjected to trials²⁸⁴. The type of amnesty granted by Law No. 38 can be categorized as a blanket amnesty, as it was aimed at guaranteeing that the rebels that had guided the Libyan Revolution and who had committed serious human rights atrocities would be sheltered from prosecution²⁸⁵.

After having explored the scope of Law No. 38, this paragraph will analyze the two main problems that this piece of legislation posed. The first issue posed by Law No. 38 was underlined by many Civil Society Organizations such as the Libyan Lawyers for Justice Network, and it rested in the fact that this piece of legislation was biased vis-à-vis the rebels and it hindered any efforts to restore accountability in Libya. For instance, according to the Libyan Lawyers for Justice Network, by uniquely holding the affiliates of the Qadhafi regime accountable for the crimes that had been perpetrated during Qadhafi's forty-two years long dictatorship while granting pardon to the rebels who had perpetrated wrongdoings during the 2011 Libyan revolts, Law No. 38 ended up leaving all of the abuses perpetrated during the revolts unaddressed, thus fostering “a culture of impunity” and hindering the promotion of accountability in Libya²⁸⁶. Among the crimes that were perpetrated by the rebels during the 2011 Libyan revolts was the Tawerghans' “forced expulsion” perpetrated by the Misrata rebels in August 2011. As it was reported by the UN Commission of Inquiry on Libya in 2012, “the Misrata *thumar* have killed,

²⁸² Kamal M. Showaia, ‘Transitional Justice in Libya: Between Current Challenges and Future Prospects’, *Macquarie Law Journal*, 13 (2014), p. 66

²⁸³ *ibidem*

²⁸⁴ Christopher K. Lamont, ‘Contested Governance: Understanding Justice Interventions in Post-Qadhafi Libya’, *Journal of Intervention and Statebuilding*, 10 (2016), cit., p. 392

²⁸⁵ Mark Kersten, ‘Transitional Justice without a Peaceful Transition-The Case of Post-Gaddafi Libya’, *CRPD Working Paper*, 38 (2015), p. 14

²⁸⁶ Christopher K. Lamont, ‘Contested Governance: Understanding Justice Interventions in Post-Qadhafi Libya’, *Journal of Intervention and Statebuilding*, 10 (2016), cit., p. 392

arbitrarily arrested and tortured Tawerghans across Libya. The destruction of Tawergha has been done to render it uninhabitable”²⁸⁷. These human rights abuses can be deemed to amount to crimes of genocide, as they were perpetrated for the purpose of destroying a specific group, namely the Tawerghans, as such. Nevertheless, these crimes were mostly left unaddressed, as the Mosratan rebels were granted pardon, pursuant to Law No. 38²⁸⁸. A second example of crimes perpetrated by rebel groups during the 2011 revolts in Libya concerns the murder of 53 Libyan citizens that occurred in Sirte in October 2011, and which was perpetrated by the militias that had taken control of the Sirte area, according to Human Rights Watch; given the widespread and systematic nature of this abuse, this atrocity can be deemed to amount to a crime against humanity²⁸⁹. This crime against humanity was left unaddressed as well, because Law No. 38 provided that “even if a person who was confined by the militia is found not guilty by a court, that person has no right to raise a criminal or civil complaint against the state or the militia regarding the abuse they faced, unless the detention is proved to be arbitrary or based on fabricated charges”²⁹⁰. This gives evidence of how Law No. 38 hindered the possibility to restore justice in Libya, by depriving those Libyan citizens who had been unfairly arrested by the militias during the revolution to be fostered redress by a civil or criminal court²⁹¹.

A second problem posed by Law No. 38 was that it did not comply with the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and with the Convention against Torture, which had both been ratified by Libya. The parties to these Conventions are expressly forbidden to pass pieces of legislation which aim to “limit the prosecution of war crimes and crimes against humanity”, and they are called upon to punish whoever perpetrates such crimes on their territory²⁹². By sheltering from prosecution the rebels who perpetrated acts amounting to crimes of war and crimes against humanity during the 2011 Libyan revolts, and “ignoring the calamities that might result from such immunity” Law No. 38 clearly breached the two above mentioned Conventions²⁹³. The impunity that Law No.38 fostered by preventing the prosecution of the crimes of war and crimes against humanity perpetrated during the 200 revolts has seriously hindered any efforts to promote social reconciliation within Libya. For instance, “since there is no time limit for this immunity, severe humanitarian law breaches will continue to be committed indefinitely by the militias until the legislature

²⁸⁷ Mark Kersten, ‘Transitional Justice without a Peaceful Transition-The Case of Post-Gaddafi Libya’, *CRPD Working Paper*, 38 (2015), p. 14

²⁸⁸ *ibidem*

²⁸⁹ Kamal M. Showaia, ‘Transitional Justice in Libya: Between Current Challenges and Future Prospects’, *Macquarie Law Journal*, 13 (2014), cit., p. 65

²⁹⁰ *ibidem*

²⁹¹ *ibidem*

²⁹² *ibidem*

²⁹³ *ibidem*

abolishes the immunity. It is possible that the militias will not stop violating human rights in the foreseeable future, as they enjoy full immunity from accountability”²⁹⁴.

2.4 Transitional justice measures adopted by the GNC

After having analyzed the transitional justice measures adopted by the self-proclaimed NTC, this thesis will analyze the transitional justice endeavors that the elected GNC undertook. In particular, this paragraph will focus on three main transitional justice measures which were put in place by the GNC: the 2012 establishment of the Ministry for Families of Martyrs and Missing Persons, Law No. 13 of 2013 on Political and Administrative Isolation, Law No. 29 of 2013 on Transitional Justice.

2.4.1 2012 establishment of the Ministry for Families of Martyrs and Missing Persons

In 2012 the GNC set-up the Ministry for Families of Martyrs and Missing Persons, which was tasked to keep records and to acknowledge all of the victims of forced disappearances perpetrated under the Qadhafi regime from 1969 to October 23, 2011, which is the date on which the Qadhafi regime was finally overthrown and Tripoli was liberated; the aim of the Ministry consisted in bringing justice to the families of missing persons²⁹⁵. What is remarkable is that the scope of the Ministry’s activity is limited to the forced disappearance crimes carried out under the Qadhafi regime, and the forced disappearances that had occurred after the fall of the regime could not be confronted by the Ministry; for instance, the Ministry “could not consider an individual to be a missing person if the date of their disappearance followed the liberation of Tripoli on 23 October 2011”²⁹⁶.

After having analyzed the scope of the Ministry’s activity, it is essential to shed lights on the three main factors that significantly hindered the effectiveness of the Ministry’s activity. First, the scope of the Ministry’s activity dramatically constrained the Ministry’s ability to bring justice to all of the families of missing persons in Libya, as most of the forced disappearances had been carried-out after the fall of the Qadhafi regime by the rebels, and thus they did not fit the jurisdiction of the Ministry. In particular, “a vast majority of those being held in detention in Libya after 2011 were being held by armed groups and not the nominal state institutions”²⁹⁷.

A second factor that contributed to limiting the effectiveness of the Ministry as a transitional justice institution lied in the fact that the Ministry could provide a full account of missing persons only in those cities that had drafted a registry of their missing citizens, and it could thus not carry out its mandate in those Libyan cities that had not kept records of the forced disappearance crimes perpetrated

²⁹⁴ *ibidem*

²⁹⁵ Christopher K. Lamont, ‘Contested Governance: Understanding Justice Interventions in Post-Qadhafi Libya’, *Journal of Intervention and Statebuilding*, 10 (2016), cit., p. 393

²⁹⁶ *ibidem*

²⁹⁷ *ibidem*

under the Qadhafi regime, such as Sabha or Benghazi. Indeed, as reported by a Ministry civil servant whose identity was not disclosed, “their list of missing persons from Qadhafi’s 42-year rule only contained 2300 names as of January 2013”²⁹⁸. As a consequence, “the newly established ministry was seen more as a Tripolitanian institution than a national Libyan institution”²⁹⁹.

Third, since the Ministry’s civil servants could have been exposed to serious security threats and they could have been subject to “institutional distrust” in such Libyan cities as Sabha and Benghazi, the Ministry could not carry out its mandate in those cities³⁰⁰.

2.4.2 Law No. 13 of 2013 on Political and Administrative Isolation

Law No. 13 of Political and Administrative Isolation (PIL) will be analyzed by focusing on its contents, on the ratification problems that surrounded it and on the problems that it posed.

The PIL was adopted by the GNC in 2013, and it aimed at preventing any Libyan citizen who had held a public office under the Qadhafi regime from September 1969 to October 2011 from holding public offices again or standing as candidates in elections under the new Libyan institutional set-up³⁰¹. The PIL reflects the notion of selective justice elaborated by Bu-Hamra, whereby only some specific categories are held accountable for their past wrongdoings, and only the stakes of a specific “group of people” are furthered³⁰². At this point, it is essential to explain why the GNC decided to pass this piece of legislation. The PIL was underpinned by political and ideological motives. In particular, the Libyan Islamist political groups were keen on basing the new Libyan institutional set-up on the principles of Sharia Law, and they feared that in case members of the Qadhafi regime had retained power within the new Libyan institutions, then the new Libyan state would have been founded on secular principles, and the new Libyan Constitutional document would not “adequately privilege the place of Islam as the source of law and authority”; in other words, for the Islamists, the PIL served as “a roadmap for countering the perceived secular challenge by disempowering competing ideological currents that did not sufficiently recognize Islamist notions of governance”³⁰³.

After having illustrated the contents of the PIL and the ideological motives underpinning this piece of legislation, it is necessary to describe the irregularities that characterized the PIL ratification process. As it has been briefly mentioned above, the GNC passes the PIL, as it had been forced to do so by the rebel groups that had fought against Qadhafi during the 2011 Libyan revolts, and which had acquired control over various areas of the Libyan country after February 17, 2011, thus hindering the

²⁹⁸ Ivi, p. 394

²⁹⁹ ibidem

³⁰⁰ ibidem

³⁰¹ Kamal M. Showaia, ‘Transitional Justice in Libya: Between Current Challenges and Future Prospects’, *Macquarie Law Journal*, 13 (2014), cit., p. 67

³⁰² Ivi, p. 68

³⁰³ Christopher K. Lamont, ‘Contested Governance: Understanding Justice Interventions in Post-Qadhafi Libya’, *Journal of Intervention and Statebuilding*, 10 (2016), cit., pp. 394-395

GNC's ability "to exert central authorities over key cities and regions"³⁰⁴. Several protests and "blockades" had indeed been organized by various rebel groups, in order to force the GNC to ratify the PIL. Besides the rebel groups, many Libyan political parties which had been sidelined under the Qadhafi regime, such as the Justice and Construction Party strongly supported the ratification of the PIL; for instance, since the aim of the PIL was ensuring that the Qadhafi regime members would no longer hold public offices in Libya, the ratification and subsequent implementation of the PIL could contribute to furthering the agenda of all of those parties that had been sidelined by Qadhafi, and it could enable them to occupy public posts in the new Libyan state³⁰⁵. While a discussion was going on among the members of the GNC on the scope and the addressees of the PIL, the headquarter of the Foreign and Justice ministries in Tripoli were ravaged by the Misrata militias, who aimed at urging the GNC to ratify the law. In particular, "the Misratan militias had effectively held government ministries in Tripoli hostage until the law's adoption", which occurred on May 5, 2013³⁰⁶.

Besides the irregularities underpinning the PIL ratification process, it is necessary to focus on the two main weaknesses presented by the PIL, which ultimately undermined the effectiveness of the transitional justice aim of this piece of legislation. First, the scope of the PIL was very vague. For instance, the PIL was addressed indiscriminately at all the Qadhafi regime members, regardless of whether they had directly been involved in the perpetration of crimes such as corruption or human rights violations, and without taking account of whether they had attempted or contributed to overthrowing the regime and to furthering the objectives of the Revolution. A practical example can render this idea more clear: "Among others, Mustafa Abdul Jalil (a former Minister of Justice under Gaddafi), Mahmud Jibril (former head of the National Planning Council of Libya and of the National Economic Development Board of Libya), and Mohmamed Magarief (a former ambassador to India), all defected from the Qadhafi regime and subsequently played leading roles in boosting the revolution's and the rebels' political legitimacy"³⁰⁷; yet, "the isolation law effectively places Magarief, Jibril, and Abdul Jalil in the same category as those who sided with Qadhafi in his war against the Libyan people", and thus did not allow them to occupy any public positions within the post-Qadhafi institutional set-up³⁰⁸. The second weakness presented by the PIL was related to the first one, and it rested in the fact that by preventing the Qadhafi regime members from holding public posts in the post-Arab Spring Libyan institutions just on the ground that they had worked for the Qadhafi administration, and "without adopting efficient and accurate criteria to firstly identify who the loyalists are, and secondly, to select their substitutes", the

³⁰⁴ Mark Kersten, 'Transitional Justice without a Peaceful Transition-The Case of Post-Gaddafi Libya', *CRPD Working Paper*, 38 (2015), cit., p. 18

³⁰⁵ *ibidem*

³⁰⁶ Christopher K. Lamont, 'Contested Governance: Understanding Justice Interventions in Post-Qadhafi Libya', *Journal of Intervention and Statebuilding*, 10 (2016), cit., p. 395

³⁰⁷ Mark Kersten, 'Transitional Justice without a Peaceful Transition-The Case of Post-Gaddafi Libya', *CRPD Working Paper*, 38 (2015), cit., p. 17

³⁰⁸ *ibidem*

PIL may end up allowing “criminal groups to infiltrate into the new system”³⁰⁹. A final problem presented by the PIL was that no enforcement mechanisms were foreseen by it, thus making it difficult to ensure compliance with its provisions³¹⁰.

Two years after its entry into force, the PIL was repealed by the 2014 elected House of Representatives.

2.4.3 Law No. 29 of 2013 on Transitional Justice

A third transitional justice measure passed by the GNC was Law No. 29 of 2013 on Transitional Justice, which repealed the 2012 Transitional Justice and National Reconciliation Law, and stretched the transitional period until the “election of a permanent legislative body”³¹¹. Two were the main goals of Law No. 29 of 2013 on Transitional Justice, and they will both be analyzed below.

The first aim of Law No. 29 of 2013 on Transitional Justice was specified in Article 4 of the law. In particular, pursuant to Article 4 of Law No. 29, a Truth and Reconciliation Commission was to be set-up to identify and tackle all of the human rights violations that had been perpetrated during the Qadhafi regime, that is from October 1969 until February 2011, when Qadhafi was finally ousted. As the mandate of the Truth and Reconciliation Commission shows, the law did not help tackle the human rights breaches perpetrated during the 2011 revolts, and it thus patently sheltered the Libyan rebel groups from being held liable for the crimes they had committed. The time frame within which the Truth and Reconciliation Commission was supposed to operate contributed to rendering the Commission’s work ineffective. Indeed, the Law foresaw that within five years, the Truth and Reconciliation Commission would be supposed to complete its mandate, thus making it impossible for the Commission to provide a complete account of the human rights breaches that had been perpetrated throughout the forty-two years of Qadhafi’s rule over Libya³¹². Unfortunately, due to the lack of data and academic literature in this regard, it is impossible to measure the extent to which the Libyan Truth and Reconciliation Commission contributed to redressing the human rights breaches perpetrated under the Qadhafi regime.

The second goal of Law No. 29 of 2013 consisted in establishing a reparations program targeting the victims of the human rights violations perpetrated under the Qadhafi regime. In particular, pursuant to Law No. 29 of 2013, a victims’ compensation department was to be set-up by the Libyan Truth and Reconciliation Commission; the victims’ compensation department was tasked to draft victims’

³⁰⁹ Kamal M. Showaia, ‘Transitional Justice in Libya: Between Current Challenges and Future Prospects’, *Macquarie Law Journal*, 13 (2014), cit., p. 68

³¹⁰ Christopher K. Lamont, ‘Contested Governance: Understanding Justice Interventions in Post-Qadhafi Libya’, *Journal of Intervention and Statebuilding*, 10 (2016), cit., p. 395

³¹¹ Kamal M. Showaia, ‘Transitional Justice in Libya: Between Current Challenges and Future Prospects’, *Macquarie Law Journal*, 13 (2014), cit., p. 66

³¹² *ibidem*

reparations programs that the GNC would then be bound to implement. Among the reparations schemes foreseen by Law No. 29 were victims' access to health care, memorials, the allocation of financial resources to victims and access to psychological care³¹³. Even in this case, the lack of data and of academic literature does not make it possible to assess whether a victims' reparations department was finally set-up and whether victims actually were allocated any reparations.

2.5 The ICC prosecutions of Muammar Qadhafi, Saif Al-Islam Qadhafi and Al-Senussi

The main transitional justice measure that was implemented in the Libyan context consisted in the arrest warrants of Qadhafi, his son and Al-Senussi by the ICC. The ICC intervention in the Libyan context will be analyzed as follows: first, this paragraph will illustrate how a case was referred to the ICC in the Libyan context; second, the arrest warrants of Qadhafi, his son Saif Al-Islam and Al-Senussi will be explored; third, the admissibility challenge filed by the NTC will be explored; then, the final solution of the case will be described, and finally, the goals that the ICC prosecutions as a transitional justice mechanism could have accomplished in Libya will be explored.

2.5.1 Referral of the Libyan situation to the ICC

The ICC's jurisdiction on the international crimes that the Libyan citizens and "nationals of non party states" had perpetrated on the Libyan territory was triggered by the UNSC referral to the ICC Prosecutor, "acting under Chapter VII of the UN Charter", through Resolution number 1970 of February 2011³¹⁴. Since the founding Statute of the ICC had not been ratified by Libya, nor had Libya "ever made an *ad hoc* declaration accepting the ICC jurisdiction under Article 13(3) of the Statute, the Court could not have prosecuted the international crimes perpetrated on the Libyan territory if the UNSC had not brought the case before the ICC Prosecutor; for instance, as foreseen by Article 13 of the ICC Statute, "the Court may exercise its jurisdiction only in the case of referral by the Security Council, where neither the State on whose territory the crimes are committed nor the State whose nationals are potentially guilty are parties to the Statute or have made an *ad hoc* declaration of acceptance"³¹⁵. When analyzing Resolution No. 1970 of 2011, it is important to point-out that this Resolution "imposed the obligation to 'cooperate fully with the Court and the Prosecutor' on the Libyan Government, which at the time was still led by Gaddafi, and, while recognizing that non-party States have no obligation under the Rome Statute, it urged all States and international organizations to do the same"³¹⁶.

³¹³ Ivi, p. 72

³¹⁴ Marina Mancini, 'Day after: Prosecuting International Crimes Committed in Libya', *The Italian Yearbook of International Law*, 21 (2011), p. 95

³¹⁵ *ibidem*

³¹⁶ *ibidem*

2.5.2 ICC arrest warrants of Muammar Qadhafi, Saif Al-Islam Qadhafi and Al-Senussi

In light of the referral of the UNSC, the crimes against humanity that the Libyan security forces were assumed to have perpetrated when crushing the anti-Qadhafi protests from February 15, 2011 till the end of the revolts began being investigated by the ICC Prosecutor on March 3, 2011. Afterwards, “on 16 May, the Prosecutor applied to Pre-Trial Chamber I...for the issuance of arrest warrants against Muammar Gaddafi, his son Saif Al-Islam and Abdullah Al-Senussi for the crimes against humanity of murder and persecution based on political grounds”³¹⁷. The Pre-Trial Chamber pronounced its sentence on June 27, 2011, and it found that, based on enough evidence, Al-Senussi could be deemed to be liable for the “indirect” perpetration of such crimes against humanity as killings and persecutions of anti-Qadhafi demonstrators, which had taken place between February 15 and February 20, 2011 in Benghazi; instead, Muammar Qadhafi and his son Saif Al-Islam were found to have been “indirect co-perpetrators” of such crimes against humanity as the persecution and killings of the anti-Qadhafi protests that had taken place in several Libyan cities between February 15 and February 28, 2011³¹⁸. The investigation of the ICC with respect to Muammar Qadhafi’s, Saif Al-Islam Qadhafi’s and Al-Senussi’s responsibility for the perpetration of crimes against humanity will be explored in depth below.

As far as Muammar Qadhafi’s and Saif Al-Islam Qadhafi’s responsibility was concerned, the Pre-Trial Chamber of the ICC held that a strategy aimed at avoiding that anti-regime protests could take place and at crushing any potential anti-regime demonstrations had for sure been devised by Qadhafi and his son, “acting as *de facto* head of the Libyan state and *de facto* Prime Minister respectively”; furthermore, Qadhafi and his son had played a fundamental role in the realization of this strategy, by instructing the Libyan security forces to kill and persecute any anti-regime protesters, and by developing all of the essential means to fulfill this objective³¹⁹. Finally, “according to the Chamber, reasonable grounds existed to believe that they ‘were both mutually aware and accepted that implementing this strategy would result in the realization of the objective elements’” of crimes against humanity³²⁰.

As far as Al-Senussi’s responsibility was concerned, the Pre-trial Chamber held that Al-Senussi, “who was at the time the head of the Libyan military intelligence”, had dictated the security forces “under his command” to kill and persecute all of the Libyan citizens participating in the anti-Qadhafi protests in Benghazi, after Qadhafi had ordered him to put in place the afore-mentioned repression strategy in that city of Libya³²¹. In particular, “the Chamber pointed out that ‘not only did Abdullah Al-Senussi play an essential role in the commission of the crimes by giving orders to the armed forces

³¹⁷ Ivi, p. 97

³¹⁸ Ivi, p. 98

³¹⁹ ibidem

³²⁰ ibidem

³²¹ ibidem

under his control, but at the same time, and as a result of his position, he had the power to determine whether and how the crimes were committed”³²².

Based on the results of the investigations, arrest warrants were filed against Al-Senussi, Muammar Qadhafi and Saif-Al Islam Qadhafi by the ICC Pre-Trial Chamber I on May 27, 2011. At this point, it is necessary to focus on the follow-up of the three arrest warrants, and to explain why it was not possible to get Muammar Qadhafi, Saif Al-Islam Qadhafi and Al-Senussi before the ICC.

On October 20, 2011, the Misratan rebels caught Muammar Qadhafi close to Sirte after he had been injured, and on October 22, 2011 they attempted to drive him to Misrata by ambulance, but the Colonel passed away prior to getting to Misrata, “reportedly due to a gunshot wound”; the Libyan Embassy to the Netherlands delivered Muammar Qadhafi’s death certificate to the Pre-Trial Chamber, and “on 22 November 2011, the Chamber terminated the case against the former Libyan leader”³²³.

On November 19, 2011 the Zintan rebels caught Saif Al-Islam Qadhafi near Ubari, and they carried him to Zintan by plane, where he was immediately kept in custody; after Saif Al-Islam Qadhafi had been caught and kept in custody in Zintan, a request was filed by Pre-Trial Chamber I to the Libyan NTC to know when and if the NTC would extradite Saif Al-Islam Qadhafi to the Netherlands to let the ICC exercise jurisdiction over him. The NTC answered that the Libyan judicial authorities were investigating on Saif Al-Islam Qadhafi’s responsibility for several crimes on the ground of the applicable Libyan criminal code, and it thus asked the Pre-Trial Chamber to put off Saif Al-Islam Qadhafi’s submission to the ICC, “pursuant to Article 94(1) of the Rome Statute, so as to complete its investigation and prosecution”³²⁴. The NTC’s petition was not accepted by Pre-Trial Chamber I, on the ground that “Article 94 only applies to ICC cooperation requests other than surrender, and demanded that Libya arrange with the Registry for Gaddafi’s surrender to the Court” (ibidem, p. 100). After two weeks, the Pre-Trial Chamber was transmitted a letter by the Libyan NTC, in which the NTC declared it would contest the ICC’s competence on Saif Al-Islam Qadhafi’s case, and it required the Chamber to hold off its petition for Saif Al-Islam Qadhafi’s extradition to the Netherlands, “pending the Chamber’s decision on the challenge, pursuant to Article 95 of the Statute”³²⁵. The NTC’s petition was not accepted by Pre-Trial Chamber I, on the ground that “Article 95 only applies when an admissibility challenge is already under consideration”, and the NTC was urged to extradite Saif Al-Islam Qadhafi to the Netherlands, so as to enable the ICC to exercise its jurisdiction over him³²⁶. Pre-Trial Chamber I’s request was not fulfilled by the NTC, and on May 1, 2012 the NTC “filed an application challenging the admissibility of the case against Gaddafi”, based on the fact that Saif Al-Islam Qadhafi’s responsibility

³²² ibidem

³²³ *Ivi*, p. 99

³²⁴ *Ivi*, p. 100

³²⁵ ibidem

³²⁶ ibidem

for the perpetration of crimes against humanity against the Libyan anti-regime demonstrators was already being scrutinized by the Libyan judicial authorities³²⁷. Moreover, the NTC asked the Pre-Trial Chamber to hold off its request for Saif Al-Islam Qadhafi's extradition, "pending a decision on the challenge"; on June 1, 2012 the Pre-Trial Chamber declared to have accepted the NTC's request³²⁸.

As far as the Al-Senussi case was concerned, as soon as he landed at the airport of Nouakchott in Mauritania with a fake Malian passport, he was caught by the Mauritanian authorities and convicted. In the immediate aftermath of Al-Senussi's conviction, the ICC filed a "surrender request" to the Mauritanian authorities, the NTC asked the Mauritanian authorities to extradite Al-Senussi to Libya, where the domestic judicial authorities were examining his responsibility for the perpetration of crimes against humanity against the anti-Qadhafi protesters in Benghazi, and the French authorities required Mauritania to extradite Al-Senussi to France, "where he had been convicted *in absentia* in 1999 of involvement in the 1989 bombing of a French passenger plane and sentenced to life imprisonment"³²⁹. Following "conflicting bids for extradition", on September 5, 2012, the Mauritanian authorities decided to extradite Al-Senussi to Libya, and an "admissibility challenge" on the Al-Senussi case was submitted by the Libyan GNC to the ICC on April 2, 2013³³⁰.

The ICC's decisions on the two admissibility challenges will be explained in-depth in the following sub-paragraph.

2.5.3 The NTC's admissibility challenge on Qadhafi's son's case and the GNC's admissibility challenge on the Al-Senussi case

Before analyzing the ICC's decision on the two admissibility challenges, it is necessary to investigate what are the tests that the ICC has to undertake to establish whether a case is inadmissible.

Pursuant to Article 17 of the Rome Statute, "the ICC 'shall' determine that a case is inadmissible if 'the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is *unwilling or unable genuinely* to carry out the investigation or prosecution'"³³¹. So, first, the ICC needs to verify that "the challenging state is investigating or prosecuting the 'same case', meaning that it must be ensured by the ICC that the competent national criminal courts are subjecting to trial the individuals the ICC intends to try, and that the competent domestic criminal courts are investigating exactly the same crimes that the ICC intends to prosecute. Second, the ICC is supposed to ascertain that the national criminal courts wish to and are capable of prosecuting the same individuals as well as the same wrongs that the ICC intends to prosecute. For the purpose of ascertaining that the willingness

³²⁷ *ibidem*

³²⁸ *ibidem*

³²⁹ *Ivi*, p. 101

³³⁰ Sarah Warburg-Johnson, 'Libya & the International Criminal Court', *Eyes on the ICC*, 11 (2015), p. 108

³³¹ *Ivi*, p. 110

criterion is fulfilled, the ICC is supposed to “focus on the state’s intent” to prosecute the individuals who are assumed to have been involved in the perpetration of crimes fitting the ICC’s jurisdiction, “considering such factors as an unjustified delay in the proceedings”³³². For the purpose of ensuring that the national judicial authorities are capable of prosecuting the guilty parties, the ICC is supposed to assess “whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings”³³³.

2.5.3 a The ICC’s decision on the NTC’s admissibility challenge concerning Al-Islam Qadhafi

On May 31, 2013 the ICC dismissed the NTC’s admissibility challenge on the Qadhafi case, and it thus stated that it did have jurisdiction on the crimes against humanity perpetrated by Saif Al-Islam Qadhafi. Pre-Trial Chamber I reached this conclusion by applying the two tests analyzed above.

The first test that the ICC undertook was based on Article 17 of the Rome Statute, and it aimed at verifying that the Libyan judicial authorities were investigating Saif Al-Islam Qadhafi’s responsibility for the perpetration of the same acts as those the ICC intended to prosecute. This test was structured into two main parts. First, Pre-Trial Chamber I analyzed whether the acts that it wished to prosecute were considered as crimes pursuant to the Libyan criminal code; in this regard, the Chamber noted that “although the Libyan charges do not cover all the aspects of the ICC case, together with its sentencing provisions, the Libyan case ‘may sufficiently capture’ the case against Gaddafi”³³⁴. Then, the Chamber moved to the core of the test, and it examined whether “an investigation against Mr. Gaddafi for the same conduct as that alleged in the proceedings before the Court is ongoing at the domestic level”³³⁵. In this respect, the ICC held that not enough proof had been submitted by the Libyan judicial authorities to the effect of showing that they were dealing with the same crimes as those the ICC aimed at punishing; in particular, “the Chamber determined that the charges, if investigated properly, could sufficiently replace the ICC charges, but that the evidence did not show sufficient investigation of these charges”³³⁶.

The second test undertaken by the ICC was still based on Article 17 of the Rome Statute, and it aimed at establishing whether the Libyan judicial authorities were unable to prosecute Saif Al-Islam Qadhafi. The Chamber was called by the ICC Prosecutor not to ground its assessment of the Libyan judicial system’s capability to prosecute Saif Al-Islam Qadhafi on International Human Rights Law, but rather on the Libyan criminal law provisions³³⁷. The conclusion was reached by the Chamber that the Libyan judicial system was incapable of prosecuting Saif Al-Islam Qadhafi in accordance with the

³³² *Ivi*, p. 111

³³³ *ibidem*

³³⁴ *Ivi*, p. 118

³³⁵ *ibidem*

³³⁶ *ibidem*

³³⁷ *ibidem*

judicial guarantees and the criminal law procedures foreseen by the Libyan legal system, and the NTC's admissibility challenge was thus dismissed. The chamber reached this conclusion based on three main arguments. The first ground for the Chamber's decision was that the Libyan judicial authorities were incapable of bringing the guilty party to justice. For instance, the Libyan judicial authorities had for long been declaring that they were struggling to ensure Qadhafi would be taken to Tripoli, so that he could appear before the competent criminal court and be subject to trial; nevertheless, the Libyan judicial authorities had not submitted any sufficient proof to demonstrate that they were actually committed to taking Qadhafi to Tripoli. The Chamber underlined that Qadhafi's transfer to Tripoli and his appearance before the competent criminal court was a *sine qua non* condition for trying him, as the Libyan criminal law system did not foresee the possibility to hold *in absentia* trials³³⁸. Second, the Chamber found that the Libyan judicial system was incapable of summoning witnesses in the relevant case. Third, it was held by the Chamber that the Libyan judicial authorities were incapable of granting Saif Al-Islam Qadhafi access to a lawyer, as the Libyan criminal code required. For instance, as it was highlighted by the Chamber, "although Libya purports to be actively engaged in securing defense counsel for Gaddafi, there is no indication as to when or how this will be achieved"³³⁹. These three reasons led the ICC chamber to put forward that the Libyan judicial system was incapable to try Saif Al-Islam Qadhafi in accordance with the Libyan criminal law standards, and thus dismissed the challenge filed by the Libyan NTC, and it declared it had jurisdiction over Saif Al-Islam Qadhafi. It is remarkable that no willingness test was undertaken by the ICC Chamber to get to this conclusion³⁴⁰.

2.5.3b The ICC's decision on the NTC's admissibility challenge concerning the Al Senussi case

On October 11, 2013 the ICC Chamber held that the Al Senussi case was inadmissible on two grounds. First, Al Senussi was being investigated by the Libyan judicial authorities for the same crimes as those the ICC intended to prosecute. Second, the Libyan judicial authorities were found to be willing to and capable of exercising their jurisdiction over the Al Senussi case³⁴¹. The two tests undertaken by the Chamber to reach this conclusion will be explored in-depth below.

The ICC Chamber held that Libya was investigating Al Senussi for the same crimes as those the ICC intended to prosecute, based on three main kinds of evidence submitted by the Libyan judicial authorities. The three main kinds of evidence submitted by the Libyan judicial authorities included the records of the Libyan criminal court proceedings concerning the Al Senussi case, such pieces of proof that the Libyan judicial authorities had gathered during their investigations as "witness statements, flight documents, medical documents, written orders, intercepts", and other sources³⁴². In light of the evidence

³³⁸ *Ivi*, p. 120

³³⁹ *ibidem*

³⁴⁰ *ibidem*

³⁴¹ *Ivi*, p. 121

³⁴² *ibidem*

submitted by the Libyan judicial authorities, the Chamber concluded that Libya was investigating Al Senussi's responsibility for the perpetration of the same acts as those the ICC intended to prosecute³⁴³.

After having determined that Al Senussi was being tried by the Libyan judicial authorities for the same acts as those the ICC intended to prosecute, the Chamber turned to evaluating whether the Libyan judicial authorities were willing to and capable of prosecuting Al Senussi. The ICC Chamber undertook this test based on some specific criteria. In particular, as far as the evaluation of the Libyan judicial authorities' willingness to prosecute Al Senussi was concerned, the ICC grounded this evaluation in three main criteria, which mostly aimed at ensuring that the due process obligation stemming from international law had been respected by the Libyan judicial authorities dealing with the Al Senussi case³⁴⁴. First, the Chamber assessed whether the trials to which Al Senussi had been subjected in Libya had not been aimed at sheltering the former head of the Libyan Intelligence Services from prosecutions before the ICC; second, the Chamber assessed whether "there has been an unjustified delay in the proceedings against Mr. Al Senussi which in the circumstances is inconsistent with an intent to bring him to justice", and finally, the Chamber evaluated whether such standards as "impartiality" and objectivity had been respected by the Libyan judicial authorities dealing with the Al Senussi case³⁴⁵. Similarly, the evaluation of the Libyan judicial authorities' capability to prosecute Al Senussi was grounded in three main criteria. First, the Chamber verified whether "Libya is unable to obtain custody of Mr. Al Senussi"; second, the ICC assessed whether the Libyan judicial authorities had been capable of summoning the witnesses and of gathering the proof which were necessary to determine Al Senussi's responsibilities, and finally, the ICC examined whether "Libya is otherwise unable to carry out its proceedings against Mr. Al Senussi"³⁴⁶.

The Defense Council for Al-Senussi stated that the Libyan judicial authorities could not be deemed as being willing and able to prosecute Al Senussi, on the grounds that Al Senussi's domestic trials had been underpinned by several delays, Al Senussi had not been provided with a lawyer, and many other human rights had been violated by the Libyan judicial authorities³⁴⁷. The Chamber held that Al Senussi's lack of access to a lawyer could not hinder the Libyan judicial authorities' capability and willingness to prosecute Al Senussi for two main reasons. First, as the Chamber put forward, the Libyan authorities were holding Al Senussi in "custody", and "certain lawyers have expressed interest in representing him" unlike in the Qadhafi case; furthermore, the Libyan authorities had confirmed that they would promptly grant Al Senussi access to a lawyer, and the Chamber stated it had "no reason to put into question the information provided by Libya in this regard, or to consider it refuted by the

³⁴³ *Ivi*, p. 122

³⁴⁴ *Ivi*, p. 123

³⁴⁵ *ibidem*

³⁴⁶ *ibidem*

³⁴⁷ *ibidem*

existence of certain security challenges across the country”³⁴⁸. Finally, the ICC Prosecutor found that any delays which may have characterized Al Senussi’s domestic trials could not be deemed as being “presumptively excessive”³⁴⁹.

In conclusion, the ICC Chamber found that the Libyan judicial authorities were willing and capable to prosecute Al Senussi, thus declaring the case inadmissible. On October 24, 2014, the Chamber’s decision was appealed by Al Senussi’s Defense Council, but “on July 24, 2014, the Appeals Chamber affirmed the decision of the Pre-Trial Chamber”³⁵⁰.

The ICC decision that the Al Senussi case was inadmissible, and that Libya could thus exercise jurisdiction over it was criticized by several legal scholars such as Lamont and Kersten. In particular, according to Lamont, the ICC should not have allowed the Libyan criminal courts to exercise jurisdiction over the Al-Senussi case, on the ground that the Tripoli-based trials against Al Senussi were underpinned by several breaches of the due process standard, such as “denial of access to legal representation and solitary confinement during trial”³⁵¹. In other words, Lamont’s point of view is that by allowing the Libyan criminal courts to deal with the Al Senussi case despite the various irregularities and human rights breaches underpinning the Tripoli-based trials, the ICC may have contributed to leaving all of those human rights violations underpinning the Tripoli-based trials unaddressed, thus hindering any efforts to uphold judicial impartiality in Libya and ultimately hindering the pursuit of social reconciliation in the country. In a similar fashion, Kersten has pointed out that the lack of an internationally recognized government exercising control over Libya, the repeated murders of lawyers and judges that had been taking place in Libya from 2011 until 2014, and the fact that “thousands of detainees remain in detention without charges-some in facilities outside of the control of central authorities” should have led the ICC to consider the Al-Senussi case admissible, thus depriving the Tripoli-based criminal court to exercise jurisdiction over the former head of the Libyan intelligence services³⁵².

2.5.3c Follow-up of the ICC decisions on the two admissibility challenges

The Libyan judicial authorities continued investigating Qadhafi’s and Al Senussi’s responsibility for the perpetration of crimes against humanity after the ICC had pronounced its sentences on the two admissibility challenges. On December 10, 2014 the ICC held that the Libyan judicial authorities were not abiding by the Court’s sentence in the Qadhafi case; in particular, the ICC held that the Libyan judicial authorities were refusing to “surrender Gaddafi for trial at the ICC and to return certain original

³⁴⁸ Ivi, pp. 124-125

³⁴⁹ Ivi, p. 123

³⁵⁰ Ivi, p. 108

³⁵¹ Christopher K. Lamont, ‘Contested Governance: Understanding Justice Interventions in Post-Qadhafi Libya’, *Journal of Intervention and Statebuilding*, 10 (2016), cit., p. 389

³⁵² Mark Kersten, ‘Transitional Justice without a Peaceful Transition-The Case of Post-Gaddafi Libya’, *CRPD Working Paper*, 38 (2015), cit., p. 10

documents to his counsel, and the Court referred the matter back to the Security Council”³⁵³. In May 2015 the Libyan judicial authorities pronounced a sentence with respect to Qadhafi, Al Senussi and other 29 individuals; Saif Al Islam Qadhafi, Al Senussi and other seven individuals were condemned to the death penalty, while “23 officials were given sentences ranging from five years to life in prison”³⁵⁴.

2.5.3d The significance of the ICC intervention in Libya as a transitional justice mechanism

The ICC prosecution of the crimes committed by Qadhafi, his son, and Al-Senussi during the 2011 Libyan revolts may have helped achieve two important objectives which underly transitional justice: deterrence and retribution.

Deterrence is the main objective which may have been accomplished through the ICC prosecution of the crimes perpetrated during the 2011 Libyan revolts. As the deterrence theory postulates, “seeing punishment inflicted on another will encourage potential perpetrators not to commit crime in the future”³⁵⁵. The deterrence theory is divided into two main branches: general deterrence and specific deterrence. General deterrence rests on the idea that any individual will be discouraged from perpetrating human rights abuses in the future only if past human rights violators are prosecuted. Specific deterrence, instead, aims at ensuring that after having been subjected to prosecution for their past crimes, past human rights violators will be disincentivized from carrying out any further human rights abuses in the future³⁵⁶.

Retribution is a further goal that may have been furthered through the ICC prosecution of the crimes perpetrated during the 2011 Libyan revolts. Retribution is defined as “allowing punishment ‘in order to restore the peace of mind and repress the criminal tendencies of others’”³⁵⁷. The relevance of pursuing retributive justice in Libya through the ICC intervention rests in the fact that if the ICC had not prosecuted the crimes against humanity perpetrated during the 2011 revolts in Libya, the need “to bring about peace may fester, preventing reconciliation and holding the Libyan nation in a state of tension” which would have prevented any endeavors to undertake a democratic transition in the country³⁵⁸.

2.6 How to enhance the effectiveness of the Libyan transitional justice process

In light of the institutional stalemate that Libya has been facing since 2014, and of the shortcomings of the transitional justice mechanisms that were put in place by the NTC, the GNC and

³⁵³ Sarah Warburg-Johnson, ‘Libya & the International Criminal Court’, *Eyes on the ICC*, 11 (2015), cit., p. 108

³⁵⁴ *ibidem*

³⁵⁵ Ben Christopher Eoin Mitchell, ‘Gaddafi and the International Criminal Court: An Analysis of Transitional Justice in Libya’, *King’s Inns Student Law Review*, 59 (2011), p. 70

³⁵⁶ *ibidem*

³⁵⁷ *Ivi*, p. 71

³⁵⁸ *ibidem*

external actors such as the ICC, it is necessary to analyze two main issues that the Libyan transitional justice process should take into account, in order to enhance the effectiveness of the transitional justice mechanisms that the NTC and the GNC have put in place: redress for the gender crimes that were perpetrated during the 2011 revolts, disarmament and demobilization.

2.6.1 Redress for the gender crimes committed during the 2011 revolts

During the 2011 Libyan revolts, a high number of gender crimes were perpetrated by members of the Qadhafi regime. In particular, the Qadhafi regime members were administered ant-impotence drugs, and they had been mandated by Muammar Qadhafi to perpetrated such injustices against Libyan women taking part in the 2011 revolts as “systemic mass rape, gang rape, sexual torture, sexual enslavement, sexual terrorism, gender-based persecution, male rape and forced nudity”; evidence of these crimes was provided by high-ranking officers of the Libyan Revolution’s Military Council, who reported that “Libyan rebels found cellphone pictures and videos of rape, as well as condoms and viagra in the vehicles and uniform pockets of Qadhafi loyalists who were captured on the battle field”³⁵⁹. Since these crimes were perpetrated on a systematic basis and on a “widespread” scale, these crimes can be considered as forming the *mens rea* of crimes against humanity, as foreseen by the Rome Statute³⁶⁰. The transitional justice mechanisms put forward by the NTC and the GNC did not foster redress to these crimes, as they just targeted the injustices perpetrated until February 17, 2011, that is before the beginning of the revolts. The ICC did not manage either to foster redress for the gender crimes perpetrated during the revolts, as Muammar Qadhafi passed away before the ICC pronounced its sentence, the Al Senussi case was found to be inadmissible, and Saif Al-Islam Qadhafi was not surrendered to the ICC for prosecution by the Libyan authorities. The failure to acknowledge the crimes perpetrated against Libyan women during the 2011 revolts inevitably hindered any attempts to foster national reconciliation in the country. In order to incorporate gender concerns into the Libyan transitional justice process and to ensure that the gender crimes endured by Libyan women can be fostered redress, two main mechanisms could be put in place.

First, given the Libyan domestic courts’ incapability to restore gender crimes victims’ justice, and the failure of the ICC intervention, a viable solution would be setting up a hybrid judicial system whereby domestic and international judges would both deal with the prosecution of Libyan gender-based crimes, based on both international legal provisions and Libyan criminal law provisions. This solution would yield significant advantages. First, international judges would boost domestic judges’ capability to work in accordance with fair trial and human rights standards; second, by empowering Libyan judges to deal with gender crimes cases, rather than transferring jurisdiction to an

³⁵⁹ Hilmi M. Zawati, ‘The Challenge of Prosecuting Conflict-Related Gender-Based Crimes under Libyan Transitional Justice’, *Journal of International Law and International Relations*, 10 (2014), pp. 48-49

³⁶⁰ *Ivi*, pp. 49-50

international court, it is possible to “maintain Libya’s sovereignty”, and finally, this solution would make it possible to “strengthen Libya’s position on the international stage as a transformed country, newly emerged from statelessness to accountability and the rule of law”³⁶¹.

A second option would consist in organizing “a multi-layered inclusive national dialogue” aimed at furthering social reconciliation³⁶². The inclusive nature of this dialogue would imply that all of the Libyan social groups should be engaged in this dialogue, regardless of their ethnic or religious belonging, and independent of their gender. The multi-layered character of this dialogue would entail that political parties should not be the only actors to be engaged in this dialogue; indeed, beyond political parties, this dialogue should include such actors as “youth, and intermediate structures (tribal leaders, religious leaders, syndicates, associations, unions, etc)”³⁶³. Besides being multi-layered and inclusive, this dialogue should also be multidimensional, entailing that a wide array of issues should be dealt with by the actors engaging in this dialogue, including “ethical, economic, social, legal and political problems”³⁶⁴. The facilitator of the Libyan national dialogue should be the international community, which should provide the actors engaging in the dialogue with “expertise and logistics to safeguard an inclusive and sustainable national dialogue”³⁶⁵. The organization of a Libyan national dialogue may contribute to redressing gender crimes; for instance, by being engaged in a national dialogue with the other Libyan social actors, Libyan women may have the possibility to raise their concerns, and to voice all of the injustices that they have undergone, and this may lead to an acknowledgment of gender crimes and to social reconciliation.

2.6.2 Disarmament and demobilization

A second concern that the Libyan transitional justice process should incorporate is the disarmament, demobilization and reintegration (DDR) of militias. DDR aims at ensuring “the prevention of the recurrence of circumstances that may degenerate into or reignite war and threaten the social fabric that typically emerges in very fragile and highly polarized fashion in the wake of intra-state conflict and/or civil war”³⁶⁶.

In 2012, in Libya, two military bodies, namely the Supreme Security Committee (SSC) and the Libya Shield Force (LSF) emerged, which were only made up of rebels, and which amounted to 200.000 military units in total. This number “had the net result of simply fielding yet other militias and that included jihadists and extremists, thereby providing only the flimsiest appearance of a new, emerging

³⁶¹ Ivi, p. 89

³⁶² Zahra Langhi, ‘Gender and state-building in Libya: towards a politics of inclusion’, *The Journal of North African Studies*, 19 (2014), p. 208

³⁶³ *ibidem*

³⁶⁴ *ibidem*

³⁶⁵ *ibidem*

³⁶⁶ Youssef Mohammad Sawani, ‘Security sector reform, disarmament, demobilization and reintegration of militias: the challenges for state building in Libya’, *Contemporary Arab Affairs*, 10 (2017), p. 172

‘security order’”³⁶⁷. What is striking about these two military bodies is that they have consistently refused to undertake a DDR program, meaning that they have never accepted to transform into state-controlled military institutions. More precisely, the Islamist wings of these two bodies have been the most reluctant ones to undertake this transformation, as they were convinced that by “maintaining their organizational and military capacity intact”, they would better further their political interests³⁶⁸. This chaotic situation led to the “emergence of a curious and peculiar military ‘balance’, wherein militias have had the upper hand while the nascent state has lacked any exclusive control over military force and has been obliged to rely on semi-co-opted militias, eventually became hostage to them and their diverse and independent agendas”³⁶⁹. The Libyan transitional authorities have not even seemed to be willing to adopt transitional justice measures aimed at furthering DDR. So, Libya is experiencing a catch-22 situation in military terms, meaning that the Libyan transitional authorities “cannot demobilize non-state armed groups until a functioning national security structure is in place but they cannot establish a functioning national security structure until the armed groups are demobilized”³⁷⁰.

Libya can get out of the catch-22 military situation described above provided that the transitional authorities facilitate the conclusion of a “national and social reconciliation agreement” which entrenches a DDR objective, and which is signed by all of the Libyan social groups, including the Libyan tribes and the civil society organizations operating on the Libyan territory; moreover, this agreement should provide for “a detailed plan of action or road map, specifying dates, criteria and benchmarks according to a realistic timetable”³⁷¹.

³⁶⁷ *Ivi*, p. 174

³⁶⁸ *ibidem*

³⁶⁹ *Ivi*, p. 175

³⁷⁰ Louise Riis Andersen, ‘How the local matters: Democratization in Libya, Pakistan, Yemen and Palestine’, *DIIS Report*, 1(2013), p. 14

³⁷¹ Youssef Mohammad Sawani, ‘Security sector reform, disarmament, demobilization and reintegration of militias: the challenges for state building in Libya’, *Contemporary Arab Affairs*, 10 (2017), cit., p. 183

3. Transitional Justice after the Arab Spring: the case of Tunisia

This chapter will analyze the transitional justice mechanisms that were put in place in Tunisia in the aftermath of the Arab Spring. The chapter will be divided into five main parts. The first paragraph will describe the main actors that played a role in pre-Arab Spring and post-Arab Spring Tunisia. The second paragraph will briefly analyze the democratic transition process that took place in Tunisia after the ousting of Ben Ali. The third and the fourth paragraphs will get to the core of the theme: the third paragraph will focus on the transitional justice measures that were adopted in Tunisia soon after the end of the anti-regime revolts, that is from January 2011 till the October 23, 2011 National Constitutional Assembly (NCA) elections, while the fourth paragraph will concentrate on the transitional justice mechanisms which were adopted from April 23, 2011 onwards. Finally, the Internet reforms which were implemented by the Tunisian Internet Agency, and which contributed to enhancing transitional justice in Tunisia will be analyzed.

3.1 Tunisian Pre-Arab Spring and post-Arab Spring social and political actors

The aim of this paragraph consists in outlining the main institutional aspects of Tunisia before 2011, by focusing on the political parties and on the institutional features that had underpinned Bourghiba's and Ben Ali's regime. The reason why this paragraph needs to be incorporated within this thesis rests in the fact that the political parties that proliferated in Tunisia in the aftermath of Ben Ali's regime and the causes for the Arab revolts outbreak in Tunisia can be fully contextualized only by analyzing the institutional features of pre-revolutionary Tunisia.

3.1.1 Tunisian pre-Arab Spring social and political actors: from 1956 to 2011

As Melidoro and Sibilio have underlined, before the outbreak of the 2011 Arab revolts, the Tunisian political scenario had been dominated by a single political current, which came under the name of "Destur". In 1920, when Tunisia was still under the French Protectorate, the Destur Party was founded by a group of Tunisian intellectuals; the founding members of the Destur Movement advocated the enactment of a Tunisian Constitution, which would grant Tunisia independence from France; for instance, as Melidoro and Sibilio have highlighted, the emergence of the Destur Party has marked the birth of the Tunisian Liberation Movement according to many historians. In 1934, some militants of the Destur Party decided to secede from the Party and to found a new movement, which was called Neo-Destur Party, under the leadership of Hadid Bourghiba, a lawyer who had received his education from French Universities³⁷².

The Neo-Destur led the fight for the Tunisian independence from France, which was finally achieved in 1956. The first Tunisian National Constitutional Assembly, which was set-up in 1956 after

³⁷² Domenico Melidoro & Simone Sibilio, *Voci dal Mondo Arabo: Cronache e Testimonianze delle Transizioni in Egitto, Siria, Tunisia e Yemen* (Rome: Editrice Apes, 2014), p. 93

Tunisia's independence, and the Government that came to the forth after the first Tunisian elections were dominated by the Neo-Destur. In the 1960s, the Neo-Destur was renamed as the Destur Socialist Party, and it was still led by Bourghiba. In the meantime, in the 1970s, the Tunisian Islamist current flourished, as a result of the combination of two Islamist tendencies: a more conservative one, which had emerged to counter the modernizing politics of post-colonial Tunisia, and a more ideological one, which was in line with the values of the Muslim Brotherhood, which had been founded in Egypt in 1928. In the 1970s, by combining these two tendencies, Rashid Ghannouchi created the Islamic Group (*Jama'a Islamiya*). As Sibilio and Melidoro have underlined, the Islamic Group was not originally a political party, but it was merely a movement that advocated a religious and moral reform of the Tunisian society. When in 1978 social unrest broke out in Tunisia, which culminated in the repression of the UGTT (*Union Generale Tunisienne du Travail*), which was the most important trade union in the country, by Bourghiba's government, the Islamic Group deemed this event to be the direct consequence of the collapse of the Tunisian society most authentic values. When in the 1980s Bourghiba gradually came to allow political pluralism, the Islamic Movement transformed into a full-fledged political party, under the name of Islamic Tendency Movement (MTI). At the end of the 1980s, however, Bourghiba, who had never really been in favor of political parties having a religious orientation, and who no longer needed the support of the MTI, decided to put in place a repression strategy vis-à-vis the MTI: the leading figures of the party were tried and arrested, several members of the MTI were accused of having perpetrated acts of violence, and Rashid Ghannouchi was condemned to the death penalty³⁷³.

In 1987 Ben Ali, who had been Bourghiba's prime minister, overthrew Bourghiba's regime, and from 1987 to 2011 Tunisia was led by Ben Ali. In 1988 the Destur Socialist Party was renamed as *Rassemblement Constitutionnel Democratique* (RCD), and it held exclusive control over the Tunisian society and within all of the Tunisian Governments until 2011. As Sibilio and Melidoro underlined, three are the main features of the RCD: first, from 1987 till 2011 all of the branches of the Tunisian Government were led by the RCD; second, the RCD leadership was despotic, and finally, the RCD was a pragmatic party, and it was never underpinned by a clear-cut ideology³⁷⁴. As soon as Ben Ali had acquired control over Tunisia, he decided to grant pardon to Rachid Ghannouchi and to the other members of the RCD who had been convicted under Bourghiba's regime. As Leila el Houssi has claimed, Ben Ali's act was mostly driven by the need to please those portions of the Tunisian electorate who sympathized with the MTI³⁷⁵. Ben Ali's act was met with satisfaction by the MTI militants, who reached a compromise with Ben Ali, whereby they would accept the MTI to be renamed *Ennahda* (rebirth), in order to comply with the Tunisian legislative act that prohibited the establishment of parties having a religious orientation. Nevertheless, as such authors as Tania Groppi and Irene Spigno have

³⁷³ Ivi, p. 95

³⁷⁴ Ivi, p. 94

³⁷⁵ Leila el-Houssi, *Il Risveglio della democrazia: la Tunisia dall'indipendenza alla transizione* (Rome: Carocci, 2013), p. 93

pointed out, Ben Ali's attitude towards *Ennahda* completely changed in 1991, after the outbreak of the first Gulf War and the emergence of Islamic integralism; for instance as Groppi and Spigno clarified, in 1991 the Tunisian Western European partners started to fear that Islamic integralism could also hit Tunisia, and Ben Ali was supposed to reassure his partners that Tunisia would not be targeted by Islamic integralism; to do so, he decided to exclude all of the Tunisian Islamist movements from public participation, and he launched a repressive campaign against such Islamist parties as *Ennahda*³⁷⁶. As a consequence of Ben Ali's repressive strategy, Rachid Ghannouchi and other *Ennahda* militants were supposed to flee the country, and seek asylum in Europe³⁷⁷. *Ennahda* was thus banned from public participation until 2011, when the Arab revolts started and Ben Ali's regime was overthrown. The legal and political dynamics underpinning the Arab revolts in Tunisia and the Tunisian democratic transition process will be analyzed in-depth in paragraph 3.2.

3.1.2 Tunisian social and political actors during the Arab Spring and the democratic transition process

As Sibilio and Melidoro have pointed out, after the overthrow of Ben Ali's regime, a significant number of political parties proliferated, which had previously been banned, and which played an important role within the Tunisian National Constituent Assembly that was elected in 2011, as paragraph 3.2 will show. Furthermore, the Tunisian democratic transition process witnessed an active engagement on the part of several Tunisian civil society organizations, which extensively contributed to shaping the normative debates taking place within the Tunisian National Constituent Assembly. In light of the importance of all of these actors, this sub-paragraph will analyze the main party configurations that emerged in Tunisia in the aftermath of Ben Ali's overthrow, as well as the main civil society organizations that "participated" in the Tunisian democratic and constitutional transition processes.

3.1.2.a Tunisian political parties after Ben Ali's overthrow

The most important political party that came to play a role in the Tunisian political scenario in the aftermath of Ben Ali's overthrow was *Ennahda*, which is an Islamist party. As it has been already described above, the leader of this party is Rachid Ghannouchi, and this party had been banned in Tunisia from 1991 to 2011, and Ghannouchi had been supposed to flee to Europe in the 1990s. Only after Ben Ali's overthrow Ghannouchi could return to Tunisia and *Ennahda* could compete again for elections. When focusing on the role played by *Ennahda* in post-Ben Ali's Tunisia, it is essential to analyze the ideology underpinning this party. The main aspect underpinning Rachid Ghannouchi's ideology is that Ghannouchi is not in favor of reinstating a caliphate within Tunisia, but he is rather in favor of establishing a "civil state governed by *Shari'a* but based on citizenship and political

³⁷⁶ Tania Groppi & Irene Spigno, *Tunisia: La primavera della Costituzione* (Rome: Carocci, 2015), p. 46

³⁷⁷ Domenico Melidoro & Simone Sibilio, *Voci dal Mondo Arabo: Cronache e Testimonianze delle Transizioni in Egitto, Siria, Tunisia e Yemen* (Rome: Editrice Apes, 2014), cit., p. 95

pluralism”³⁷⁸. This entails, as Cavatorta and Merone have stated, that Ghannouchi has explicitly endorsed the idea that “references to religion are purely identity based and not sources for public policy-making”³⁷⁹. Second, Rachid Ghannouchi endorses the idea that “men and women are free and are able to use their reason...to decide over religious issues without imposition and coercion”³⁸⁰. Third, the *Ennahda* leader supports the idea that identical “duties” and “prohibitions” are born by all Muslims and that “every Muslim committing a crime deserves punishment but he remains Muslim unless he commits serious sins”³⁸¹.

Besides the re-emergence of Ennahda, in the aftermath of Ben Ali’s overthrow, the Tunisian political scenario witnessed the emergence of various Salafist organizations and political actors. As Pietro Longo has claimed, two main currents of Salafis can be found in Tunisia. The first of these currents is radical salafism. Tunisian radical salafist groups are “affiliated to wahhabi ideologies”, they reject any form of political engagement, and they tend to be arranged as “associations or simply as informal groups”³⁸². An example of Tunisian radical salafist organization is *Ansar al-Sharia*. The second current of Tunisian Salafists seems to be more in line with “malikism” and “moderation”; examples in this regard include such salafist movements that appeared in Tunisia in the 1980s, as *Jabaht al-Islah* and *al-Jabhat al-Islamiyya al-Tunisiyya*. Unlike the radical salafis, the Maliki salafis advocate massive political engagement, and they tend to “accept politics and an organizational structure”³⁸³. In particular, the main goal of *al-Jabhat al-Islamiyya al-tunisiyya* consists in fostering “the truest faith based on the Quran and the Muhammadic sunna”³⁸⁴. In light of this, political engagement is deemed to be the only possible vehicle to eliminate “evils and promote righteousness in the society as a whole and inside its political system”³⁸⁵. The type of Islam that is professed by the Tunisian Maliki salafists can be deemed to be comparable to that professed by *Ennahda*; for instance, the Maliki salafis’ main aim consists in reinstating the original values of Islam, “a religion that is not against freedom of thought, beliefs and conscience”³⁸⁶. Out of the two Tunisian Maliki salafist parties described above, two parties arose in the aftermath of Ben Ali’s fall. For instance, as soon as the Arab revolts had begun in Tunisia, a political party was founded by Muhammad Ali Hurrath, “based on the former *al-Jabhat al-Islamiyya al-Tunisiyya*”, while Muhammad Khouja created a party, building on the previous *Jabhat al-Islah*³⁸⁷.

³⁷⁸ Pietro Longo, ‘Salafism and Takfirism in Tunisia: Between Al-Nahda’s Discourses and Local Peculiarities’, *Middle East Studies Center (MESC) Working Paper*, 01 (2016), p. 7

³⁷⁹ Francesco Cavatorta & Fabio Merone, ‘Modernization through Exclusion? The Journey of the Tunisian Ennahda from Fundamentalism to Conservative Party’, *Democratization*, 20 (2013), p. 861

³⁸⁰ Pietro Longo, ‘Salafism and Takfirism in Tunisia: Between Al-Nahda’s Discourses and Local Peculiarities’, *Middle East Studies Center (MESC) Working Paper*, 01 (2016), cit., p. 7

³⁸¹ *ibidem*

³⁸² *Ivi*, p. 9

³⁸³ *ibidem*

³⁸⁴ *ibidem*

³⁸⁵ *ibidem*

³⁸⁶ *ibidem*

³⁸⁷ *Ivi*, p. 5

Despite their restricted membership, these two Maliki salafis parties have played an important role in the Tunisian constituent process and in the Tunisian political arena more in general. As Longo recalls, the various salafis political groups pressed the Tunisian National Constituent Assembly in 2012 to modify Article 1 of the Constitution, so as to “strengthen the Muslim identity in Tunisia”, and to establish a legal system based on *shari’a* in the country³⁸⁸. This amendment was not approved, as all of the parties in the Tunisian Constituent Assembly, including *Ennahda*, were against it³⁸⁹.

A third important political party that emerged in post-Ben Ali Tunisia was the *Congrès Pour la République* (CPR), which was founded by Moncef Marzouki. It re-emerged in the Tunisian political arena in 2011 after it had been banned for nine years. This party had a nationalist and secular orientation, and its main goal was the promotion of human rights in the country³⁹⁰. The leader of the CPR, Moncef Marzouki had played a very important role under Ben Ali’s Tunisia, as he had been the President of the *Ligue Tunisienne pour la Defense des Droits de l’Homme*, which was a civil society organizations that was very vocal in denouncing Ben Ali’s repression policies and human rights abuses targeting his political opposers³⁹¹.

A third important Tunisian post-Ben Ali political force was the *Forum Democratique pour le Travail et les Libertés* (FDTL or Ettakatol), which had been founded by Mustapha Ben Jafaar, who was a Tunisian doctor in 1994, but it was legalized only in 2002. Ben Jafaar’s Party has a liberal-socialist and secular orientation, and it acted as a strong opposition force against Ben Ali’s RCD³⁹².

The fourth important Tunisian post-Ben Ali’s party was the *Parti Democratique Progressiste* (PDP), which had been founded by Ahmed Néjib Chebbi in 1983, but in 2011 it was led by Maya Jribi. The PDP is a center-left secular party, whose most prominent feature is that it was one of the few legal political parties under Ben Ali’s regime, and in pre-revolutionary Tunisia it always acted as an RCD opposer³⁹³.

3.1.2.b Tunisian post-Ben Ali civil society organizations

The Tunisian constitutional transition process was underpinned by a great involvement of civil society organizations (CSOs), which exercised pressure upon the NCA in two main respects. First, every time the NCA produced a new draft of the constitutional text, meetings were organized by various CSOs, during which the new draft was evaluated, and recommendations were issued to the NCA. Second, many CSOs pushed the NCA to make its work public. In this respect, remarkable was the

³⁸⁸ *Ivi*, p. 10

³⁸⁹ *ibidem*

³⁹⁰ Leila el-Houssi, *Il Risveglio della democrazia: la Tunisia dall’indipendenza alla transizione* (Rome: Carocci, 2013), cit., p.

62

³⁹¹ *Ivi*, p. 35

³⁹² *Ivi*, p. 62

³⁹³ *Ivi*, pp. 62-63

pressure exercised by Al-Bawsala, which was a CSO that closely monitored the activities of the NCA, and regularly informed Tunisian citizens on the NCA's work through the Marsad website. The Al-Bawsala CSO also started a legal procedure against the NCA President, after he had refused to make the NCA's work public, in breach of Decree Law No. 41 of 2011³⁹⁴.

During the Tunisian constitutional transition process, a fundamental role was also played by the quartet made up of the UGTT (*Union Tunisienne Generale du Travail*), which had been founded by Farhat Hached during the colonial period, and which had contributed to organizing general strikes in Tunisia in 1978 and 2011, the UTICA (*Union Tunisienne de l'Industrie, du Commerce et de l'Artisanat*), the LTDH (*Ligue Tunisienne Pour la Defense des Droits de l'Homme*), and the ONAT (*Ordre National des Advocats de Tunisie*). This quartet launched the National Dialogue Initiative on October 5, 2013, acting as a third party, in an attempt to mediate between the NCA political forces sitting in the Tunisian NCA, after negotiations on the new constitutional text had stalled. Under the National Dialogue Initiative, the Quartet invited the various NCA political forces to sit around a negotiating table and resume negotiations on the Tunisian constitutional text, under the mediation of the Quartet. All the NCA political forces accepted to participate in the National Dialogue, with the exception of the CPR, whose members rejected the Initiative and abandoned the negotiations table. The National Dialogue Initiative officially started on October 25, 2013, and twenty political parties joined it. The National Dialogue culminated in the twenty political forces reaching consensus on a document, which set out the main steps the NCA had to undertake to accomplish the constitutional transition process, as well as the deadlines within which the Tunisian constitutional transition process had to be completed³⁹⁵. Thanks to the national dialogue, negotiations were successfully resumed, and they led to the adoption of a new constitutional text, as the below paragraph will show. In 2015 the Quartet was awarded the Nobel Peace Prize, for having contributed to boosting the Tunisian constitutional transition process, which culminated in the democratization of the country.

3.2 The Tunisian democratic transition process

This paragraph will focus on the Tunisian democratic transition process that occurred after the January 2011 Arab Spring, and it will be structured as follows: first, the main causes of the Arab Spring and the unfolding of the revolts will be investigated; then, a detailed description will be provided of the main transitional institutions that were put in place in the aftermath of Ben Ali's overthrow, and finally, the Tunisian constitutional transition process which culminated in the adoption of the 2014 Constitution will be analyzed.

³⁹⁴Tania Groppi & Irene Spigno, *Tunisia: La primavera della Costituzione* (Rome: Carocci, 2015), cit., pp. 63-64

³⁹⁵Ivi, p. 64

3.2.1 Causes of the Arab Spring in Tunisia

Three are the main causes that may have contributed to the outbreak of the Arab Spring in Tunisia in December 2010. The first cause of the Tunisian Arab Spring can be identified in the financial recession that started in the country in 2006, and which led to massive unemployment, in particular among young graduates. For instance, in 2010 the unemployment rate among young people “aged 15-24 years of age” amounted to 30%; more specifically, “those with higher education were especially affected; over 45 percent of college graduates could not find work”³⁹⁶.

A second cause of Tunisian citizens’ dissatisfaction with the Ben Ali regime and of the subsequent beginning of the Arab Spring could be identified in the brutal repression of any Islamist movements that had been taking place in Tunisia since the inception of Ben Ali’s regime in 1987. This repression was particularly exacerbated following “the al-Qaida bombing of the el-Ghriba synagogue on the Island of Jerbain 2002”³⁹⁷. Among the Tunisian citizens who endorsed Islamist ideas and who were consequently arrested by Ben Ali was Ali Khlifi, who was a Tunisian University student; Khlifa was arrested, as “one of his friends, unbeknownst to him, was also friends with two young men who mentioned to the wrong person that the Ben Ali regime should be replaced by an Islamist regime. Ben Ali apparently learned of the public statements of the two young men via an informant. All were arrested and jailed”³⁹⁸. Among the Tunisian citizens who endorsed Islamist ideas and who were systematically persecuted by Ben Ali were two categories of women; the first category included those women who belonged to the Ennahda movement, which had been banned by Ben Ali, while the second category included those Tunisian women who did not belong to Ennahda, but were married to men who were Ennahda affiliates³⁹⁹. Gray and Coonan (2013) have reported that most of the Islamist women detainees had not even been subjected to a criminal prosecution prior to being convicted, and while in detention, they had been inflicted upon sexual violence by the security forces, such as “describing perverse sexual acts involving their parents, making explicit reference to women’s genitals or detailing male sexual fantasies”⁴⁰⁰. Besides being subjected to human rights violations during their detention, many of these women detainees had also suffered human rights violations in the aftermath of their detention. The most serious human rights abuse inflicted upon women in the aftermath of their detention was *pointage*, which was “a system of terror and daily harassment that required women-either after their release from jail or by virtue of being closely related to someone in jail or prison-to report three to

³⁹⁶ Peter J. Schraeder, ‘Tunisia’s Jasmine Revolution, International Intervention, and Popular Sovereignty’, *The Whitehead Journal of Diplomacy and International Relations*, 13 (2012), p. 75

³⁹⁷ *Ivi*, p. 76

³⁹⁸ *ibidem*

³⁹⁹ Doris H. Gray & Terry Coonan, ‘Notes from the Field: Silence Kills! Women and the Transitional Justice Process in Post-Revolutionary Tunisia’, *The International Journal of Transitional Justice*, 7 (2013), p. 351

⁴⁰⁰ *Ivi*, p. 354

five times daily to a police station...the duration of this obligation could be up to five years”⁴⁰¹. The Tunisian women who had been subjected to such an obligation had a hard time getting a regular basis job and a source of income⁴⁰².

Third, Tunisian citizens were particularly resentful with the Ben Ali regime for the corruption scandals in which Ben Ali himself, and his wife, Leila Trabelsi, had been involved. Leila Trabelsi had taken advantage of her husband’s position to let “her rapacious side of the family to sink their teeth into businesses, throughout Tunisia”⁴⁰³. In particular, Leila Trabelsi’s brother had “illegally assumed control over an array of companies, including an airline, several hotles, one of Tunisia’s two private radio stations, numerous car assembly plants, a Ford distribution center...and the list goes on”⁴⁰⁴. Tunisia’s corruption records had also been acknowledged by the International Community. For instance, in 2010 Tunisia was classified in the annual “perception of corruption” index by Transparency International as the fifty ninth most corrupt country “out of a total of 178 countries monitored”⁴⁰⁵.

3.2.2 The unfolding of the Arab Spring in Tunisia

The Arab revolts in Tunisia officially started on December 17, 2010, after Mohamad Bouazizi, a Tunisian street fruit seller, had “set himself on fire” in front of the governorate of Sidi Bouzid⁴⁰⁶. Bouazizi had been confiscated his fruit stalls by the local police⁴⁰⁷. Bouazizi was so frustrated by the corruption underpinning Tunisia and by the continuous “humiliation” he had been undergoing for years, that he decided to commit suicide as an act of protest against Ben Ali. Bouazizi’s suicide triggered a wave of mass demonstrations all around the province of Sidi Bouzid; the demonstrators posted videos and images of the revolts on Facebook and Twitter, so that they could reach out to and mobilize the Tunisian citizens living in other areas of the country⁴⁰⁸. Soon the revolts spread in other areas of the country, such as the areas of Kasserine, and Tala. Social networks had helped catalyze the revolts, thanks to the massive use of Facebook and Twitter all around Tunisia. For instance, “Tunisia had nearly 2 million Facebook users and around 2000 active bloggers. This gave the protest movement visibility in ways that traditional media could not provide”⁴⁰⁹. Another important contribution in catalyzing the protests was given by Tunisian trade unions, such as the UGTT. For instance, even if at the beginning of the Arab Spring the UGTT had been skeptical about organizing the revolts, and it had rather suggested

⁴⁰¹ *Ivi*, p. 352

⁴⁰² *ibidem*

⁴⁰³ Peter J. Schraeder, ‘Tunisia’s Jasmine Revolution, International Intervention, and Popular Sovereignty’, *The Whitehead Journal of Diplomacy and International Relations*, 13 (2012), cit., pp. 76-77

⁴⁰⁴ *Ivi*, p. 77

⁴⁰⁵ *Ivi*, p. 76

⁴⁰⁶ *Ivi*, p. 77

⁴⁰⁷ *ibidem*

⁴⁰⁸ *Ivi*, p. 78

⁴⁰⁹ Vincent Durac, ‘Protest movements and political change: an analysis of the ‘Arab uprisings’ of 2011’, *Journal of Contemporary African Studies*, 31 (2013), p. 186

“to act as an intermediary between the regime and the protesters”, at the end, “under the pressure from more militant local branches, the UGTT mobilized its activists in a growing number of cities”⁴¹⁰.

The regime violently crushed the revolts, by deploying police forces in all of the Tunisian cities where the anti-regime protests were taking place, and by ordering the security forces to use violence against demonstrators. The police repression resulted in a huge number of casualties in the cities of Tala and Kasserine from January 8 to January 10, 2011, “killing roughly 21 people according to the authorities, and closer to 50 according to trade unions and hospital sources”⁴¹¹.

What was striking about the Tunisian Arab revolts was that the Tunisian citizens’ protests were not countered by any demonstrations in favor of Ben Ali. For instance, the dictator had sidelined the ruling RCD party in 2010 to such an extent that no parades were held by the RCD in favor of the President. Nor did the Tunisian entrepreneurial class stand in solidarity with Ben Ali, as they were disappointed with “the predatory behavior of the Ben Ali and Trabelsi families”⁴¹². In light of the popular dissatisfaction and of the mounting protests, Ben Ali decided to flee the country on January 14, 2011.

3.2.3 The establishment of the Tunisian transitional institutions

After Ben Ali had fled the country, on January 15, 2011, based on Article 15 of the 1959 Tunisian Constitution, the Tunisian Constitutional Council adopted a Declaration pursuant to which transitional institutions were to be established in the country. The leader of the Chamber of Deputies came to occupy the position of interim President of the Republic, and he appointed Muhammad Ghannouchi, who had already been prime minister under the Ben Ali regime, as interim prime minister. Muhammad Ghannouchi’s appointment as interim prime minister was not met with satisfaction by the Tunisian citizens, who wanted to break completely with the past and with the RCD. Thus, two waves of protests took place in the main square of Tunis, which took the name of Kasbah 1 and Kasbah 2 demonstrations, during which the Tunisian citizens voiced their dissatisfaction with Ghannouchi’s appointment as interim prime minister, and asked for his dismissal⁴¹³.

The interim president of the republic responded to the popular dissatisfaction by dismissing Ghannouchi and replacing him with Béji Caid Essebsi on February 27, 2011, and by calling for the elections of a National Constitutional Assembly (NCA), to take place on October 23, 2011. The interim president of the republic also suspended the application of the 1959 constitution, and he dissolved the two chambers of the Tunisian Parliament, as well as the Constitutional Council⁴¹⁴. At the end of

⁴¹⁰ *ibidem*

⁴¹¹ *ibidem*

⁴¹² *ibidem*

⁴¹³ Tania Groppi & Irene Spigno, *Tunisia: La primavera della Costituzione* (Rome: Carocci, 2015), p. 50

⁴¹⁴ *ibidem*

February 2011, the High Commission for Political Reform was appointed by the interim prime minister, and it was presided by constitutionalist Yadh Ben Achour. The High Commission for Political Reform was in charge of acting as a transitional legislative assembly, and of enacting the legislative acts which were necessary to regulate the Tunisian democratic transition process. The legislative acts adopted by the High Commission for Political Reform were to be approved by the interim prime minister, and then transmitted to the interim president of the republic. On April 18, 2011, Decree Law No. 27 was passed, pursuant to which a High Independent Authority for Elections (ISIE) had to be set-up, and it had to be entrusted with enacting the electoral law to be applied in the context of the NCA elections⁴¹⁵.

Between August 5 and September 6, 2011 a Conference was held in Tunisia, which was presided by Yadh Ben Achour. The leaders of the twelve political parties that would stand as candidates at the October 2011 NCA elections participated at the Conference, which aimed at setting-out the principles that would guide the Tunisian democratic and constitutional transition. The most problematic matter which was discussed during the Conference consisted in establishing the terms for the NCA's mandate. On September 15, 2011 the declaration on the constituent process was signed by eleven political formations out of twelve; Article 3 of the declaration provided that the mandate of the NCA could not exceed one year, meaning that the NCA would have to draft the new Tunisian Constitution within one year from its election⁴¹⁶.

3.2.4 The elections of the NCA and the Tunisian constitutional transition

The NCA elections were held on October 23, 2011, and the results of the elections were the following: 89 seats were obtained by Ennahda, whose leader was Rashid al-Gannouchi, and which had an Islamist orientation, 29 seats were obtained by the *Congrès pour la République* (CPR), Al Aridha won 26 seats, 20 seats were won by Ettakatol, the *Parti Démocrate Progressiste* (PDP) obtained 16 seats, the *Pole Démocratique Moderniste* (PDM) obtained five seats, 4 seats were obtained by Afek Tounes, the *Parti Communiste des Ouvriers de Tunisie* (PCOT) was allocated 3 seats, and the *Mouvement des Démocrates Socialistes* (MDS) was allocated 2 seats. Ennahda decided to form a coalition with Ettakatol and the CPR within the NCA. In all, the coalition, which came under the name of *Troika*, had 138 seats in the NCA⁴¹⁷. The NCA elections marked the first democratic elections that had been held in Tunisia.

The NCA was first convened, and thus started its work on November 22, 2011. On this occasion, the Ettakol leader, Mustapha Ben Jaafar, was appointed as the NCA President, and an Ennahda member, Habib Khedher, was appointed as the speaker of the NCA⁴¹⁸. The one year time limit that had been

⁴¹⁵ Ivi, p. 51

⁴¹⁶ Ivi, p. 52

⁴¹⁷ Ivi, p. 53

⁴¹⁸ ibidem

fixed for for the NCA's mandate was exceeded at the end, due to many political problems that came to the forth.

Among the may political problems that emerged was Ennahda's endorsement of a conservative and Islamist stance on gender issues. During the period of the revolts, that is in January 2011, Ennahda members' stance on gender issues had seemed to be quite progressive. Indeed, they had claimed to be willing to "keep the Tunisian code of personal status in force"⁴¹⁹. As soon as the NCA's works started, however, the most radical Ennahda's wing endorsed an extremely conservative and radical stance on gender issues. Indeed, many of the secular Tunisian politicians who had been struggling for gender equality, including many women were targeted and murdered by some of the most radical Ennahda members, who were instead in favor of the introduction of a constitutional clause (Article 28) foreseeing women's complementarity to men⁴²⁰. The draft of this article was approved by the NCA on August 13, 2012. *Ennahda's* deputies were convinced that draft article 28 did not threaten women's rights. In particular, as Leila el Houssi reports, Mehrezia Labidi-Maiza, who was an *Ennahda* Deputy and acted as vice-president of the NCA stated that complementarity did not imply gender inequality, but it rather implied that "there would be an equal exchange, a sort of partnership between the two sexes"⁴²¹. Another *Ennahda* Deputy, Suad Abderrahim, claimed to be in favor of the complementarity principle, and as el-Houssi reports, she stated that all of those women who were bearing children without being married had to be considered as a source of shame, and they thus did not deserve to receive any assistance from the Tunisian Government⁴²². *Ennahda's* stance vis-à-vis women's rights sparked a lot of outrage among women rights movements both at the international and at the Tunisian level, as the complementarity principle profoundly challenged the gender equality values that had underpinned the Tunisian society and legal system since 1956. Among the Tunisian women rights organizations who were very active in this debate, and who held several sessions to discuss the complementarity principle implications on gender equality was the *Femmes Democrat*es Organization, which issued a communication according to which "*Ennahda's* stance on complementarity contributes to threatening women's rights and to establishing a patriarchal system within the Tunisian society, whereby all the power is going to rest in the hands of men, while women are going to be stripped of their rights"⁴²³. As el-Houssi reported, the position put forward by the *Femmes Democrat*es Organization was also supported by Saud Ben Achour, according to whom the approval of draft article 28 would have given Tunisian women the status of second-class citizens⁴²⁴. In light of all of the criticism that had been raised vis-à-vis draft article 28 on Complementarity *Ennahda* accepted to remove that article from the draft of

⁴¹⁹ Francesca Maria Corrao, *Islam, Religion and Politics* (Rome: Luiss University Press, 2017), p. 172

⁴²⁰ *ibidem*

⁴²¹ Leila el-Houssi, *Il Risveglio della democrazia: la Tunisia dall'indipendenza alla transizione* (Rome: Carocci, 2013), cit., p. 72

⁴²² *Ivi*, p. 73

⁴²³ *ibidem*

⁴²⁴ *ibidem*

the Tunisian Constitutional text, and it acquiesced to the introduction of a gender equality clause within the Tunisian draft constitution; these demonstrations also resulted in another “no less important victory—freedom of religious faith, with the abolition of discrimination on grounds of apostasy”⁴²⁵. Four drafts of the Tunisian constitutional text were drafted; the first three ones were rejected, as there was not a sufficient number of deputies agreeing on their contents, while the fourth one was finally approved on January 26, 2014. Two hundred deputies over two-hundred and sixteen voted in favor of the approval⁴²⁶. The Tunisian constitutional transition had thus been accomplished.

After having briefly described the main features of the Tunisian constitutional transition process, it is essential to briefly focus on some of the most innovative features of the 2014 Tunisian constitution. The 2014 Tunisian constitution catalogue of rights includes first generation rights, that is civil and political rights, second generation rights, namely economic and social rights, and third generation rights, such as women’s rights, the rights of the child, disabled people’s rights, as well as other rights, such as the right to water (Article 44), and the right to a healthy and safe environment (Article 45). The introduction of third generation rights within the Tunisian constitution makes it possible to deem the 2014 Tunisian constitutional text as a modern constitution⁴²⁷. With regards to the separation of powers, in line with other democratic constitutions, the 2014 Tunisian constitutional text contains detailed provisions on the independence of the judiciary (Article 102) and on the role of the High Council of the Judiciary, which is in charge of verifying that judges exercise their role impartially, and in accordance with the principle of judicial independence⁴²⁸.

When dealing with the Tunisian Constitution catalogue of rights, it is essential to focus on the Tunisian Constitution’s approach towards gender equality. In this regard, as Groppi and Spigno have underlined, it can be noted that the Tunisian Constitution does not provide for any specific grounds on which gender-based discrimination is forbidden, but it includes a general and all-encompassing prohibition of gender based-discrimination. For instance, pursuant to Article 21 of the Tunisian Constitution, all male and female citizens have equal rights and duties, they are equal before the law, and every type of gender-based discrimination is forbidden. This approach the the Tunisian Constituent Assembly has adopted can be considered to be in conflict with the approach which was followed by the drafters of the African Charter on Human and Peoples rights, which was adopted in 1981 in Nairobi, and which got ratified by Tunisia in 1983. Nevertheless, the Tunisian Constituent Assembly’s approach can be deemed to be in line with the constitutional traditions of other African states, such as South Africa, as shown by Article 6 of the 1996 South African Constitution⁴²⁹.

⁴²⁵ Francesca Maria Corrao, *Islam, Religion and Politics* (Rome: Luiss University Press, 2017), p. 172

⁴²⁶ Tania Groppi & Irene Spigno, *Tunisia: La primavera della Costituzione* (Rome: Carocci, 2015), cit., p. 65

⁴²⁷ Ivi, p. 26

⁴²⁸ Ivi, p. 28

⁴²⁹ Ivi, pp. 120-121

With regards to gender equality, besides Article 21, the Tunisian constitutional text also incorporates two further important clauses, namely Article 34 (2) and article 46, which can be read in conjunction. Article 34 (2) mandates the Tunisian government to ensure that women's representation within the Tunisian legislative chambers is equal to men's. Article 46 (1) mandates the Tunisian government to safeguard women's constitutionally protected rights, while Article 46 (2) partly replicates Article 34 (2), as it provides that equal opportunities for men and women must be guaranteed in both the private and public sectors, and more specifically within the Tunisian legislative chambers⁴³⁰. Two important considerations stem from Articles 34 (2), 46 (1) and 46 (2) of the Tunisian constitution. First, these constitutional clauses contribute to ensuring that any potential future Tunisian electoral law restricting women's representation in the legislative chambers would be unconstitutional and thus inapplicable. Second, the content of these articles seems to reflect the constitutional traditions of other Southern Mediterranean countries, such as Morocco. For instance, like the 2014 Tunisian constitution, article 30 of the 2011 Moroccan constitution provides that legislative acts may be adopted, aimed at ensuring that an equal representation of men and women within the Moroccan legislative chambers⁴³¹. The last paragraph of article 46 mandates the Tunisian government to eradicate any forms of violence perpetrated against women, and it can be deemed to represent an important transitional justice endeavor on the part of the Tunisian Constituent Assembly. For instance, according to Groppi and Spigno, by introducing this clause within the Tunisian constitutional text, the Tunisian Constituent Assembly seemed to recognize that several abuses had been perpetrated against Islamist women under the Ben Ali regime, and it seemed to be willing to "symbolically" compensate those women for all of the abuses they had undergone. One may moreover assume that the introduction of this clause within the Tunisian constitutional text may have been motivated by the willingness to fill the gap that the two truth commissions set-up by Muhammad Ghannouchi left, in terms of redressing the gender abuses perpetrated under the Ben Ali regime, as it will be better explained below⁴³².

As the above description shows, the Tunisian case differs from the Libya none to the extent that in Tunisia a real democratic and constitutional transition occurred.

3.3 First phase of the Tunisian transitional justice process (from January 2011 till October 23, 2011)

This paragraph will analyze the transitional justice mechanisms which were implemented in Tunisia from January 2011 to October 23, 2011, that is during the final days of Ben Ali's regime, and under the following two Interim Governments headed by Muhammad Ghannouchi, and by Essebsi.

⁴³⁰ Ivi, pp. 121-122

⁴³¹ Ivi, pp. 122-123

⁴³² Ivi, p. 123

Within this span of time, four important transitional justice mechanisms were put in place: a truth-seeking process, a reparations program, a lustration program, and trials of former regime members.

3.3.1 Truth-seeking process

The beginning of the Tunisian transitional justice process was marked by Muhammad Ghannouchi's January 14, 2011 establishment of two main truth commissions: the Inquiry Commission on Crimes and Abuses committed during the revolution, and the Inquiry Commission on Corruption and Embezzlement. The first truth commission was aimed at providing an overall account of the human rights abuses perpetrated by the Tunisian police forces against the anti-regime protesters from December 17, 2010 and October 23, 2011, 2011, while the second truth commission was in charge of shedding lights on the ESR and corruption crimes which had been perpetrated during the Ben Ali regime from 1987 until 2011⁴³³. The mandates of the two commissions will be analyzed in-depth.

The Inquiry Commission on Crimes and Abuses committed during the revolution was headed by Taoufik Bouderbala, who was a human rights advocate. This Commission grounded its analysis of the abuses perpetrated against the anti-regime demonstrators from December 17, 2010 to October 23, 2011 upon the evidence disclosed by witnesses, victims, and perpetrators. The Commission included a department which was in charge of collecting evidence of human rights violations from witnesses and victims. Moreover, the personal details of the citizens who had disclosed evidence of human rights violations were stored within a database and an archive system which had been created on purpose. Thanks to the investigative activity carried-out by the Commission, it is now well-known that 2489 Tunisian citizens underwent police violence during the anti-regime protests, and these police abuses had resulted in 2147 injured people and 338 casualties⁴³⁴. The commission's work presented two main limitations that hindered the effectiveness of the commission's investigative activity. First, the police abuses that had been perpetrated against Tunisian citizens before December 17, 2010 were left unaddressed, as the time span covered by the Commission's investigative activity started from December 17, 2010, that is from the first day of the Arab Spring in Tunisia. Second, the Commission was not allocated enough funds to carry-out its mandate. Finally, "the final report was not widely distributed", meaning that a huge number of Tunisian citizens did not manage to have access to the Commission's final report, and the report did not even accurately determine who could actually be deemed liable for the perpetration of specific abuses⁴³⁵. The Commission's members justified the limitations of their final report on the ground that they had been pushed to alter the results of their

⁴³³ Christopher Lamont & Hannah Pannwitz, 'Transitional Justice as Elite Justice? Compromise Justice and Transition in Tunisia', *Global Policy*, 7 (2016), p. 279

⁴³⁴ Kora Andrieu, 'Confronting the Dictatorial Past in Tunisia: Human Rights and the Politics of Victimhood in Transitional Justice Discourses Since 2011', *Human Rights Quarterly*, 38 (2016), p. 269

⁴³⁵ *Ivi*, p. 270

investigative activity by the Tunisian transitional authorities. Hence, it is possible to conclude that “there was no true accountability process on the basis of their findings”⁴³⁶.

The second Commission which was set-up by Muhammad Ghannouchi on January 13, 2011 was the Inquiry Commission on Corruption and Embezzlement (ICCE). As it has already been specified above, the mandate of the Commission consisted in disclosing and providing an overall account of the ESR violations and corruption crimes that had been perpetrated against Tunisian citizens from the beginning of the Ben Ali regime in 1987, till the end of Ben Ali’s dictatorship in January 2011. This Commission grounded its investigative activity in the evidence disclosed by victims and witnesses, and it included a department which was in charge of collecting victims’ grievances. The ICCE often investigated corruption crimes which had been perpetrated within the context of other abuses, including “police beating and other humiliations”, thus contributing to ensuring “social inclusion, recognizing and reintegrating individuals previously considered as ‘outsiders’ while dismantling former networks of ‘connivance’”⁴³⁷. A significant number of Tunisian citizens resorted to the ICCE to report on the corruption crimes they had undergone during Ben Ali’s regime; for instance, the Commission “received some 10.000 complaints and referred 400 cases to the director of publishing prosecutions before publishing its final report in May 2012”⁴³⁸. Following the production of a final communication outlining the results of the ICCE’s investigations, the Commission “was later transformed into a permanent anti-corruption institution”⁴³⁹.

As Lamont and Pannwitz have noticed, the scope of these truth commissions’ mandates was very limited, and they failed addressing all of those civil and political rights abuses that had been carried-out during the Ben Ali regime. According to the two scholars, the reason why the scope of these truth commissions’ mandates was so limited rested in the fact that “there were no shared objectives held by protesters beyond Ben Ali’s ouster and demands for social justice. As a result, transitional justice demands from below remained largely invisible in the months immediately following January 2011”⁴⁴⁰. Indeed, these truth commissions’ mandates made no reference to the human rights abuses that the Ben Ali regime had perpetrated against Islamist women; yet, these human rights violations could be deemed to be systematic and serious, as the above paragraph has briefly shown, and thus they needed to be redressed as soon as the Ben Ali regime had fallen, in order to pave the way for a faster social reconciliation⁴⁴¹. Moreover, in the immediate aftermath of the Ben Ali regime’s overthrow, many

⁴³⁶ *ibidem*

⁴³⁷ *ibidem*

⁴³⁸ Isabel Robinson, ‘Truth Commissions and Anti-Corruption: Towards a Complementary Framework?’ *International Journal of Transitional Justice*, 9 (2015), p. 46

⁴³⁹ Kora Andrieu, ‘Confronting the Dictatorial Past in Tunisia: Human Rights and the Politics of Victimhood in Transitional Justice Discourses Since 2011’, *Human Rights Quarterly*, 38 (2016), cit., p. 270

⁴⁴⁰ Christopher Lamont & Hannah Pannwitz, ‘Transitional Justice as Elite Justice? Compromise Justice and Transition in Tunisia’, *Global Policy*, 7 (2016), cit., p. 279

⁴⁴¹ *ibidem*

gender rights activists had called for the implementation of transitional justice mechanisms aimed at redressing the gender abuses perpetrated by Ben Ali. Among these activists was Laabidi, who is a Tunisian lawyer. According to Laabidi, all of those women who had been detained on political grounds under the Ben Ali regime should have been the recipients of a compensation program soon after the regime's overthrow. In particular, Laabidi claimed that compensations should have been immediately provided to all of those Tunisian women who did not manage to get a job after they had been freed. Furthermore, according to Laabidi, Tunisian history books should be rewritten, "beginning with its independence from France in 1956, because rights were curtailed from the very inception of the postcolonial state: 'The democratization process cannot go forward without speaking of the victims. Not doing so will encourage extremism'"⁴⁴².

3.3.2 Reparations

A second transitional justice mechanism that was put in place within the period between January 2011 and October 23, 2011 consisted in two reparations schemes. The first reparations scheme was put in place by Muhammad Ghannouchi's Interim Government through Decree Law No. 1, which was passed on February 19, 2011, while the second reparations program was put forward by Essebsi's Interim Government through another law decree on October 24, 2011. Both the schemes will be analyzed in-depth.

On February 19, 2011 the Tunisian Interim Government headed by Muhammad Ghannouchi passed Decree Law No. 1, pursuant to which all of the Tunisian citizens who had been convicted from 1989 to 2011 on the ground of their political orientation, "including for violating the protest law or for belonging to an illegal organization", were pardoned⁴⁴³. This decree resulted in more than twelve thousand Tunisian citizens being pardoned and freed. Moreover, it was foreseen by Decree No. 1 that all of the amnestied Tunisian citizens were to benefit from a reparations program that included the allocation of financial resources, as well as "the recruitment of all beneficiaries of the amnesty program into the public sector"⁴⁴⁴. Decree No. 1 posed three main problems. First, the amnesty and reparations program targeted indiscriminately all of the Tunisian citizens who had been convicted on political grounds, without distinguishing between "the beneficiaries who were illegally arrested and the Jihadist members of the Salafist group *Ansar –el Charia*, who were also imprisoned and enjoyed the same rights", thus enabling Jihadists to occupy positions within the Tunisian public sector⁴⁴⁵. Second, the Interim Government had not assessed how many Tunisian citizens would be actually entitled to receive reparations, before it devised the reparations scheme. Therefore, many Tunisian citizens who were

⁴⁴²Doris H. Gray & Terry Coonan, 'Notes from the Field: Silence Kills! Women and the Transitional Justice Process in Post-Revolutionary Tunisia', *The International Journal of Transitional Justice*, 7 (2013), cit., p. 355

⁴⁴³ Kora Andrieu, 'Confronting the Dictatorial Past in Tunisia: Human Rights and the Politics of Victimhood in Transitional Justice Discourses Since 2011', *Human Rights Quarterly*, 38 (2016), cit., p. 271

⁴⁴⁴ *ibidem*

⁴⁴⁵ *Ivi*, pp. 271-272

entitled to receive reparations were not allotted any financial resources. For instance, as Andrieu has confirmed, “the implementation of the decree raised many issues: compensation payments were slow, uneven, and unfinished”⁴⁴⁶. The third problem raised by the program was that “many victims were excluded from recognition because they did not have the court judgment that was necessary for them to make their claims”⁴⁴⁷.

On October 24, 2011 a decree was passed by the Interim Government presided by Essebsi, pursuant to which a series of financial and symbolic reparations had to be addressed to the “Martyrs and Wounded of the Revolution”, which included all of those Tunisian citizens who had either passed away or got injured as a result of their participation in the anti-regime revolts that had taken place between December 17, 2010 and February 28, 2011. As far as the symbolic dimension of reparations was concerned, the decree foresaw that the symbolic reparations to be granted pursuant to the decree included “public commemoration of 14 January as a new national holiday; the creation of a museum on the revolution; changing street names to recognizing martyrs; and reforming history books”⁴⁴⁸. It is important to notice that not so many efforts were actually made to prioritize “the symbolic aspect of reparations, ...and apart from the several ‘14 January 2011’ street signs that have replaced the former ‘7 November 1987’ ones, to this day, there is no official recognition of those victims in the public space”⁴⁴⁹. With respect to the financial dimension of reparations, victims could have access to compensations as long as they handed to their “governorate headquarters” a medical certificate that gave evidence of the injuries they had been inflicted upon. The Interim Government allotted compensations to the victims in two installments. The first installment was disbursed in December, while the second installment was disbursed in February. The 2749 injured citizens were granted six thousand Dinars, while “the families of the 347 martyrs” were allotted 40.000 Dinars; the Interim Government managed to allocate such compensations thanks to a \$20 million fund donated by the Qatari Government⁴⁵⁰. All of those reparations recipients who were “incapacitated at more than 6 per cent” were to be provided with a refund for all of the medical and transportation expenses they had undertaken⁴⁵¹. This reparations scheme raised one significant issue. First, each recipient was allotted the same sum of money, regardless of how seriously s/he had got injured, and regardless of the medical costs that each recipient would have to bear for the rest of his/her life. As an example, a far bigger amount of money than that allocated was needed by those Tunisian citizens who had got “paraplegic”, as a result of the revolts, and who were thus supposed to go through medical treatments for the rest of their life. In order to redress this problem, it was decided by Essebsi’s Interim Government that a public sector position had to be awarded to each

⁴⁴⁶ Ivi, p. 272

⁴⁴⁷ ibidem

⁴⁴⁸ ibidem

⁴⁴⁹ ibidem

⁴⁵⁰ Ivi, p. 273

⁴⁵¹ ibidem

victim who had got seriously injured during the revolution, and who would need a larger amount of money than the one allotted within the framework of the reparations program. Indeed, “in October 2013, more than 2700 wounded had been recruited in the public sector, as well as 200 family members of martyrs”⁴⁵².

3.3.3 Military prosecutions of former regime members and security forces

A third transitional justice mechanism that was put in place in 2011, in the immediate aftermath of the revolts, consisted in the military trials of those former regime members and security forces who had been involved in the murder of the Tunisian anti-regime demonstrators from December 17, 2010 to January 14, 2011. This thesis will analyze the military trials as follows: first, it will be shown how the Tunisian military tribunals’ jurisdiction was triggered, and the verdict of the military tribunals will be dealt with; second, the verdict of the military courts of appeal will be analyzed, and finally, the various shortcomings of these military trials will be described.

The cases concerning the anti-regime demonstrators’ murders that had taken place from December 17, 2010 to January 14, 2011 started being dealt with by civil investigative judges in February 2011. Since then, civil investigative judges had summoned witnesses, gathered proof, and finally charged some “alleged perpetrators” with the crime of murder. In May 2011 it was then established by the civil investigative judges that military tribunals had to be transmitted those cases, as “Article 22 of the 1982 law regulating the Basic Status of Internal Security Forces gave military courts jurisdiction over cases in which the accused were security forces personnel”⁴⁵³. The cases were arranged by the military justice directorate in accordance with “territorial jurisdiction of the first instance military courts of le Kef, Tunis and Sfax”; more than forty “alleged perpetrators” were tried by the military tribunals of Tunis and le Kef, while the Sfax military tribunal tried other perpetrators⁴⁵⁴. Trials were held in November and December 2011 in the military tribunals of le Kef, Tunis and Sfax. In all, fifty three accused parties were subjected to trial, including security forces as well as civil servants who had been affiliated with Ben Ali’s regime. The military tribunals issued their judgments in Summer 2012, “condemning *in absentia* Ben Ali to life imprisonment and sentencing other key deciders for murder, manslaughter or complicity”⁴⁵⁵. Many other security forces, however, were found not to be guilty. As an example, the military tribunals exculpated Moncef Laajimi, who had presided over the security forces of

⁴⁵² *ibidem*

⁴⁵³ Human Rights Watch, *Flawed Accountability: Shortcomings of Tunisia's Trials for Killings during the Uprising*, 12 January 2015, pp. 15-16. Available at: <http://www.refworld.org/docid/54b4ea044.html>

⁴⁵⁴ *Ivi*, p. 16

⁴⁵⁵ Kora Andrieu, ‘Confronting the Dictatorial Past in Tunisia: Human Rights and the Politics of Victimhood in Transitional Justice Discourses Since 2011’, *Human Rights Quarterly*, 38 (2016), cit., p. 275

the city of Thala, where many policemen and army officers had seriously injured anti-regime demonstrators in January 2011⁴⁵⁶.

The military tribunals' judgments concerning the guilt of Ben Ali and other security forces were appealed to the military court of appeal. On April 12, 2014, the military court of appeal issued its judgment: Ben Ali's life imprisonment sentence was upheld, but all the other security forces' imprisonment sentences were decreased, thus "leading to the release of most of Ben Ali's national security and presidential guard chiefs"⁴⁵⁷. After having analyzed the verdicts of the Tunisian military tribunals and of the Tunisian military courts of appeal, it is necessary to underline the main accomplishments and shortcomings of the Tunisian military trials.

One was the main accomplishment of the Tunisian military trials. This accomplishment rested in the fact that the defendants' human rights were basically not infringed by the military judges⁴⁵⁸. In particular, the right to fair trial was upheld by the military tribunals as well as by the military court of appeal. Indeed, each "alleged perpetrator" was granted the right to be represented by a lawyer, and legal representatives were allowed to tap into all of the evidence gathered by the tribunals and the court of appeal, "including the indictment, the testimony of victims and witnesses, and all other evidence introduced during the proceedings"⁴⁵⁹. The only case in which the defendant's human rights were not fully respected was the Ben Ali case. Ben Ali was the only perpetrator who got prosecuted *in absentia*. *In absentia* trials are not forbidden by International Law; nevertheless, International Law prescribes that the accused party's human rights should be respected during *in absentia* trials, including "notifying him in advance of the proceedings, of his right to representation in his or her absence, and affirming the defendant's right to a retrial on the merits of the conviction following the person's return to the jurisdiction"⁴⁶⁰. No specific judicial guarantees to be respected during *in absentia* trials were foreseen by the Tunisian Criminal Code that the Tunisian military tribunal and military court of appeal applied. In the Ben Ali case, although a legal representative had been nominated by the le Kef military tribunal, Ben Ali's legal representative "did not participate fully in the proceedings. During the final proceedings, he was present but decided not to make an argument"⁴⁶¹.

Despite the above achievement, several flaws underpinned the military trials. One of the main shortcomings of the le Kef and Tunis military trials was that the proof collected by the investigative judges did not help determine guilt for the murder of anti-regime demonstrators in most cases. The pieces of proof gathered by the le Kef and Tunis military investigative judges "consist largely of

⁴⁵⁶ *ibidem*

⁴⁵⁷ *ibidem*

⁴⁵⁸ *Ivi*, p. 276

⁴⁵⁹ Human Rights Watch, *Flawed Accountability: Shortcomings of Tunisia's Trials for Killings during the Uprising*, 12 January 2015, cit., p. 20. Available at: <http://www.refworld.org/docid/54b4ea044.html>

⁴⁶⁰ *ibidem*

⁴⁶¹ *ibidem*

interviews that the military investigative judges conducted with hundreds of witnesses, few of whom could identify the killers in specific cases”⁴⁶². Even if the details of the anti-regime demonstrations repressions, as well as “the context and the circumstances in which the police resorted to lethal force against protesters” clearly emerged from the interviews released by the witnesses, the witnesses “failed to identify the police officers who fired the fatal shots, who were often a mix of locally-base officers and officers brought from other regions”⁴⁶³. Since the interviews had not really helped single out the police forces who were responsible for the violent suppression of the anti-regime protests, the military tribunals should have tapped into other pieces of evidence, such as the official lists reporting the areas where each individual police officer had been dispatched, as well as the weapons that each single lawyers had been assigned. The military tribunals had actually been petitioned by the victims’ legal representatives to urge the Interior Ministry to make those registers available, but the tribunals rejected the lawyers’ petition. A second piece of evidence that the military investigative judges could have tapped into consisted in the mobile phone records of those police officers who had been dispatched to repress the anti-regime revolts from December 2010 to January 2011. For instance, such records would have helped determine high-ranking officers’ responsibilities, as the mobile phone messages sent by high-ranking officers to their subordinates would have clearly shown that the high-ranking officers had instructed their subordinates to use violence against the anti-regime demonstrators, in breach of the Interior Ministry’s instructions. Even in this case, the victims’ legal representatives had petitioned the military court of appeal to urge the Tunisian phone companies to make the police officers’ mobile phone records accessible. The military court of appeal filed such a request to the Tunisian phone companies, but it could not obtain the required records, as these had been “technically available for one year only before the phone companies deleted them”⁴⁶⁴. This clearly demonstrates that “if the first instance courts had ordered the phone companies to hand over these records within 12 months of the killings, they may have assisted the identification of individual perpetrators and revealed whether there was evidence of existence of orders to kill, or to use force without abiding by the requirements of necessity and proportionality”⁴⁶⁵.

A second shortcoming of the Tunisian military trials had to do with the fact that since the Tunisian criminal code did not foresee “command or superior responsibility for crime” as grounds for liability⁴⁶⁶, “the chain of command could not be established” by the investigative military judges⁴⁶⁷; for instance, only crimes perpetrators and co-perpetrators could undergo a criminal prosecution under

⁴⁶² Ivi, p. 25

⁴⁶³ ibidem

⁴⁶⁴ Ivi, pp. 25-26

⁴⁶⁵ Ivi, pp. 26-27

⁴⁶⁶ Ivi, p. 35

⁴⁶⁷ Kora Andrieu, ‘Confronting the Dictatorial Past in Tunisia: Human Rights and the Politics of Victimhood in Transitional Justice Discourses Since 2011’, *Human Rights Quarterly*, 38 (2016), cit., p. 276

Article 32 of the Tunisian criminal code⁴⁶⁸. The principle of command responsibility, as foreseen by Article 28 of the Rome Statute, entails that “a commander can be held criminally liable even if he or she did not order the crimes committed if there is evidence to prove three conditions: that an effective superior-subordinate relationship existed; that the commander knew or had reason to know that his subordinate was committing a crime; and that the commander failed to take all reasonable steps to prevent or punish

such acts”⁴⁶⁹. Since Tunisia is a party to the Rome Statute, the Tunisian criminal code should be amended, so as to incorporate the crime of command responsibility. The incorporation of the command responsibility crime within the Tunisian criminal code would serve a very important transitional justice purpose. For instance, only through the introduction of the command responsibility crime within the Tunisian criminal code could superior officers be held responsible for the abuses perpetrated by the lower-ranking officers operating under their behest, thus fostering social reconciliation in the country⁴⁷⁰.

3.3.4 Lustration of Public Officials

Two were the main lustration measures that were adopted by the Tunisian Interim Governments between January 2011 and October 23, 2011.

First, a judicial decision was taken in March 2011, pursuant to which Ben Ali’s party, the RCD, was disbanded, and the RCD’s assets, including the RCD’s headquarter were freezed by the Interim Government headed by Essebsi. This decision was adopted in the aftermath of the Kasbah 1 and Kasbah 2 demonstrations; the Kasbah 1 and Kasbah 2 demonstrations, as it has been briefly described above, were two waves of revolts that had been sparked by the appointment of Muhammad Ghannouchi, who had acted as Prime Minister under Ben Ali’s regime between 1999 and 2001, as President of the Tunisian Interim Government in January 2011. The Kasbah 1 and Kasbah 2 revolts pushed Ghannouchi to give up his mandate in February 2011⁴⁷¹.

The second lustration measure was adopted in March 2011 as well. Essebsi’s Interim Government set-up the Commission on Political Reform, which was led by Constitutionalist Yadh Ben Achour, and which was entrusted with formulating a new electoral law to be applied in the context of the October 23, 2011 NCA elections. The Commission came up with an electoral law, Decree No. 35, which foresaw that three groups of citizens were not eligible to stand as candidates at the October 23, 2011 NCA elections. The first group included those Tunisian citizens who had acted as civil servants under Ben Ali’s regime; the second group included all of those Tunisian citizens who had been RCD

⁴⁶⁸Human Rights Watch, *Flawed Accountability: Shortcomings of Tunisia’s Trials for Killings during the Uprising*, 12 January 2015, cit., p. 35. Available at: <http://www.refworld.org/docid/54b4ea044.html>

⁴⁶⁹ Ivi, pp. 35-36

⁴⁷⁰ Ivi, p. 36

⁴⁷¹Kora Andrieu, ‘Confronting the Dictatorial Past in Tunisia: Human Rights and the Politics of Victimhood in Transitional Justice Discourses Since 2011’, *Human Rights Quarterly*, 38 (2016), cit., p. 274

members, while the third group included “those who called for Ben Ali’s reelection in 2014”⁴⁷². Three main issues were raised by Decree No. 35. First, this Decree seriously infringed the Principle of nonretroactivity, as under Ben Ali’s regime, the Tunisian citizens belonging to the RCD could not be deemed to be acting illegally, pursuant to the Tunisian Criminal Code which was in force at the time. Furthermore, under Ben Ali’s regime, “membership in the RCD was often imposed externally”, meaning that it was a prerequisite to benefit from many public services, such as free public education, free transportation and healthcare⁴⁷³. Second, “the High Commission on Political Reform, which was tasked with implementing political exclusion, failed to notify banned persons”, and finally “the Commission failed to establish a process that would allow individuals to challenge their exclusion”⁴⁷⁴. It is thus possible to conclude that Decree No. 35 “resembled more a purge or witch-hunt than an actual vetting process in a fair transitional justice framework”, as it prevented any former members of the Ben Ali regime or any RCD members to stand as candidates at the NCA elections, without first assessing who, among the former regime members and RCD members, could actually be held liable for the perpetration of human rights abuses⁴⁷⁵.

3.4 Second phase of the Tunisian Transitional Justice process (from October 23, 2011 onwards)

The 2011 Tunisian elections were won by the Ennahda Party, which however did not obtain such an overwhelming majority to form a government, but rather needed to form coalitions with other parties. A National Unity Government thus emerged, which was “a coalition between the Islamists, the Republican Congress (Moncef Marzouki) and Ettakatol (Mustapha Ben Jaatar). This coalition government was better known as the Troika”⁴⁷⁶. A Law Decree was passed by the 2011 Coalition Government, which mandated the NCA to enact a transitional justice Organic Law; in order to fulfill this purpose, the NCA set-up a Ministry of Human Rights and Transitional Justice in 2012. Twenty-four National Consultations were held all around Tunisia by the Ministry of Human Rights and Transitional Justice, during which civil society organizations and victims’ organizations were called upon to express their preferences on the contents of the future transitional justice law. The final organic law on transitional justice was devised on the ground of the CSOs’ and victims’ organizations’ preferences. The Organic Law on Establishing and Organizing Transitional Justice was finally approved by the NCA on

⁴⁷² Christopher Lamont, ‘Transitional Justice and the Politics of Lustration in Tunisia’, *Middle East Institute*, (2013). Available at: <http://www.mei.edu/content/transitional-justice-and-politics-lustration-tunisia>

⁴⁷³ Kora Andrieu, ‘Confronting the Dictatorial Past in Tunisia: Human Rights and the Politics of Victimhood in Transitional Justice Discourses Since 2011’, *Human Rights Quarterly*, 38 (2016), cit., p. 279

⁴⁷⁴ Christopher Lamont, ‘Transitional Justice and the Politics of Lustration in Tunisia’, *Middle East Institute*, (2013), cit. Available at: <http://www.mei.edu/content/transitional-justice-and-politics-lustration-tunisia>

⁴⁷⁵ Kora Andrieu, ‘Confronting the Dictatorial Past in Tunisia: Human Rights and the Politics of Victimhood in Transitional Justice Discourses Since 2011’, *Human Rights Quarterly*, 38 (2016), cit., p. 279

⁴⁷⁶ Ivi, p. 282

December 14, 2013. Pursuant to this Organic Law, the Truth and Dignity Commission (TDC) was set-up⁴⁷⁷. It is important to notice that in order to enact the Organic Law on Establishing and Organizing Transitional Justice and to organize National Consultations around the country, Dilou relied upon the expertise and guidelines of such international think tanks as the International Center for Transitional Justice, and of such international actors as the United Nations Development Program (UNDP). Furthermore, Dilou drew extensively from the transitional justice mechanisms that had been implemented overseas, such as the Latin American and South African transitional justice processes. The result of Dilou's reliance upon international transitional justice practices was that within the Organic Law that was finally drafted, Tunisian citizens' requests for economic and social justice, "that centered around access to jobs, unemployment and inequality, which betrayed a strong developmental focus, were filtered into more traditional legal frameworks that centered around violations of civil and political rights such as police abuses and violations of due process"⁴⁷⁸. After having illustrated the procedures through which the Organic Law was adopted, this paragraph will illustrate the contents of the Organic Law on Establishing and Organizing Transitional Justice in three main parts: first, the general mandate and the composition of the TDC will be analyzed; second, the specific tasks assigned to the TDC with respect to redressing ESR violations will be explored, and finally, the mandate of the Specialized Judicial Chambers foreseen by the Organic Law will be described.

3.4.1 General mandate and composition of the TDC

This sub-paragraph will focus on the general mandate and composition of the TDC. The TDC was composed of fifteen independent members, who were appointed for a term of four years by a specific committee of the NCA. They were chosen by the committee "from 288 valid applications among persons who were never involved politically and had a reputation for neutrality, independence and impartiality"⁴⁷⁹. The NCA committee uploaded the list of the TDC members who had finally been selected on the NCA website, so as to enable any Tunisian citizen to challenge the appointments made by the committee. Nevertheless, the citizens' "objections" were not taken into account by the committee, "the list was not widely disseminated and the law allowed for no right of appeal on the final selection"⁴⁸⁰. In June 2014 the NCA committee finally set-up the TDC, and Sihem Ben Sedrine, who had for long worked as a journalist and had strongly opposed to the Ben Ali regime, was appointed as the leader of the TDC. The Commission was supposed to begin carrying-out its mandate within six months from its establishment. In the meantime, the TDC members were coached to deal with transitional justice cases, they hired employees who would be in charge of the investigative activity,

⁴⁷⁷ Ibidem

⁴⁷⁸ Christopher Lamont & Hannah Pannwitz, 'Transitional Justice as Elite Justice? Compromise Justice and Transition in Tunisia', *Global Policy*, 7 (2016), cit., p. 280

⁴⁷⁹ Kora Andrieu, 'Confronting the Dictatorial Past in Tunisia: Human Rights and the Politics of Victimhood in Transitional Justice Discourses Since 2011', *Human Rights Quarterly*, 38 (2016), cit., p. 284

⁴⁸⁰ Ibidem

they set-out the rules of procedure by which they would abide when carrying out their mandate, they drafted the forms to submit to victims and witnesses, and they engaged with a huge variety of stakeholders. The first witnesses and victims were summoned by the TDC in December 2014⁴⁸¹.

As far as the TDC's mandate was concerned, the TDC was in charge of providing an overall account of the human rights violations which had been committed on the Tunisian territory between July, 1 1955 and December 2013, which is the date on which the Organic Law was promulgated. Moreover, the TDC was entrusted with dealing with "issues of reparations, accountability, institutional reform, vetting, collective memory, and national reconciliation"⁴⁸². In order for the TDC to detect cases of human rights violations, the TDC mostly relied upon victims' and witnesses' statements, "with the goal of creating a comprehensive database of human rights violations" (ibidem, p. 283). Among the investigative powers conferred upon the TDC by the Organic Law were the power to obtain data from the public administration, the power to call upon witnesses to disclose evidence, and the powers to "access public archives, to organize confidential or public hearings, ...and to have access to the relevant files in the tribunals"⁴⁸³. Furthermore, action could be taken by the TDC to safeguard victims' and witnesses' personal safety, and the TDC was allowed to have field inspections and to request forensic examinations"⁴⁸⁴. Finally, the TDC was conferred upon the power to settle disputes related to ESR violations or corruption crimes, through an arbitration committee. In case the alleged perpetrators of human rights abuses revealed all the truth about the violations they had committed, they could be granted pardon, "with the agreement of the victim"⁴⁸⁵.

When analyzing the contents of the Organic Law on Establishing and Organizing Transitional Justice, it is essential to focus on the definition of "victims" foreseen by the Organic Law. Pursuant to the Organic Law, the victims that could go before the TDC included "any region that has been systematically marginalized or excluded"⁴⁸⁶. This broad definition of "victims" allowed many regions of Tunisia, such as Kasserine, Gafsa or Sidi Bouzid, which had lagged behind in terms of socio-economic progress due to the central government's unwillingness to foster growth in those regions, to claim their right to "collective reparations or affirmative action programs"⁴⁸⁷. Since its establishment, the TDC has already heard three thousand cases⁴⁸⁸.

The establishment of the TDC was met with great satisfaction by many Ennahda members. In particular, Beya Jouadi, who was one of Ennahda's NCA members, and Labidi, who was the Ennahda

⁴⁸¹ Ivi, pp. 284-285

⁴⁸² Ivi, p. 282

⁴⁸³ Ivi, p. 283

⁴⁸⁴ ibidem

⁴⁸⁵ ibidem

⁴⁸⁶ ibidem

⁴⁸⁷ ibidem

⁴⁸⁸ ibidem

Deputy speaker at the NCA voiced their satisfaction with the TDC. According to Beya Jouadi, the TDC could help acknowledge all of the human rights violations that had been perpetrated in the past. For instance, Jouadi stated that the TDC could help “reclaim national memory and rewrite history”⁴⁸⁹. According to Labadi, instead, the TDC could play a very important role in terms of fostering national reconciliation. Indeed, the Deputy Speaker claimed that the TDC could help “cross the bridge between a divided and united society, a society in turmoil and society that was serene and at peace in mind”⁴⁹⁰.

3.4.2 The TDC and redress for ESR violations

Pursuant to the Organic Law, by means of an Arbitration and Reconciliation Committee chaired by a financial expert, the TDC has the power to settle disputes concerning ESR violations. This subparagraph will describe the power of this Arbitration and Reconciliation Committee, as well as some of the issues that the inclusion of ESR concerns within the TDC’s mandate raises.

As far as the Arbitration Committee’s arbitral powers in ESR matters are concerned, whoever has undergone an ESR breach may bring a case before the TDC, thus activating the TDC’s “arbitral function”. More specifically, the category of victims that can ask the TDC to arbitrate an ESR dispute includes “any individual, group or legal entity having suffered harm as a result of a violation”⁴⁹¹. This broad definition of victims implies that also the state can be a victim of ESR violations, thus being entitled to bring an ESR dispute before an Arbitration Committee. Moreover, the Organic Law provides that “the state will be party to all disputes presented to the committee, and in cases of financial corruption relating to public funds the state must approve the request”⁴⁹².

With respect to the arbitral committee’s powers, the arbitration committee “has broad quasijudicial powers, including the power to request information or documents that cannot be refused on grounds of ‘professional secrecy obligations’, to order public hearings and to undertake precautionary measures to preserve documents that are at risk of being destroyed”⁴⁹³. Furthermore, the Arbitration Committee has the power to issue an arbitral award “that suspends litigation or execution of a sentence provided that the terms of the judgment are implemented”⁴⁹⁴. In particular, pardon can be granted by the Arbitral Committee to those ESR violators that explicitly recognize to have breached ESR, and who “offer a clear apology”⁴⁹⁵.

⁴⁸⁹ Christopher Lamont & Hannah Pannwitz, ‘Transitional Justice as Elite Justice? Compromise Justice and Transition in Tunisia’, *Global Policy*, 7 (2016), cit., p. 280

⁴⁹⁰ *ibidem*

⁴⁹¹ Isabel Robinson, ‘Truth Commissions and Anti-Corruption: Towards a Complementary Framework?’ *International Journal of Transitional Justice*, 9 (2015), cit., p. 45

⁴⁹² *Ivi*, pp. 45-46

⁴⁹³ *Ivi*, p. 46

⁴⁹⁴ *ibidem*

⁴⁹⁵ *ibidem*

After having described the functioning of the TDC's arbitral committee, it is necessary to focus on some of the main issues which may be raised by the incorporation of ESR concerns into the TDC's mandate. First, Robinson feared that by incorporating ESR issues into the TDC's mandate, the TDC may get overwhelmed with cases to deal with, and it may ultimately get paralyzed. This concern was also raised by the Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence, according to whom independent institutions should be set-up, "with the professional capacities, and specialization for investigating financial files and settling individual corruption cases by arbitration"⁴⁹⁶. Second, Robinson raised the concern that too much attention may be paid to disputes related to ESR breaches by the Arbitral Committee, while cases concerning violations of civil and political rights may be neglected⁴⁹⁷.

3.4.3 Specialized Judicial Chambers

Pursuant to the Organic Law, Specialized Judicial Chambers would have to be set-up in Tunisia to foster redress for serious human rights abuses. This sub-paragraph will analyze the composition as well as the jurisdiction of the Specialized Judicial Chambers.

Pursuant to Article 8 of the Organic Law on Establishing and Organizing Transitional Justice, "within the Courts of first instance of various regions", the Tunisian Government should set-up Specialized Judicial Chambers by means of a decree; the judges sitting in these Specialized Judicial Chambers should be coached to deal with transitional justice cases, and they ought to be selected among "those who have never participated in trials of a political nature"⁴⁹⁸.

As far as the Specialized Judicial Chambers' jurisdiction is concerned, cases could be brought by individuals before these Chambers, concerning the breach of human rights obligations stemming from the international human rights treaties to which Tunisia was a party, and which were specifically listed in Article 8 of the Organic Law. Moreover, the Specialized Judicial Chambers' jurisdiction could be triggered by the TDC, which could bring before the Specialized Judicial Chambers both cases related to civil and political rights breaches, such as "torture, sexual violence, and arbitrary detention", and cases concerning ESR breaches, such as public resources mismanagement, forced migration, "election fraud", and "financial corruption"; the TDC was also conferred upon the power to "reopen certain cases, and to transfer them to the Chambers if its investigations brought out important new evidence"⁴⁹⁹.

The Organic Law provisions concerning the Specialized Judicial Chambers' powers and jurisdiction raise two important legal problems. One of the issues posed by Article 8 of the Organic Law

⁴⁹⁶ *ibidem*

⁴⁹⁷ *ibidem*

⁴⁹⁸ Kora Andrieu, 'Confronting the Dictatorial Past in Tunisia: Human Rights and the Politics of Victimhood in Transitional Justice Discourses Since 2011', *Human Rights Quarterly*, 38 (2016), cit., p. 283

⁴⁹⁹ *Ivi*, pp. 283-284

is that the boundaries between the Specialized Judicial Chambers' competencies and the competencies of the "normal chambers within the courts system" are not explicitly regulated by Article 8, and this may give rise to overlapping jurisdiction problems⁵⁰⁰. For instance, when the Specialized Judicial Chambers were set-up within the eight Tunisian Courts of First Instance, many torture cases were "pending in various courts, most at the investigative level", and it was difficult to figure out which court was competent on resolving the cases at hand⁵⁰¹. The second problem was posed by Article 42 of the Organic Law on Establishing and Organizing Transitional Justice. Article 42 dealt with the ways in which the Specialized Judicial Chambers' jurisdiction can be triggered. According to Human Rights Watch, the main issue posed by Article 42 was that it breached the *Ne Bis In Idem* prohibition foreseen by Article 9 of the ICCPR, to which Tunisia is a party. As clarified by the Human Rights Committee in its General Comment No. 32, Article 14 (7) of the ICCPR forbids "bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence"⁵⁰². Article 42 of the Organic Law on Establishing and Organizing transitional Justice breaches this principle, as it foresees that those Tunisian individuals who have already been tried by a criminal court for a given human rights abuse may be subjected to another prosecution, for the same offence, before the Specialized Judicial Chambers if a case is brought before the Specialized Judicial Chambers by the TDC⁵⁰³.

3.5 Transitional justice through media reforms

The internet reforms carried-out by the Tunisian Internet Agency (ATI) in the aftermath of the fall of Ben Ali regime played a fundamental role in enhancing transitional justice in the country. Even if, at a first glance, transitional justice and internet reforms may seem to have nothing to do with each other, there is actually a close connection between transitional justice and internet reforms, as most of the goals entrenched in transitional justice processes can only be furthered by ensuring citizens' access to the internet; indeed, "the TJ literature addresses the need to allow avenues for citizens to make their concerns heard and to question authority...and more generally to build a robust democracy and engaged citizenry, which is assumed to include a healthy media environment as a 'fourth pillar' of democracy"⁵⁰⁴. In light of the important role that internet reforms can play in enhancing transitional justice, the internet reforms carried-out by the ATI in the aftermath of Ben Ali's overthrow deserve to be investigated. This analysis will be conducted as follows: first, the role played by ATI under the Ben

⁵⁰⁰ Human Rights Watch, '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>

⁵⁰¹ *ibidem*

⁵⁰² *ibidem*

⁵⁰³ *ibidem*

⁵⁰⁴ Christalla Yakinthou & Sky Croeser, 'Transforming Tunisia: Transitional Justice and Internet Governance in a Post-Revolutionary Society', 10 (2016), pp. 235-236

Ali regime will be explored, and then the paragraph will focus on the internet reform implemented by ATI in the aftermath of the regime's overthrow.

3.5.1 ATI's role under the Ben Ali regime

As far as the ATI's role under the Ben Ali regime was concerned, Yakinthou and Croeser have underlined that ATI's task mostly consisted in providing the Ben Ali regime's Ministry of Interior with the operational support and the technological expertise to implement the regime's censorship policies. In particular, as the two scholars have highlighted, "although the Ministry developed blacklists, manually filtered emails and engaged in other decisions about censorship and surveillance, the ATI was integral to this process, including through its development of in-house products for email filtering"⁵⁰⁵. The implication of this was that Tunisian citizens considered the ATI "as an important institution (albeit not the only one) responsible for implementing the dictatorship and, thus, implicated in the process of postconflict change"⁵⁰⁶.

The repression strategy that was put in place thanks to the digital and operational support provided by the ATI to Ben Ali's regime resulted in a series of human rights violations that "played an important role in sustaining the dictatorship"⁵⁰⁷. Indeed, the regime's censorship policy implemented through the ATI's support resulted in the conviction of several bloggers and journalists who had used the internet to criticize the regime. As an example, after blogger Zouhair Yahyaoui had called upon the Tunisian internet users to "vote on whether Tunisia was a republic, a kingdom, a zoo or a prison", he was convicted and tortured⁵⁰⁸. Other bloggers, such as Taoufik Ben Brik, were convicted as they had ranked Tunisia as "one of the most repressive countries towards bloggers and online activists" on an Internet site called *Global Voices*⁵⁰⁹. In light of these human rights violations that had resulted from the regime's repressive internet policy, redress needed to be fostered, and the best way to foster redress consisted in the adoption of a democratic internet governance reform. In this respect, two initiatives were launched by the ATI, which will be described in the sub-paragraph below.

3.5.2 ATI's transitional justice initiatives

Two were the main transitional justice initiative launched by the ATI in the aftermath of Ben Ali's overthrow. First, the ATI accepted to participate in many seminars which dealt with internet governance, during which it highlighted the importance of ensuring citizens access to the Internet, and it disclosed important information on how it had collaborated with the regime in curtailing freedom of expression and in developing censorship policies. For instance, during the international seminars in

⁵⁰⁵ Ivi, p. 240

⁵⁰⁶ ibidem

⁵⁰⁷ Ivi, p. 242

⁵⁰⁸ ibidem

⁵⁰⁹ Ivi, p. 243

which it participated, the ATI usually revealed vital information about how it had “worked under the regime, the companies that provided surveillance equipment to the agency and the challenges it faces today around pressure to continue censorship and surveillance”⁵¹⁰. Related to this, it is also worth noting that under the auspices of the ATI, “Tunisia has also joined the Freedom Online Coalition, a network of 23 governments committed to protecting freedom of expression, assembly and privacy online”⁵¹¹.

The second and most important transitional justice initiative launched by the ATI in 2013 consisted in setting-up the so-called 404 Lab; this initiative consisted in “the transformation of the former surveillance headquarters’ basement, where the regime kept its surveillance hardware, into a dual memorial/educative site”⁵¹². In doing so, the ATI gave rise to a public platform where it publicly acknowledged to have cooperated with Ben Ali in the repression of freedom of expression, it revealed to the Tunisian citizens which strategies had actually been put in place by the regime to surveil Tunisian internet users, it tabled debates with various stakeholders on how to reform media and internet governance, and it launched “global projects for other less-open societies”⁵¹³. This initiative can be deemed to be comparable to a truth-seeking process, as it represented a real commitment on the part of the ATI “to provide accountability for its role in the dictatorship’s machinery and engaging in efforts at restitution”⁵¹⁴.

⁵¹⁰ *Ivi*, p. 244

⁵¹¹ *ibidem*

⁵¹² *Ivi*, p. 245

⁵¹³ *ibidem*

⁵¹⁴ *ibidem*

Conclusion

Reiteration of the main research question and outline

In conclusion, this thesis has described the main mechanisms which were put in place in Libya and Tunisia in the aftermath of the Arab Spring, and it has attempted to evaluate to what extent these mechanisms have contributed to fostering redress for the human rights abuses that had been perpetrated in the two countries both under the authoritarian regimes and during the revolts. As the introduction and the main chapters of this thesis have underlined, the Libyan case and the Tunisian one are very different from each other for three main reasons. First, while in the Libyan case the democratic transition process that had begun in 2011 dramatically failed in 2014, after the elections of the Libyan House of Representatives, the outcome of the Arab Spring in Tunisia consisted in the realization of a democratic transition and in the adoption of a new constitution, which entrenches such rights as gender equality, in line with Western democratic constitutions. Second, while the Tunisian transitional justice process was steered by the domestic transitional institutions, in the Libyan transitional justice process, a very important role was played by such international actors as the International Criminal Court, which issued arrest warrants vis-à-vis Muammar Qadhafi, Saif-Al Islam Qadhafi, and Al-Senussi in 2011.

The thesis has been structured in the following way: the first chapter has provided the legal definition of the term “transitional justice”, and it has focused on the most recent theoretical debates which have surrounded the transitional justice concept. The second chapter has focused on the transitional justice mechanisms that were put in place in Libya in the aftermath of the Arab Spring; after having described how the democratic transition process failed in the country, the chapter focused on the transitional justice process implemented by the NTC and the GNC, as well as on the trial of Muammar Qadhafi, Saif Al-Islam Qadhafi and Al Senussi by the ICC, and it showed how all of these transitional justice mechanisms failed restoring accountability in the country. The final part of the chapter focused on some issues that the Libyan transitional authorities should have taken into account to boost the effectiveness of the Libyan transitional justice process. The third chapter has focused on transitional justice in Tunisia; after having described how successfully Tunisia achieved a democratic and a constitutional transition, the chapter has analyzed the transitional justice measures implemented by the Tunisian transitional governments, by assessing the extent to which they have contributed to fostering redress for human rights abuses. Then, the chapter has focused on the Truth and Dignity (TDC) and the Specialized Judicial Chambers that were set up in the aftermath of the election of the Tunisian National Constituent Assembly.

Hypothesis validation

At this point, it is necessary to assess whether the hypothesis that has been made in the introduction can be validated in the Libyan case. The transitional justice mechanism that was put in

place by the NTC pursuant to the 2012 Transitional Justice and National Reconciliation Law dramatically failed fostering redress for all of the human rights violations that had occurred in Libya, as it just targeted those human rights abuses that had been perpetrated under the Qadhafi regime, while leaving the abuses perpetrated at the hand of the Libyan rebels during the 2011 revolts unaddressed. The same problem was presented by the 2012 Law No. 38 on Transitional Justice Special Measures, which was passed by the NTC with the aim of pardoning all of the Libyan rebels that had fought in the revolts that had begun on February 17, 2010, by Law No. 13 on Political and Administrative Isolation, pursuant to which any Libyan citizen who had ever held a public office under the Qadhafi regime from September 1969 to October 2011 was to be barred from holding public offices again, or from standing as candidates at elections under the new Libyan institutional set-up, and by Law No. 29 of 2013, which was passed by the GNC, with a view to establish a Truth and Reconciliation Commission in charge of providing a full account of the crimes perpetrated in Libya under the Qadhafi regime from October 1969 till February 2011. With respect to the GNC's 2012 establishment of the Ministry for Families of Martyrs and Missing Persons, which was tasked with keeping records and acknowledging all of the victims of forced disappearances perpetrated under the Qadhafi regime, the failure of this measure was due to two main factors: first, only the forced disappearances crimes perpetrated under the Qadhafi regime were to be fostered redress by this Ministry, while no account was to be taken of the arbitrary detention crimes perpetrated by the Libyan rebels during the 2011 revolts. Second, the Ministry civil servants were unable to carry-out their mandate in such cities as Sabha and Benghazi, due to security threats. Finally, the ICC prosecutions vis-à-vis Muammar Qadhafi, his son, and Al-Senussi were ineffective in fostering redress for the human rights violations perpetrated during the revolts, as the Libyan transitional authorities (the NTC and the GNC) refused to collaborate with the ICC, and to surrender Saif Al-Islam Qadhafi to the ICC for prosecution. As these considerations can very well demonstrate, the hypothesis that I made in the introduction cannot be validated in the Libyan case.

At this point, it is necessary to assess whether the hypothesis of the thesis can be validated in the Tunisian case. The research I have undertaken clearly shows that, as far as the Tunisian truth-seeking processes are concerned, the hypothesis of the thesis can be fully validated, meaning that the Tunisian truth-seeking bodies were effective in dealing with the human rights abuses falling within their mandates. For instance, the Inquiry Commission on Crimes and Abuses committed during the Revolution which had been established by Muhammad Ghannouchi in 2011 succeeded in documenting that 2489 Tunisian citizens had undergone police violence during the 2011 revolts, and in highlighting how many of these abuses had resulted in casualties. The 2011 Inquiry Commission on Corruption and Embezzlement managed to hear ten thousand cases concerning the economic and social rights violations and the corruption crimes perpetrated under the Ben Ali regime; the Truth and Dignity Commission (TDC) set-up in 2014, despite its very recent establishment, has already managed to hear several cases

of human rights abuses. For instance, three thousand cases of human rights abuses have already been heard by the TDC since its establishment. Unlike in the case of the Tunisian truth-seeking processes, the hypothesis of the thesis cannot instead be validated with regards to the reparations measures which were put in place in Tunisia in March 2011. For instance, Decree Law No. 1, pursuant to which all of those citizens who had been convicted from 1989 to 2011 based on their political orientation had to be pardoned, they had to receive financial compensation and be hired in the Tunisian public sector was not an effective vehicle to foster redress for human rights abuses. For instance, as a result of this decree, many Jihadist members of the Salafist group *Ansar-el Charia*, who had been convicted under the Ben Ali regime, ended up being freed and recruited in the Tunisian public sector. Moreover, since the Tunisian transitional government had not accurately estimated how many citizens would be entitled to reparations, many beneficiaries ended up not getting any financial resources. The second Tunisian reparations scheme, which was put in place in March 2011 by a law decree, and which provided that symbolic and financial reparations had to be addressed to those Tunisian citizens who got injured during the 2011 revolts, and to the families of those citizens who had passed away during the revolts was not effective either. For instance, each recipient was allotted the same sum of money, regardless of how seriously s/he had got injured, and regardless of the medical costs that each recipient would have to incur for the rest of his/her life. With regards to the Tunisian military prosecutions of those police forces who violently crushed the 2011 revolts, the hypothesis of the thesis cannot be validated either. For instance, due to several investigative shortcomings, the Tunisian military judges failed identifying and punishing those police forces who had used violence against the anti-regime demonstrators. Finally, the hypothesis of the thesis cannot even be validated in the case of the Tunisian lustration process. For instance, the Tunisian lustration process cannot be deemed to be an effective transitional justice mechanism, as it infringed upon the human rights of the lustrated individuals. In particular, the electoral law that was enacted by the Commission for Political Reform in 2011, and which was supposed to be applied in the NCA elections, provided that all of those Tunisian citizens who had either been RCD members, or had acted as civil servants under the Ben Ali regime could not stand as candidates in the RCD elections. This measure seriously infringed the principle of non-retroactivity, as under the Ben Ali regime, the Tunisian citizens belonging to the RCD could not be deemed to be acting illegally, pursuant to the criminal code which was in force at the time. Moreover, no system was foreseen by this electoral law, pursuant to which the lustrated citizens could appeal against their exclusion.

It is possible to conclude, that while in the Libyan case the hypothesis of the thesis cannot be validated at all, in the Tunisian case it can only be validated in part.

This thesis may have given three important contributions to Comparative Public Law future research. First, this thesis has attempted to analyze the most recent constitutional developments in North Africa. For instance, this thesis has analyzed the 2014 Tunisian constitutional text, by focusing

specifically on the Tunisian constitution's catalogue of rights, and by showing how the Tunisian constitutional provisions on women's rights and economic and social rights compare with the constitutional provisions of other Northern African states, such as Morocco.

Second, this thesis has attempted to trace the main features of the Libyan institutional paralysis, and to identify the main actors that have emerged on the Libyan political scenario after the fall of Qadhafi's regime, as well as the role played by international institutions such as the United Nations in those political contexts in which democratic transitions have failed.

Finally, this thesis has attempted to show how those transitional justice processes that are steered by international organizations, such as the International Criminal Court, which played a relevant role in prosecuting members of the Qadhafi regime, differ from the transitional justice processes which are entirely driven by domestic transitional institutions.

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Summary

INTRODUCTION

This thesis has attempted to answer the following research question: Which transitional justice mechanisms were put in place in Libya and Tunisia in the aftermath of the Arab Spring? To what extent were they effective in fostering redress for the human rights abuses that had been perpetrated in the two countries under the authoritarian regimes and during the revolts?

The following hypothesis has been made: the transitional justice mechanisms that were put in place in Tunisia and in Libya in the aftermath of the Arab Spring have been effective in fostering redress for the abuses perpetrated against the civilian population under the authoritarian regimes and during the 2011 Arab revolts. This thesis has attempted to validate this hypothesis.

CHAPTER 1: Transitional Justice Theoretical Background

This chapter has dealt with the main legal features of the transitional justice process. Among the issues which have been covered by this chapter are the definition of the term “transitional justice” and the description of the main transitional justice mechanisms, as provided by the 2010 United Nations Secretary General (UNSG) Guidance Note, the three main historical phases of transitional justice identified by Rudi Teitel, and the new debates surrounding the study of transitional justice, namely, the possible incorporation of economic and social rights (ESR) and gender concerns within the transitional justice mandate.

Transitional justice definition and mechanisms

The term “transitional justice” was first used in the 1990s in two Conferences that took place respectively in the US and in Austria. The first Conference was the Conference on Political Justice and Transition to the Rule of Law in Central and Eastern Europe, which took place at the University of Chicago in 1991, while the second conference was the Conference on Justice in Times of Transition, which was held in Salzburg in 1992⁵¹⁵. The aim of these two Conferences consisted in analyzing to what extent the Eastern European countries which had just started their transition to democracy could take advantage of the democratic transition experiences of Latin American countries such as Argentina and Chile, and transitional justice was viewed as one of the main components of the democratic transition process⁵¹⁶. Building upon these academic efforts, Ruti Teitel distinguished between three main phases in the historical evolution of transitional justice. The first phase took place in the immediate aftermath of World War II (WWII), and it was characterized by the establishment of the International Military Tribunal of Nuremberg by the winners of WWII, for the purpose of prosecuting the Nazi Criminals

⁵¹⁵ William Schabas, ‘Transitional Justice and the Norms of International Law’, *Japanese Society of International Law*, 2011, p. 1, available at: http://www.jsil.jp/annual_documents/2011/fall/schabas_trans_just911.pdf

⁵¹⁶ *ibidem*

who had perpetrated crimes against humanity, crimes of war and crimes against peace during WWII. The second phase in the historical evolution of the transitional justice process took place in the mid-1980s, when a transition to democracy occurred in such Latin American countries as Chile and Argentina, and it was mostly characterized by the recourse to truth commissions and domestic trials as vehicles to foster transitional justice⁵¹⁷. The third phase of transitional justice occurred in the 1990s, after the world had been hit by a significant number of civil conflicts; this phase was mostly characterized by the emergence of international criminal tribunals, such as the International Criminal Court (ICC), which was founded in 1998, pursuant to the Rome Statute, for the purpose of trying individuals responsible for war crimes, crimes against humanity, crimes of genocide and crimes of aggression.

The first legal definition of the term “transitional justice” was provided by a 2010 United Nations Secretary General (UNSG) Guidance Note. Pursuant to the 2010 UNSG Guidance Note, the term “transitional justice” refers to “both judicial and non-judicial processes and mechanisms, including prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations”.⁵¹⁸ The main objective of transitional justice mechanisms consists in fostering redress for the human rights violations perpetrated under the previous regime, with a view to ensuring accountability, justice and societal reconciliation.⁵¹⁹ A legal definition of the term “social reconciliation” does not exist; therefore, it was necessary to rely upon a sociological definition provided by Crossley-Frolick, according to whom, the term “social reconciliation” refers to “the condition under which citizens can once again trust one another as citizens. That means that they are sufficiently committed to the norms and values that motivate their ruling institutions; sufficiently confident that those who operate those institutions do so also on this basis; and sufficiently secure about their fellow citizens’ commitment to abide by these norms and values”.⁵²⁰ After having provided the main definition of the term “transitional justice”, all of the main transitional justice mechanisms set-out by the UNSG Guidance Note will be analyzed in depth.

Among the main judicial transitional justice mechanisms set-out by the UNSG Guidance note, one can find prosecutions of former regime officials who are liable for having perpetrated breaches of international humanitarian law and international human rights law. In particular, the Guidance Note stresses that Prosecution initiatives need to be carried-out in an impartial way, in order for them to be

⁵¹⁷Ruti G. Teitel, ‘Transitional Justice Genealogy’, *Harvard Human Rights Journal*, 16(2003), pp. 72-74

⁵¹⁸ United Nations Secretary General Guidance Note (2010). *United Nations Approach to Transitional Justice*. Available at: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf; p. 2

⁵¹⁹Sweeney, A., ‘Restorative Justice and Transitional Justice at the ECHR’, *International Criminal Law Review*, 12(2012), p. 317

⁵²⁰ Kate A. Crossley-Frolick, ‘The European Union and Transitional Justice: Human Rights and Post-Conflict Reconciliation in Europe and Beyond’, *Contemporary Readings in Law & Social Justice*, p. 50

deemed as “credible” and “legitimate”, and that the main actors who are responsible for prosecuting former regime members are states⁵²¹.

Among the non-judicial transitional justice mechanisms foreseen by the Guidance Note, one can find truth-seeking processes. Schlunck has formulated four main criteria that truth commissions have to fulfill, in order to qualify as such. First, truth commissions need to focus on human rights breaches that were perpetrated in the past; second, truth commissions should provide a general overview of the human rights violations which were perpetrated during a specific span of time, rather than focusing on a single “specific event in the past”; third, truth commissions can only be in place for a limited time span, and upon completing their mandate, they are supposed to issue a communication concerning the results of their investigations, and finally, truth commissions are “vested with a certain authority”⁵²². Truth Commissions, which are usually composed of both judicial and non-judicial personnel, are tasked with providing an overall account of the human rights violations which were perpetrated under the former regime, with a view to identifying the main human rights violators, the patterns of violations, and the victims of the human rights abuses. In an attempt to carry-out their mandate, truth commissions can perform a series of activities, including the launching of awareness programs, the organization of seminars during which human rights violations perpetrators are called upon to reveal all the truth about the human rights abuses they have carried out, and the preparation of studies highlighting what factors have actually facilitated the perpetration of human rights violations under the former regime⁵²³.

A further non-judicial transitional justice mechanism foreseen by the UNSG Guidance note consists in reparations schemes. Reparations schemes “can include monetary compensation, medical and psychological services, health care, educational support, return of property or compensation for loss thereof, but also official public apologies, building museums and memorials, and establishing days of commemoration”⁵²⁴. Among the main international law documents which regulate the use of reparations programs as a transitional justice mechanism is the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which is a resolution passed by the UNGA on December 16, 2005; being a UN General Assembly Resolution, this document has the status of soft law, meaning that it lacks enforcement mechanisms, as Garcia-Godos has underlined⁵²⁵. Pursuant to the Basic Principles, all of the victims of international human rights law and international humanitarian law

⁵²¹United Nations Secretary General Guidance Note (2010). *United Nations Approach to Transitional Justice*, cit., p. 7. Available at: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf

⁵²² Angelika Schlunck, ‘Truth and Reconciliation Commission’, *Journal of International Law and Comparative Law*, 4 (1998), p. 417

⁵²³United Nations Secretary General Guidance Note (2010). *United Nations Approach to Transitional Justice*. Available at: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf; cit., p.8

⁵²⁴ Ivi, p. 8

⁵²⁵Jemima Garcia-Godos, ‘Victim Reparations in Transitional Justice-What Is at Stake and Why’, *Nordisk Tidsskrift for Menneskerettigheter*, 111(2008), p. 124

violations need to be addressed a reparations program to be compensated for the harm they have suffered, an “equal and effective access to justice” must be ensured to all of the victims of international human rights and international humanitarian law violations, and data must be available to the public opinion, concerning the human rights abuses that have been perpetrated as well as the reparations system that has been put in place to foster redress⁵²⁶. Among the main forms of reparations foreseen by the Basic Principles are “restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition”⁵²⁷.

A fourth transitional justice initiative foreseen by the UNSG Guidancel Note, which is judicial in nature, consists in carrying out institutional reforms, namely in setting up institutions that work in accordance with democratic principles and the rule of law, and which aim at promoting a long-lasting peace, and at making the perpetration of other human rights breaches in the future impossible⁵²⁸. The most important type of institutional reform initiatives consists in lustration measures, which consist in preventing all of those former regime members who have committed human rights violations from occupying administrative or other types of public positions under the new institutional set up⁵²⁹.

A final transitional justice mechanism foreseen by the UNSG Guidance Note consists in holding national consultations, which consist in gathering the local communities which will be targeted by the transitional justice process in a national dialogue, in which they will be asked to express their preferences concerning the transitional justice mechanisms to be put in place. The aim of National Consultations consists in ensuring that the transitional justice process is going to be tailored to the needs of the local communities.

CHAPTER 2: Transitional justice in Libya

The second chapter of this thesis has focused on the extent to which the transitional justice mechanisms which were put in place in Libya in the aftermath of Qadhafi’s fall have actually been effective in dealing with the human rights abuses that had been committed both under Qadhafi’s regime and during the 2011 revolts. The first paragraph of this chapter has mostly concentrated on the social and political actors who had played a role under Qadhafi’s regime, and on the social and political actors that instead flourished in the aftermath of Qadhafi’s overthrow, and contributed to shaping post-Qadhafi’s Libyan politics. Among the actors that played a fundamental role under Qadhafi’s Libya, the most important ones are tribal groups, which by the 1970s had already acquired control of the most important sectors of the Libyan economy as well as of the Libyan public administration. Among the

⁵²⁶ *ibidem*

⁵²⁷ *ibidem*

⁵²⁸ United Nations Secretary General Guidance Note (2010). *United Nations Approach to Transitional Justice*. Available at: https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf; cit., p. 9

⁵²⁹ Los, M., ‘Lustration and Truth Claims: Unfinished Revolutions in Central Europe’, *Law & Social Inquiry*, 20 (1995), cit., p. 121

actors who were instead opposed by Qadhafi were the Muslim Brothers and the Libyan Islamic Fighting Group, whose most prominent members were arrested in the 1990s and freed only in 2006. In 2011, as soon as Qadhafi's regime had fallen, a multitude of actors flourished on the Libyan political system, including the political forces that ran for the 2012 Grand National Assembly (GNA) elections, and the various armed groups, such as Revolutionary Brigades, Unregulated Brigades, Pro-Revolutionary Brigades and militia groups. Furthermore, among the actors that played a relevant role during the revolts were the tribal groups, which were involved in conflict resolution, and such ethnic groupings as the Amazigh, the Tuareg and the Tubu, whose participation in the anti-regime demonstrations mostly depended on the extent to which they sympathized with Qadhafi.

The second paragraph of chapter 2 has focused on the causes of the Arab revolts in Libya, on the main events that marked the beginning of the Arab revolts, and on the democratic transition process that started in 2011, but dramatically failed in 2016. Among the reasons why the revolts against Qadhafi's regime had started were people's dissatisfaction with Qadhafi's misuses of public funds, the massive human rights violations perpetrated by Qadhafi against his political opposers, and the foreign policy choices that had been made by Qadhafi. As Decaro Bonella has underlined, the Arab revolts in Libya began on February 15, 2011; the event that triggered the protests was the arrest of Fathi Tarbel, who was a Tripolitanian lawyer who had represented the families of the 1200 victims of the 1996 Abu Selim prison revolts⁵³⁰. In February 21, 2011, the Libyan democratic transition process started; the Libyan democratic transition process was articulated into four main phases, with the last phase occurring in 2016 and marking the dramatic failure of the Libyan democratic transition process. On February 26, 2011, the National Transitional Council (NTC) was set up in Benghazi by some rebel groups and some defectors of the Qadhafi regime, and the first phase of the Libyan democratic transition process officially started. The NTC proclaimed itself as the only legitimate representative of the Libyan Republic in the first week of March 2011. Its aim consisted in carrying out the anti-Qadhafi demonstrations, until achieving the full liberation of the country from the regime. The second phase of the Libyan transition to democracy took place on July 7, 2012, when the Grand National Council (GNC) elections took place, and the GNC's mandate was supposed to last until June 25, 2014. On August 8, 2012, power was transferred from the NTC to the GNC. The third phase of the Libyan transition to democracy took place on June 25, 2014, when the elections of the House of Representatives took place. The voting turnout of these elections was very low, as only 18% of the Libyan citizens had cast their vote, and this low voting turnout sparked a series of protests, aimed at challenging the legitimacy of the elections; because of the disorders that were taking place in Tripoli, the House of Representatives had to relocate to Tobruk, where they formed a coalition government with Operation Dignity, led by General

⁵³⁰Carmela Decaro Bonella, *Itinerari costituzionali a confronto: Turchia, Libia, Afghanistan* (Roma: Carocci Editore, 2013), p. 230

Haftar. In the meantime, many former GNC representatives challenged the “legitimacy” of the newly elected House of Representatives, and they re-established the GNC in Tripoli as a competing authority, which was renamed as National Salvation Government. Two competing Libyan authorities thus came to the forth: the Tobruk-based Parliament and Executive on the one hand, which were recognized as the legitimate Libyan institutions, and the Tripoli-based institutions on the other hand, which instead did not enjoy any formal recognition. On July 11, 2015, the fourth phase of the Libyan transition to democracy started, when, under the umbrella of the UN, the Peace and Reconciliation Agreement was concluded in Skhirat, Morocco, for the purpose of overcoming the Libyan institutional crisis that had started in 2014. Under the Agreement, the Tobruk-based House of Representatives was supposed to be the legitimate Libyan legislative organ, and a Government of National Accord had to be set up in Tripoli, and it would need the confidence of the House of Representatives in order to be put in place. On August 22, 2016, the Government of National Accord did not get the confidence of the House of Representatives, and the UN thus decided to solve the Libyan institutional crisis in an ambivalent way, by “recognizing al-Serraj Presidential Council as the highest authority in the country while at the same time considering the Chamber of Representatives in Tobruk as the only legislative authority”⁵³¹. Since then, Haftar has hindered the reunification of the country, by “contributing to paralyze the Tobruk Parliament, the only one officially recognized by the International Community”⁵³², Libya has precipitated in a dramatic institutional paralysis, and the Libyan democratic transition process has dramatically failed.

The third paragraph of chapter 2 has gone to the core of the thesis, and it has analyzed the transitional justice measures that had been put in place by the NTC, and their effectiveness in fostering social reconciliation in the country. Two main transitional justice mechanisms were put in place by the NTC. The first of these transitional justice mechanisms was Law No. 38 of 2012 on Transitional Justice Special Measures, pursuant to which all of those Libyan citizens who had committed crimes during the revolts that had started on February 17, 2011 were to be pardoned. This piece of legislation has raised a significant issue, namely it contributed to granting impunity to all of those Libyan rebels who had committed crimes against humanity during the revolts, and who had to be punished, in accordance with Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and with the Convention against Torture, to which Libya was a party, and it thus failed restoring justice to those Libyan victims who had undergone crimes against humanity during the revolts⁵³³. The second transitional justice mechanism that was adopted by the NTC was the 2012 Transitional Justice and National Reconciliation Law, which was aimed at putting in place a series of judicial, social and administrative measures to deal with the human rights abuses which had been

⁵³¹ Arturo Varvelli, *State-Building in Libya: Integrating Diversities, Traditions and Citizenship* (Rome: Reset-Dialogues on Civilizations, 2017), cit., p. 140

⁵³² *Ivi*, p. 138

⁵³³ Kamal M. Showaia, ‘Transitional Justice in Libya: Between Current Challenges and Future Prospects’, *Macquarie Law Journal*, 13 (2014), cit., p. 65

perpetrated under Qadhafi's regime, from September 1969 to February 2011. This piece of legislation was problematic from the point of view of fostering social reconciliation, as it left all of those human rights abuses that had been perpetrated during the 2011 revolts unaddressed⁵³⁴.

The fourth paragraph of Chapter 2 has mostly focused on the transitional justice measures which were put in place by the GNC, and it has analyzed the extent to which these measures have managed to foster social reconciliation. In particular, three were the most important transitional justice measures that had been put in place by the GNC. The first one consisted in the 2012 establishment of the Ministry for Families of Martyrs and Missing Persons, which was in charge of restoring justice to the families of all of those citizens who had been subjected to forced disappearance from 1969, which is the year in which Qadhafi acquired power in Libya, until October 23, 2011, which is the day on which the Qadhafi regime was finally overthrown and Libya was fully liberated. Two main issues hindered the effectiveness of this transitional justice mechanism. First, the Ministry could operate only in those cities which had kept records of the forced disappearances that had taken place under their Qadhafi regime, which entailed that the Ministry could not carry-out its mandate in such Libyan cities as Sabah or Benghazi. Second, since in many Libyan cities such as Sabah or Misrata the Ministry civil servants' personal safety would have been endangered, in those cities the Ministry did not carry out its mandate, thus failing to address the forced disappearances crimes that had been perpetrated in those cities⁵³⁵. The second transitional justice mechanism that was adopted by the GNC was Law No. 13 of 2013 on Political and Administrative Isolation, pursuant to which all of those Libyan citizens who had held a public position under Qadhafi's regime would be prevented from holding any public posts or from standing as candidates at elections under the new Libyan institutional set-up. Two were the main issues raised by this piece of legislation. First, this piece of legislation targeted indiscriminately whoever had collaborated with Qadhafi, irrespective of any real involvement in the perpetration of human rights violations; furthermore, by preventing any former Qadhafi regime members from penetrating the new Libyan institutional set-up, "without adopting efficient and accurate criteria to firstly identify who the loyalists are, and secondly, to select their substitutes", this piece of legislation may have enabled "criminal groups to infiltrate into the new system"⁵³⁶. A third transitional justice mechanism adopted by the GNC was Law No. 29 of 2013 on Transitional Justice, pursuant to which a Truth and Reconciliation Commission had to be put in place to redress all of the human rights abuses that had been committed in Libya under Qadhafi's regime from October 1969 till February 2011, and the victims of such human rights abuses had to receive reparations. The main problem of this piece of legislation was that it

⁵³⁴ Ivi, p. 66

⁵³⁵ Christopher K. Lamont, 'Contested Governance: Understanding Justice Interventions in Post-Qadhafi Libya', *Journal of Intervention and Statebuilding*, 10 (2016), cit., p. 393

⁵³⁶ Kamal M. Showaia, 'Transitional Justice in Libya: Between Current Challenges and Future Prospects', *Macquarie Law Journal*, 13 (2014), cit., p. 68

sheltered the Libyan rebel groups who had committed human rights violations during the 2011 revolts, and it thus left all of those violations unaddressed.

The fifth paragraph of Chapter 2 has focused on the International Criminal Court (ICC)'s prosecution of Muammar Qadhafi, Saif al-Islam Qadhafi, and Al-Senussi for crimes against humanity. Following the UN Security Council (UNSC)'s referral of the Libyan situation to the ICC through Resolution No. 1970 of 2011, the crimes against humanity that the Libya security forces were alleged to have perpetrated from February 15, 2011 till the end of the revolts started being investigated by the ICC Prosecutor on March 3, 2011. In particular, "on 16 May, the Prosecutor applied to Pre-Trial Chamber I...for the issuance of arrest warrants against Muammar Gaddafi, his son Saif Al-Islam and Abdullah Al-Senussi for the crimes against humanity of murder and persecution based on political grounds"⁵³⁷. After having conducted thorough investigations, arrest warrants were filed against Al-Senussi, Muammar Qadhafi and Saif-Al Islam Qadhafi by the ICC Pre-Trial Chamber I on May 27, 2011⁵³⁸. The case against Muammar Qadhafi was terminated on November 22, 2011, after Muammar Qadhafi had passed away. Instead, as far as Saif al-Islam Qadhafi's case and Al-Senussi's case are concerned, the NTC challenged the ICC's jurisdiction on the two cases, respectively on May 1, 2012 and on April 2, 2013, on the ground that the two parties' responsibility for the perpetration of crimes against humanity was being already investigated by the Libyan judicial authorities. Both the challenges were accepted by the ICC. On May 31, 2013, the ICC dismissed the NTC's admissibility challenge, and claimed it did have jurisdiction over Saif al-Islam Qadhafi, on the ground that the Libyan judicial authorities were unwilling and unable to resolve the case. Instead, as far as the Al-Senussi case was concerned, the ICC concluded that it did not have jurisdiction over the crimes against humanity committed by Al-Senussi, as the Libyan judicial authorities were already exercising jurisdiction over him, and they seemed to be willing and capable of dealing with the case. As of now, the ICC has not been able to exercise jurisdiction over Saif al-Islam Qadhafi, on the ground that the Libyan authorities refused to extradite him to the Netherlands.

The final paragraph of Chapter 2 has focused on the two major problems presented by the Libyan transitional justice process as a whole. These two issues consisted in a patent failure of the Libyan transitional justice process to foster redress for the gender crimes that had been perpetrated during the 2011 revolts, and in the lack of any references to disarmament and demobilization issues in the Libyan transitional justice mechanisms.

⁵³⁷ Marina Mancini, 'Day after: Prosecuting International Crimes Committed in Libya', *The Italian Yearbook of International Law*, 21 (2011), p. 97

⁵³⁸ *ibidem*

CHAPTER 3: Transitional justice in Tunisia after the Arab Spring

The third chapter of this thesis has focused on the transitional justice mechanisms that have been put in place in Tunisia in the aftermath of the Arab revolts to foster redress for the human rights violations that had been perpetrated during the Ben Ali regime, which had lasted from 1987 to 2011, as well as during the 2011 revolts. This chapter has been divided into five main paragraphs. The first paragraph has described the main social and political actors that had played a role under Ben Ali's regime, as well as the main social and political actors that emerged in the aftermath of Ben Ali's fall, contributing to shaping post-Ben Ali's Tunisia. With regards to Ben Ali's regime, the paragraph has shed light on the fact that under Ben Ali's regime, the *Rassemblement Constitutionnel Democratique* (RCD) held exclusive control over the Tunisian Government as well as over the Tunisian society, and political opposers were harshly repressed. In particular, the Ennahda Party led by Rachid Ghannouchi was subjected to a brutal repression in the 1980s, which obliged Rachid Ghannouchi and other leading figures of the Party to relocate to Europe. When in 2011 the Arab revolts started and Ben Ali's regime was overthrown, a huge variety of political parties flourished on the Tunisian political scene, and they significantly contributed to shaping post-Ben Ali's Tunisia: among these parties, a relevant role was played by Ennahda, whose leader, Rachid Ghannouchi, had finally had the chance to return to Tunisia and to engage in political activities. The most prominent feature of Ennahda's political program was that the party was in favor of a "civil state governed by *Shari'a* but based on citizenship and political pluralism"⁵³⁹. Other important political parties included the *Congrès Populaire pour la Republique* (CPR), which is led by Moncef Marzouki, it has a nationalist and secular political orientation, and its main agenda consists in ensuring the respect for human rights within Tunisia, the *Forum Democratique pour le Travail et les Libertés* (FDTL or Ettakatol), which had been founded in 1994 but it had been legalized only in 2002, and it was led by Mustapha Ben Jafaar. This party has a liberal-socialist and secular orientation, and it had acted as an opposition force against Ben Ali. A final important political force was the *Parti Democratique Progressiste* (PDP), which has a center-left, secular orientation. During Ben Ali's regime, it was one of the few parties to be legalized, and it acted as a strong opposition movement.

The second paragraph of this chapter has analyzed the main causes of the Arab revolts in Tunisia, the unfolding of the Arab revolts in Tunisia, and the Tunisian democratic transition process. As far as the causes of the Arab revolts in Tunisia were concerned, the academic literature has shed light on Tunisian citizens' dissatisfaction with Ben Ali's corruption, Tunisian citizens' dissatisfaction with the human rights abuses that had been perpetrated against any political opposers on a regular basis from 1987 until 2011, and popular discontent with Ben Ali's misuse of public resources. The Arab revolts in

⁵³⁹Pietro Longo, 'Salafism and Takfirism in Tunisia: Between Al-Nahda's Discourses and Local Peculiarities', *Middle East Studies Center (MESOC) Working Paper*, 01 (2016), p. 7

Tunisia officially started on December 10, 2011, after Bouazizi, a fruit street vendor who had been confiscated his stalls by the police decided to set himself on fire in front of the governorate of Sidi Bouzid. Bouazizi's self-immolation sparked a series of protests against Ben Ali's regime, which very quickly spread all over Tunisia, thanks to the use of social networks. On January 14, 2011 Ben Ali decided to flee the country, and on January 15, 2011, based on Article 15 of the 1959 Tunisian Constitution, the Tunisian Constitutional Council adopted a Declaration pursuant to which transitional institutions were to be established in the country. The President of the Chamber of Deputies came to occupy the position of interim President of the Republic, and he appointed Muhammad Ghannouchi, who had already acted as Prime Minister under Ben Ali's regime, as interim Prime Minister. The Tunisian citizens reacted to Ghannouchi's appointment as provisional prime minister by holding a series of demonstrations, which came under the name of Kasbah 1 and Kasbah 2 demonstrations. The interim President of the Republic responded to the popular dissatisfaction by dismissing Muhammad Ghannouchi and by replacing him with Caid Essebsi on February 27, 2011, and by calling for the elections of a National Constituent Assembly (NCA), which would take place on October 23, 2011. The interim President of the Republic also suspended the application of the 1959 constitution, he dissolved the two chambers of the Tunisian Parliament, and the National Constitutional Council. The elections of the NCA which took place on October 23, 2011 resulted in Ennahda getting most of the votes, and in the formation of a coalition between Ennahda, the CPR and Ettakatol, which came to be known as the Troika. The NCA was first convened on November 22, 2011, and Mustapha Ben Jafaar, who was Ettakatol's leader, was appointed as the NCA's President. The new Tunisian Constitution was approved on January 26, 2014. The adoption of the new Tunisian Constitution, which foresaw a long catalogue of rights and provided for a separation of power, marked the accomplishment of the Tunisian democratic transition.

The third paragraph of Chapter 3 has dealt with the transitional justice mechanisms that were put in place by Muhammad Ghannouchi's transitional government. The transitional justice mechanisms adopted by Muhammad Ghannouchi took the form of two truth commissions: the first one was the Inquiry Commission on Crimes and Abuses committed during the Revolution, which succeeded in documenting that 2489 Tunisian citizens had undergone police violence during the 2011 revolts, and in highlighting how many of these abuses had resulted in casualties; the second one was the 2011 Inquiry Commission on Corruption and Embezzlement, which managed to hear ten thousand cases concerning the economic and social rights violations and the corruption crimes perpetrated under the Ben Ali regime.

Moreover, the third paragraph has focused on the transitional justice mechanisms which were adopted by Essebsi. The transitional justice mechanisms that Essebsi adopted took the form of two reparations schemes and a lustration measures. As far as the two reparations schemes were concerned,

these were adopted in March 2011, pursuant to two law decrees. Decree Law No. 1, provided that all of those citizens who had been convicted from 1989 to 2011 based on their political orientation had to be pardoned, they had to receive financial compensation and be hired in the Tunisian public sector. This reparations scheme was not an effective vehicle to foster redress for human rights abuses. For instance, as a result of this decree, many Jihadist members of the Salafist group *Ansar-el Charia*, who had been convicted under the Ben Ali regime, ended up being pardoned and hired as civil servants. The second Tunisian reparations scheme was put in place in March 2011 by a law decree, and provided that symbolic and financial reparations had to be provided to those Tunisian citizens who got injured during the 2011 revolts, and to the families of those citizens who had passed away during the revolts. This mechanism was not effective either. For instance, the amount of money each recipient was granted took no account of the treatment the recipient would have to incur for the rest of his/her life. Besides these two reparations mechanisms, a very important lustration measure, which took the form of an electoral law, was enacted by the Commission for Political Reform under Essebsi's Government. In particular, the electoral law that was enacted by the Commission for Political Reform in 2011, and which was supposed to be applied in the NCA elections, provided that all of those Tunisian citizens who had either been RCD members, or had acted as civil servants under the Ben Ali regime could not stand as candidates in the RCD elections. This measure clearly impinged upon the Principle of non-retroactivity, and it did not make it possible for the lustrated individuals to appeal against the lustration process they would have to undergo.

Finally, the third paragraph has focused on the military trials of those Tunisian security forces that had violently repressed the anti-regime demonstrations in 2011. These military trials were not effective in holding the responsible security forces accountable for the crimes they had committed. For instance, various investigative weaknesses, such as the military investigative judges' impossibility to tap into the security forces' phone records, and the judges' unwillingness to tap into the official lists that specified where each policeman had been dispatched during the revolts, made it hard to establish responsibilities and to identify the guilty parties.

The fourth paragraph of Chapter 3 has focused on the transitional justice processes that were established in Tunisia in the aftermath of the NCA's elections. In particular, pursuant to the December 14, 2014 Organic Law on Establishing and Organizing Transitional Justice, which was passed by the NCA, two main transitional justice mechanisms were established. The first of these mechanisms consisted in setting up a truth and Dignity Commission (TDC), and in setting up Specialized Judicial Chambers within some of the Tunisian Courts of First Instance. The TDC's mandate consisted in fostering redress for the human rights violations which had been committed on the Tunisian territory between July, 1 1955, which was the date on which Tunisia obtained independence and December 2013, which is the date on which the Organic Law was promulgated. Moreover, the TDC was in charge of

settling by arbitration any potential disputes concerning economic and social rights violations committed in the above-indicated span of time. The victims that could appear before the TDC included “any region that has been systematically marginalized or excluded”⁵⁴⁰. Besides establishing the TDC, the Organic Law also provided that Specialized Judicial Chambers had to be established within the Courts of First Instance of various Tunisian regions to deal with cases concerning the breach of international human rights obligations that Tunisia is bound to respect; the judges sitting in these Specialized Judicial Chambers must “have never participated in trials of a political nature”⁵⁴¹.

CONCLUSION

The conclusion of the thesis has attempted at verifying whether the initial hypothesis could be validated. As the concluding chapter has highlighted, the hypothesis of the thesis cannot be validated in the Libyan case, as all of the transitional justice measures that were put in place in Libya were just aimed at fostering redress for the crimes committed during the Qadhafi regime, while leaving the crimes committed by the rebels during the revolts unaddressed. Moreover, the Libyan transitional authorities refused to surrender Saif al-Islam Qadhafi to the Netherlands to have him prosecuted by the ICC, thus failing to hold those responsible for human rights abuses accountable.

In the Tunisian case, the main hypothesis could be validated as far as the various truth-seeking processes were concerned. However, the hypothesis could not be validated with respect to the reparations measures, the military trials of the former regime security forces, and the lustration process, as all of these mechanisms gave rise to various human rights problems, as the above description and the concluding chapter of the thesis have shown.

⁵⁴⁰ Kora Andrieu, ‘Confronting the Dictatorial Past in Tunisia: Human Rights and the Politics of Victimhood in Transitional Justice Discourses Since 2011’, *Human Rights Quarterly*, 38 (2016), cit., p. 283

⁵⁴¹ *ibidem*